NEW YORK APPELLATE DIGEST

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IN THIS ISSUE

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FEATURED DECISION

CITIZEN REVIEW BOARD HAS THE CAPACITY TO SUE AND STANDING TO BRING AN ARTICLE 78-DECLARATORY JUDGMENT ACTION SEEKING THE POLICE DEPARTMENT'S COMPLIANCE WITH POLICE-ACTION-REVIEW PROCEDURES.

The Fourth Department, in a full-fledged opinion by Justice Curran, in a matter of first impression, determined the Citizen Review Board of Syracuse (CRB) had the capacity to sue and had standing to bring Article 78/declaratory judgment proceedings against the Syracuse Police Department seeking compliance with the citizen review procedures:

Opinion by Curran, J.:

Respondents-defendants (respondents) appeal from an order denying their motion to dismiss this hybrid CPLR article 78 proceeding and declaratory judgment action on the grounds of lack of capacity and standing. We conclude that the order should be affirmed.

I. Background

In 2011, the Common Council of the City of Syracuse (Common Council) amended Local Law 11 of 1993 (ordinance), which had previously established petitioner-plaintiff, Citizen Review Board of the City of Syracuse (CRB). The purpose of the ordinance was "[t]o establish an open citizen-controlled process for reviewing grievances involving members of the Syracuse Police Department and provide a non-exclusive alternative to civil litigation." The ordinance further states that, "[i]n order to insure public accountability over the powers exercised by members of the Syracuse Police Department while preserving the integrity of the agency that employs them, citizen complaints regarding members of the Syracuse Police Department shall be heard and reviewed fairly and impartially by the review board."

The CRB consists of 11 members, who "shall be residents of the City of Syracuse and should aspire to reflect the City's diverse community with respect to age, disability, ethnicity, gender, geography, language, race, religion and sexual orientation," and is independent of the Syracuse Police Department.

FROM THE EDITOR

This is the 36th issue of the Digest---an indexed compilation of the summaries of New York State appellate decisions posted weekly in March, 2017, on the “Just Released” page of www.newyorkappellatedigest.com

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The ordinance provides that the CRB "shall hear, investigate and review complaints and recommend action regarding police misconduct," and also may make recommendations with respect to changes in police policies and procedures.

Pursuant to the ordinance, "[w]ithin 60 days of the receipt of a complaint, the CRB shall complete its investigation, determine whether there is reasonable cause to proceed to a hearing, conduct a hearing, and issue its findings and recommendations to the Chief [of Police] and the Corporation Counsel." The ordinance further provides that, "[w]ithin thirty (30) days of the [*2]receipt of a recommendation from a hearing panel, the Chief of Police shall advise the [CRB] in writing as to what type of actions or sanctions were imposed, and the reasons if none were imposed." The CRB administrator also must regularly publish reports that document, among other things, the total number and type of complaints, the number of cases involving recommendation for sanctions, the number of cases where sanctions were imposed, the number of cases reviewed by the full CRB, the length of time each case was pending before the CRB, and the number of complainants who filed a notice of claim against the City of Syracuse while their complaints were being considered by the CRB.

In furtherance of the CRB's duties, the ordinance provides that the CRB, "by majority vote of its members, may authorize the issuance of a subpoena" and that "[CRB] subpoenas are enforceable pursuant to relevant provisions of Article 23 of the [CPLR]." The CRB also is authorized, in the event of a conflict with the Corporation Counsel, to seek and retain independent legal counsel.

On October 28, 2015, in response to four CRB findings sent to the Chief of Police, the Chief of Police notified the CRB administrator via a letter that, because he "did not receive findings from the [CRB] within the sixty (60) days allotted by Local Law 11, Section 7, Sub 3a," the Syracuse Police Department "was forced to proceed without recommendations from the [CRB]" in those four matters. The Chief of Police also refused to "advise the board in writing as to what type of actions or sanctions were imposed, and the reasons if none were imposed," as required by the ordinance.

On February 5, 2016, the CRB commenced this hybrid CPLR article 78 proceeding/declaratory judgment action seeking, inter alia, a judgment directing the Chief of Police to comply with the ordinance by advising the CRB in writing as to what type of sanctions or actions were imposed against the officers and the reasons if none were imposed.

On March 9, 2016, respondents moved to dismiss the petition/complaint (petition) pursuant to CPLR 3211 and 7804 (f), arguing, among other things, that the CRB lacked capacity and standing to institute the proceeding/action. Supreme Court granted that part of the motion in which respondents contended that the City of Syracuse was not a proper party to the CRB's request for declaratory relief, and otherwise denied the motion, and respondents appeal.

The matters raised in this appeal are issues of first impression in this Department, and we conclude that the CRB has both the capacity and standing to institute this proceeding/action for the relief sought in the petition in furtherance of its independent duties under the ordinance (see Matter of Green v Safir, 174 Misc 2d 400, 405-406, affd 255 AD2d 107, lv denied 93 NY2d 882).

II. The CRB's Legal Capacity to Sue

We first address respondents' contention that the CRB lacks legal capacity to sue. As the Court of Appeals noted in Community Bd. 7 of Borough of Manhattan v Schaffer (84 NY2d 148, 155-156), "[g]overnmental entities created by legislative enactment present . . . capacity problems. Being artificial creatures of statute, such entities have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory predicate." However, "[a]n express grant of authority is not always necessary . . . Rather, capacity may be inferred as a necessary implication from the powers and responsibilities of a governmental entity" (Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs., 5 NY3d 36, 42), "provided, of course, that there is no clear legislative intent negating review' " (Community Bd. 7 of Borough of Manhattan, 84 NY2d at 156; see Matter of New York State Bd. of Examiners of Sex Offenders v Ransom, 249 AD2d 891, 891).

Here, pursuant to the plain language of the ordinance, the CRB is entitled to the response from the Chief of Police required by section seven (3) (g) of the ordinance in furtherance of its independent duties thereunder (see Green, 255 AD2d at 107-108). Like the Public Advocate in Green, the CRB is charged in the ordinance with determining the effectiveness of the police department's responses to civilian complaints and ascertaining whether the police department's "failure to prosecute and/or impose discipline against misbehaving officers is indicative of [*3]systemic problems in the response to complaints" (Green, 174 Misc 2d at 402). Thus, in light of the CRB's mandate and obligation to handle grievances filed by citizens against police officers, it is squarely within the CRB's "zone of interest" to take action to obtain compliance with the ordinance. Further, pursuant to the ordinance, the CRB has both subpoena power, including the

authority to enforce those subpoenas in court, and the power to retain independent counsel. Such factors, together with a lack of legislative intent that negates review, provide a clear indication of an implied power to sue (see Saratoga Lake Protection & Improvement Dist. v Department of Pub. Works of City of Saratoga Springs, 11 Misc 3d 780, 782-785, mod on other grounds 46 AD3d 979, lv denied 10 NY3d 706; cf. Community Bd. 7 of Borough of Manhattan, 84 NY2d at 157-158). Moreover, without the required response letters from the Chief of Police, the CRB cannot publicly report the number of cases where sanctions were imposed as required by the ordinance, thereby depriving the CRB and the public of the ability to assess the disciplinary practices of the Chief of Police as intended by the ordinance (see generally Community Bd. 7 of Borough of Manhattan, 84 NY2d at 156; Matter of City of New York v City Civ. Serv. Commn., 60 NY2d 436, 444-445, rearg denied 61 NY2d 759).

III. The CRB's Standing

We turn next to the issue of standing. It is well settled that

"[s]tanding is an element of the larger question of justiciability . . . The various tests that have been devised to determine standing are designed to ensure that the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast[] the dispute in a form traditionally capable of judicial resolution . . . Often informed by considerations of public policy . . . , the standing analysis is, at its foundation, aimed at advancing the judiciary's self-imposed policy of restraint, which precludes the issuance of advisory opinions" (Community Bd. 7 of Borough of Manhattan, 84 NY2d at 154-155 [internal quotation marks omitted]).

Thus, in order to establish standing, the CRB "must show injury in fact, meaning that [the CRB] will actually be harmed by the challenged . . . action. As the term itself implies, the injury must be more than conjectural. Second, the injury [the CRB] asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" (Matter of Graziano v County of Albany, 3 NY3d 475, 479 [internal quotation marks omitted]).

Here, the CRB's enabling legislation provides that it was formed to "establish an open citizen-controlled process for reviewing grievances involving members of the Syracuse Police Department" and that "citizen complaints regarding members of the Syracuse Police Department shall be heard and reviewed fairly and impartially by the review board." Further, the CRB is required by the ordinance to report and publish the number of cases in which sanctions were imposed. Inasmuch as the CRB cannot perform its legislative mandate without the Chief of Police's compliance with the corresponding legislative mandate that he "advise the [CRB] in writing as to what type of actions or sanctions were imposed, and the reasons if none were imposed," we conclude that the CRB has sustained a sufficiently particularized injury that falls squarely within the zone of interests set forth in the ordinance (see Saratoga Lake Protection & Improvement Dist., 46 AD3d at 981-982).

IV. Conclusion

Accordingly, we conclude that the CRB has both the capacity and standing to institute this proceeding/action seeking, inter alia, to compel the Chief of Police to comply with the legislative mandate at issue, and the order therefore should be affirmed. **Matter of Citizen Review Bd. of The City of Syracuse v Syracuse Police Dept., 2017 NY Slip Op 02181, 4th Dept 3-24-17**

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ADMINISTRATIVE LAW.

DEPARTMENT OF CONSUMER AFFAIR'S DETERMINATION WAS AFFECTED BY AN ERROR OF LAW WHICH RESULTED IN A MISINTERPRETATION OF THE ADMINISTRATIVE CODE, DETERMINATION SHOULD HAVE BEEN ANNULLED.

The Second Department determined that the imposition of a fine by the NYC Department of Consumer Affairs (DCA) was improper because the fine was based upon a misinterpretation of a provision of the NYC Administrative Code. The Article 78 petition seeking annulment of the DCA's determination should have been granted:

> Here, the DCA's determination was affected by an error of law, since its interpretation of the Administrative Code provision which the petitioner was charged with violating was unreasonable ... . The Administrative Code provision at issue provides, in relevant part: "Any person requesting application information from a prospective tenant or tenants shall post a sign . . . in any location at which the principal purpose is conducting business transactions pertaining to the rental of residential real estate properties" (Administrative Code § 20-809[a]). It was undisputed by the respondents that the petitioner's business concerned sales of real estate properties, although the petitioner admitted to handling one or two residential rentals per year. Under these circumstances, the petitioner correctly argued that the Administrative Code provision was inapplicable to it because it did not have a "location at which the principal purpose is conducting business transactions pertaining to the rental of residential real estate properties" (id.). **Matter of Arash Real Estate & Mgt. Co. v New York City Dept. of Consumer Affairs, 2017 NY Slip Op 02416, 2nd Dept 3-29-17**

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TERMINATION OF OUT OF WORK SCHOOL DISTRICT EMPLOYEE PURSUANT TO THE CIVIL SERVICE LAW IS NOT ARBITRABLE, PETITION TO STAY ARBITRATION SHOULD HAVE BEEN GRANTED.

The Second Department determined the school district's petition to stay arbitration should have been granted. A school district employee, Turco, was injured on the job and was out of work on Workers' Compensation leave for more than a year. The district terminated his employment pursuant to Civil Service Law 71. Turco filed a grievance with his union alleging the termination violated the collective bargaining agreement. The Second Department held that the matter was not arbitrable because of the conflict between the agreement and the statute:

> Despite the general policy favoring the resolution of disputes by arbitration, some matters, because of competing considerations of public policy, cannot be heard by an arbitrator. "If there is some statute, decisional law or public policy that prohibits arbitration of the subject matter of dispute, . . . the claim is not arbitrable'" ... . Indeed, the public policy exception can be invoked as a threshold issue to preclude arbitration pursuant to CPLR 7503 ... . "Preemptive judicial intervention in the arbitration process is warranted where the arbitrator [cannot] grant any relief without violating public policy" ... . * * *
>
> Here, the district terminated Turco's employment pursuant to Civil Service Law § 71. Section 71 provides that a public employer may terminate an employee who is absent due to an occupational disability for a cumulative period of one year if the employee remains physically or mentally unable to return to work ... . **Matter of Enlarged City Sch. Dist. of Middletown N.Y. v Civil Serv. Empls. Assn., Inc., 2017 NY Slip Op 02421, 2nd Dept 3-29-17**

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ALTHOUGH THE FIRST DEPARTMENT FELT CONSTRAINED BY COURT OF APPEALS PRECEDENT TO DISMISS THIS DOG INJURY CASE SOUNDING IN NEGLIGENCE, THE COURT FORCEFULLY ARGUED THE LAW SHOULD BE CHANGED TO ALLOW SUCH A SUIT.

The First Department, in a substantial opinion by Justice Acosta, reluctantly affirmed Supreme Court's dismissal of the dog-injury complaint. Defendant tied his 35 pound dog to an unsecured bicycle rack which weighed five pounds. The dog ran off, dragging the rack. Plaintiff's leg became tangled in the rack, causing him to fall. The First Department followed the Court of Appeals precedent, which allows a dog-injury suit only on vicious propensity/strict liability grounds. The opinion strongly argued the law should be changed to allow dog-injury suits based upon negligence:

> Were we not ... constrained ... we would ... permit plaintiffs to pursue their negligence cause of action. To avoid the harshness of the [Court of Appeals] rule, the recognition of the following exception would be appropriate: A dog owner who attaches his or her dog to an unsecured, dangerous object, allowing the dog to drag the object through the streets and cause injury to others, may be held liable in negligence. In these circumstances, negligence liability would be in keeping with the principles of fundamental fairness, responsibility for one's actions, and societal expectations ... — assuming a jury would deem unreasonable defendant's failure to ensure that the rack was secured before he tied his dog to it. It is not unreasonable to expect dog owners to restrain their dogs in public unless unleashing them is safe or specifically permitted at certain times and locations, as evidenced by local leash laws (see e.g. 24 RCNY 161.05). However, the Court of Appeals has decided that local leash laws have no bearing on whether liability in negligence ought to attach ... , undermining the declared public policy of those localities that have enacted such laws ... And although the [Court of Appeals] reasoned that New Yorkers may expect to find unrestrained dogs in public parks ... , New Yorkers certainly do not expect to find those dogs running on public roads towing large metal objects behind them. A dog owner who, without observing a reasonable standard of care, attaches his or her dog to an object that could foreseeably become weaponized if the dog is able to drag the object through public areas should not be immune from liability when that conduct causes injury. **Scavetta v Wechsler, 2017 NY Slip Op 01985, 1st Dept 3-16-17**

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ATTORNEYS.

ATTORNEY MISCONDUCT CLAIM UNDER JUDICIARY LAW 487 APPLIES ONLY TO COURT, NOT ARBITRATION, PROCEEDINGS.

The First Department noted that a Judiciary Law 487 claim against attorneys for misconduct does not apply to alleged misconduct in arbitration, as opposed to court, proceedings:

> Plaintiff ... failed to state a cause of action under Judiciary Law § 478, because the statute does not apply to attorney misconduct during an arbitral proceeding. The plain text of § 478 limits the statute's application to conduct deceiving "the court or any party" ... , and, because the statute has a criminal component, it must be interpreted narrowly ... . Moreover, courts have held that the statute does not apply to conduct outside New York's territorial borders or to administrative proceedings, observing that its purpose is to regulate the manner in which litigation is conducted before the courts of this State ... .
>
> In any event, plaintiff failed to allege the elements of a cause of action under the statute, i.e., intentional deceit and damages proximately caused by the deceit ... . The misconduct that plaintiff alleges is not "egregious" or "a chronic and extreme pattern of behavior" ... and the allegations regarding scienter lack the requisite particularity ... . **Doscher v Mannatt, Phelps & Phillips, LLP, 2017 NY Slip Op 01973, 1st Dept 3-16-17**

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The First Department determined nonparty Perlmutter (attorney) did not have an expectation of privacy in an email account owned by his employer, Marvel. Therefore the emails were not protected by attorney client privilege or spousal privilege. However, some emails may be protected as attorney work product:

Application of the four factors set forth in In re Asia Global Crossing, Ltd. (322 BR 247, 257 [Bankr SD NY 2005]), which we endorse ... , indicates that Perlmutter lacked any reasonable expectation of privacy in his personal use of the email system of Marvel, his employer, and correspondingly lacked the reasonable assurance of confidentiality that is an essential element of the attorney-client privilege ... . Among other factors, while Marvel's email policies during the relevant time periods permitted "receiving e-mail from a family member, friend, or other non-business purpose entity . . . as a courtesy," the company nonetheless asserted that it "owned" all emails on its system, and that the emails were "subject to all Company rules, policies, and conduct statements." Marvel "reserve[d] the right to audit networks and systems on a periodic basis to ensure [employees'] compliance" with its email policies. It also "reserve[d] the right to access, review, copy and delete any messages or content," and "to disclose such messages to any party (inside or outside the Company)." Given, among other factors, Perlmutter's status as Marvel's Chair, he was, if not actually aware of Marvel's email policy, constructively on notice of its contents

Perlmutter's use of Marvel's email system for personal correspondence with his wife waived the confidentiality necessary for a finding of spousal privilege ... .

Given the lack of evidence that Marvel viewed any of Perlmutter's personal emails, and the lack of evidence of any other actual disclosure to a third party, Perlmutter's use of Marvel's email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections ... . **Peerenboom v Marvel Entertainment, LLC, 2017 NY Slip Op 01981, 1st Dept 3-16-17**

CIVIL PROCEDURE

CIVIL PROCEDURE (SIX MONTHS WITHIN WHICH TO RECOMMENCE AN ACTION IN STATE COURT AFTER DISMISSAL IN FEDERAL COURT RUNS FROM THE DETERMINATION OF THE FEDERAL RECONSIDERATION MOTION, NOT FROM THE INITIAL FEDERAL DISMISSAL)/RECONSIDER, MOTION TO (SIX MONTHS WITHIN WHICH TO RECOMMENCE AN ACTION IN STATE COURT AFTER DISMISSAL IN FEDERAL COURT RUNS FROM THE DETERMINATION OF THE FEDERAL RECONSIDERATION MOTION, NOT FROM THE INITIAL FEDERAL DISMISSAL)/RECOMMENCE ACTION (SIX MONTHS WITHIN WHICH TO RECOMMENCE AN ACTION IN STATE COURT AFTER DISMISSAL IN FEDERAL COURT RUNS FROM THE DETERMINATION OF THE FEDERAL RECONSIDERATION MOTION, NOT FROM THE INITIAL FEDERAL DISMISSAL)

CIVIL PROCEDURE.

SIX MONTHS WITHIN WHICH TO RECOMMENCE AN ACTION IN STATE COURT AFTER DISMISSAL IN FEDERAL COURT RUNS FROM THE DETERMINATION OF THE FEDERAL RECONSIDERATION MOTION, NOT FROM THE INITIAL FEDERAL DISMISSAL.

The First Department, reversing Supreme Court, determined the six-months within which plaintiff was required to file his state action after dismissal in federal court (CPLR 205(a)) ran from the federal court's ruling on plaintiff's reconsideration motion, not from the initial dismissal in federal court:

Plaintiff was not required to commence a defamation action in state court while the reconsideration motion was pending, or to file a notice of appeal in federal court, in order to gain the benefit of the six-month extension ... ; were our decision otherwise, the result would waste judicial resources by forcing a party to commence either a federal appeal or a new state court action while his or her case was still ongoing in federal court. **Arty v New York City Health & Hosps. Corp., 2017 NY Slip Op 01626, 1st Dept 3-2-17**

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CIVIL PROCEDURE.

FOUR-MONTH ARTICLE 78 STATUTE OF LIMITATIONS STARTS WHEN THE PETITIONER'S ATTORNEY IS NOTIFIED OF THE CHALLENGED DETERMINATION, NOT WHEN PETITIONER IS NOTIFIED.

The Second Department determined the four-month statute of limitations for bringing an Article 78 action starts when petitioner's attorney is notified of the challenged determination, not when the petitioner is notified:

> Contrary to the Supreme Court's determination, the four-month statute of limitations did not begin to run when the petitioner was personally served with a copy of the respondents' letter notifying him that his employment had been terminated. At that time, the respondents were on notice that the petitioner had retained counsel to represent him in connection with the disciplinary charges. " [B]asic procedural dictates and . . . fundamental policy considerations . . . require that once counsel has appeared in a matter a Statute of Limitations or time requirement cannot begin to run unless that counsel is served with the determination or the order or judgment sought to be reviewed'" ... . Under the circumstances of this case, the respondents were required to serve a copy of the letter on the petitioner's counsel in order for the statute of limitations to commence running ... . **Matter of Munroe v Ponte, 2017 NY Slip Op 02041, 2nd Dept 3-22-17**

CIVIL PROCEDURE (RECORDS OF PLAINTIFF'S STAY AT A SHELTER FOR VICTIMS OF DOMESTIC VIOLENCE ARE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION AS DEEMED APPROPRIATE BY THE TRIAL COURT UPON REVIEW)/DISCOVERY (RECORDS OF DOMESTIC VIOLENCE SHELTER, RECORDS OF PLAINTIFF'S STAY AT A SHELTER FOR VICTIMS OF DOMESTIC VIOLENCE ARE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION AS DEEMED APPROPRIATE BY THE TRIAL COURT UPON REVIEW)/PRIVILEGE (DISCOVERY, DOMESTIC VIOLENCE SHELTER RECORDS, RECORDS OF PLAINTIFF'S STAY AT A SHELTER FOR VICTIMS OF DOMESTIC VIOLENCE ARE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION AS DEEMED APPROPRIATE BY THE TRIAL COURT UPON REVIEW)/PRIVILEGE LOG (CIVIL PROCEDURE, DISCOVERY, RECORDS OF DOMESTIC VIOLENCE SHELTER, RECORDS OF PLAINTIFF'S STAY AT A SHELTER FOR VICTIMS OF DOMESTIC VIOLENCE ARE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION AS DEEMED APPROPRIATE BY THE TRIAL COURT UPON REVIEW, DEFENDANTS ENTITLED TO PRIVILEGE LOG)/DOMESTICE VIOLENCE SHELTER (CIVIL PROCEDURE, DISCOVERY, RECORDS OF DOMESTIC VIOLENCE SHELTER, RECORDS OF PLAINTIFF'S STAY AT A SHELTER FOR VICTIMS OF DOMESTIC VIOLENCE ARE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION AS DEEMED APPROPRIATE BY THE TRIAL COURT UPON REVIEW, DEFENDANTS ENTITLED TO PRIVILEGE LOG)

CIVIL PROCEDURE.

RECORDS OF PLAINTIFF'S STAY AT A SHELTER FOR VICTIMS OF DOMESTIC VIOLENCE ARE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION AS DEEMED APPROPRIATE BY THE TRIAL COURT UPON REVIEW, DEFENDANTS ENTITLED TO PRIVILEGE LOG.

The Fourth Department determined the records of plaintiff's stay at a shelter for domestic violence victims were not protected by privilege. The defendants in this medical malpractice action sought the records and the plaintiff's privilege log. The medical malpractice action stemmed from treatment of injuries from an assault. The Fourth Department held that the defendants were entitled to the privilege log, which plaintiff the trial court had ordered submitted only to the court. After the defendants review the log the trial court should hear argument from the defendants concerning the discoverability of any identified documents:

... [T]he shelter records are not protected by any privilege, and they are thus subject to disclosure to the extent that they are material and necessary to the defense of the action ... . Even assuming, arguendo, that the records were prepared by licensed social workers, which is not evident from the records themselves, we conclude that plaintiff waived any privilege afforded by CPLR 4508 by affirmatively placing her medical and psychological condition in controversy through the broad allegations of injury in her bills of particulars ... . Inasmuch as defendants are not seeking disclosure of the street address of the shelter, we reject plaintiff's contention that Social Services Law § 459-h precludes disclosure of the records. Furthermore, 18 NYCRR 452.10 (a), which renders confidential certain information "relating to the operation of residential programs for victims of domestic violence and to the residents of such programs," does not preclude disclosure of the records because that regulation allows for access to such information "as permitted by an order of a court of competent jurisdiction" ... . That regulation does not preclude a court from ordering disclosure of shelter records that are material and necessary to the defense of an action ... .

... [W]e conclude that defendants are not entitled to " unfettered disclosure' " of plaintiff's potentially sensitive shelter records ... . Indeed, we note that a court is "entitled to consider . . . the personal nature of the information sought" in making a disclosure order ... . We agree with defendants, however, that the court should have directed plaintiff to provide a copy of her privilege log to them rather than directing her to provide it only to the court as an aid for its in camera review of the records. **Abraha v Adams, 2017 NY Slip Op 02526, 4th Dept 3-31-17**

CIVIL PROCEDURE (DEFENDANTS' DEMAND FOR A CHANGE OF VENUE WAS PROPERLY DISMISSED AS UNTIMELY UNDER THE ELECTRONIC FILING RULES (TO WHICH DEFENDANTS HAD CONSENTED))/ELECTRONIC FILING (CIVIL PROCEDURE, DEFENDANTS' DEMAND FOR A CHANGE OF VENUE WAS PROPERLY DISMISSED AS UNTIMELY UNDER THE ELECTRONIC FILING RULES (TO WHICH DEFENDANTS HAD CONSENTED))

CIVIL PROCEDURE.

DEFENDANTS' DEMAND FOR A CHANGE OF VENUE WAS PROPERLY DISMISSED AS UNTIMELY UNDER THE ELECTRONIC FILING RULES (TO WHICH DEFENDANTS HAD CONSENTED).

The First Department determined defendants demand for a change of venue was untimely under the electronic filing rules, to which defendants had consented:

Supreme Court properly concluded that defendants' motion was untimely. Having consented to electronic filing, defendants were required to serve their papers electronically (Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b[d][1]), and indeed served their demand for change of venue, together with their answer, by e-filing the documents on July 14, 2015 ... . Having served their demand, defendants were required to bring their motion to change venue within 15 days, or by July 29, 2015 (CPLR 511). However, defendants did not bring their motion until July 31, 2015, rendering it untimely. That defendants also elected to serve their demand via United States mail did not extend the deadline for their motion under CPLR 2103(b)(2). Because they consented to participate in Supreme Court's e-filing system, defendants were bound by the applicable rules governing service. **Woodward v Millbrook Ventures LLC, 2017 NY Slip Op 02522, 1st Dept 3-30-17**

CIVIL PROCEDURE (PLAINTIFFS HAD STANDING TO SUE FOR LEGAL MALPRACTICE STEMMING FROM A TRIAL BROUGHT IN THE NAME OF PLAINTIFFS' CHAPTER 13 BANKRUPTCY TRUSTEE)/BANKRUPTCY (PLAINTIFFS HAD STANDING TO SUE FOR LEGAL MALPRACTICE STEMMING FROM A TRIAL BROUGHT IN THE NAME OF PLAINTIFFS' CHAPTER 13 BANKRUPTCY TRUSTEE)/ATTORNEYS (LEGAL MALPRACTICE, PLAINTIFFS HAD STANDING TO SUE FOR LEGAL MALPRACTICE STEMMING FROM A TRIAL BROUGHT IN THE NAME OF PLAINTIFFS' CHAPTER 13 BANKRUPTCY TRUSTEE)/LEGAL MALPRACTICE (PLAINTIFFS HAD STANDING TO SUE FOR LEGAL MALPRACTICE STEMMING FROM A TRIAL BROUGHT IN THE NAME OF PLAINTIFFS' CHAPTER 13 BANKRUPTCY TRUSTEE)

CIVIL PROCEDURE, BANKRUPTCY, ATTORNEYS.

PLAINTIFFS HAD STANDING TO SUE FOR LEGAL MALPRACTICE STEMMING FROM A TRIAL BROUGHT IN THE NAME OF PLAINTIFFS' CHAPTER 13 BANKRUPTCY TRUSTEE.

The Second Department, reversing Supreme Court, over a dissent, determined the plaintiffs, who were discharged in Chapter 13 bankruptcy proceedings, could sue for legal malpractice stemming from a personal injury trial brought in the name of the bankruptcy trustee. The plaintiffs alleged the recovery in the personal injury trial was diminished because the jury became aware an injury report had been altered by the defendant lawyers and a doctor:

> ... [W]e find that the plaintiffs, as Chapter 13 debtors, had standing to maintain this action. We note that standing, of course, concerns the absence or presence of a sufficiently cognizable stake in the outcome of the litigation ... .
>
> In contrast to Chapter 7 proceedings, the object of a Chapter 13 proceeding is the rehabilitation of the debtor under a plan that adjusts debts owed to creditors by the debtor's regular periodic payments derived principally from income. Thus, in a Chapter 13 proceeding, a debtor generally retains his property, if he so proposes, and seeks court confirmation of a plan to repay his debts over a three- to five-year period ... . Payments under a Chapter 13 plan are usually made from a debtor's "future earnings or other future income" ... . "Accordingly, the Chapter 13 estate from which creditors may be paid includes both the debtor's property at the time of his bankruptcy petition, and any wages and property acquired after filing" ... . Assets acquired after a Chapter 13 plan is confirmed by the court are not included as property of the estate, unless they are necessary to maintain the plan ... , or the trustee seeks a modification of the plan to remedy a substantial change in the debtor's income or expenses that was not anticipated at the time of the confirmation hearing ... . Unlike Chapter 7 proceedings, there is no separation of the estate property from the debtor under a Chapter 13 proceeding, except to the extent that the plan, as confirmed by order of the court, places control over an asset in the hands of the trustee ... . This is the basis for the conclusion that, while Chapters 7 and 11 debtors lose capacity to maintain civil suits, Chapter 13 debtors do not ... . Thus, a Chapter 13 debtor keeps all, or at the very least some, of the income and property he or she acquires during the administration of the repayment plan. Accordingly, in this action, it was never the bankruptcy estate, or its creditors, that was damaged by a decrease in the amount awarded in the underlying personal injury action due to the alleged conduct of the defendants. Only the plaintiffs had an interest in the recovery of damages in the personal injury action ... . Moreover, it was the plaintiffs and the defendants who were engaged in a face-to-face relationship in the underlying personal injury action and to the extent the defendants allegedly breached a duty in that action the foreseeable harm was to the plaintiffs, not the trustee or the bankruptcy estate. Thus, under the circumstances presented here, the relationship of the plaintiffs to the personal injury action is unique and demands an exception to the general rule regarding privity ... . **Nicke v Schwartzapfel Partners, P.C., 2017 NY Slip Op 02437. 2nd Dept 3-29-17**

CIVIL PROCEDURE (GUARANTY WHICH DID NOT HAVE A FORUM SELECTION CLAUSE DEEMED TO BE SUBJECT TO THE CLAUSE IN A RELATED CONTRACT EXECUTED CLOSE IN TIME, SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED, OUTSIDE PROOF NECESSARY)/CONTRACT LAW (FORUM SELECTION CLAUSE, (GUARANTY WHICH DID NOT HAVE A FORUM SELECTION CLAUSE DEEMED TO BE SUBJECT TO THE CLAUSE IN A RELATED CONTRACT EXECUTED CLOSE IN TIME, SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED, OUTSIDE PROOF NECESSARY)/GUARANTY ((GUARANTY WHICH DID NOT HAVE A FORUM SELECTION CLAUSE DEEMED TO BE SUBJECT TO THE CLAUSE IN A RELATED CONTRACT EXECUTED CLOSE IN TIME, SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED, OUTSIDE PROOF NECESSARY)/SUMMARY JUDGMENT IN LIEU OF COMPLAINT (GUARANTY WHICH DID NOT HAVE A FORUM SELECTION CLAUSE DEEMED TO BE SUBJECT TO THE CLAUSE IN A RELATED CONTRACT EXECUTED CLOSE IN TIME, SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED, OUTSIDE PROOF NECESSARY)

CIVIL PROCEDURE, CONTRACT LAW.

GUARANTY WHICH DID NOT HAVE A FORUM SELECTION CLAUSE DEEMED TO BE SUBJECT TO THE CLAUSE IN A RELATED CONTRACT EXECUTED CLOSE IN TIME, SUMMARY JUDGMENT IN LIEU OF COMPLAINT SHOULD NOT HAVE BEEN GRANTED, OUTSIDE PROOF NECESSARY.

The Second Department determined the forum selection clause in the loan contract was enforceable and applied to the related guaranty (which did not include a similar clause). The Second Department further determined Supreme Court should not have granted plaintiff's motion for summary judgment in lieu of complaint because proof of the amount owed required proof in addition to the documents:

> ... "[D]ocuments executed at about the same time and covering the same subject matter are to be interpreted together, even if one does not incorporate the terms of the other by reference, and even if they are not executed on the same date, so long as they are substantially' contemporaneous" ... . Contrary to the defendant's contention, the agreement and guaranty were executed sufficiently close in time and relate to the same subject matter, such that they should be interpreted together to determine the parties' intent to be bound by the forum selection clause ... . * * *
>
> Although an unconditional guarantee may qualify as an instrument for the payment of money only ... , here, neither the guaranty nor the underlying agreement relied upon by the plaintiff in support of its motion contains an unconditional promise to pay a sum certain, signed by the maker and due on demand or at a definite future time ... . Since proof outside of the guaranty and underlying agreement is required to establish the amount of Platinum's obligation to the plaintiff pursuant to the agreement, the plaintiff's motion for summary judgment in lieu of complaint should have been denied, with the motion and answering papers deemed to be the complaint and answer, respectively ... . **Oak Rock Fin., LLC v Rodriguez, 2017 NY Slip Op 02048, 2nd Dept 3-22-17**

CIVIL PROCEDURE (DELIBERATIVE PROCESS PRIVILEGE UNDER THE FREEDOM OF INFORMATION LAW DOES NOT APPLY TO DISCOVERY REQUEST FOR GOVERNMENT DOCUMENTS UNDER THE CPLR)/FREEDOM OF INFORMATION LAW (FOIL) (DELIBERATIVE PROCESS PRIVILEGE UNDER THE FREEDOM OF INFORMATION LAW DOES NOT APPLY TO DISCOVERY REQUEST FOR GOVERNMENT DOCUMENTS UNDER THE CPLR)/MUNICIPAL LAW (DELIBERATIVE PROCESS PRIVILEGE UNDER THE FREEDOM OF INFORMATION LAW DOES NOT APPLY TO DISCOVERY REQUEST FOR GOVERNMENT DOCUMENTS UNDER THE CPLR)/DELIBERATIVE PROCESS PRIVILEGE (FOIL, DELIBERATIVE PROCESS PRIVILEGE UNDER THE FREEDOM OF INFORMATION LAW DOES NOT APPLY TO DISCOVERY REQUEST FOR GOVERNMENT DOCUMENTS UNDER THE CPLR)/INTER OR INTRA AGENCY EXCEPTION (FOIL, DELIBERATIVE PROCESS PRIVILEGE UNDER THE FREEDOM OF INFORMATION LAW DOES NOT APPLY TO DISCOVERY REQUEST FOR GOVERNMENT DOCUMENTS UNDER THE CPLR)

CIVIL PROCEDURE, FREEDOM OF INFORMATION LAW (FOIL), MUNICIPAL LAW.

DELIBERATIVE PROCESS PRIVILEGE UNDER THE FREEDOM OF INFORMATION LAW DOES NOT APPLY TO DISCOVERY REQUEST FOR GOVERNMENT DOCUMENTS UNDER THE CPLR.

In the context of a suit against the county, the Fourth Department determined the deliberative process privilege (also called the inter-agency or intra-agency materials exception) which applies to documents requested under the Freedom of Information Law does not apply to discovery request under the CPLR:

> Both the CPLR and FOIL provide for disclosure of documents. The former controls discovery between litigants in court proceedings, and the latter permits disclosure of governmental records to the public even in the absence of litigation. "When a public agency is one of the litigants, this means that it has the distinct disadvantage of having to offer its adversary two routes into its records" ... . The deliberative process privilege or exemption under FOIL seeks "to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers" ... . While some courts have applied that privilege outside the FOIL context ... , we decline to do so inasmuch as the Court of Appeals "has never created nor recognized a generalized deliberative process privilege' " ... .
>
> We "recognize[] the existence of some cases which all too casually mention the deliberate process privilege' and purport to apply it outside the context of a FOIL proceeding" ... . Nevertheless, it is also important to recognize that "privileges simply do not exist in the absence of either constitutional or statutory authority, or, when created as a matter of jurisprudence" ... . Although the County seeks to assert "the so-called deliberative process privilege[,]' " in the context of a civil litigation, "neither the Court of Appeals' case law nor that of the [Fourth] Department can be construed [as] having created a distinct deliberate process privilege' outside the context of a FOIL proceeding" ... . **Mosey v County of Erie, 2017 NY Slip Op 02201, 4th Dept 3-24-17**

CIVIL PROCEDURE (BUILDING RESIDENTS COULD BRING CLASS ACTION AGAINST OWNERS-MANAGERS ALLEGING NEGLIGENCE IN PREPARATION FOR SUPERSTORM SANDY)/CLASS ACTIONS (BUILDING RESIDENTS COULD BRING CLASS ACTION AGAINST OWNERS-MANAGERS ALLEGING NEGLIGENCE IN PREPARATION FOR SUPERSTORM SANDY)/LANDLORD-TENANT (BUILDING RESIDENTS COULD BRING CLASS ACTION AGAINST OWNERS-MANAGERS ALLEGING NEGLIGENCE IN PREPARATION FOR SUPERSTORM SANDY)/SUPERSTORM SANDY (BUILDING RESIDENTS COULD BRING CLASS ACTION AGAINST OWNERS-MANAGERS ALLEGING NEGLIGENCE IN PREPARATION FOR SUPERSTORM SANDY)

CIVIL PROCEDURE, LANDORD-TENANT, NEGLIGENCE.

BUILDING RESIDENTS CAN BRING CLASS ACTION AGAINST OWNERS-MANAGERS ALLEGING NEGLIGENCE IN PREPARATION FOR SUPERSTORM SANDY.

The First Department determined the residents of a building met the requirements for a class action suit alleging negligent failure to secure the building prior to Superstorm Sandy:

The court properly concluded that plaintiffs satisfied the criteria of CPLR 901, and the factors enumerated in CPLR 902 support class certification.

It is undisputed that the building has more than 400 residential apartments above 15 floors of commercial space. Thus, the numerosity requirement is met and joinder of all class members is impracticable ... .

The commonality requirement is also satisfied in that the proof at trial will consist of evidence of defendants' efforts to prevent damage in advance of the storm and to repair damage after the storm. Since the class consists of tenants of the building, common questions predominate over individual questions concerning the amount and type of damages sustained by each class member ... . Any differences in proof with respect to the applicability of the warranty of habitability in Real Property Law § 235-b as between residential tenants and commercial tenants is insufficient to overcome the significant common questions, and the court may, in its discretion, establish subclasses ... .

The claims of the putative class representatives are typical of the class's claims since each resides or leases space in the building and their injuries, if any, derive from the same course of conduct by defendants ... . Moreover, the record reflects that they are sufficiently informed about the facts, have no conflicts of interest with the class they seek to represent, and are able to act as a check on counsel ... . **Roberts v Ocean Prime, LLC, 2017 NY Slip Op 01974, 1st Dept 3-16-17**

CIVIL PROCEDURE (PLAINTIFF ENTITLED TO AMEND BILL OF PARTICULARS AS OF RIGHT PRIOR TO FILING OF NOTE OF ISSUE)/NEGLIGENCE (MEDICAL MALPRACTICE, PLAINTIFF ENTITLED TO AMEND BILL OF PARTICULARS AS OF RIGHT PRIOR TO FILING OF NOTE OF ISSUE)/MEDICAL MALPRACTICE (PLAINTIFF ENTITLED TO AMEND BILL OF PARTICULARS AS OF RIGHT PRIOR TO FILING OF NOTE OF ISSUE)

CIVIL PROCEDURE, NEGLIGENCE, MEDICAL MALPRACTICE.

PLAINTIFF ENTITLED TO AMEND BILL OF PARTICULARS AS OF RIGHT PRIOR TO FILING OF NOTE OF ISSUE.

The Second Department, over a two-justice dissent, determined plaintiff properly amended his bill of particulars as of right prior to the filing of the note of issue, despite labeling the document a "supplemental" bill of particulars. The amended bill of particulars added the failure to diagnose appendicitis as a basis for the lawsuit:

The defendant's contentions regarding the plaintiff's delay in amending his bill of particulars are misplaced. While it is true that "once discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances'" ... , no such showing is required where a bill of particulars is amended as of right before the note of issue and certificate of readiness have been filed. The as-of-right amendment of a bill of particulars has been appropriately compared to the as-of-right amendment of a pleading: "Presumably this amendment [pursuant to CPLR 3042(b)] can make any change in the bill, just as an amendment as of course can make any change in a pleading under CPLR 3025(a). But the latter is restricted in time to the outset of the action while CPLR 3042(b) keeps the bill's amendment time open during the whole pre-note of issue period" ... . **Mackauer v Parikh, 2017 NY Slip Op 01847, 2nd Dept 3-15-17**

CONTRACT LAW

CONTRACT LAW (DEFENDANTS' FAILURE TO INSIST ON PROMISED MONTHLY MINIMUM PURCHASES OF DEFENDANTS' PRODUCTS CONSTITUTED A WAIVER OF THE CONTRACTUAL MINIMUM PURCHASE REQUIREMENTS, NOTWITHSTANDING A NO ORAL WAIVER CLAUSE)/WAIVER (CONTRACT LAW, (DEFENDANTS' FAILURE TO INSIST ON PROMISED MONTHLY MINIMUM PURCHASES OF DEFENDANTS' PRODUCTS CONSTITUTED A WAIVER OF THE CONTRACTUAL MINIMUM PURCHASE REQUIREMENTS, NOTWITHSTANDING A NO ORAL WAIVER CLAUSE)

CONTRACT LAW.

DEFENDANTS' FAILURE TO INSIST ON PROMISED MONTHLY MINIMUM PURCHASES OF DEFENDANTS' PRODUCTS CONSTITUTED A WAIVER OF THE CONTRACTUAL MINIMUM PURCHASE REQUIREMENTS, NOTWITHSTANDING A NO ORAL WAIVER CLAUSE.

The Second Department, in a full-fledged opinion by Justice Chambers, determined the failure of defendants to insist on the fulfillment of plaintiffs' promise to make monthly minimum purchases of defendants' product constituted a waiver of the minimum-purchases contract, notwithstanding the "no oral waiver" contractual provision:

> ... [W]e find that the Supreme Court properly concluded that ... the affirmative conduct of [defendants] over the previous weeks and months evinced an unmistakable intent to waive the remaining 2006 minimum purchase requirements, including the 2006 annual minimum purchase requirement ... . * * *
>
> ...[W]e agree with the Supreme Court that, under the facts presented, the agreements' no-oral-waiver provision ... does not compel a different result. As explained above, the [plaintiffs'] persistent and repeated failure to meet minimum purchase requirements, coupled with [defendants'] continued acceptance of such conduct without any reservation or protest until a few weeks before the expiration of the agreements (by which time it was, of course, too late to insist upon strict compliance with the terms of the agreements), equitably estops [defendants] from invoking the benefit of the no-oral-waiver provision ... . **Kamco Supply Corp. v On the Right Track, LLC, 2017 NY Slip Op, 02025, 2nd Dept 3-22-17**

CONTRACT LAW (STATUTE OF FRAUDS (GENERAL OBLIGATIONS LAW) REQUIREMENTS FOR A CONTRACT TO NEGOTIATE A BUSINESS OPPORTUNITY NOT MET, PART PERFORMANCE NOT APPLICABLE)/STATUTE OF FRAUDS (GENERAL OBLIGATIONS LAW) REQUIREMENTS FOR A CONTRACT TO NEGOTIATE A BUSINESS OPPORTUNITY NOT MET, PART PERFORMANCE NOT APPLICABLE)/GENERAL OBLIGATIONS LAW (STATUTE OF FRAUDS, (GENERAL OBLIGATIONS LAW) REQUIREMENTS FOR A CONTRACT TO NEGOTIATE A BUSINESS OPPORTUNITY NOT MET, PART PERFORMANCE NOT APPLICABLE)

CONTRACT LAW.

STATUTE OF FRAUDS (GENERAL OBLIGATIONS LAW) REQUIREMENTS FOR A CONTRACT TO NEGOTIATE A BUSINESS OPPORTUNITY NOT MET, PART PERFORMANCE NOT APPLICABLE.

The Second Department, reversing Supreme Court, determined summary judgment should not have been granted in favor of defendants' counterclaim for a finder's fee. General Obligations Law 5-701(a)(1) (Statute of Frauds) applies to

contracts for services rendered in negotiating a business opportunity. In finding the writings did not satisfy the Statute of Frauds, the court explained the relevant criteria:

> The memorandum necessary to satisfy the statute of frauds may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject matter and occasion ... . In the event that one of the writings is unsigned, it may be read together with the signed writings, provided that they clearly refer to the same subject matter or transaction ... . Here, the collective writings to which the defendants point, seeking to make out a written agreement sufficient to satisfy the statute of frauds ... , are insufficient since there is no writing establishing a contractual relationship between the parties which bears the signature of the plaintiff, who is the party to be charged ... .
>
> Additionally, part performance does not take the matter out of the statute of frauds. The exception to the statute of frauds for part performance has not been extended to General Obligations Law § 5-701... . **Kelly v P & G Ventures 1, LLC, 2017 NY Slip Op 02026, 2nd Dept 3-22-17**

COURT OF CLAIMS

COURT OF CLAIMS (CLAIM ALLEGING NEGLIGENT PLACEMENT OF A GUARDRAIL PROPERLY DISMISSED, STATE ENTITLED TO QUALIFIED IMMUNITY)/IMMUNITY (HIGHWAY DESIGN, CLAIM ALLEGING NEGLIGENT PLACEMENT OF A GUARDRAIL PROPERLY DISMISSED, STATE ENTITLED TO QUALIFIED IMMUNITY)/NEGLIGENCE (HIGHWAY DESIGN, CLAIM ALLEGING NEGLIGENT PLACEMENT OF A GUARDRAIL PROPERLY DISMISSED, STATE ENTITLED TO QUALIFIED IMMUNITY)/HIGWAYS AND ROADS (CLAIM ALLEGING NEGLIGENT PLACEMENT OF A GUARDRAIL PROPERLY DISMISSED, STATE ENTITLED TO QUALIFIED IMMUNITY)/GUARDRAILS (CLAIM ALLEGING NEGLIGENT PLACEMENT OF A GUARDRAIL PROPERLY DISMISSED, STATE ENTITLED TO QUALIFIED IMMUNITY)

COURT OF CLAIMS, IMMUNITY, NEGLIGENCE.

CLAIM ALLEGING NEGLIGENT PLACEMENT OF A GUARDRAIL PROPERLY DISMISSED, STATE ENTITLED TO QUALIFIED IMMUNITY.

The Second Department determined the claim alleging negligent highway design was properly dismissed after trial:

> "[A] municipality owes to the public the absolute duty of keeping its streets in a reasonably safe condition" ... . However, "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 qualified immunity doctrine, liability may arise where there is proof that the State's traffic design plan "evolved without adequate study or lacked a reasonable basis" ... . Moreover, "something more than a mere choice between conflicting opinions of experts is required before the State . . . may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public" ... .
>
> Here, the Court of Claims properly dismissed the claim based upon the evidence the State submitted at trial, which showed that the design and placement of the guardrail were the result of a deliberate decision-making process after an adequate study and had a reasonable basis ... . **Gagliardi v State of New York, 2017 NY Slip Op 01845, 2nd Dept 3-15-17**

CRIMINAL LAW

CRIMINAL LAW (PRESENCE OF POLICE OFFICER'S AND OFFICER'S STATEMENT TO THE VICTIM DID NOT RENDER THE SHOWUP INDENTIFICATION UNDULY SUGGESTIVE)/IDENTIFICATION (CRIMINAL LAW, PRESENCE OF POLICE OFFICER'S AND OFFICER'S STATEMENT TO THE VICTIM DID NOT RENDER THE SHOWUP INDENTIFICATION UNDULY SUGGESTIVE)/SHOWUP INDENTIFICATION (PRESENCE OF POLICE OFFICER'S AND OFFICER'S STATEMENT TO THE VICTIM DID NOT RENDER THE SHOWUP INDENTIFICATION UNDULY SUGGESTIVE)

CRIMINAL LAW.

PRESENCE OF POLICE OFFICERS AND OFFICER'S STATEMENT TO THE VICTIM DID NOT RENDER THE SHOWUP INDENTIFICATION UNDULY SUGGESTIVE.

The First Department determined the showup identification was not unduly suggestive, despite the presence of police officers and an officer's statement to the victim they may have someone who matched the perpetrator's description:

> Police, who undisputedly had a sufficient basis for a common-law inquiry of defendant based on their investigation of a robbery, entered defendant's apartment with the consent of another resident. After the resident who answered the door knocked on a bathroom door, defendant came out of the bathroom and complied with an officer's request to move to a position between two officers. Meanwhile, an officer told the victim that the police might have someone who matched the description, and then brought him to the apartment. While defendant was flanked on both sides by two officers, and other officers were nearby, the victim identified defendant as one of the robbers. ...
>
> The showup identification procedure was not unduly suggestive, in light of the "close spatial and temporal proximity to the robbery, as the result of a single unbroken chain of events," and the fact that defendant was not physically restrained ... . Notwithstanding the presence of several police officers in or near the apartment, and an officer's statement to the victim that the police had someone who might match the description provided by the victim, "the overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup" ... . **People v Vizcaino, 2017 NY Slip Op 01811, 1st Dept 3-5-17**

CRIMINAL LAW (FAILURE TO GIVE SUPPLEMENTAL INSTRUCTIONS TO CLARIFY THE SHARED INTENT REQUIREMENTS FOR ACCOMPLICE LIABILITY DEPRIVED DEFEFNDANTS OF A FAIR TRIAL)/JURY INSTRUCTIONS (CRIMINAL LAW, FAILURE TO GIVE SUPPLEMENTAL INSTRUCTIONS TO CLARIFY THE SHARED INTENT REQUIREMENTS FOR ACCOMPLICE LIABILITY DEPRIVED DEFEFNDANTS OF A FAIR TRIAL)/ACCOMPLICE LIABILITY (FAILURE TO GIVE SUPPLEMENTAL INSTRUCTIONS TO CLARIFY THE SHARED INTENT REQUIREMENTS FOR ACCOMPLICE LIABILITY DEPRIVED DEFEFNDANTS OF A FAIR TRIAL)/SHARED INTENT (CRIMINAL LAW, FAILURE TO GIVE SUPPLEMENTAL INSTRUCTIONS TO CLARIFY THE SHARED INTENT REQUIREMENTS FOR ACCOMPLICE LIABILITY DEPRIVED DEFEFNDANTS OF A FAIR TRIAL)

CRIMINAL LAW.

FAILURE TO GIVE SUPPLEMENTAL INSTRUCTIONS TO CLARIFY THE SHARED INTENT REQUIREMENTS FOR ACCOMPLICE LIABILITY DEPRIVED DEFEFNDANTS OF A FAIR TRIAL.

The First Department, in a full-fledged opinion by Justice Renwick, over a full-fledged dissenting opinion, determined (in the interest of justice) the two defendants were deprived of a fair trial by the failure of the trial judge give supplemental instructions to clarify the requirements for robbery convictions under an accomplice (shared intent) theory. One of the two

defendants stole three rings from a small shop. The other struck the shopkeeper after she confronted them. The jury made repeated requests for clarification of the intent criteria. In response to each request the trial court read the elements of the robbery charges and accomplice liability:

> With regard to Telesford, the issue of intent was critical in one respect. The evidence adduced at trial undeniably established that Telesford assaulted the complainant. To sustain a conviction for robbery in the second degree based upon accessorial liability, however, the evidence, when viewed in a light most favorable to the prosecution, must prove beyond a reasonable doubt that Telesford acted with the mental culpability necessary to commit the robbery and that, in furtherance thereof, he solicited, requested, commanded, importuned or intentionally aided the principal to commit such crime ... . Thus, in this case, an inference that Telesford helped Celestine commit the robbery, based on his role as an accomplice, would have been insufficient to prove the requisite intent to steal, in the absence of a specific finding that Telesford intended to do more than commit an assault ... .
>
> With regard to Celestine, the issue of intent was critical in a different respect. Undeniably, the evidence established beyond a reasonable doubt that Celestine took the three rings. Such conduct, however, by itself, constituted no more than a larceny, absent proof that either defendant used force to take or retain the stolen items. Although, as indicated, Telesford did use force to attack the victim, in order to convict either defendant of robbery, the jury needed to find that the violent attack on the victim, by Telesford, was not a mere response to insults and being spat upon by the victim, but that it was rather part and parcel to the taking or retaining of the stolen items. In other words, the jury had to find that Celestine intended to use force to retain the ring(s), either by using his own force or taking advantage of Telesford use of force ... . **People v Telesford, 2017 NY Slip Op 01836, 1st Dept 3-15-17**

CRIMINAL LAW (POSSIBILITY OF DEPORTATION NOT MENTIONED AT TIME OF GUILTY PLEA, MATTER REMITTED)/DEPORATION (CRIMINAL LAW, POSSIBILITY OF DEPORTATION NOT MENTIONED AT TIME OF GUILTY PLEA, MATTER REMITTED)

CRIMINAL LAW.

POSSIBILITY OF DEPORTATION NOT MENTIONED AT TIME OF GUILTY PLEA, MATTER REMITTED.

The Second Department sent the matter back for a report from Supreme Court because the possibility of deportation was not mentioned at the time of the guilty plea:

> Here, the record does not demonstrate that the Supreme Court mentioned the possibility of deportation as a consequence of the defendant's plea. Under the circumstances of this case, we remit the matter to the Supreme Court, Westchester County, to afford the defendant an opportunity to move to vacate his plea, and for a report by the Supreme Court thereafter. Any such motion shall be made by the defendant within 60 days after the date of this decision and order ... , and, upon such motion, the defendant will have the burden of establishing that there is a "reasonable probability" that he would not have pleaded guilty had the court advised him of the possibility of deportation ... . In its report to this Court, the Supreme Court shall state whether the defendant moved to vacate his plea of guilty, and if so, shall set forth its finding as to whether the defendant made the requisite showing or failed to make the requisite showing ... . **People v Agramonte, 2017 NY Slip Op 01876, 2nd Dept 3-15-17**

CRIMINAL LAW (IT WAS THEORETICALLY POSSIBLE (ALTHOUGH HIGHLY UNLIKELY) THE TWO ASSAULT CONVICTIONS WERE BASED UPON THE SAME ACT, DEFENDANT SHOULD NOT HAVE BEEN GIVEN CONSECUTIVE SENTENCES)/SENTENCING (IT WAS THEORETICALLY POSSIBLE (ALTHOUGH HIGHLY UNLIKELY) THE TWO ASSAULT CONVICTIONS WERE BASED UPON THE SAME ACT, DEFENDANT SHOULD NOT HAVE BEEN GIVEN CONSECUTIVE SENTENCES)/CONCURRENT SENTENCES (IT WAS THEORETICALLY POSSIBLE (ALTHOUGH HIGHLY UNLIKELY) THE TWO ASSAULT CONVICTIONS WERE BASED UPON THE SAME ACT, DEFENDANT SHOULD NOT HAVE BEEN GIVEN CONSECUTIVE SENTENCES)/CONSECUTIVE SENTENCES (IT WAS THEORETICALLY POSSIBLE (ALTHOUGH HIGHLY UNLIKELY) THE TWO ASSAULT CONVICTIONS WERE BASED UPON THE SAME ACT, DEFENDANT SHOULD NOT HAVE BEEN GIVEN CONSECUTIVE SENTENCES)

CRIMINAL LAW.

IT WAS THEORETICALLY POSSIBLE (ALTHOUGH HIGHLY UNLIKELY) THE TWO ASSAULT CONVICTIONS WERE BASED UPON THE SAME ACT, DEFENDANT SHOULD NOT HAVE BEEN GIVEN CONSECUTIVE SENTENCES.

The Second Department determined defendant should have been sentenced concurrently for his two assault convictions. The victim was stabbed 20 times and his face was slashed. Defendant was convicted of two counts of assault first---intent to disfigure and intent to cause serious injury. It was not possible to determine whether the jury convicted on both counts based upon only the slashing of the victim's face as opposed to two different acts:

> We agree with the defendant's contention. Pursuant to Penal Law § 70.25(2), concurrent sentences must be imposed "for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other." " Thus, sentences [of imprisonment] imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other'" ... . Nonetheless, " trial courts retain consecutive sentence discretion when separate offenses are committed through separate acts, though they are part of a single transaction'" ... .
>
> Here, the People have failed to establish that the acts constituting the respective assault in the first degree convictions were separate and distinct from each other as required by the statute ... . It is impossible to determine from the record whether the slashing of an "X" into the victim's face, which formed the basis for the assault in the first degree "intent to disfigure another person seriously and permanently" conviction ... , also formed the basis for the jury's verdict of guilt on the assault in the first degree "intent to cause serious physical injury" conviction ... Thus, the People failed to establish that the acts constituting each of the two assault in the first degree convictions were separate and distinct from each other. **People v Henderson, 2017 NY Slip Op 01885, 2nd Dept 3-15-17**

CRIMINAL LAW (DEFENDANT'S OMISSIONS, INCONSISTENT STATEMENTS AND LIES AFTER A ROUTINE TRAFFIC STOP JUSTIFIED THE CANINE SNIFF)/SUPPRESSION (DEFENDANT'S OMISSIONS, INCONSISTENT STATEMENTS AND LIES AFTER A ROUTINE TRAFFIC STOP JUSTIFIED THE CANINE SNIFF)/TRAFFIC STOP (DEFENDANT'S OMISSIONS, INCONSISTENT STATEMENTS AND LIES AFTER A ROUTINE TRAFFIC STOP JUSTIFIED THE CANINE SNIFF)/CANINE SNIFF (DEFENDANT'S OMISSIONS, INCONSISTENT STATEMENTS AND LIES AFTER A ROUTINE TRAFFIC STOP JUSTIFIED THE CANINE SNIFF)

CRIMINAL LAW.

DEFENDANT'S OMISSIONS, INCONSISTENT STATEMENTS AND LIES AFTER A ROUTINE TRAFFIC STOP JUSTIFIED THE CANINE SNIFF.

The Third Department, over a two-justice dissent, determined the motion to suppress cocaine discovered using a canine sniff after a traffic stop for tinted windows was properly denied. Enough information and inconsistencies came to the officers' attention after the stop to warrant the dog sniff. Defendant was on parole but initially did not inform the officer of

that fact, the stop was outside the county in which defendant was paroled, defendant lied about his cell phone being broken, etc.:

> The prolonged diet of inconsistencies and lies provided by defendant about his travels, when coupled with his parole situation and his nervous demeanor throughout the encounter, combined to give the officers a "founded suspicion of criminality" ... . This founded suspicion justified both the extension of the stop after its initial justification had been exhausted and the exterior canine sniff that followed ... . The alert gave the troopers probable cause to search the vehicle and recover the bookbag from the back seat that contained cocaine ... . **People v Banks, 2017 NY Slip Op 01916, 3rd Dept 3-16-17**

CRIMINAL LAW (ATTEMPTED ASSAULT IN THE FIRST DEGREE COULD NOT SERVE AS A PREDICATE FOR CONVICTION OF CRIMINAL USE OF A FIREARM IN THE SECOND DEGREE)/ASSAULT (ATTEMPTED ASSAULT IN THE FIRST DEGREE COULD NOT SERVE AS A PREDICATE FOR CONVICTION OF CRIMINAL USE OF A FIREARM IN THE SECOND DEGREE)/FIREARM, CRIMINAL USE OF (ATTEMPTED ASSAULT IN THE FIRST DEGREE COULD NOT SERVE AS A PREDICATE FOR CONVICTION OF CRIMINAL USE OF A FIREARM IN THE SECOND DEGREE)

CRIMINAL LAW.

ATTEMPTED ASSAULT IN THE FIRST DEGREE COULD NOT SERVE AS A PREDICATE FOR CONVICTION OF CRIMINAL USE OF A FIREARM IN THE SECOND DEGREE.

The Fourth Department noted that attempted assault in the first degree cannot serve as a predicate for conviction of criminal use of a firearm in the second degree:

> ... [T]he use or display of the firearm while committing the class C felony of attempted assault in the first degree cannot serve as the predicate for his conviction of criminal use of a firearm in the second degree inasmuch as the use or display of that same firearm satisfied an element of attempted assault in the first degree ... . Although defendant failed to preserve that contention for our review ... , we exercise our power to review it as a matter of discretion in the interest of justice (see CPL 470.15 [6] [a]), and we modify the judgment by reversing that part convicting him of criminal use of a firearm in the second degree and dismissing that count of the indictment. **People v Butler, 2017 NY Slip Op 02186, 4th Dept 3-24-17**

CRIMINAL LAW (FIRST DEPARTMENT REDUCED DEFENDANT'S SORA RISK LEVEL FROM THREE TO TWO, BASED PRIMARILY UPON DEFENDANT'S USE OF EDUCATIONAL AND REHABILITATIVE RESOURCES WHILE IN PRISON)/SEX OFFENDER REGISTRATION ACT (SORA) (FIRST DEPARTMENT REDUCED DEFENDANT'S SORA RISK LEVEL FROM THREE TO TWO, BASED PRIMARILY UPON DEFENDANT'S USE OF EDUCATIONAL AND REHABILITATIVE RESOURCES WHILE IN PRISON)

CRIMINAL LAW.

FIRST DEPARTMENT REDUCED DEFENDANT'S SORA RISK LEVEL FROM THREE TO TWO, BASED PRIMARILY UPON DEFENDANT'S USE OF EDUCATIONAL AND REHABILITATIVE RESOURCES WHILE IN PRISON.

The First Department took the unusual step of reducing defendant's SORA risk level from three to two. Defendant committed a heinous rape 30 years ago when he was using drugs and alcohol. While in prison defendant earned two bachelor degrees and completed many therapeutic programs:

The Court of Appeals has enunciated a three-step process for determining whether to depart downward from a defendant's presumptive risk level ... . First, a court must decide whether the proffered mitigating circumstance or circumstances are "of a kind, or to a degree, not adequately taken into account by the guidelines" ... . Second, a court must determine whether the defendant seeking a downward departure has proven the existence of these alleged mitigating circumstances by a preponderance of the evidence ... . If the defendant surmounts these first two steps, a court must then exercise its discretion and determine at the final third step, "whether the totality of the circumstances warrants a departure" .... .

Here, we find that, under this three-step analysis, a departure to level two is warranted. Initially, we note that defendant has met his burden of proving the existence of mitigating circumstances unaccounted for in the Guidelines by a preponderance of the evidence. Defendant's remarkable rehabilitation and his pain and mobility problems constitute, in this case, the sort of "special circumstances" for which a downward departure is appropriate ... . Moreover, defendant supported his application with a number of exhibits, including his degrees, his medical records, and his letters of recommendation. **People v Williams, 2017 NY Slip Op 01988, 1st Dept 3-21-17**

CRIMINAL LAW (BOTH THE GRAND JURY AND THE TRIAL JURY SHOULD HAVE BEEN INSTRUCTED ON THE DEFENSE OF INNOCENT POSSESSION OF A WEAPON, INDICTMENT DISMISSED)/WEAPON, POSSESSION (BOTH THE GRAND JURY AND THE TRIAL JURY SHOULD HAVE BEEN INSTRUCTED ON THE DEFENSE OF INNOCENT POSSESSION OF A WEAPON, INDICTMENT DISMISSED)/GRAND JURY (BOTH THE GRAND JURY AND THE TRIAL JURY SHOULD HAVE BEEN INSTRUCTED ON THE DEFENSE OF INNOCENT POSSESSION OF A WEAPON, INDICTMENT DISMISSED)/DEFENSES (CRIMINAL LAW, BOTH THE GRAND JURY AND THE TRIAL JURY SHOULD HAVE BEEN INSTRUCTED ON THE DEFENSE OF INNOCENT POSSESSION OF A WEAPON, INDICTMENT DISMISSED)

CRIMINAL LAW.

BOTH THE GRAND JURY AND THE TRIAL JURY SHOULD HAVE BEEN INSTRUCTED ON THE DEFENSE OF INNOCENT POSSESSION OF A WEAPON, INDICTMENT DISMISSED.

The Fourth Department determined the both the grand jury and the trial jury should have been instructed on the defense of innocent possession of a weapon. The indictment was dismissed:

We agree with defendant ... that reversal is required because Supreme Court erred in denying his request for a jury instruction on the defense of temporary innocent possession of the handgun. In order for a defendant to be entitled to such an instruction, "there must be proof in the record showing a legal excuse for having the weapon in [one's] possession as well as facts tending to establish that, once possession [was] obtained, the weapon [was not] used in a dangerous manner" ... . Here, there were such facts. Defendant testified that he briefly struggled with a man who threatened him with a gun in front of his wife's residence and, in the struggle, the gun fell to the ground. According to defendant's testimony, after the assailant fled the scene, defendant picked up the gun from the street and immediately handed it to his wife, who then brought it into the home and hid it in the bedroom. * * *

We agree with defendant that the integrity of the grand jury proceeding was impaired, and we thus dismiss the two counts of the indictment of which defendant was convicted, without prejudice to the People to re-present any appropriate charges under those counts to another grand jury ... . The prosecutor is required to instruct the grand jury on the law with respect to matters before it ... . If the prosecutor fails to instruct the grand jury on a defense that would eliminate a needless or unfounded prosecution, the proceeding is defective, mandating dismissal of the indictment ... . **People v Graham, 2017 NY Slip Op 02175, 4th Dept 3-24-17**

CRIMINAL LAW (IF POSSIBLE, A RECONSTRUCTION HEARING MUST BE HELD TO DETERMINE DEFENDANT'S COMPETENCY AT THE TIME HE ENTERED A GUILTY PLEA, IF A HEARING CANNOT BE HELD THE PLEA MUST BE VACATED)/VACATE CONVICTION, MOTION TO (IF POSSIBLE, A RECONSTRUCTION HEARING MUST BE HELD TO DETERMINE DEFENDANT'S COMPETENCY AT THE TIME HE ENTERED A GUILTY PLEA, IF A HEARING CANNOT BE HELD THE PLEA MUST BE VACATED)/COMPETENCY (CRIMINAL LAW, (IF POSSIBLE, A RECONSTRUCTION HEARING MUST BE HELD TO DETERMINE DEFENDANT'S COMPETENCY AT THE TIME HE ENTERED A GUILTY PLEA, IF A HEARING CANNOT BE HELD THE PLEA MUST BE VACATED)

CRIMINAL LAW.

IF POSSIBLE, A RECONSTRUCTION HEARING MUST BE HELD TO DETERMINE DEFENDANT'S COMPETENCY AT THE TIME HE ENTERED A GUILTY PLEA, IF A HEARING CANNOT BE HELD THE PLEA MUST BE VACATED.

The Fourth Department determined a reconstruction hearing should be held to determine whether defendant was competent to stand trial in 2008 when he entered a guilty plea. If a reconstruction hearing cannot be held, the plea should be vacated. At the time of the plea two examining psychiatrists came to opposite conclusions about defendant's competency. Yet the guilty plea was accepted without holding a competency hearing:

> "Article 730 of the Criminal Procedure Law sets out the procedures courts of this State must follow in order to prevent the criminal trial of [an incompetent] defendant" ... . The CPL expressly provides that, "[w]hen the examination reports submitted to the court show that the psychiatric examiners are not unanimous in their opinion as to whether the defendant is or is not an incapacitated person, . . . the court must conduct a hearing to determine the issue of capacity" ... . "That section is mandatory and not discretionary" ... , and a plea of guilty cannot be accepted unless the requisite hearing is held and the defendant is found competent ... . **People v Pett, 2017 NY Slip Op 02178, 4th Dept 3-24-17**

CRIMINAL LAW (AMENDMENT OF INDICTMENTS CHARGING A COURSE OF SEXUAL CONDUCT TO CHARGES WHICH REQUIRE A UNANIMOUS VERDICT WITH RESPECT TO A PARTICULAR ACT DEPRIVED DEFENDANT OF HIS RIGHT TO BE TRIED ONLY ON THE CRIMES CHARGED)/INDICTMENT, AMENDMENT OF (AMENDMENT OF INDICTMENTS CHARGING A COURSE OF SEXUAL CONDUCT TO CHARGES WHICH REQUIRE A UNANIMOUS VERDICT WITH RESPECT TO A PARTICULAR ACT DEPRIVED DEFENDANT OF HIS RIGHT TO BE TRIED ONLY ON THE CRIMES CHARGED)

CRIMINAL LAW.

AMENDMENT OF INDICTMENTS CHARGING A COURSE OF SEXUAL CONDUCT TO CHARGES WHICH REQUIRE A UNANIMOUS VERDICT WITH RESPECT TO A PARTICULAR ACT DEPRIVED DEFENDANT OF HIS RIGHT TO BE TRIED ONLY ON THE CRIMES CHARGED.

The Fourth Department, reversing defendant's convictions, determined the indictments were improperly amended after trial:

> We agree with defendant ... that the court erred in granting the People's motion to amend the indictments at the close of proof. The fact that defendant consented to the amendments is of no moment because he has " a fundamental and nonwaivable right to be tried only on the crimes charged' " ... . "An indictment may not be amended in any respect which changes the theory or theories of the prosecution as reflected in the evidence before the grand jury which filed it" ... . Unlike the crimes charged in the amended indictments, the crimes of course of sexual conduct against a child in the first degree and predatory sexual assault against a child based upon allegations that defendant committed a course of sexual conduct against a child in the first degree as charged in the initial indictments do not criminalize a specific act, and thus do not require jury unanimity with respect to a specific act ... . For that reason, we conclude that the amendments of the indictments "resulted in an impermissible substantive change in the indictment[s] by adding new counts that changed the theory of the prosecution" ... . We therefore reverse the judgments insofar as they convicted defendant on those counts, and dismiss those counts of

the amended indictments without prejudice to the People to re-present any appropriate charges under those counts to another grand jury. **People v Vickers, 2017 NY Slip Op 02183, 4th Dept 3-24-17**

CRIMINAL LAW (DIFFERENT OFFENSE DATES IN THE SUPERIOR COURT INFORMATION REQUIRED DISMISSAL)/SUPERIOR COURT INFORMATION (DIFFERENT OFFENSE DATES IN THE SUPERIOR COURT INFORMATION REQUIRED DISMISSAL)/INDICTMENT, WAIVER OF (DIFFERENT OFFENSE DATES IN THE SUPERIOR COURT INFORMATION REQUIRED DISMISSAL)

CRIMINAL LAW.

DIFFERENT OFFENSE DATES IN THE SUPERIOR COURT INFORMATION REQUIRED DISMISSAL.

The Fourth Department determined the superior court information (SCI) must be dismissed because it did not charge the same offenses which were charged in the written waiver of indictment (different dates):

> Here, the felony complaint charged defendant with the commission of robbery in the first degree "on or about the 2nd day of 2011," i.e., January 2, 2011. The written waiver of indictment, however, specified that defendant waived his right to indictment with respect to the commission of robbery in the first degree on February 2, 2012, and the SCI itself charged defendant with the commission of robbery in the first degree on February 2, 2011. Inasmuch as robbery is a single-act offense ... , the January 2, 2011 robbery charged in the felony complaint was a " different crime entirely' " from both the February 2, 2012 robbery set forth in the waiver of indictment and the February 2, 2011 robbery charged in the SCI ... . Indeed, "the [dates] set forth in the [three] instruments," i.e., the felony complaint, the waiver of indictment, and the SCI, "exclude any possibility that they were based on the same criminal conduct" ... . The SCI therefore violates CPL 195.20 and must be dismissed as jurisdictionally defective ... .
>
> The SCI is also jurisdictionally defective inasmuch as it violates CPL 200.15, which provides in relevant part that a "superior court information . . . shall not include an offense not named in the written waiver of indictment." That "express prohibition" was violated here ... , inasmuch as the SCI included an offense, i.e., a robbery in the first degree committed on February 2, 2011 that was not set forth in the written waiver of indictment, which identified only a robbery in the first degree committed on February 2, 2012. **People v Walker, 2017 NY Slip Op 02200, 4th Dept 3-24-17**

CRIMINAL LAW (DEFENDANT WAS ENTITLED TO SEVERANCE FROM THE CODEFENDANTS, CODEFENDANTS TOOK AN AGGRESSIVE ADVERSERIAL STANCE AGAINST DEFENDANT AT TRIAL, NEW TRIAL ORDERED)/SEVERANCE (CRIMINAL LAW, DEFENDANT WAS ENTITLED TO SEVERANCE FROM THE CODEFENDANTS, CODEFENDANTS TOOK AN AGGRESSIVE ADVERSERIAL STANCE AGAINST DEFENDANT AT TRIAL, NEW TRIAL ORDERED)

CRIMINAL LAW.

DEFENDANT WAS ENTITLED TO SEVERANCE FROM THE CODEFENDANTS, CODEFENDANTS TOOK AN AGGRESSIVE ADVERSERIAL STANCE AGAINST DEFENDANT AT TRIAL, NEW TRIAL ORDERED.

The Fourth Department determined defendant's trial for criminal possession of a weapon should have been severed from the trial of his codefendants for the same offense. At trial the codefendants alleged it was defendant who possessed the weapon:

We conclude that the codefendants' respective attorneys "took an aggressive adversarial stance against [defendant at trial], in effect becoming a second [and a third] prosecutor" ... . We further conclude that the " essence or core of the defenses [were] in conflict, such that the jury, in order to believe the core of one defense, . . . necessarily [had to] disbelieve the core of the other' " ... . Thus, in retrospect ... , there was "a significant danger . . . that the conflict alone would lead the jury to infer defendant's guilt," and therefore severance was required ... . **People v Mcguire, 2017 NY Slip Op 02206, 4th Dept 3-24-17**

CRIMINAL LAW (FAILURE TO READ JURY NOTE INTO RECORD REQUIRED REVERSAL)/JURY NOTE (CRIMINAL LAW, FAILURE TO READ JURY NOTE INTO RECORD REQUIRED REVERSAL)

CRIMINAL LAW.

FAILURE TO READ JURY NOTE INTO RECORD REQUIRED REVERSAL.

The Fourth Department, over an extensive dissent, determined the trial court erred when it did not read the contents of a jury note into the record. The note said the jury "was not sure what to do:"

The record establishes that a jury note marked as court exhibit 8 stated that "[w]e have made decision on the Third Count we are having hard time with 1 and 2 just giving you are [sic] status." Soon thereafter, a jury note marked as court exhibit 9 stated that "[w]e have arrived on decision on 2 and 3, but we have a lot of work to do on #1. I don[']t see it being quick. Not sure what to do. We ars [sic] starting to make way." * * *

Our dissenting colleague concludes that the jury's statement, "[n]ot sure what to do," was a ministerial inquiry concerning the logistics of the jury's deliberations, i.e., the jury was asking whether it should continue deliberating that evening considering the late hour. We agree that the note could be interpreted that way, but we conclude that it also could be interpreted as it was interpreted by the court, i.e., the jury was having difficulty reaching a unanimous verdict and was making a substantive inquiry for guidance concerning further deliberations. In response to the note, the court issued an Allen-type charge. Quite simply, even if we consider all the surrounding circumstances, the jury note was ambiguous, and we must resolve that ambiguity in defendant's favor .. . **People v Morrison, 2017 NY Slip Op 02324, 4th Dept 3-24-17**

CRIMINAL LAW (FINE BELOW THE MINIMUM STATUTORY AMOUNT WAS ILLEGAL AND WAS THEREFORE VACATED BY THE APPELLATE DIVISION)/FINES (CRIMINAL LAW, FINE BELOW THE MINIMUM STATUTORY AMOUNT WAS ILLEGAL AND WAS THEREFORE VACATED BY THE APPELLATE DIVISION)

CRIMINAL LAW.

FINE BELOW THE MINIMUM STATUTORY AMOUNT WAS ILLEGAL AND WAS THEREFORE VACATED BY THE APPELLATE DIVISION.

The Fourth Department, over a two-justice dissent, determined the $1500 fine imposed in connection with a DWI was illegal because the statute required a minimum fine of $2000.00. The court determined no fine should be imposed. The dissent agreed the fine was illegal but argued the matter should be remitted:

As the People correctly concede, however, the court erred in imposing a $1,500 fine. Vehicle and Traffic Law § 1193 (1) (c) (ii) provides that a person convicted of driving while intoxicated as a class D felony "shall be punished by a fine of not less than two thousand dollars nor more than ten thousand dollars or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment." The court therefore had the authority to

impose a fine and a sentence of imprisonment, but was required to impose a minimum fine of $2,000 if it chose to impose any fine. We cannot allow the $1,500 illegal fine to stand ... and, as a matter of discretion in the interest of justice, we conclude that no fine should be imposed. We therefore modify the judgment by vacating the fine. **People v Neal, 2017 NY Slip Op 02320, 4th Dept 3-24-17**

CRIMINAL LAW (AFTER FINDING THE ISSUE PRESENTED AN EXCEPTION TO THE MOOTNESS DOCTRINE, THE COURT DETERMINED THE STATE DID NOT ADEQUATELY ASSIST A SEX OFFENDER IS FINDING SUITABLE HOUSING UPON RELEASE)/SEX OFFENDERS (AFTER FINDING THE ISSUE PRESENTED AN EXCEPTION TO THE MOOTNESS DOCTRINE, THE COURT DETERMINED THE STATE DID NOT ADEQUATELY ASSIST A SEX OFFENDER IS FINDING SUITABLE HOUSING UPON RELEASE)/RESIDENTIAL TREATMENT FACILITY (SEX OFFENDERS, AFTER FINDING THE ISSUE PRESENTED AN EXCEPTION TO THE MOOTNESS DOCTRINE, THE COURT DETERMINED THE STATE DID NOT ADEQUATELY ASSIST A SEX OFFENDER IS FINDING SUITABLE HOUSING UPON RELEASE)/APPEALS (AFTER FINDING THE ISSUE PRESENTED AN EXCEPTION TO THE MOOTNESS DOCTRINE, THE COURT DETERMINED THE STATE DID NOT ADEQUATELY ASSIST A SEX OFFENDER IS FINDING SUITABLE HOUSING UPON RELEASE)

CRIMINAL LAW, APPEALS.

AFTER FINDING THE ISSUE PRESENTED AN EXCEPTION TO THE MOOTNESS DOCTRINE, THE COURT DETERMINED THE STATE DID NOT ADEQUATELY ASSIST A SEX OFFENDER IS FINDING SUITABLE HOUSING UPON RELEASE.

The Third Department, in a full-fledged opinion by Justice Garry, determined the Department of Corrections and Community Services (DOCCS) did not give the petitioner, an indigent sex offender who had completed his sentence, adequate assistance in finding housing in a residential treatment facility (RTF) upon release. Although petitioner had been provided RTF housing by the time the matter was heard, the Third Department reached the issue as an exception to the mootness doctrine. DOCCS's insufficient assistance in finding RTF housing for released sex offenders was deemed a recurring problem that needed to be addressed:

> We agree with petitioner that, due to the "recognized difficulty in securing acceptable housing" for persons subject to sex offender residency restrictions, there is a likelihood of repetition regarding individuals being placed in RTFs due to the failure to secure suitable housing ... . Given the transitory purpose of RTFs and considering the lack of appellate precedent regarding challenges to RTF placements and programing, we further recognize that the phenomenon typically evades review ... . Finally, we find the issues novel and substantial given that petitioner's challenges concern whether RTFs are serving their distinct purpose, as contrasted with confinement facilities generally ... . * * *
>
> The feasibility and appropriateness of the specific means by which DOCCS may choose to provide affirmative assistance in locating housing to petitioner are, of course, discretionary and beyond the reach of judicial review unless they are shown to be irrational, arbitrary and capricious. Accordingly, we may not specify the particular actions that DOCCS should have taken. Nevertheless, its passive approach of leaving the primary obligation to locate housing to an individual confined in a medium security prison facility 100 miles from his family and community, without access to information or communication resources beyond that afforded to other prison inmates, falls far short of the spirit and purpose of the legislative obligation imposed upon DOCCS to assist in this process. **Matter of Gonzalez v Annucci, 2017 NY Slip Op 02099, 3rd Dept 3-23-17**

CRIMINAL LAW (TRIAL COURT'S GRANT OF A TRIAL ORDER OF DISMISSAL IN THIS MURDER CASE WAS ERROR, HOWEVER THERE IS NO STATUTORY AUTHORITY FOR THE PEOPLE'S APPEAL)/APPEALS (CRIMINAL LAW, (TRIAL COURT'S GRANT OF A TRIAL ORDER OF DISMISSAL IN THIS MURDER CASE WAS ERROR, HOWEVER THERE IS NO STATUTORY AUTHORITY FOR THE PEOPLE'S APPEAL)/TRIAL ORDER OF DISMISSAL (CRIMINAL LAW, TRIAL COURT'S GRANT OF A TRIAL ORDER OF DISMISSAL IN THIS MURDER CASE WAS ERROR, HOWEVER THERE IS NO STATUTORY AUTHORITY FOR THE PEOPLE'S APPEAL)

CRIMINAL LAW, APPEALS.

TRIAL JUDGE'S GRANT OF A TRIAL ORDER OF DISMISSAL IN THIS MURDER CASE WAS ERROR, HOWEVER THERE IS NO STATUTORY AUTHORITY FOR THE PEOPLE'S APPEAL.

The Fourth Department determined the People did not have statutory authority to appeal the grant of a trial order of dismissal after a mistrial had been declared because the jury could not reach a verdict. The Fourth Department explicitly stated that it had reviewed the evidence and found it legally sufficient to support the charge (murder). The trial order of dismissal, then, should not have been granted. But there was no mechanism for the People to appeal the error:

> "It is fundamental that in the absence of a statute expressly authorizing a criminal appeal, there is no right to appeal" ... . CPL 450.20, the "exclusive route for a People's appeal" ... , does not authorize this appeal. Contrary to the People's contention, CPL 450.20 (2) does not provide the statutory basis for this appeal, inasmuch as the order they seek to appeal did not set aside a guilty verdict and dismiss the indictment pursuant to CPL 290.10 (1) (b). Rather, there was no guilty verdict to set aside, and the order was issued pursuant to CPL 290.10 (1) (a). Thus, the order is not appealable ... . We may not "create a right to appeal out of thin air" in order to address the merits "without trespassing on the Legislature's domain and undermining the structure of article 450 of the CPL—the definite and particular enumeration of all appealable orders" ... . Were we able to review the merits, however, we would agree with the People that the court erred in dismissing the indictment. A "review [of] the legal sufficiency of the evidence as defined by CPL 70.10 (1), [while] accepting the competent evidence as true, in the light most favorable to the People," compels the conclusion that the evidence was legally sufficient to support the charge ... . **People v Tan, 2017 NY Slip Op 02541, 4th Dept 3-31-17**

CRIMINAL LAW (DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT ALLEGED HE WAS NOT INFORMED OF THE INTOXICATION DEFENSE PRIOR TO PLEADING GUILTY)/ATTORNEYS (CRIMINAL LAW, DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT ALLEGED HE WAS NOT INFORMED OF THE INTOXICATION DEFENSE PRIOR TO PLEADING GUILTY)/INEFFECTIVE ASSISTANCE (DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT ALLEGED HE WAS NOT INFORMED OF THE INTOXICATION DEFENSE PRIOR TO PLEADING GUILTY)/VACATE CONVICTION, MOTION TO DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT ALLEGED HE WAS NOT INFORMED OF THE INTOXICATION DEFENSE PRIOR TO PLEADING GUILTY)/INTOXICATION DEFENSE (MOTION TO VACATE CONVICTION, DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT ALLEGED HE WAS NOT INFORMED OF THE INTOXICATION DEFENSE PRIOR TO PLEADING GUILTY)

CRIMINAL LAW, ATTORNEYS.

DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO VACATE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, DEFENDANT ALLEGED HE WAS NOT INFORMED OF THE INTOXICATION DEFENSE PRIOR TO PLEADING GUILTY.

The Third Department determined defendant was entitled to a hearing on his motion to vacate his conviction. Defendant alleged he was not informed of the intoxication defense prior to pleading guilty:

... [R]egarding defendant's claim in his CPL 440.10 motion that counsel's representation was ineffective for failing to inform him that the required element of criminal intent for burglary in the second degree (see Penal Law § 140.25) could be negated by the defense of intoxication[:] The victims' statements to police include the observations that defendant "looked high and his speech was slow" and that defendant appeared "either drunk or stoned." Additionally, his criminal record reflects a history of alcohol-related arrests and convictions. Insofar as a defendant's knowledge that the element of intent may be negated by the potential defense of intoxication is essential to a knowing and voluntary plea ... and there is no indication that defendant was aware of the intoxication defense and knowingly waived his right to present such evidence, we are persuaded that defendant has raised an issue sufficient to require a hearing ... . **People v Perry, 2017 NY Slip Op 02095, 3rd Dept 3-23-17**

CRIMINAL LAW (PROSECUTOR'S SUMMATION AMOUNTED TO MISCONDUCT, 911 CALL SHOULD NOT HAVE BEEN ADMITTED AS PRESENT SENSE IMPRESSION OR AN EXCITED UTTERANCE, CROSS-EXAMINATION OF COMPLAINANT UNDULY RESTRICTED)/ATTORNEYS (CRIMINAL LAW, PROSECUTORIAL MISCONDUCT, PROSECUTOR'S SUMMATION AMOUNTED TO MISCONDUCT, 911 CALL SHOULD NOT HAVE BEEN ADMITTED AS PRESENT SENSE IMPRESSION OR AN EXCITED UTTERANCE, CROSS-EXAMINATION OF COMPLAINANT UNDULY RESTRICTED)/PROSECUTORIAL MISCONDUCT (PROSECUTOR'S SUMMATION AMOUNTED TO MISCONDUCT, 911 CALL SHOULD NOT HAVE BEEN ADMITTED AS PRESENT SENSE IMPRESSION OR AN EXCITED UTTERANCE, CROSS-EXAMINATION OF COMPLAINANT UNDULY RESTRICTED)/EVIDENCE (CRIMINAL LAW, PROSECUTOR'S SUMMATION AMOUNTED TO MISCONDUCT, 911 CALL SHOULD NOT HAVE BEEN ADMITTED AS PRESENT SENSE IMPRESSION OR AN EXCITED UTTERANCE, CROSS-EXAMINATION OF COMPLAINANT UNDULY RESTRICTED)/HEARSAY (CRIMINAL LAW, PROSECUTOR'S SUMMATION AMOUNTED TO MISCONDUCT, 911 CALL SHOULD NOT HAVE BEEN ADMITTED AS PRESENT SENSE IMPRESSION OR AN EXCITED UTTERANCE, CROSS-EXAMINATION OF COMPLAINANT UNDULY RESTRICTED)/911 CALL (CRIMINAL LAW, PROSECUTOR'S SUMMATION AMOUNTED TO MISCONDUCT, 911 CALL SHOULD NOT HAVE BEEN ADMITTED AS PRESENT SENSE IMPRESSION OR AN EXCITED UTTERANCE, CROSS-EXAMINATION OF COMPLAINANT UNDULY RESTRICTED)

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

PROSECUTOR'S SUMMATION AMOUNTED TO MISCONDUCT, 911 CALL SHOULD NOT HAVE BEEN ADMITTED AS PRESENT SENSE IMPRESSION OR AN EXCITED UTTERANCE, CROSS-EXAMINATION OF COMPLAINANT UNDULY RESTRICTED.

The Second Department, reversing defendant's conviction, determined the prosecutor's remarks in summation amounted to prosecutorial misconduct, a 911 call made by a non-testifying witness should not have been admitted as present sense impression or an excited utterance, and the cross-examination of the complainant was unduly restricted. With respect to the prosecutor's summation, the court wrote:

Here, during summation, the prosecutor repeatedly engaged in improper conduct. For instance, the prosecutor vouched for the credibility of the People's witnesses with regard to significant aspects of the People's case by asserting, inter alia, that "the witnesses who came before you provided truthful testimony that makes sense," that they gave the "kind of truthful and credible testimony that you can rely on," and that one witness had "no reason . . . to be anything but truthful with the 911 operator" ... . In describing a complainant, the prosecutor asserted that he was "exactly what you hoped to see from someone who had troubles with the law in their youth," but had "changed [his] life" and now worked at an organization that helps "low-income people [obtain] health care," which was a clear attempt to appeal to the sympathy of the jury ... . To support the credibility of that same complainant, the prosecutor injected the integrity of the District Attorney's office into the trial to downplay the severity of a past criminal charge he faced ... . Further, the prosecutor denigrated the defense and undermined the defendant's right to confront witnesses by implying that the complainants were victims of an overly long cross-examination and that one was a "saint" for answering so many questions ... . Moreover, the prosecutor improperly used the defendant's right to pretrial silence against him by arguing that he could not be a victim as he did not call 911 ... . The cumulative effect of these improper comments deprived the defendant of a fair trial ... . **People v Casiano, 2017 NY Slip Op 02053, 2nd Dept 3-22-17**

CRIMINAL LAW (DEFENDANT THREW BAGS OF COCAINE ONTO THE FLOOR IN PLAIN SIGHT OF POLICE OFFICERS, NOT SUFFICIENT TO SUPPORT TAMPERING WITH EVIDENCE CHARGE)/EVIDENCE (CRIMINAL LAW, TAMPERING WITH EVIDENCE, DEFENDANT THREW BAGS OF COCAINE ONTO THE FLOOR IN PLAIN SIGHT OF POLICE OFFICERS, NOT SUFFICIENT TO SUPPORT TAMPERING WITH EVIDENCE CHARGE)/TAMPERING WITH EVIDENCE (DEFENDANT THREW BAGS OF COCAINE ONTO THE FLOOR IN PLAIN SIGHT OF POLICE OFFICERS, NOT SUFFICIENT TO SUPPORT TAMPERING WITH EVIDENCE CHARGE)

CRIMINAL LAW, EVIDENCE.

DEFENDANT THREW BAGS OF COCAINE ONTO THE FLOOR IN PLAIN SIGHT OF POLICE OFFICERS, NOT SUFFICIENT TO SUPPORT TAMPERING WITH EVIDENCE CHARGE.

The Fourth Department determined the evidence was insufficient for conviction of the tampering with evidence charge. Defendant threw bags of cocaine on the floor. There was insufficient evidence that the act of throwing the drugs on the floor was intended to conceal the evidence:

> ... [T]he evidence is legally insufficient to support the conviction of tampering with physical evidence. Insofar as relevant here, a person is guilty of that crime when, "[b]elieving that certain physical evidence is about to be produced or used in an official proceeding or a prospective official proceeding, and intending to prevent such production or use, he [or she] suppresses it by any act of concealment" ... . The People's theory was that defendant tampered with physical evidence by throwing bags of cocaine onto the floor of a store with the intent of concealing the drugs from the pursuing police officers and thereby preventing the use of the drugs in a prospective official proceeding. The evidence at trial established that officers observed defendant throw bags of suspected crack cocaine onto the floor when he passed through the front entrance of the store. Although the offense of tampering with physical evidence does not require the actual suppression of physical evidence, there must be an act of concealment while intending to suppress the evidence ... . We conclude that the evidence is legally insufficient to establish that defendant accomplished an act of concealment inasmuch as he dropped the items onto the floor in plain sight of the officers ... . **People v Parker, 2017 NY Slip Op 02208, 4th Dept 3-24-17**

CRIMINAL LAW (IN THIS DRUG OFFENSE TRIAL, COURT SHOULD NOT HAVE ALLOWED IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR DRUG-RELATED CONVICTIONS)/EVIDENCE (CRIMINAL LAW, SANDOVAL, IN THIS DRUG OFFENSE TRIAL, COURT SHOULD NOT HAVE ALLOWED IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR DRUG-RELATED CONVICTIONS)/SANDOVAL (IN THIS DRUG OFFENSE TRIAL, COURT SHOULD NOT HAVE ALLOWED IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR DRUG-RELATED CONVICTIONS)

CRIMINAL LAW, EVIDENCE.

IN THIS DRUG OFFENSE TRIAL, COURT SHOULD NOT HAVE ALLOWED IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR DRUG-RELATED CONVICTIONS.

Although the error was deemed harmless, the Fourth Department determined the People should not have been allowed, in this drug-offense trial, to impeach defendant with evidence of his prior drug-related convictions:

> We agree with defendant that the court abused its discretion in ruling that the People could impeach him using his prior drug-related convictions and their underlying facts. In determining whether the People may impeach a defendant using prior criminal acts, a court must balance the probative value of the evidence on the issue of credibility against the risk of undue prejudice, as measured by the potential impact of the evidence and the possibility that its introduction would deter defendant from testifying in his or her defense (see People v Sandoval, 34 NY2d 371, 376-377). Certain factors should be considered, such as the prior conviction's temporal proximity, the

degree to which the prior conviction bears upon the defendant's truthfulness, and the extent to which the prior conviction may be taken as evidence of the defendant's propensity to commit the crime charged (see id.). It is well recognized that " in the prosecution of drug charges, interrogation as to prior narcotics convictions . . . may present a special risk of impermissible prejudice because of the widely accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders' " ... . Here, the record reveals that the court considered only the temporal proximity of the prior convictions and defendant's willingness to place his interests above those of society in general ... . There is no indication that the court considered the special risk that defendant's prior drug-related convictions might be taken by the jury as evidence of his propensity to commit the crime charged ... . **People v Brown, 2017 NY Slip Op 02190, 4th Dept 3-24-17**

CRIMINAL LAW (UNWARNED STATEMENT PRECEDED MIRANDIZED STATEMENT BY TEN MINUTES, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED)/EVIDENCE (CRIMINAL LAW, UNWARNED STATEMENT PRECEDED MIRANDIZED STATEMENT BY TEN MINUTES, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED)/SUPPRESS, MOTION TO (CRIMINAL LAW, STATEMENTS, UNWARNED STATEMENT PRECEDED MIRANDIZED STATEMENT BY TEN MINUTES, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED)/STATEMENTS (CRIMINAL LAW, SUPPRESSION, UNWARNED STATEMENT PRECEDED MIRANDIZED STATEMENT BY TEN MINUTES, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED)

CRIMINAL LAW, EVIDENCE.

UNWARNED STATEMENT PRECEDED MIRANDIZED STATEMENT BY TEN MINUTES, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Second Department determined defendant's motion to suppress his statements should have been granted:

At the suppression hearing, a police detective testified that while the defendant was in custody, he administered Miranda warnings ... and took the defendant's written statement. On cross-examination, the detective admitted that 10 minutes prior to taking the defendant's Mirandized written statement, he questioned the defendant without administering Miranda warnings. The written statement itself refers to incriminating statements made by the defendant during the earlier, pre-Miranda questioning. The Supreme Court denied suppression.

"[W]here an improper, unwarned statement gives rise to a subsequent Mirandized statement as part of a single continuous chain of events,' there is inadequate assurance that the Miranda warnings were effective in protecting a defendant's rights, and the warned statement must also be suppressed" ... . Here, the improper unwarned statements made by the defendant gave rise to a subsequent Mirandized written statement as part of a single continuous chain of events. Accordingly, both the oral statement and the written statement should have been suppressed. **People v Ghee, 2017 NY Slip Op 01564, 2nd Dept 3-1-17**

CRIMINAL LAW (EVIDENCE OF KNOWING POSSESSION OF A CONTROLLED SUBSTANCE WAS SUFFICIENT TO SUPPORT AN INDICTMENT, SUPREME COURT REVERSED)/EVIDENCE (CRIMINAL LAW, EVIDENCE OF KNOWING POSSESSION OF A CONTROLLED SUBSTANCE WAS SUFFICIENT TO SUPPORT AN INDICTMENT, SUPREME COURT REVERSED)/GRAND JURIES (EVIDENCE OF KNOWING POSSESSION OF A CONTROLLED SUBSTANCE WAS SUFFICIENT TO SUPPORT AN INDICTMENT, SUPREME COURT REVERSED)/CONTROLLED SUBSTANCE, POSSESSION OF (EVIDENCE OF KNOWING POSSESSION OF A CONTROLLED SUBSTANCE WAS SUFFICIENT TO SUPPORT AN INDICTMENT, SUPREME COURT REVERSED)

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF KNOWING POSSESSION OF A CONTROLLED SUBSTANCE WAS SUFFICIENT TO SUPPORT AN INDICTMENT, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the evidence before the grand jury was sufficient to demonstrate defendant's knowledge he possessed cocaine. The defendant received a package containing cocaine addressed to a name (not his name) he used to sign for it and the package was addressed to a location which was not where defendant resided. The defendant was arrested before the package was opened:

> "Courts assessing the sufficiency of the evidence before a grand jury must evaluate whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted—and deferring all questions as to the weight or quality of the evidence—would warrant conviction" ... . " Legally sufficient evidence' means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof" ... . " In the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt'" ... . "The reviewing court's inquiry is limited to whether the facts, if proven, and the inferences that logically flow from those facts, supply proof of every element of the charged crimes, and whether the Grand Jury could rationally have drawn the guilty inference. That other, innocent inferences could possibly be drawn from those facts is irrelevant to the sufficiency inquiry as long as the Grand Jury could rationally have drawn the guilty inference" ... . **People v Jimenez, 2017 NY Slip Op 01566, 2nd Dept 3-1-17**

CRIMINAL LAW (DESPITE CONFLICTING EVIDENCE, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE IN THIS MANSLAUGHTER-ASSAULT CASE, DEFENDANT, WHO PROVIDED THE GUN TO THE SHOOTER, WAS DEEMED TO SHARE THE SHOOTER'S INTENT)/EVIDENCE (CRIMINAL LAW, JUSTIFICATION DEFENSE, DESPITE CONFLICTING EVIDENCE, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE IN THIS MANSLAUGHTER-ASSAULT CASE, DEFENDANT, WHO PROVIDED THE GUN TO THE SHOOTER, WAS DEEMED TO SHARE THE SHOOTER'S INTENT)/JUSTIFICATION DEFENSE (DESPITE CONFLICTING EVIDENCE, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE IN THIS MANSLAUGHTER-ASSAULT CASE, DEFENDANT, WHO PROVIDED THE GUN TO THE SHOOTER, WAS DEEMED TO SHARE THE SHOOTER'S INTENT)/ACCOMPLICE (CRIMINAL LAW, JUSTIFICATION DEFENSE, DESPITE CONFLICTING EVIDENCE, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE IN THIS MANSLAUGHTER-ASSAULT CASE, DEFENDANT, WHO PROVIDED THE GUN TO THE SHOOTER, WAS DEEMED TO SHARE THE SHOOTER'S INTENT)

CRIMINAL LAW, EVIDENCE.

DESPITE CONFLICTING EVIDENCE, JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE IN THIS MANSLAUGHTER-ASSAULT CASE, DEFENDANT, WHO PROVIDED THE GUN TO THE SHOOTER, WAS DEEMED TO SHARE THE SHOOTER'S INTENT.

The Second Department, in an extensive decision with an equally extensive dissent, determined defendant was entitled to a new trial on manslaughter and assault charges because the trial judge did not instruct the jury on the justification defense. Defendant was not the shooter. Defendant provided the gun to the shooter (Martinez-Mendoza) during a confrontation with a group of people outside a bar, where defendant had been beaten up. Because it was alleged defendant shared the shooter's intent, and because it was possible (despite conflicting evidence) the shooter feared the use of deadly force when he fired, defendant was entitled to the justification jury charge:

At the outset, we note that whether the defendant intended for Martinez-Mendoza to use the gun he provided or knew that he would use the gun does not preclude a defense of justification ... .

... [H]ere, some evidence contradicted the defendant's testimony. However, the record also included evidence, including testimony from Martinez-Mendoza, that, when viewed in the light most favorable to the defendant and drawing all reasonable permissible inferences in his favor, indicated the propriety of charging the justification defense requested by the defendant. Indeed, a justification defense was found to be appropriate in cases where part of a defendant's testimony was inconsistent with a justification defense ... , where a defendant's testimony was in conflict with that of other witnesses ... , and even where there was "strong" evidence to negate a defendant's testimony relating to justification ... .

Furthermore, we disagree with the conclusion drawn by our dissenting colleague that the defendant could not have reasonably believed that there was no ability to safely retreat, as demonstrated by the fact that the defendant, along with his female companions, were able to get to the car without incident a few minutes earlier. The use of lethal defensive force is limited to circumstances when the defender cannot "with complete personal safety, to oneself and others," "avoid the necessity of so doing by retreating" ... . However, the duty to retreat does not arise until the defendant forms a reasonable belief that another person "is using or about to use deadly physical force" ... . More specifically, the other person's deadly force must be actually occurring or imminent before the duty to retreat arises ... . Here, the evidence, when viewed in the light most favorable to the defendant and drawing all reasonable inferences in his favor, might lead a jury to decide that it was not until the point in time that the defendant returned to his companions with the gun that the threat of deadly physical force was imminent. Thus, the justification defense remained available to this defendant, even though it may have been more prudent for his own safety for him to leave the area of [the bar] when he first went to the car to retrieve the gun ... . **People v Sanchez, 2017 NY Slip Op 01718. 2nd Dept 3-8-17**

CRIMINAL LAW (WITNESS'S DISAVOWED IDENTIFICATION OF ANOTHER AS THE PERPETRATOR COULD NOT BE USED AFFIRMATIVELY BY THE DEFENDANT AS EVIDENCE OF THIRD-PARTY CULPABILITY)/EVIDENCE (CRIMINAL LAW, WITNESS'S DISAVOWED IDENTIFICATION OF ANOTHER AS THE PERPETRATOR COULD NOT BE USED AFFIRMATIVELY BY THE DEFENDANT AS EVIDENCE OF THIRD-PARTY CULPABILITY)/THIRD PARTY CULPABILITY (CRMINAL LAW, (WITNESS'S DISAVOWED IDENTIFICATION OF ANOTHER AS THE PERPETRATOR COULD NOT BE USED AFFIRMATIVELY BY THE DEFENDANT AS EVIDENCE OF THIRD-PARTY CULPABILITY)

CRIMINAL LAW, EVIDENCE.

WITNESS'S DISAVOWED IDENTIFICATION OF ANOTHER AS THE PERPETRATOR COULD NOT BE USED AFFIRMATIVELY BY THE DEFENDANT AS EVIDENCE OF THIRD-PARTY CULPABILITY.

The First Department determined a witness's disavowed identification of another as the perpetrator could not be used as evidence of third-party culpability:

The court providently exercised its discretion in ruling that defendant could not, in the absence of additional evidence, argue that the person initially identified by the witness was the actual perpetrator ... , and this ruling did not deprive defendant of a fair trial or the right to present a defense. The court did not preclude defendant from introducing evidence of third-party culpability; on the contrary, it expressly invited defendant to introduce certain evidence of that nature. Rather than precluding a third-party culpability defense, the court providently ruled that such a defense could not, without more, be supported by the disavowed identification, which the witness explained as a deliberate falsehood. Defendant received a full opportunity to explore the misidentification and all surrounding circumstances, and to use these matters to attack the witness's credibility. While defendant cites additional evidence that would have supported the claim that the misidentified man was the actual perpetrator, he was free to introduce this evidence at trial but failed to do so. Even if the court had permitted defendant to specifically argue

third-party culpability in summation, defendant would not have been entitled to argue about matters not in evidence. **People v Francis, 2017 NY Slip Op 01817, 1st Dept 3-15-17**

CRIMINAL LAW (EVIDENCE, ALLOWING POLICE OFFICER TO TESTIFY ABOUT VICTIM'S IDENTIFICATION OF DEFENDANT AT A SHOWUP WAS NOT BOLSTERING, VICTIM'S STATEMENT WAS AN EXCITED UTTERANCE)/EVIDENCE (CRIMINAL LAW, ALLOWING POLICE OFFICER TO TESTIFY ABOUT VICTIM'S IDENTIFICATION OF DEFENDANT AT A SHOWUP WAS NOT BOLSTERING, VICTIM'S STATEMENT WAS AN EXCITED UTTERANCE)/HEARSAY (CRIMINAL LAW, ALLOWING POLICE OFFICER TO TESTIFY ABOUT VICTIM'S IDENTIFICATION OF DEFENDANT AT A SHOWUP WAS NOT BOLSTERING, VICTIM'S STATEMENT WAS AN EXCITED UTTERANCE)/BOLSTERING (CRIMINAL LAW, ALLOWING POLICE OFFICER TO TESTIFY ABOUT VICTIM'S IDENTIFICATION OF DEFENDANT AT A SHOWUP WAS NOT BOLSTERING, VICTIM'S STATEMENT WAS AN EXCITED UTTERANCE)/EXCITED UTTERANCE (CRIMINAL LAW, ALLOWING POLICE OFFICER TO TESTIFY ABOUT VICTIM'S IDENTIFICATION OF DEFENDANT AT A SHOWUP WAS NOT BOLSTERING, VICTIM'S STATEMENT WAS AN EXCITED UTTERANCE)/SHOWUP IDENTIFICATION CRIMINAL LAW, ALLOWING POLICE OFFICER TO TESTIFY ABOUT VICTIM'S IDENTIFICATION OF DEFENDANT AT A SHOWUP WAS NOT BOLSTERING, VICTIM'S STATEMENT WAS AN EXCITED UTTERANCE)/INDENTIFICATION (CRIMINAL LAW, ALLOWING POLICE OFFICER TO TESTIFY ABOUT VICTIM'S IDENTIFICATION OF DEFENDANT AT A SHOWUP WAS NOT BOLSTERING, VICTIM'S STATEMENT WAS AN EXCITED UTTERANCE)

CRIMINAL LAW, EVIDENCE.

ALLOWING POLICE OFFICER TO TESTIFY ABOUT VICTIM'S IDENTIFICATION OF DEFENDANT AT A SHOWUP WAS NOT BOLSTERING, VICTIM'S STATEMENT WAS AN EXCITED UTTERANCE.

The First Department determined a police officer was properly allowed to testify the robbery victim identified defendant at a showup because the victim's statement was an excited utterance:

> At trial, the court properly permitted a police officer to testify that the victim of the ... robbery identified defendant at a showup. This testimony was admissible, notwithstanding the general rule against third-party bolstering ... , because the victim's declaration qualified as an excited utterance. Shortly after the victim was robbed at gunpoint in his taxicab, he called 911 and was brought in a police vehicle to defendant, who was being detained. The victim immediately yelled, "[O]h my God[!] . . . [I]t is the same guy . . . . Thank God you caught him[!]" Under the circumstances, this identification was made "under the stress of excitement caused by an external event, and [was] not the product of studied reflection and possible fabrication" ... . **People v Everette, 2017 NY Slip Op 01962, 1st Dept 3-16-17**

CRIMINAL LAW (NO NEED FOR ARRESTING OFFICER TO TESTIFY AT SUPPRESSION HEARING, INFERENCE OF MUTUAL COMMUNICATION APPLIED)/EVIDENCE (CRIMINAL LAW, NO NEED FOR ARRESTING OFFICER TO TESTIFY AT SUPPRESSION HEARING, INFERENCE OF MUTUAL COMMUNICATION APPLIED)/MUTUAL COMMUNICATION, INFERENCE OF (CRIMINAL LAW, NO NEED FOR ARRESTING OFFICER TO TESTIFY AT SUPPRESSION HEARING, INFERENCE OF MUTUAL COMMUNICATION APPLIED)/SUPPRESSION (CRIMINAL LAW, EVIDENCE, NO NEED FOR ARRESTING OFFICER TO TESTIFY AT SUPPRESSION HEARING, INFERENCE OF MUTUAL COMMUNICATION APPLIED)

CRIMINAL LAW, EVIDENCE.

NO NEED FOR ARRESTING OFFICER TO TESTIFY AT SUPPRESSION HEARING, INFERENCE OF MUTUAL COMMUNICATION APPLIED.

The First Department determined the arresting officer did not need to testify at the suppression hearing and explained the inference of mutual communication:

> The arresting officer had probable cause to arrest defendant under the fellow officer rule because "the radio transmission [of] the undercover officer . . . provided details of the defendant's race, sex, clothing, as well as his location and the fact that a positive buy' had occurred" and defendant was the only person in the area who matched the description at the location ... . Although the arresting officer did not testify at the suppression hearing, "the only rational explanation for how defendant came to be arrested . . . is that [the arresting officer] heard the radio communication [heard by the testifying officer] and apprehended defendant on that basis" ... . The inference of mutual communication ... does not turn on what kind of radios the officers were using, or how well the radios were working, but on the simple fact that, without hearing the radio transmission, the arresting officer would have had no way of knowing where to go or whom to arrest. **People v Vidro, 2017 NY Slip Op 01975, 1st Dept 3-16-17**

CRIMINAL LAW (911 CALL AND PRIOR CONSISTENT STATEMENT PROPERLY ADMITTED AS EXCITED UTTERANCES)/EVIDENCE (CRIMINAL LAW, 911 CALL AND PRIOR CONSISTENT STATEMENT PROPERLY ADMITTED AS EXCITED UTTERANCES)/HEARSAY (CRIMINAL LAW, 911 CALL AND PRIOR CONSISTENT STATEMENT PROPERLY ADMITTED AS EXCITED UTTERANCES)/EXCITED UTTERANCES (CRIMINAL LAW, 911 CALL AND PRIOR CONSISTENT STATEMENT PROPERLY ADMITTED AS EXCITED UTTERANCES)

CRIMINAL LAW, EVIDENCE.

911 CALL AND PRIOR CONSISTENT STATEMENT PROPERLY ADMITTED AS EXCITED UTTERANCES.

The Second Department determined a 911 call and a prior consistent statement were properly admitted as excited utterances:

> ... [T]he recording of the 911 call was properly admitted into evidence under the excited utterance and present sense impression exceptions to the hearsay rule, as the probative value of this evidence outweighed any prejudicial effect ... .
>
> The defendant contends that he was deprived of a fair trial when the prosecutor elicited testimony from a police officer and the victim's niece regarding statements made by the victim's son at the scene, which improperly bolstered the testimony of the victim's son identifying the defendant as the shooter. ... . If a proffered statement also meets the requirements to be admitted as an excited utterance, its admission would be proper, notwithstanding the characterization as a prior consistent statement ... . Here, the Supreme Court properly admitted the testimony of the police officer and the victim's niece concerning the statements of the victim's son at the scene identifying the defendant as the shooter under the excited utterance exception to the hearsay rule, and that testimony did not constitute improper bolstering ... . **People v Chin, 2017 NY Slip Op 01880, 2nd Dept 3-15-17**

CRIMINAL LAW (IN THIS DRUG OFFENSE TRIAL, COURT SHOULD NOT HAVE ALLOWED IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR DRUG-RELATED CONVICTIONS)/EVIDENCE (CRIMINAL LAW, SANDOVAL, IN THIS DRUG OFFENSE TRIAL, COURT SHOULD NOT HAVE ALLOWED IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR DRUG-RELATED CONVICTIONS)/SANDOVAL (IN THIS DRUG OFFENSE TRIAL, COURT SHOULD NOT HAVE ALLOWED IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR DRUG-RELATED CONVICTIONS)

CRIMINAL LAW, EVIDENCE.

IN THIS DRUG OFFENSE TRIAL, COURT SHOULD NOT HAVE ALLOWED IMPEACHMENT OF DEFENDANT WITH EVIDENCE OF PRIOR DRUG-RELATED CONVICTIONS.

Although the error was deemed harmless, the Fourth Department determined the People should not have been allowed, in this drug-offense trial, to impeach defendant with evidence of his prior drug-related convictions:

> We agree with defendant that the court abused its discretion in ruling that the People could impeach him using his prior drug-related convictions and their underlying facts. In determining whether the People may impeach a defendant using prior criminal acts, a court must balance the probative value of the evidence on the issue of credibility against the risk of undue prejudice, as measured by the potential impact of the evidence and the possibility that its introduction would deter defendant from testifying in his or her defense (see People v Sandoval, 34 NY2d 371, 376-377). Certain factors should be considered, such as the prior conviction's temporal proximity, the degree to which the prior conviction bears upon the defendant's truthfulness, and the extent to which the prior conviction may be taken as evidence of the defendant's propensity to commit the crime charged (see id.). It is well recognized that " in the prosecution of drug charges, interrogation as to prior narcotics convictions . . . may present a special risk of impermissible prejudice because of the widely accepted belief that persons previously convicted of narcotics offenses are likely to be habitual offenders' " ... . Here, the record reveals that the court considered only the temporal proximity of the prior convictions and defendant's willingness to place his interests above those of society in general ... . There is no indication that the court considered the special risk that defendant's prior drug-related convictions might be taken by the jury as evidence of his propensity to commit the crime charged ... . **People v Brown, 2017 NY Slip Op 02190, 4th Dept 3-24-17**

CRIMINAL LAW (DEFENDANT'S MOTION TO VACATE HIS CONVICTION, BASED UPON NEWLY DISCOVERED EVIDENCE IN THE FORM OF A DECLARATION AGAINST INTEREST, SHOULD HAVE BEEN GRANTED)/EVIDENCE (DECLARATION AGAINST INTEREST, DEFENDANT'S MOTION TO VACATE HIS CONVICTION, BASED UPON NEWLY DISCOVERED EVIDENCE IN THE FORM OF A DECLARATION AGAINST INTEREST, SHOULD HAVE BEEN GRANTED)/CONVICTION, MOTION TO VACATE (DEFENDANT'S MOTION TO VACATE HIS CONVICTION, BASED UPON NEWLY DISCOVERED EVIDENCE IN THE FORM OF A DECLARATION AGAINST INTEREST, SHOULD HAVE BEEN GRANTED)/DECLARATION AGAINST INTEREST (DEFENDANT'S MOTION TO VACATE HIS CONVICTION, BASED UPON NEWLY DISCOVERED EVIDENCE IN THE FORM OF A DECLARATION AGAINST INTEREST, SHOULD HAVE BEEN GRANTED)

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION, BASED UPON NEWLY DISCOVERED EVIDENCE IN THE FORM OF A DECLARATION AGAINST PENAL INTEREST, SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant's motion to vacate his conviction based upon newly discovered evidence of third party culpability should have been granted. The statement at issue was admissible as a declaration against penal interest:

As a preliminary matter, it is well settled that a "less stringent standard [of admissibility] applies, where, as here, the declaration is offered by defendant to exonerate himself rather than by the People, to inculpate him" ... . Furthermore, the statements attributed to the third party "all but rule[] out a motive [for the third party] to falsify" the statement that it was he, and not defendant, who shot the victim ... . Thus, in determining whether there is evidence constituting "sufficient supportive evidence of a declaration against penal interest[,] . . . [t]he crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself . . . Supportive evidence is sufficient if it establishes a reasonable possibility that the statement might be true. Whether [the hearing] court believes the statement to be true is irrelevant . . . If the proponent of the statement is able to establish this possibility of trustworthiness, it is the function of the jury alone to determine whether the declaration is sufficient to create reasonable doubt of guilt" ... .

We conclude that defendant provided sufficient competent evidence at the 440.10 hearing to establish the "possibility of trustworthiness" of the third party's statement to satisfy the requirement that the statement was a declaration against penal interest. In addition to the trial testimony that the third party was engaged in a dispute with the victim, the third party admitted to the defense investigator that he was present and engaged in a dispute with the victim and that he wrote the letters to defendant's former attorney. Thus, we conclude that the third party is unavailable and that his alleged statement is "supported by independent proof indicating that it is trustworthy and reliable" and thus that it is a statement against penal interest ... . Furthermore, the statement is "clearly exculpatory of the defendant" ... . We therefore conclude that defendant met his burden of establishing, by a preponderance of the evidence ... , that the third party's statement against penal interest was not available at the time of defendant's trial and "is of such a character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" ... . **People v Mcfarland, 2017 NY Slip Op 02194, 4th Dept 3-24-17**

CRIMINAL LAW (INSUFFICIENT EVIDENCE TO SUPPORT PHYSICAL INJURY ELEMENT OF ASSAULT THIRD, INSUFFICIENT EVIDENCE TO WARRANT SENTENCING AS A PERSISTENT FELONY OFFENDER)/EVIDENCE (CRIMINAL LAW, INSUFFICIENT EVIDENCE TO SUPPORT PHYSICAL INJURY ELEMENT OF ASSAULT THIRD, INSUFFICIENT EVIDENCE TO WARRANT SENTENCING AS A PERSISTENT FELONY OFFENDER)/ASSAULT (CRIMINAL LAW, INSUFFICIENT EVIDENCE TO SUPPORT PHYSICAL INJURY ELEMENT OF ASSAULT THIRD, INSUFFICIENT EVIDENCE TO WARRANT SENTENCING AS A PERSISTENT FELONY OFFENDER)/SENTENCING (INSUFFICIENT EVIDENCE TO SUPPORT PHYSICAL INJURY ELEMENT OF ASSAULT THIRD, INSUFFICIENT EVIDENCE TO WARRANT SENTENCING AS A PERSISTENT FELONY OFFENDER)/PERSISTENT FELONY OFFENDER INSUFFICIENT EVIDENCE TO SUPPORT PHYSICAL INJURY ELEMENT OF ASSAULT THIRD, INSUFFICIENT EVIDENCE TO WARRANT SENTENCING AS A PERSISTENT FELONY OFFENDER)

CRIMINAL LAW, EVIDENCE.

INSUFFICIENT EVIDENCE TO SUPPORT PHYSICAL INJURY ELEMENT OF ASSAULT THIRD, INSUFFICIENT EVIDENCE TO WARRANT SENTENCING AS A PERSISTENT FELONY OFFENDER.

The Second Department determined the evidence of physical injury was not sufficient to support the assault third conviction. The court further determined the totality of the circumstances did not support sentencing defendant as a persistent felony offender:

The record, which contains photographs that were shown to the jury depicting the complainant's injury, demonstrated that the complainant sustained a one-half inch laceration on one of her toes, which stopped bleeding before an emergency medical technician arrived at the scene. No evidence was introduced that the injury sustained by the complainant caused her more than trivial pain. The complainant's vague testimony that she was unable to wear shoes for an unspecified period of time failed to sufficiently demonstrate that the use of her foot was impaired by her injury. Accordingly, there was insufficient evidence that the complainant suffered a "physical injury" within the meaning of Penal Law § 10.00(9) ... .

... [T]he totality of the evidence adduced at the persistent felony offender hearing, although warranting the defendant's adjudication as a second felony offender, did not warrant his adjudication as a persistent felony offender ... . In addition, in reaching its determination, the Supreme Court improperly considered a crime of which the defendant was acquitted as a basis for sentencing ... . **People v Fews. 2017 NY Slip Op 02443, 2nd Dept 3-29-17**

CRIMINAL LAW (A CONVICTION BY GUILTY PLEA MAY BE SET ASIDE ON ACTUAL INNOCENCE GROUNDS, DEFENDANT ENTITLED TO A HEARING ON HER ACTUAL INNOCENCE CLAIM AND ON HER INEFFECTIVE ASSISTANCE CLAIM)/EVIDENCE (CRIMINAL LAW, MOTION TO SET ASIDE CONVICTION, A CONVICTION BY GUILTY PLEA MAY BE SET ASIDE ON ACTUAL INNOCENCE GROUNDS, DEFENDANT ENTITLED TO A HEARING ON HER ACTUAL INNOCENCE CLAIM AND ON HER INEFFECTIVE ASSISTANCE CLAIM)/SET ASIDE CONVICTION, MOTION TO (A CONVICTION BY GUILTY PLEA MAY BE SET ASIDE ON ACTUAL INNOCENCE GROUNDS, DEFENDANT ENTITLED TO A HEARING ON HER ACTUAL INNOCENCE CLAIM AND ON HER INEFFECTIVE ASSISTANCE CLAIM)/ATTORNEYS (CRIMINAL LAW, A CONVICTION BY GUILTY PLEA MAY BE SET ASIDE ON ACTUAL INNOCENCE GROUNDS, DEFENDANT ENTITLED TO A HEARING ON HER ACTUAL INNOCENCE CLAIM AND ON HER INEFFECTIVE ASSISTANCE CLAIM)/INEFFECTIVE ASSISTANCE (A CONVICTION BY GUILTY PLEA MAY BE SET ASIDE ON ACTUAL INNOCENCE GROUNDS, DEFENDANT ENTITLED TO A HEARING ON HER ACTUAL INNOCENCE CLAIM AND ON HER INEFFECTIVE ASSISTANCE CLAIM)/ACTUAL INNOCENCE (CRIMINAL LAW, A CONVICTION BY GUILTY PLEA MAY BE SET ASIDE ON ACTUAL INNOCENCE GROUNDS, DEFENDANT ENTITLED TO A HEARING ON HER ACTUAL INNOCENCE CLAIM AND ON HER INEFFECTIVE ASSISTANCE CLAIM)

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

A CONVICTION BY GUILTY PLEA MAY BE SET ASIDE ON ACTUAL INNOCENCE GROUNDS, DEFENDANT ENTITLED TO A HEARING ON HER ACTUAL INNOCENCE CLAIM AND ON HER INEFFECTIVE ASSISTANCE CLAIM.

The Second Department, in a full-fledged opinion by Justice Leventhal, reversing County Court, determined a conviction by guilty plea can be challenged on actual innocence grounds. The defendant was entitled to a hearing on her motion to set aside her conviction both on her actual innocence claim and her ineffective assistance of counsel claim. Defendant was a nurse who bathed a profoundly disabled child. After the bath blisters appeared on the child's skin. At the time she stated she didn't think the water was hot. In her motion to set aside, she alleged that she was convinced during interrogation that the water must have been too hot and pled guilty for that reason. Expert evidence indicates the blisters may not have been burns, but rather were a reaction to antibiotics. A biopsy was consistent with an allergic reaction:

Having determined that a defendant's plea of guilty does not absolutely bar that defendant from maintaining a freestanding actual innocence claim pursuant to CPL 440.10(1)(h), we address whether the County Court properly denied, without a hearing, that branch of the defendant's motion which was to vacate the judgment based on actual innocence. Contrary to the People's contention, the defendant is entitled to a hearing on her actual innocence claim. "A prima facie showing of actual innocence is made out when there is "a sufficient showing of possible merit to warrant a fuller exploration"' by the court" ... . Here, by submitting her affidavit, [defendant's expert's] affirmation, and other material, such as the skin biopsy pathology report, the defendant made the requisite prima facie showing ... . We also note that subsequent to the entry of the defendant's plea of guilty, the civil action against the defendant and her former employer resulted in a jury verdict in their favor. We are mindful that the burden of proof in a civil trial is different than that in a criminal trial and that the evidence presented at each may differ. However, in the civil trial, the jury found that the defendant's care was not a proximate cause of the child's injuries, despite the fact that the defendant and her former employer were collaterally estopped from contesting liability. **People v Tiger, 2017 NY Slip Op 01575, 2nd Dept 3-1-17**

CRIMINAL LAW (DEFENSE COUNSEL NOT INEFFECTIVE FOR FAILING TO INTRODUCE TAPED THIRD-PARTY CONFESSION, THE RELIABILITY PRONG OF THE STATEMENT AGAINST PENAL INTEREST CRITERIA WAS VERY WEAK)/ATTORNEYS (CRIMINAL LAW, DEFENSE COUNSEL NOT INEFFECTIVE FOR FAILING TO INTRODUCE TAPED THIRD-PARTY CONFESSION, THE RELIABILITY PRONG OF THE STATEMENT AGAINST PENAL INTEREST CRITERIA WAS VERY WEAK)/EVIDENCE (STATEMENT AGAINST PENAL INTEREST, DEFENSE COUNSEL NOT INEFFECTIVE FOR FAILING TO INTRODUCE TAPED THIRD-PARTY CONFESSION, THE RELIABILITY PRONG OF THE STATEMENT AGAINST PENAL INTEREST CRITERIA WAS VERY WEAK)/STATEMENT AGAINST PENAL INTEREST (DEFENSE COUNSEL NOT INEFFECTIVE FOR FAILING TO INTRODUCE TAPED THIRD-PARTY CONFESSION, THE RELIABILITY PRONG OF THE STATEMENT AGAINST PENAL INTEREST CRITERIA WAS VERY WEAK)

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DEFENSE COUNSEL NOT INEFFECTIVE FOR FAILING TO INTRODUCE TAPED THIRD-PARTY CONFESSION, THE RELIABILITY PRONG OF THE STATEMENT AGAINST PENAL INTEREST CRITERIA WAS VERY WEAK.

The Fourth Department determined the defendant's motion to vacate the judgment of conviction on ineffective assistance grounds was properly denied. The basis of the ineffective assistance claim was his attorney's failure to put in evidence a third party's taped confession to the crime (to which defendant had pled guilty). The Fourth Department explained the tape recording did not meet the criteria for a statement against penal interest:

> "The declaration against penal interest exception to the hearsay rule recognizes the general reliability of such statements . . . because normally people do not make statements damaging to themselves unless they are true' " ... . "The exception has four components: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time the statement is made that it is contrary to penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient proof independent of the utterance to assure its reliability ... . "The fourth factor is the most important' aspect of the exception" ... , and "[t]he crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself" ... . Where, as here, the declaration exculpates the defendant, "[s]upportive evidence is sufficient if it establishes a reasonable possibility that the [declaration] might be true" ... .
>
> In support of her conclusion that the confession was inadmissible, trial counsel testified that all she had was a voice on a tape recording and, based on her discussions with the prior attorney, "there was some question as to whether [the third party] was even voluntarily in [the prior attorney's] office" when he made the confession. Defendant testified that the third party was a friend of one of his sisters, and that the third party and defendant's sister smoked crack cocaine together. ... [T]he prior attorney made arrangements for the third party to be appointed counsel, but the third party disappeared shortly thereafter and, despite diligent efforts, including maintaining the investigator's search, trial counsel was unable to locate him even up through defendant's trial. **People v Conway, 2017 NY Slip Op 02530, 4th Dept 3-31-17**

CRIMINAL LAW (SEX OFFENDER REGISTRATION ACT, INSUFFICIENT INQUIRY INTO SEX OFFENDER'S REQUEST TO REPRESENT HIMSELF)/SEX OFFENDER REGISTRATION ACT (SORA) (INSUFFICIENT INQUIRY INTO SEX OFFENDER'S REQUEST TO REPRESENT HIMSELF)/ATTORNEYS (SEX OFFENDER REGISTRATION ACT, INSUFFICIENT INQUIRY INTO SEX OFFENDER'S REQUEST TO REPRESENT HIMSELF)

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), ATTORNEYS.

INSUFFICIENT INQUIRY INTO SEX OFFENDER'S REQUEST TO REPRESENT HIMSELF.

The Second Department determined the judge did not make a sufficient inquiry before allowing the sex offender to represent himself in this SORA proceeding:

Where a defendant makes a timely and unequivocal request to waive the right to counsel and represent herself or himself, "the trial court is obligated to conduct a searching inquiry' to ensure that the defendant's waiver is knowing, intelligent, and voluntary" ... . "A waiver is voluntarily made when the trial court advises the defendant and can be certain that the dangers and disadvantages of giving up the fundamental right to counsel have been impressed upon the defendant'" ... . "A searching inquiry' does not have to be made in a formulaic manner, . . . although it is better practice to ask the defendant about [her or] his age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver'" ... .

... [W]e conclude that the Supreme Court failed to conduct the requisite searching inquiry to ensure that the defendant's waiver of the right to counsel was unequivocal, voluntary, and intelligent ... . The court made only minimal inquiry into the defendant's age, experience, intelligence, education, and exposure to the legal system, and did not explain the risk inherent in proceeding pro se or the advantages of representation by counsel. The court's failure to conduct a searching inquiry renders the defendant's waiver of the right to counsel invalid and requires reversal ... . **People v Griffin, 2017 NY Slip Op 01577, 2nd Dept 3-1-17**

CRIMINAL LAW (SEX OFFENDER REGISTRATION ACT, ANOMALY IN GUIDELINES MAY RESULT IN AN OVERESTIMATION OF THE CHILD-PORNOGRAPHY-BASED RISK, CASE REMITTED FOR FINDINGS)/SEX OFFENDER REGISTRATION ACT (SORA) (ANOMALY IN GUIDELINES MAY RESULT IN AN OVERESTIMATION OF THE CHILD-PORNOGRAPHY-BASED RISK, CASE REMITTED FOR FINDINGS)/CHILD PORNOGRAPHY (SEX OFFENDER REGISTRATION ACT, ANOMALY IN GUIDELINES MAY RESULT IN AN OVERESTIMATION OF THE CHILD-PORNOGRAPHY-BASED RISK, CASE REMITTED FOR FINDINGS)

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA)

ANOMALY IN GUIDELINES MAY RESULT IN AN OVERESTIMATION OF THE CHILD-PORNOGRAPHY-BASED RISK, CASE REMITTED FOR FINDINGS.

The Third Department noted an acknowledged anomaly in the risk assessment guidelines for child pornography that may result in the overestimation of the risk. Because the SORA court did not make any findings about the possible overestimation, the case was remitted:

The Court of Appeals has found that an anomaly exists in assessing points to child pornography offenders under risk factor 7 in the RAI, in that the absence of a previous relationship between the offender and children pictured in pornographic images may not normally heighten the risk that the offender presents to the community, whereas a situation in which "the offender and the children are acquainted would seem to present a greater threat to the community, not a lesser one" ... . The Court further concluded that such an anomaly may result in an overestimation of a child pornography offender's risk of reoffense and danger to the public ... . While the Court concluded that, despite the anomaly, the plain language of the guidelines of the Board of Examiners of Sex Offenders authorizes the assessment of points against child pornography offenders under risk factor 7, it further stated that, "in deciding a child pornography offender's application for a downward departure, a [Sex Offender Registration Act] court should, in the exercise of its discretion, give particularly strong consideration to the possibility that adjudicating the offender in accordance with the guidelines point score and without departing downward might lead to an excessive level of registration" ... .

In denying the request for a downward departure, County Court found that points were properly assessed under risk factor 7, but did not take into consideration the potential overestimation of defendant's risk of reoffense and the danger to the public created by the assessment of those points. Accordingly, the matter must be remitted for the court to determine whether such an overestimation was created and whether a downward departure is therefore warranted ... . **People v Kemp, 2017 NY Slip Op 01618, 3rd Dept 3-2-17**

CRIMINAL LAW (SORA GUIDELINE WHICH ALLOWS JUVENILE DELINQUENCY ADJUDICATION TO BE CONSIDERED IN THE CRIMINAL HISTORY CALCULATION SHOULD NOT BE FOLLOWED)/SEX OFFENDER REGISTRATION ACT (SORA) (SORA GUIDELINE WHICH ALLOWS JUVENILE DELINQUENCY ADJUDICATION TO BE CONSIDERED IN THE CRIMINAL HISTORY CALCULATION SHOULD NOT BE FOLLOWED)/FAMILY LAW (SORA GUIDELINE WHICH ALLOWS JUVENILE DELINQUENCY ADJUDICATION TO BE CONSIDERED IN THE CRIMINAL HISTORY CALCULATION SHOULD NOT BE FOLLOWED)/JUVENILE DELINQUENCY (SORA GUIDELINE WHICH ALLOWS JUVENILE DELINQUENCY ADJUDICATION TO BE CONSIDERED IN THE CRIMINAL HISTORY CALCULATION SHOULD NOT BE FOLLOWED)

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), FAMILY LAW.

SORA GUIDELINE WHICH ALLOWS JUVENILE DELINQUENCY ADJUDICATION TO BE CONSIDERED IN THE CRIMINAL HISTORY CALCULATION SHOULD NOT BE FOLLOWED.

The Fourth Department determined the language in the SORA guideline which allows a juvenile delinquency adjudication to be used to calculate points in the criminal history category should not be followed because it conflicts with provisions of the Family Court Act:

> The risk assessment guidelines issued by the Board provide that a juvenile delinquency adjudication is considered a crime for purposes of assessing points under the criminal history section of the risk assessment instrument (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [Guidelines], at 6 [2006]). Family Court Act § 381.2 (1) provides, however, that neither the fact that a person was before Family Court for a juvenile delinquency hearing, nor any confession, admission or statement made by such a person is admissible as evidence against him or her in any other court. Section 380.1 (1) further provides that "[n]o adjudication under this article may be denominated a conviction and no person adjudicated a juvenile delinquent shall be denominated a criminal by reason of such adjudication." Given this conflict between the Guidelines and the plain language of the Family Court Act, we agree with the Second Department[ ] ... and conclude that the Board "exceeded its authority by adopting that portion of the Guidelines which includes juvenile delinquency adjudications in its definition of crimes for the purpose of determining a sex offender's criminal history" ... . **People v Brown, 2017 NY Slip Op 02323, 4th Dept 3-24-17**

DISCIPLINARY HEARINGS

DISCIPLINARY HEARINGS (INMATES) (NO PROOF INMATE WAS PROPERLY INFORMED OF THE CONSEQUENCES OF HIS NOT ATTENDING THE HEARING AT THE TIME OF HIS PURPORTED REFUSAL TO ATTEND, DETERMINATION ANNULLED)

DISCIPLINARY HEARINGS (INMATES)

NO PROOF INMATE WAS PROPERLY INFORMED OF THE CONSEQUENCES OF HIS NOT ATTENDING THE HEARING AT THE TIME OF HIS PURPORTED REFUSAL TO ATTEND, DETERMINATION ANNULLED.

The Third Department annulled the determination because there was no proof the proper information was provided to the inmate at the time the inmate purported refused to attend the hearing:

> ... [T]he only indication in the record that petitioner refused to attend the hearing is the form signed by the Hearing Officer and an employee witness attesting that petitioner refused to attend the hearing. Although the form includes instructions to inform an inmate about the nature of the hearing, the charges against him or her and the fact that the hearing will be conducted in the refusing inmate's absence, the record reflects no information regarding the steps taken to ascertain the legitimacy of petitioner's refusal or to inform him of his

right to attend the hearing and the consequences of his failure to do so ... . **Matter of Wilson v Annucci, 2017 NY Slip Op 01617, 3rd Dept 3-2-17**

DISCIPLINARY HEARINGS (INMATES) (THERE WAS NO GOOD REASON TO DENY PETITIONER'S REQUEST FOR A WITNESS, DETERMINATION ANNULLED AND EXPUNGED)

DISCIPLINARY HEARINGS (INMATES).

THERE WAS NO GOOD REASON TO DENY PETITIONER'S REQUEST FOR A WITNESS, DETERMINATION ANNULLED AND EXPUNGED.

The Third Department determined the hearing officer improperly and without good cause refused to call a witness requested by the petitioner. The determination was therefore annulled and expunged:

> Among petitioner's many contentions is that he was improperly denied his right to call certain witnesses at the hearing. Notably, his defense that he did not act in the manner alleged in the misbehavior report was very much dependent on the testimony of witnesses, correction officers and inmates alike, who were present in the mess hall and who may have observed his actions. In this regard, petitioner asserts that he was improperly denied the right to call the correction officer who was stationed in the gas booth overseeing the mess hall at the time of the incident. The Hearing Officer denied this witness on the basis that "the staff in the gas booth have the entire messhalls . . . to watch and would not be expected to know the details of each incident." Petitioner objected, stating at the hearing that "the guy in the gas booth would be able to honestly see this incident and give the perfect testimony . . . of what transpired because he's the guy that controls the gas and if it was a bigger incident tha[n] what it was he'd have to drop the gas." ...
>
> Respondent, however, urges that remittal for a new hearing is the appropriate remedy. Under the particular circumstances presented here, we disagree. Although the Hearing Officer articulated a reason for the denial, the legitimacy of that reason is suspect given that the gas booth officer was in the mess hall for the very purpose of watching the activities of the inmates and responding to problems. There is no support in the record for the Hearing Officer's baseless conclusion that the officer on duty did not have knowledge of the incident involving petitioner. **Matter of Balkum v Annucci, 2017 NY Slip Op 01741, 3rd Dept 3-9-17**

DISCIPLINARY HEARINGS (INMATES) (FAILURE TO PRODUCE A COPY OF THE MAIL WATCH AUTHORIZATION REQUIRED THAT THE DETERMINATION BE ANNULLED AND EXPUNGED)/MAIL WATCH AUTHORIZATION (INMATE DISCIPLINARY HEARINGS, FAILURE TO PRODUCE A COPY OF THE MAIL WATCH AUTHORIZATION REQUIRED THAT THE DETERMINATION BE ANNULLED AND EXPUNGED)

DISCIPLINARY HEARINGS (INMATES).

FAILURE TO PRODUCE A COPY OF THE MAIL WATCH AUTHORIZATION REQUIRED THAT THE DETERMINATION BE ANNULLED AND EXPUNGED.

The Third Department determined the respondent did not demonstrate the mail watch which led to the charges against petitioner was properly authorized. The related evidence could not be the basis for the determination, which was annulled and expunged:

... [P]etitioner requested a copy of the mail watch authorization four times during the course of the hearing, but it was never produced and is not part of the record. Although the senior investigator testified that the mail watch was authorized by the Superintendent of the facility, the reason for its issuance and the specific facts underlying it were never disclosed and are not apparent from the record. Under these circumstances, we find that authorization for the mail watch was not established in accordance with the requirements of 7 NYCRR 720.3 (e) (1) ... . Inasmuch as correspondence obtained through the unlawful mail watch was instrumental in finding petitioner guilty of solicitation and violating facility correspondence procedures, that part of the determination must ,,, be annulled ... . **Matter of Wilson v Commissioner of N.Y. State Dept. of Corr. & Community Supervision, 2017 NY Slip Op 01921, 3rd Dept 3-16-17**

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW (TERMINATION OF TEACHER BASED ON HER SUBMISSION OF INACCURATE TIME SHEETS, UNDER THE CIRCUMSTANCES, SHOCKS THE CONSCIENCE)/EMPLOYMENT LAW (EDCUATION-SCHOOL LAW, TERMINATION OF TEACHER BASED ON HER SUBMISSION OF INACCURATE TIME SHEETS, UNDER THE CIRCUMSTANCES, SHOCKS THE CONSCIENCE)/MUNICIPAL LAW (EDCUATION-SCHOOL LAW, TERMINATION OF TEACHER BASED ON HER SUBMISSION OF INACCURATE TIME SHEETS, UNDER THE CIRCUMSTANCES, SHOCKS THE CONSCIENCE)

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, MUNICIPAL LAW.

TERMINATION OF TEACHER BASED ON HER SUBMISSION OF INACCURATE TIME SHEETS, UNDER THE CIRCUMSTANCES, SHOCKS THE CONSCIENCE.

The First Department, over a two-justice dissent, determined the termination of a teacher for submitting inaccurate time sheets was not warranted. The teacher had an unblemished record and the misconduct was precipitated by Hurricane Sandy, which flooded her home and the home of her disabled student:

Petitioner filled out the time sheets in question in advance of the dates to which those time sheets pertained. Although she did not, in fact, proceed to provide instruction to the disabled student on the days set forth in those time sheets, she submitted the time sheets without correction on a subsequent date. Because petitioner instructed other students on each of the dates in question, she would have received the same salary regardless of how many students she had instructed or how many hours she had spent with them, and thus derived no benefit from her actions. Petitioner's misconduct is more a matter of lax bookkeeping than implementation of any venal scheme. There was no scheme to defraud or theft of services on petitioner's part, and the harm to the public and to the DOE was mitigated. * * *

At the hearing, petitioner admitted that she was guilty of submitting reports stating that she had provided instruction to the disabled student on certain dates when she had not done so and that she had reported to various schools and libraries on certain dates when she had not done so. As petitioner acknowledges, her misconduct warrants punishment, since the disabled student was deprived of the services of a teacher for two months. Petitioner does not seek to set aside the findings of misconduct contained in the hearing officer's opinion, but only to modify the penalty imposed on her. She has acknowledged her error in judgment and has pledged to change her practices and never to repeat the error. There is no evidence that "petitioner could not remedy her behavior" ... . **Matter of Beatty v City of New York, 2017 NY Slip Op 01628, 1st Dept 3-2-17**

EDUCATION-SCHOOL LAW (PETITION FOR LEAVE TO FILE LATE NOTICE OF CLAIM PROPERLY DENIED)/NEGLIGENCE (EDUCATION-SCHOOL LAW, PETITION FOR LEAVE TO FILE LATE NOTICE OF CLAIM PROPERLY DENIED)/NOTICE OF CLAIM (EDUCATION-SCHOOL LAW, PETITION FOR LEAVE TO FILE LATE NOTICE OF CLAIM PROPERLY DENIED)

EDUCATION-SCHOOL LAW, NEGLIGENCE.

PETITION FOR LEAVE TO FILE LATE NOTICE OF CLAIM PROPERLY DENIED.

The Second Department determined the petition for leave to file a late notice of claim for a student (Lopez) allegedly injured in gym class was properly denied:

> Here, the petitioner failed to establish that the City had acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter (see General Municipal Law § 50-e[5]). While the petitioner alleges that the physical education teacher invented the particular exercise and was present when Lopez was injured, she failed to submit any evidence that the City acquired actual knowledge of the essential facts underlying their negligence claims ... . Thus, the City had no reason to conduct a prompt investigation into the purported negligence ... .
>
> The petitioner also failed to proffer evidence establishing a reasonable excuse for her failure to serve a timely notice of claim ... . Lopez's infancy, without any showing of a nexus between the infancy and the delay, was insufficient to constitute a reasonable excuse ... . Moreover, the assertion by the petitioner that she was consumed with Lopez's medical care was also insufficient to constitute a reasonable excuse, as it was not supported by any evidence demonstrating that the delay in serving a notice of claim was directly attributable to Lopez's medical condition ... .
>
> Finally, the petitioner failed to present "some evidence or plausible argument" supporting a finding that the City was not substantially prejudiced by the 11-month delay in serving a notice of claim ... . **Matter of Ramos v Board of Educ. of the City of New York, 2017 NY Slip Op 01868, 2nd Dept 3-15-17**

EMPLOYMENT LAW

EMPLOYMENT LAW (NEGLIGENCE, QUESTION OF FACT WHETHER BOUNCER WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE THREW PLAINTIFF TO THE GROUND)/RESPONDEAT SUPERIOR (NEGLIGENCE, QUESTION OF FACT WHETHER BOUNCER WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE THREW PLAINTIFF TO THE GROUND)

EMPLOYMENT LAW.

QUESTION OF FACT WHETHER BOUNCER WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE THREW PLAINTIFF TO THE GROUND.

The First Department determined defendant bar's motion for summary judgment dismissing plaintiff's respondeat superior claim was properly denied. Plaintiff was thrown to the ground by the bar's bouncer. There was a question of fact whether the bouncer was acting within the scope of his employment:

> Plaintiff was assaulted by a security guard/bouncer in the employ of defendant after plaintiff, who had been denied admittance to defendant's bar because of perceived intoxication, grabbed the baseball cap from the bouncer's head. Less than 30 seconds elapsed between plaintiff taking the cap and the bouncer throwing plaintiff to the ground, which occurred approximately 10 feet from the entrance to defendant's bar. On this record, it cannot be

concluded, as a matter of law, that the bouncer was acting outside the scope of his employment at the time of the assault ... . **Salem v MacDougal Rest. Inc., 2017 NY Slip Op 01832, 1st Dept 3-15-17**

EMPLOYMENT LAW (DRIVER AND CAR OWNER WERE NOT EMPLOYEES OF CAR SERVICE, CAR SERVICE THEREFORE NOT LIABLE FOR ACCIDENT UNDER DOCTRINE OF RESPONDEAT SUPERIOR)/RESPONDEAT SUPERIOR (DRIVER AND CAR OWNER WERE NOT EMPLOYEES OF CAR SERVICE, CAR SERVICE THEREFORE NOT LIABLE FOR ACCIDENT UNDER DOCTRINE OF RESPONDEAT SUPERIOR)/INDEPENCENT CONTRACTOR (DRIVER AND CAR OWNER WERE NOT EMPLOYEES OF CAR SERVICE, CAR SERVICE THEREFORE NOT LIABLE FOR ACCIDENT UNDER DOCTRINE OF RESPONDEAT SUPERIOR)/NEGLIGENCE (RESPONDEAT SUPERIOR, DRIVER AND CAR OWNER WERE NOT EMPLOYEES OF CAR SERVICE, CAR SERVICE THEREFORE NOT LIABLE FOR ACCIDENT UNDER DOCTRINE OF RESPONDEAT SUPERIOR)

EMPLOYMENT LAW, NEGLIGENCE.

DRIVER AND CAR OWNER WERE NOT EMPLOYEES OF CAR SERVICE, CAR SERVICE THEREFORE NOT LIABLE FOR ACCIDENT UNDER DOCTRINE OF RESPONDEAT SUPERIOR.

The Second Department, reversing Supreme Court, determined defendants Tuapanta and Hanif (driver and owner of the car involved in an accident) were not employees of defendant car service, Church Ave. Therefore the car service was not liable to plaintiff passenger:

Here, Church Ave established, prima facie, that Tuapanta and Hanif were independent contractors, not its employees. The evidence submitted by Church Ave showed that it is a licensed livery base station in the business of dispatching for-hire vehicles. Specifically, Church Ave receives calls from customers seeking transportation services and then dispatches such calls to drivers of vehicles affiliated with it. Church Ave further demonstrated that it does not own the vehicles to which it dispatches calls and that it does not provide any services to drivers other than transmitting a customer's request for transportation services. Drivers are responsible for their own schedules, choosing when to turn on their two-way radios and deciding which dispatches to accept. Drivers are free to provide their services to other car services and they retain all of the monies paid by the customers. Drivers pay Church Ave $100 per week to use the service. Church Ave does not provide a salary to the drivers, nor does it provide them with any tax forms. Drivers are also responsible for maintaining their own insurance. There were no written agreements or meetings between the drivers and Church Ave, nor did Church Ave provide any manuals, policies, or procedures for the drivers outside of establishing prices. Under these circumstances, Church Ave established, prima facie, that it did not exercise sufficient control to give rise to liability under the doctrine of respondeat superior ... . **Castro-Quesada v Tuapanta, 2017 NY Slip Op 02014, 2nd Dept 3-22-17**

EMPLOYMENT LAW, NEGLIGENCE, LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

QUESTIONS OF FACT WHETHER VESSEL OWNER LIABLE IN NEGLIGENCE UNDER LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, PLAINTIFF INJURED JUMPING DOWN FROM THE DOCK TO THE VESSEL DECK.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Acosta, over a full-fledged dissenting opinion, determined summary judgment should have not been granted to defendant vessel owners. Plaintiff was injured when he boarded the vessel by jumping from the dock down to the deck of the vessel. Plaintiff, who was a deemed worker on the vessel, was covered by the Longshore and Harbor Workers' Compensation Act (LHWCA):

> In Scindia [Steam Nav. Co. v De los Santos] (451 US 156 [1981]], the Supreme Court addressed the duty of care owed by a shipowner to a longshoreman injured in the course of stevedoring operations aboard a ship. The Court held that the ship's liability for due care under the circumstances is limited to turning over the vessel in a reasonably safe condition (the turnover duty); conducting reasonably safely operations regarding the vessel and stevedoring operations in which it actively involves itself (the active control duty); and intervening in areas under the stevedore employer's control only if the vessel has actual knowledge of an unsafe condition that the stevedore is not exercising reasonable care to protect against (duty to intervene) ... . * * *
>
> "[T]he turnover duty, at a minimum, requires a vessel to provide a safe means of access" ... . * * *
>
> The second of the turnover duties — or corollary to the turnover duty — is a duty to warn of latent hazards on the ship or with respect to its equipment that are known, or with the exercise of reasonable care should be known, to the vessel owner and are likely to be encountered by, but not obvious to or anticipated by, the stevedore in the reasonably competent performance of his work ... . * * *
>
> There are also issues of fact as to whether defendant violated its duty to intervene. The duty to intervene requires the vessel owner to intervene in areas under the principal control of the stevedore if the owner has actual knowledge that a condition of the vessel or its equipment poses a risk of harm and the stevedore or other contractor is not exercising reasonable care to protect its employees from that risk ... . **Schnapp v Miller's Launch, Inc., 2017 NY Slip Op 02172, 1st Dept 3-21-17**

FAMILY LAW (PUBLIC POLICY PROHIBITS RECOUPMENT OF OVERPAYMENT OF CHILD SUPPORT)/CHILD SUPPORT (PUBLIC POLICY PROHIBITS RECOUPMENT OF OVERPAYMENT OF CHILD SUPPORT)

FAMILY LAW.

PUBLIC POLICY PROHIBITS RECOUPMENT OF OVERPAYMENT OF CHILD SUPPORT.

The Second Department noted that public policy prohibited the recoupment of overpayment of child support by reducing future child support payments. However a commensurate reduction of future payments of educational expenses was okay:

> "There is strong public policy in this state, which the [Child Support Standards Act] did not alter, against restitution or recoupment of the overpayment of child support" ... . "The reason for this policy is that . . . child support payments are deemed to have been devoted to that purpose, and no funds exist from which one may recoup moneys so expended' if the award is thereafter reversed or modified" ... . Thus, recoupment of child support payments is only appropriate under "limited circumstances" ... . * * *
>
> However, "[w]hile child support overpayments may not be recovered by reducing future support payments, public policy does not forbid offsetting add-on expenses against an overpayment'" ... . Thus, although the overpayments may not be applied to the father's child support obligation, he may use the overpayments to offset his share of the add-on expenses, such as the educational expenses ... . **Matter of McGovern v McGovern, 2017 NY Slip Op 01862. 2nd Dept 3-15-17**

FAMILY LAW (APPELLANT'S LATE APPEARANCE FOR A HEARING DID NOT JUSTIFY A DEFAULT FINDING)/DEFAULT (FAMILY LAW, APPELLANT'S LATE APPEARANCE FOR A HEARING DID NOT JUSTIFY A DEFAULT FINDING)

FAMILY LAW.

APPELLANT'S LATE APPEARANCE FOR A HEARING DID NOT JUSTIFY A DEFAULT FINDING.

The Second Department determined Family Court should not have denied a motion to vacate an order of protection. Appellant had been slightly late for a hearing on her sister's request for an order of protection and the order was issued based upon appellant's default:

> In this family offense proceeding, the Family Court issued an order of protection against the appellant and in favor of her sister upon the appellant's failure to appear at a hearing. The appellant moved to vacate the order of protection entered upon her default, and the Family Court denied her motion. * * *
>
> The Family Court improvidently exercised its discretion in denying the appellant's motion to vacate the order of protection entered upon her default in appearing at the hearing. The appellant showed no willfulness or intent to default, where she was minimally tardy to the hearing, and the tardiness might have been due, at least in part, to crowded conditions at the courthouse, she attended prior court appearances, she engaged in motion practice through her attorney, and she participated in multiple preparatory conferences with her attorney ... . Also, the appellant moved to vacate the order of protection relatively soon after it was issued. Under the circumstances, the appellant demonstrated a reasonable excuse for her failure to appear at the hearing. Further, the appellant

demonstrated a potentially meritorious defense to the petition .... . **Matter of Williams v Williams, 2017 NY Slip Op 01873, 2nd Dept 3-15-17**

FAMILY LAW (FAMILY COURT SHOULD HAVE MADE FINDINGS ALLOWING JUVENILE TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS, PARENTAL NEGLECT PRECLUDED REUNIFICATION)/SPECIAL IMMIGRANT JUVENILE STATUS (FAMILY COURT SHOULD HAVE MADE FINDINGS ALLOWING JUVENILE TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS, PARENTAL NEGLECT PRECLUDED REUNIFICATION)/IMMIGRATION LAW (FAMILY COURT SHOULD HAVE MADE FINDINGS ALLOWING JUVENILE TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS, PARENTAL NEGLECT PRECLUDED REUNIFICATION)

FAMILY LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS ALLOWING JUVENILE TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS, PARENTAL NEGLECT PRECLUDED REUNIFICATION.

The Second Department, reversing Family Court, determined Family Court should have made findings which would allow the juvenile to petition for special immigrant juvenile status (SIJS). Reunification with a parent was precluded by parental neglect, including excessive corporal punishment, and forcing the juvenile to work rather than attend school:

> Pursuant to 8 USC § 1101(a)(27)(J) ... and 8 CFR 204.11, a "special immigrant" is a resident alien who, inter alia, is under 21 years of age, is unmarried, and has been legally committed to, or placed under the custody of, an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for special immigrant juvenile status, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law ... , and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence ... .
>
> Based upon our independent factual review, we conclude that the record supports a finding that reunification of the child with one or both of his parents is not a viable option based upon parental neglect, which includes the infliction of excessive corporal punishment and requiring the child to begin working at the age of 12 instead of attending school on a regular basis ... . The record further supports a finding that it would not be in the best interests of the child to return to India ... . **Matter of Palwinder K. v Kuldeep K., 2017 NY Slip Op 02423. 2nd Dept 3-29-17**

FAMILY LAW (PETITIONER'S PATERNITY CLAIM PROPERLY DISMISSED ON EQUITABLE ESTOPPEL GROUNDS, REINSTATEMENT OF PETITION UPON A PRIOR APPEAL DID NOT PRECLUDE DISMISSAL)/PATERNITY (PETITIONER'S PATERNITY CLAIM PROPERLY DISMISSED ON EQUITABLE ESTOPPEL GROUNDS, REINSTATEMENT OF PETITION UPON A PRIOR APPEAL DID NOT PRECLUDE DISMISSAL)/EQUITABLE ESTOPPEL (FAMILY LAW, PATERNITY, PETITIONER'S PATERNITY CLAIM PROPERLY DISMISSED ON EQUITABLE ESTOPPEL GROUNDS, REINSTATEMENT OF PETITION UPON A PRIOR APPEAL DID NOT PRECLUDE DISMISSAL)/APPEALS (FAMILY LAW, PETITIONER'S PATERNITY CLAIM PROPERLY DISMISSED ON EQUITABLE ESTOPPEL GROUNDS, REINSTATEMENT OF PETITION UPON A PRIOR APPEAL DID NOT PRECLUDE DISMISSAL)

FAMILY LAW, APPEALS.

PETITIONER'S PATERNITY CLAIM PROPERLY DISMISSED ON EQUITABLE ESTOPPEL GROUNDS, REINSTATEMENT OF PETITION UPON A PRIOR APPEAL DID NOT PRECLUDE DISMISSAL.

The Second Department determined petitioner was properly estopped from asserting his paternity claim. The Second Department noted that the fact that petitioner's paternity petition was reinstated upon a prior appeal did not preclude the denial of the petition on equitable estoppel grounds:

> The Family Court properly applied the doctrine of equitable estoppel to preclude the petitioner from asserting his paternity claim with respect to the subject child. The evidence at a hearing established that the respondent Gaston R. has established a strong father-daughter relationship with the child. The child has referred to Gaston R. as "daddy" since she was 18 months old and continues to view him as the only father figure in her life. In contrast, the petitioner learned, shortly after the child's birth, that he was the child's biological father. Nevertheless, he did not commence the instant paternity proceeding until the child was four years old. The petitioner has not had a parent-child relationship with the child for several years, and the child no longer recognizes the petitioner's name. Under these circumstances, the court properly determined that it was in the child's best interests to equitably estop the petitioner from asserting his paternity claim
>
> Contrary to the petitioner's contention, this Court's determination on a prior appeal, which, inter alia, reinstated his paternity petition, did not preclude the Family Court from considering the doctrine of equitable estoppel upon remittal ... . **Matter of Thomas T. v Luba R., 2017 NY Slip Op 01870, 2nd Dept 3-15-17**

FAMILY LAW (ALTHOUGH NONE OF THE THREE CHILDREN TESTIFIED IN THIS NEGLECT CASE, THE STATEMENTS ATTRIBUTED TO THEM CROSS-CORROBORATED ONE ANOTHER AND WERE THEREFORE ADMISSIBLE)/EVIDENCE (FAMILY LAW, ALTHOUGH NONE OF THE THREE CHILDREN TESTIFIED IN THIS NEGLECT CASE, THE STATEMENTS ATTRIBUTED TO THEM CROSS-CORROBORATED ONE ANOTHER AND WERE THEREFORE ADMISSIBLE)/HEARSAY (ALTHOUGH NONE OF THE THREE CHILDREN TESTIFIED IN THIS NEGLECT CASE, THE STATEMENTS ATTRIBUTED TO THEM CROSS-CORROBORATED ONE ANOTHER AND WERE THEREFORE ADMISSIBLE)

FAMILY LAW, EVIDENCE.

ALTHOUGH NONE OF THE THREE CHILDREN TESTIFIED IN THIS NEGLECT CASE, THE STATEMENTS ATTRIBUTED TO THEM CROSS-CORROBORATED ONE ANOTHER AND WERE THEREFORE ADMISSIBLE.

The Third Department determined that, although none of the three children testified in this child neglect case, the children's statements about the domestic violence witnessed by them were admissible because the statements were cross-corroborated:

> "While the mere repetition of an accusation by a child is insufficient to corroborate the child's prior account of abuse or neglect" ... , "independent statements by children requiring corroboration may corroborate each other" ... . * * *

... [W]e find that, although none of the children testified, their out-of-court statements sufficiently cross-corroborated one another ... . **Matter of Annarae I. (Jennifer K.), 2017 NY Slip Op 01605, 3rd Dept 3-2-17**

FAMILY LAW (NOT NECSSARY TO PROVE WHICH OF TWO CARETAKERS WITH ACCESS TO THE CHILD ACTUALLY INJURED THE CHILD)/EVIDENCE (FAMILY LAW, CHILD ABUSE, NOT NECSSARY TO PROVE WHICH OF TWO CARETAKERS WITH ACCESS TO THE CHILD ACTUALLY INJURED THE CHILD)/CHILD ABUSE (NOT NECSSARY TO PROVE WHICH OF TWO CARETAKERS WITH ACCESS TO THE CHILD ACTUALLY INJURED THE CHILD)

FAMILY LAW, EVIDENCE.

NOT NECSSARY TO PROVE WHICH OF TWO CARETAKERS WITH ACCESS TO THE CHILD ACTUALLY INJURED THE CHILD.

The Second Department determined Family Court properly found both mother and caretaker responsible for child abuse. It was not necessary to prove which of the two caused injury to the child:

> The Family Court Act defines an abused child, inter alia, as a child whose parent, or other person legally responsible for his or her care, "(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ or (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause [such injury]" ... . Family Court Act § 1046(a)(ii) provides that a prima facie case of child abuse or neglect may be established by evidence of (1) an injury to a child that would ordinarily not occur absent an act or omission of the respondents, and (2) that the respondents were the caretakers of the child at the time the injury occurred ... . "A parent who stands by while others inflict harm may be found responsible for that harm" ... .
>
> Section 1046(a)(ii) "authorizes a method of proof which is closely analogous to the negligence rule of res ipsa loquitur" ... . The statute also permits findings of abuse against more than one caretaker where multiple individuals had access to the child in the period in which the injury occurred ... . In such cases, the petitioner is not required to establish which caregiver actually inflicted the injury or whether they did so together ... . **Matter of Zoey D. (Simona D.), 2017 NY Slip Op 01689, 2nd Dept 3-8-17**

FAMILY LAW, EVIDENCE.

CHILD'S STATEMENTS ABOUT RESPONDENT PROPERLY EXCLUDED FROM NEGLECT PROCEEDING INVOLVING A DIFFERENT CHILD, NO SHOWING RESPONDENT WAS LEGALLY RESPONSIBLE FOR THE CHILD WHO MADE THE STATEMENTS.

The Second Department determined Family Court properly dismissed the neglect petition without prejudice. The petitioner failed to establish the respondent father was legally responsible for the child whose statements petitioner sought to use as evidence. (The neglect proceedings did not involve the child who made the statements):

> Here, the petitioner failed to establish by a preponderance of the evidence ... . At the fact-finding hearing, the petitioner presented a caseworker as its only witness and documentation of the father's criminal offenses. The caseworker testified to previous statements allegedly made to her by a child complainant in one of the respondent's prior criminal cases. Family Court Act § 1046(a)(vi) provides that "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence" (Family Ct Act § 1046[a][vi]). Such statements are admissible in a child protective proceeding, even when the child is not the subject of the proceeding ... . However, child protective proceedings encompass only abuse or neglect by a person who is a parent or other person legally responsible for the child's care ... , and the sections regarding admissibility of previous statements of an abused or neglected child refer to a child in the care of the respondent ... .
>
> A person legally responsible includes a custodian of the child, which "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 abuse or neglect of the child" ... . In determining whether a respondent is such a custodian, the court should consider the particular circumstances, including "the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s)"... . A person legally responsible is not a caregiver who has fleeting or temporary care of a child, such as a supervisor of a play date ... .
>
> Here, the petitioner failed to establish that the respondent was a person legally responsible for the child whose statements it wished to introduce through the testimony of the caseworker ... . **Matter of Kaliia F. (Jason F.), 2017 NY Slip Op 01691, 2nd Dept 3-8-17**

FAMILY LAW (CHIDREN WERE HEALTHY AND WELL CARED FOR, NEGLECT PETITION BASED UPON MOTHER'S MENTAL ILLNESS PROPERLY DISMISSED)/NEGLECT (FAMILY LAW, MENTIAL ILLNESS, CHIDREN WERE HEALTHY AND WELL CARED FOR, NEGLECT PETITION BASED UPON MOTHER'S MENTAL ILLNESS PROPERLY DISMISSED)/MENTAL ILLNESS (FAMILY LAW, NEGLECT, CHIDREN WERE HEALTHY AND WELL CARED FOR, NEGLECT PETITION BASED UPON MOTHER'S MENTAL ILLNESS PROPERLY DISMISSED)

FAMILY LAW, EVIDENCE.

CHIDREN WERE HEALTHY AND WELL CARED FOR, NEGLECT PETITION BASED UPON MOTHER'S MENTAL ILLNESS PROPERLY DISMISSED.

The Second Department determined Family Court properly dismissed the neglect petition against mother which was based upon mother's alleged mental illness:

> Although a finding of neglect may be predicated upon proof that a child's mental, physical, or emotional condition is in imminent danger of becoming impaired as a result of a parent's mental illness, "proof of mental illness alone will not support a finding of neglect" ... .
>
> Here, the petitioner failed to sustain its burden of proving by a preponderance of the evidence that the children's physical, mental, or emotional condition was in imminent danger of becoming impaired as a result of the mother's mental illness ... . The evidence showed that the children were healthy and well cared for by the mother ... . **Matter of Jaurelious G. (Gwendolyn J.), 2017 NY Slip Op 01692, 2nd Dept 3-8-17**

FAMILY LAW (NEGLECT PETITION ALLEGING EXCESSIVE CORPORAL PUNISHMENT SHOULD NOT HAVE BEEN DISMISSED AFTER PRESENTATION OF DIRECT CASE, CHILD'S OUT OF COURT STATEMENTS SUFFICIENTLY CORROBORATED)/EVIDENCE (FAMILY LAW, NEGLECT, NEGLECT PETITION ALLEGING EXCESSIVE CORPORAL PUNISHMENT SHOULD NOT HAVE BEEN DISMISSED AFTER PRESENTATION OF DIRECT CASE, CHILD'S OUT OF COURT STATEMENTS SUFFICIENTLY CORROBORATED)/NEGLECT (FAMILY LAW, NEGLECT PETITION ALLEGING EXCESSIVE CORPORAL PUNISHMENT SHOULD NOT HAVE BEEN DISMISSED AFTER PRESENTATION OF DIRECT CASE, CHILD'S OUT OF COURT STATEMENTS SUFFICIENTLY CORROBORATED)

FAMILY LAW, EVIDENCE.

NEGLECT PETITION ALLEGING EXCESSIVE CORPORAL PUNISHMENT SHOULD NOT HAVE BEEN DISMISSED AFTER PRESENTATION OF DIRECT CASE, CHILD'S OUT OF COURT STATEMENTS SUFFICIENTLY CORROBORATED.

The Second Department, reversing Family Court, determined the neglect petition should not have been dismissed at the close of the direct case. There was sufficient evidence of excessive corporal punishment and sufficient corroboration of the child's out of court statements:

> At the fact-finding hearing, the petitioner introduced a recording of two telephone calls to the 911 emergency number, and elicited testimony from a police officer and a caseworker that the mother admitted using a belt against the child. Such evidence was sufficient to corroborate the child's out-of-court statements to the caseworker that the mother beat her ... . Moreover, the absence of physical injury is not dispositive ... . In any event, the caseworker's testimony that the child had stated that her upper right arm hurt from having defended herself, was not undermined on cross examination. Finally, dismissal was not warranted on the ground that the child gave a conflicting statement to the police officer. **Matter of Jaivon J. (Patricia D.), 2017 NY Slip Op 01856, 2nd Dept 3-15-17**

FORECLOSURE

FORECLOSURE (LENDER DID NOT NEGOTIATE A MORTGAGE MODIFICATION IN GOOD FAITH AND WAS PROPERLY SANCTION)/CIVIL PROCEDURE (FORECLOSURE, LENDER DID NOT NEGOTIATE A MORTGAGE MODIFICATION IN GOOD FAITH AND WAS PROPERLY SANCTION)

FORECLOSURE, CIVIL PROCEDURE.

LENDER DID NOT NEGOTIATE A MORTGAGE MODIFICATION IN GOOD FAITH AND WAS PROPERLY SANCTIONED.

The Second Department determined plaintiff-lender did not negotiate a mortgage modification in good faith and was properly sanctioned by the tolling of interest, costs and attorney's fees accrued during the four years of negotiations:

> Pursuant to CPLR 3408(f), the parties at a mandatory foreclosure settlement conference are required to negotiate in good faith to reach a mutually agreeable resolution ... . "The purpose of the good faith requirement . . . is to ensure that both plaintiff and defendant are prepared to participate in a meaningful effort at the settlement conference to reach resolution" ... . Compliance with the good faith requirement is measured by the totality of the circumstances and whether the party's conduct demonstrates a meaningful effort at reaching a resolution ... .
>
> Here, the totality of the circumstances supports the finding that the plaintiff failed to negotiate in good faith. The hearing evidence demonstrated that the plaintiff, among other things, engaged in dilatory conduct by making piecemeal document requests, providing contradictory information, and repeatedly requesting documents that had already been provided ... . **Aurora Loan Servs., LLC v Diakite, 2017 NY Slip Op 01528, 2nd Dept 3-1-17**

FREEDOM OF INFORMATION LAW (LAW)

FREEDOM OF INFORMATION LAW (FOIL) (INSUFFICIENT SHOWING BY THE STATE POLICE TO JUSTIFY DENIAL OF REQUEST FOR RECORDS PERTAINING TO A VICTIM OF CRIMES COMMITTED BY PETITIONER, MATTER REMITTED)

FREEDOM OF INFORMATION LAW (FOIL).

INSUFFICIENT SHOWING BY THE STATE POLICE TO JUSTIFY DENIAL OF REQUEST FOR RECORDS PERTAINING TO A VICTIM OF CRIMES COMMITTED BY PETITIONER, MATTER REMITTED.

The Third Department determined the state police did not make sufficient assertions to justify the denial of petitioner's request for records concerning a victim of crimes committed by petitioner (an inmate). The state police did not provide factual information to support the claims that the records would disclose non-routine investigatory techniques and would violate privacy. The state police further failed to show that redaction could address those concerns. The matter was remitted to Supreme Court:

> The State Police merely paraphrased the statutory language of the exemptions without describing the records withheld or providing any factual basis for its conclusory assertions that disclosure would constitute an unwarranted invasion of personal privacy and would reveal nonroutine criminal investigative techniques and procedures ... . Further, with respect to the personal privacy exemption, the State Police offered no proof that the requested

records fell into any enumerated categories and failed to specify the implicated privacy interests, if any, against which the public interest in disclosing the records were to be balanced ... .

Moreover, Public Officers Law § 89 (2) (a) expressly permits an agency to delete "identifying details" from records that it makes available to the public in order to prevent unwarranted invasions of personal privacy ... , and the State Police failed to make any showing as to whether the requested documents could be redacted in such a manner as to protect personal privacy ... . Nor did it submit the documents to Supreme Court for an in camera review to allow an "informed determination" by the court on that issue ... . **Matter of McFadden v Fonda, 2017 NY Slip Op 02101, 3rd Dept 3-23-17**

FREEDOM OF INFORMATION LAW (FOIL) (RECORDS OF PROCEEDINGS BEFORE THE CIVILIAN COMPLAINT REVIEW BOARD ARE POLICE OFFICER PERSONNEL RECORDS WHICH ARE EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST)/CIVILIAN COMPLAINT REVIEW BOARD (FOIL, POLICE OFFICERS, RECORDS OF PROCEEDINGS BEFORE THE CIVILIAN COMPLAINT REVIEW BOARD ARE POLICE OFFICER PERSONNEL RECORDS WHICH ARE EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST)/POLICE OFFICERS (FOIL, RECORDS OF PROCEEDINGS BEFORE THE CIVILIAN COMPLAINT REVIEW BOARD ARE POLICE OFFICER PERSONNEL RECORDS WHICH ARE EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST)/PERSONNEL RECORDS (POLICE OFFICERS, FOIL, RECORDS OF PROCEEDINGS BEFORE THE CIVILIAN COMPLAINT REVIEW BOARD ARE POLICE OFFICER PERSONNEL RECORDS WHICH ARE EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST)

FREEDOM OF INFORMATION LAW (FOIL),

RECORDS OF PROCEEDINGS BEFORE THE CIVILIAN COMPLAINT REVIEW BOARD ARE POLICE OFFICER PERSONNEL RECORDS WHICH ARE EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST.

The First Department, in a full-fledged opinion by Justice Sweeney, reversing Supreme Court, determined Civilian Complaint Review Board (CCRB) records are police officer "personnel records" and are therefore exempt from disclosure under the Public Officers Law and Civil Rights Law. Petitioner sought a summary of any CCRB proceedings involving Officer Pantaleo, who was videotaped applying a choke hold to Eric Garner. Eric Garner died while being restrained by police officers:

We are called upon to determine whether the documents sought herein are the type of documents that fall within the parameters of "personnel records" and are thus protected from disclosure. Civil Rights Law § 50-a does not define "personnel records," leaving it to the courts to determine the kind of documents qualify for this exemption. * * *

... [T]here is no question that the summary sought involves one officer and are part and parcel of his personnel file. There is also no question that the records sought are "used to evaluate performance toward continued employment or promotion," as required by the statute. ...

CCRB findings and recommendations are clearly of significance to superiors in evaluating police officers' performance. As noted, all complaints filed with the CCRB, regardless of the outcome, are filed with and remain in an officer's CCRB history, which is part of his or her personnel record maintained by the NYPD. We therefore hold that the CCRB met its burden of demonstrating that those documents constitute "personnel records" for purposes of Civil Rights Law § 50-a, and that they fall squarely within a statutory exemption of the statute ... . **Matter of Luongo v Records Access Officer, Civilian Complaint Review Bd., 2017 NY Slip Op 02523, 1st Dept 3-30-17**

FREEDOM OF INFORMATION LAW (FOIL) (RESULTS OF NYPD DISCIPLINARY TRIALS ARE PERSONNEL RECORDS EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST)/POLICE OFFICERS (FOIL, RESULTS OF NYPD DISCIPLINARY TRIALS ARE PERSONNEL RECORDS EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST)/PERSONNEL RECORDS (POLICE OFFICERS, FOIL, RESULTS OF NYPD DISCIPLINARY TRIALS ARE PERSONNEL RECORDS EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST)

FREEDOM OF INFORMATION LAW (FOIL).

RESULTS OF NYPD DISCIPLINARY TRIALS ARE PERSONNEL RECORDS EXEMPT FROM A FREEDOM OF INFORMATION LAW REQUEST.

The First Department, reversing Supreme Court, determined that the results of NYPD police officer disciplinary trials were personnel records which are exempt from a Freedom of Information Law request:

> Public Officers Law § 87(2)(a) provides that an agency "may deny access to records" that "are specifically exempted from disclosure by state . . . statute." The NYPD disciplinary decisions sought here fall within Civil Rights Law § 50-a, which makes confidential police "personnel records used to evaluate performance toward continued employment or promotion" ... .
>
> The fact that NYPD disciplinary trials are open to the public (38 RCNY 15-04[g]) does not remove the resulting decisions from the protective cloak of Civil Rights Law § 50-a ... . Whether the trials are public and whether the written disciplinary decisions arising therefrom are confidential are distinct questions governed by distinct statutes and regulations ... . Further, the disciplinary decisions include the disposition of the charges against the officer as well as the punishment imposed, neither of which is disclosed at the public trial. **Matter of New York Civ. Liberties Union v New York City Police Dept., 2017 NY Slip Op 02506. 1st Dept 3-30-17**

INSURANCE LAW

INSURANCE LAW (EVEN AN INNOCENT MATERIAL MISTAKE ON AN INSURANCE APPLICATION RENDERS THE POLICY UNENFORCEABLE)/MISREPRESENTATION (INSURANCE LAW, EVEN AN INNOCENT MATERIAL MISTAKE ON AN INSURANCE APPLICATION RENDERS THE POLICY UNENFORCEABLE)

INSURANCE LAW.

EVEN AN INNOCENT MATERIAL MISTAKE ON AN INSURANCE APPLICATION RENDERS THE POLICY UNENFORCEABLE.

The Second Department determined the trial court property granted the insurer's motion for a judgment as a matter of law. The insured acknowledged that the property was configured as a three-family home, but that he indicated it was a two-family home on the application for insurance. Even an innocent material misrepresentation renders the policy unenforceable:

> In order to establish the right to rescind an insurance policy, an insurer must show that its insured made a material misrepresentation of fact when he or she secured the policy ... . A misrepresentation is material if the insurer would not have issued the policy had it known the facts misrepresented ... .
>
> Here, the plaintiff's own testimony established that his house was structurally configured as a three-family dwelling, and thus, the statement on his insurance application indicating that it was a two-family dwelling was a

misrepresentation ... . Although the plaintiff testified that he believed his house was a legal two-family dwelling, an insurer may rescind a policy if the insured made a material misrepresentation of fact even if the misrepresentation was innocently or unintentionally made ... . Further, the defendant established that the plaintiff's misrepresentation was material through the uncontroverted testimony of its witnesses and documentary evidence, including its underwriting guidelines, which established that the defendant did not insure three-family dwellings, and would not have issued the subject policy if the plaintiff and his wife had disclosed that the house contained three dwelling units ... . **Estate of Gen Yee Chu v Otsego Mut. Fire Ins. Co., 2017 NY Slip Op 01536, 2nd Dept 3-1-17**

INSURANCE LAW (NOTICE OF DISCLAIMER SENT TO PLAINTIFF'S INSURER WAS NOT EFFECTIVE NOTICE TO PLAINTIFF)/DISCLAIMER (INSURANCE LAW, NOTICE OF DISCLAIMER SENT TO PLAINTIFF'S INSURER WAS NOT EFFECTIVE NOTICE TO PLAINTIFF)

INSURANCE LAW.

NOTICE OF DISCLAIMER SENT TO PLAINTIFF'S INSURER WAS NOT EFFECTIVE NOTICE TO PLAINTIFF.

The Second Department determined a notice of disclaimer sent by defendant insurer (FMIC) to plaintiff's insurer (Mt.Hawley) was not sufficient to disclaim coverage of plaintiff (Harco):

Here, although Mt. Hawley was acting on behalf of the plaintiffs when it sent notice of the occurrence to FMIC and demanded that FMIC assume the plaintiffs' defense and indemnification in connection with any lawsuits arising from the incident, that did not make Mt. Hawley the plaintiffs' agent for all purposes, or for the specific purpose that is relevant here: receipt of a notice of disclaimer ... . Contrary to FMIC's contention, Mt. Hawley's interests were not necessarily the same as Harco's in this litigation and because Harco had its own interests at stake, separate from that of Mt. Hawley, Harco was entitled to notice delivered to it ... . Since FMIC failed to provide timely notice of its denial of coverage on the basis of a policy exclusion to Harco, it is estopped from disclaiming insurance coverage on that ground ... . **Harco Constr., LLC v First Mercury Ins. Co., 2017 NY Slip Op 01846, 2nd Dept 3-15-17**

INSURANCE LAW (INSURANCE BROKER ENGAGED IN UNTRUSTWORTHY CONDUCT STEMMING FROM A MISLEADING AD AND WAS PROPERLY FINED)/UNTRUSTWORTHY CONDUCT (INSURANCE LAW, INSURANCE BROKER ENGAGED IN UNTRUSTWORTHY CONDUCT STEMMING FROM A MISLEADING AD AND WAS PROPERLY FINED)/VIATICAL SETTLEMENT AGREEMENTS (INSURANCE LAW, INSURANCE BROKER ENGAGED IN UNTRUSTWORTHY CONDUCT STEMMING FROM A MISLEADING AD AND WAS PROPERLY FINED)

INSURANCE LAW.

INSURANCE BROKER ENGAGED IN UNTRUSTWORTHY CONDUCT STEMMING FROM A MISLEADING AD FOR VIATICAL SETTLEMENT AGREEMENTS AND WAS PROPERLY FINED.

The Third Department determined petitioner, a licensed insurance agent/broker, had engaged in untrustworthy conduct and was properly fined. Petitioner sold so-called viatical settlement agreements involving the purchase of interests in life insurance policies of elderly and terminally ill persons. Whether the purchased interests would return a profit depended on whether the amounts paid for the policies and premiums was less than the amount the policies paid out upon death.

Petitioner took out an ad which was deemed misleading and there was evidence petitioner did not inform purchasers of the risks:

> Insurance Law article 21 tasks respondent's superintendent with, among other things, the dual responsibility of "ensuring that licenses are issued only to trustworthy and competent [insurance] producers" ... and disciplining any insurance producer who demonstrates untrustworthiness or incompetence ... . These statutory mandates are designed "to protect the public by requiring and maintaining professional standards of conduct on the part of all insurance brokers acting as such within this state" ... . * * *
>
> ... [W]e agree with respondent's determination that the subject advertisement was misleading. As a starting point, the language at issue indeed could be read as suggesting that an investor would receive a fixed rate of return at the end of a predetermined period of time — a representation that was not universally true, as the timing of the payout was entirely dependent upon when the viator died; more to the point, the promised fixed rate of return could effectively be diminished if the viator exceeded his or her life expectancy, i.e., did not die within the "plan" period, and the investor's profit might be eliminated altogether if he or she was required to assume responsibility for paying the premiums due. * * *
>
> We reach a similar conclusion with respect to the finding that respondent failed to fully disclose the risks of viatical settlements to some of his clients. ... [R]espondent's finding that petitioner acted in an untrustworthy manner in this regard stems from petitioner's failure to "sufficiently disclose the risks in his oral presentations to some of his clients." Without recounting the extensive testimony adduced on this point, suffice it to say that the record contains conflicting evidence as to what petitioner did or did not say to investors regarding the nature and risks of viatical settlements. **Matter of Nichols v New York State Dept. of Fin. Servs., 2017 NY Slip Op 01944m 3rd Dept 3-16-17**

INTENTIONAL TORTS

INTENTIONAL TORTS (CONTINUING TORT DOCTRINE APPLIED TO A COUNTERCLAIM FOR A DELIBERATE CAMPAIGN OF HARASSMENT SPANNING 13 YEARS)/CIVIL PROCEDURE (CONTINUING TORT DOCTRINE APPLIED TO A COUNTERCLAIM FOR A DELIBERATE CAMPAIGN OF HARASSMENT SPANNING 13 YEARS)/CONTINUING TORT DOCTRINE (CONTINUING TORT DOCTRINE APPLIED TO A COUNTERCLAIM FOR A DELIBERATE CAMPAIGN OF HARASSMENT SPANNING 13 YEARS)/HARASSMENT (INTENTIONAL TORTS, CONTINUING TORT DOCTRINE APPLIED TO A COUNTERCLAIM FOR A DELIBERATE CAMPAIGN OF HARASSMENT SPANNING 13 YEARS)

INTENTIONAL TORTS, CIVIL PROCEDURE.

CONTINUING TORT DOCTRINE APPLIED TO A COUNTERCLAIM FOR A DELIBERATE CAMPAIGN OF HARASSMENT SPANNING 13 YEARS.

The Second Department, in this assault and battery action, determined defendant's counterclaim alleging a deliberate campaign of harassment spanning 13 years was not subject to the one-year statute of limitations because the continuing tort doctrine applied:

> ... [T]he Supreme Court properly concluded that so much of the defendant's third counterclaim as was based on conduct occurring prior to September 29, 2013, was not barred by the one-year statute of limitations (see CPLR 215), and that it was instead governed by the continuing tort doctrine, which permits claims based on "wrongful conduct occurring more than one year prior to commencement of the action, so long as the final actionable event occurred within one year of the suit" ... . The counterclaim was supported by factual allegations that the plaintiff engaged in a continuing and concerted campaign of harassment and intimidation of the defendant that progressed from, among other things, calling the defendant, his family, and guests ethnic and racial epithets and throwing items onto his property to eventually making threats of violence, making false criminal accusations, committing

assault and battery against the defendant, and continuing to engage in threatening and intimidating conduct nearly two months after the physical confrontation that is the subject of the plaintiff's complaint ... . The final actionable event, allegedly occurring in November 2013, fell within one year of the defendant's service of the verified answer with counterclaims ... . **Estreicher v Oner, 2017 NY Slip Op 01844, 2nd Dept 3-15-17**

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW (LABOR LAW 241(6) CAUSES OF ACTION SHOULD SURVIVE SUMMARY JUDGMENT BECAUSE THE ITEMS PLAINTIFF TRIPPED OVER WERE NOT INTEGRAL TO THE WORK BEING DONE BY PLAINTIFF AT THE TIME HE FELL)

LABOR LAW-CONSTRUCTION LAW.

LABOR LAW 241(6) CAUSES OF ACTION SHOULD SURVIVE SUMMARY JUDGMENT BECAUSE THE ITEMS PLAINTIFF TRIPPED OVER WERE NOT INTEGRAL TO THE WORK BEING DONE BY PLAINTIFF AT THE TIME HE FELL.

The First Department determined Labor Law 241(6) causes action based on the allegation plaintiff tripped on discarded concrete and rebar should survive summary judgment because plaintiff demonstrated the concrete and rebar were not integral to his work:

> Plaintiffs established that the excess wet concrete discarded on the plywood on which plaintiff slipped was not integral to the work being performed by plaintiff at the accident site ... . Plaintiff did not work with concrete and concrete was not a part of his responsibilities in constructing the tables and forms used to hold the rebar and other ironwork in place. Similarly, the rebar on which plaintiff tripped was not integral to the work he was performing, and defendants' motion for summary judgment dismissing the claim predicated on 12 NYCRR 23-1.7(e)(2) was correctly denied ,,, . Plaintiff presented evidence that he did not work with rebar and that rebar was not integral to any work being done on the day of the accident. **Pereira v New School, 2017 NY Slip Op 01627, 1st Dept 3-2-17**

LABOR LAW-CONSTRUCTION LAW (TILTING A SKID FROM A VERTICAL POSITION ONTO A DOLLY IS COVERED UNDER LABOR LAW 240(1), QUESTION OF FACT WHETHER A SAFETY DEVICE WAS REQUIRED)

LABOR LAW-CONSTRUCTION LAW.

TILTING A SKID FROM A VERTICAL POSITION ONTO A DOLLY IS COVERED UNDER LABOR LAW 240(1), QUESTION OF FACT WHETHER A SAFETY DEVICE WAS REQUIRED.

The First Department determined Labor Law 240(1) applied to the task of tilting a skid from a vertical position to a dolly. However, there was a question of fact whether the skid was heavy enough to require a safety device:

> Plaintiff was injured when he and a coworker attempted to move a wooden skid from a vertical position onto an A-frame dolly by tilting it at a 45-degree angle on one corner and toppling it onto the dolly. While plaintiff hoisted his side of the skid overhead with his arms, his coworker apparently lost his grip, and the skid fell on plaintiff, causing tears in his arm and shoulder.

That plaintiff and the skid were on the same level does not bar application of Labor Law § 240(1) ... .

However, contrary to plaintiff's argument, a triable issue of fact exists as to the weight of the skid and, therefore, whether a safety device was required under the statute. **Natoli v City of New York, 2017 NY Slip Op 01818, 1st Dept 3-15-17**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION, FALL FROM A-FRAME LADDER)/LADDERS (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION, FALL FROM A-FRAME LADDER)

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION, FALL FROM A-FRAME LADDER.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell when the A-frame ladder moved when he was standing on it:

Plaintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim through his testimony that he was injured when the A-frame ladder on which he was standing moved underneath him as he applied pressure to it while trying to remove part of the drop ceiling he was demolishing ... . Plaintiff was not required to show that the ladder was defective or that he actually fell off the ladder to satisfy his prima facie burden ... .

Defendants failed to raise a triable issue of fact whether plaintiff was the sole proximate cause of the accident. There is no testimony in the record as to whether there were other readily available, adequate safety devices at the accident site that plaintiff declined to use ... . Moreover, the evidence establishes that the ladder twisted underneath plaintiff because it was unsecured, not because he misused it, and that defendants provided no other safety devices for his use. At most, plaintiff's application of pressure to the ladder while engaged in the work he was directed to do, which caused it to twist, was comparative negligence, no defense to a section 240(1) claim ... . "Regardless of the method employed by plaintiff to remove [the drop ceiling], the ladder provided to him was not an adequate safety device for the task he was performing" ... . **Messina v City of New York, 2017 NY Slip Op 01823, 1st Dept 3-15-17**

LABOR LAW-CONSTRUCTION LAW (INJURY WHILE TRIMMING A TREE NOT ACTIONABLE UNDER LABOR LAW 200 OR LABOR LAW 240(1))/TREE TRIMMING (LABOR LAW-CONSTRUCTION LAW, INJURY WHILE TRIMMING A TREE NOT ACTIONABLE UNDER LABOR LAW 200 OR LABOR LAW 240(1))

LABOR LAW-CONSTRUCTION LAW.

INJURY WHILE TRIMMING A TREE NOT ACTIONABLE UNDER LABOR LAW 200 OR LABOR LAW 240(1).

The Second Department determined Supreme Court properly granted defendants' motion for summary judgment on the Labor Law 200 and 240(1) causes of action. Plaintiff was injured by a power saw as he was standing on a ladder cutting a tree branch. The Labor Law 200 cause of action was dismissed because defendants did not control the manner of

plaintiff's work. The Labor Law 240(1) cause of action was dismissed because tree-trimming was not encompassed by the statute:

> Here, the accident arose from the manner in which the work was performed, and the defendants established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 claim by submitting evidence demonstrating that they did not have the authority to supervise or control the methods or materials of the plaintiff's work ... .
>
> The defendants established, prima facie, that the plaintiff's tree branch cutting work was outside the ambit of Labor Law § 240(1), because a tree is not a "building or structure" within the meaning of the statute ... . In opposition, the plaintiff failed to raise a triable issue of fact. His contention that the tree branch cutting work was necessary to complete a larger renovation project with respect to the building on the premises is unsupported by the record ... . **Olarte v Morgan, 2017 NY Slip Op 01874, 2nd Dept 3-15-17**

LABOR LAW-CONSTRUCTION LAW (QUESTIONS OF FACT WHETHER PLAINTIFF'S INJURIES WERE CAUSED BY THE PLACEMENT OF THE SCAFFOLD OR THE ABSENCE OF RAILINGS)/SCAFFOLDS (LABOR LAW-CONSTRUCTION LAW, QUESTIONS OF FACT WHETHER PLAINTIFF'S INJURIES WERE CAUSED BY THE PLACEMENT OF THE SCAFFOLD OR THE ABSENCE OF RAILINGS)

LABOR LAW-CONSTRUCTION LAW.

QUESTIONS OF FACT WHETHER PLAINTIFF'S INJURIES WERE CAUSED BY THE PLACEMENT OF THE SCAFFOLD OR THE ABSENCE OF RAILINGS.

The Fourth Department, reversing Supreme Court, determined there were questions of fact whether plaintiff's fall was caused by the placement of the scaffold or the absence of railings on the scaffold:

> We conclude that plaintiff failed to establish his entitlement to judgment as a matter of law under that statute. Specifically, we conclude that there is an issue of fact whether the scaffold failed to provide proper protection because it was not properly placed, thereby precipitating plaintiff's fall, or " whether plaintiff simply lost his balance and fell' " when his head struck the beam ... . Plaintiff likewise failed to establish as a matter of law that the lack of safety railings on the scaffold, as required by 12 NYCRR 23-5.18 (b) ... , is a sufficient basis for a determination of liability under section 240 (1) that the scaffold failed to provide plaintiff proper protection. Rather, we conclude that there is an issue of fact whether the presence of rails would have prevented his fall ... . **Kopasz v City of Buffalo, 2017 NY Slip Op 02305, 4th Dept 3-24-17**

LABOR LAW-CONSTRUCTION LAW (FALL FROM FIRST FLOOR TO BASEMENT FLOOR IS COVERED UNDER LABOR LAW 240(1), THE UNGUARDED OPENING VIOLATED A PROVISION OF THE INDUSTRIAL CODE)

LABOR LAW-CONSTRUCTION LAW.

FALL FROM FIRST FLOOR TO BASEMENT FLOOR IS COVERED UNDER LABOR LAW 240(1), THE UNGUARDED OPENING VIOLATED A PROVISION OF THE INDUSTRIAL CODE.

The Fourth Department, overruling precedent, determined a fall from the first floor through an unguarded opening to the basement floor was a covered event under Labor Law 240 (1) and the unguarded opening violated a provision of the

Industrial Code. The decision covers a number of other substantive issues (not summarized here) including statutory agent liability, Labor Law 200 and common law negligence liability, and indemnfication:

> We agree with plaintiffs that the court erred in denying that part of their motion seeking partial summary judgment on liability on their Labor Law § 240 (1) claim and in granting, instead, those parts of the motion of Gates and cross motion of Nolan seeking dismissal of that claim against them. We therefore further modify the order by denying those parts of the motion and cross motion, reinstating that claim, and granting that part of plaintiffs' motion. As a preliminary matter, we note that the court relied on our decision in Riley v Stickl Constr. Co. (242 AD2d 936) for its determination that a fall from the first floor through an unguarded opening to the basement is not a fall from an elevated worksite within the meaning of section 240 (1). To the extent that Riley stands for the proposition that a worker falling from the first floor to the basement is not protected by section 240 (1), that decision is no longer to be followed. Instead, we conclude that, because there was a "difference between the elevation level of the required work and a lower level" ... , and "[b]ecause plaintiff fell through an opening in the floor, [plaintiffs are] entitled to judgment on liability under Labor Law § 240 (1)"... .
>
> We further conclude that the court erred in denying that part of plaintiffs' motion seeking summary judgment on the limited issue whether 12 NYCRR 23-1.7 (b) (1) was violated, and we therefore further modify the order accordingly. That regulation, which is sufficiently specific to support a cause of action under Labor Law § 241 (6) ... , requires protection from hazardous openings. It is undisputed that the protective railings and the plywood cover had been removed from the stairwell opening and that plaintiff fell through the opening to the floor below. **McKay v Weeden, 2017 NY Slip Op 02327, 4th Dept 3-24-17**

LABOR LAW-CONSTRUCTION LAW (QUESTION OF FACT WHETHER OBJECT THAT FELL WAS THE TYPE OF OBJECT WHICH SHOULD HAVE BEEN SECURED WITH A SAFETY DEVICE ENUMERATED IN THE LABOR LAW STATUTE)

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER OBJECT THAT FELL WAS THE TYPE OF OBJECT WHICH SHOULD HAVE BEEN SECURED WITH A SAFETY DEVICE ENUMERATED IN THE LABOR LAW STATUTE.

The Second Department determined summary judgment should not have been granted to plaintiff on his Labor Law 240(1) cause of action. Plaintiff fell off a scissors lift when what he alleged was a "beam" came down from above him. The object which came down was also described as a "duct." The Second Department found there was a question of fact whether the object which came down should have been secured by a safety device enumerated in the Labor Law statute:

> The evidence submitted by the plaintiff was insufficient to establish that the beam in question fell due to the absence or inadequacy of an enumerated safety device. Specifically, there was a question of fact as to the nature of the "beam" at issue. The plaintiff alternately described it as a flat or narrow "metal slab supposedly made of Steel but it was mostly [copper]," or an iron or steel "beam." The plaintiff's supervisor described it as "like old duct work, metal studs," and a representative of [defendant] described it as a "duct" or "ductwork." Although the plaintiff submitted the affidavit of an expert who opined that a contractor's lift should have been provided to hold "the beam" as it was being cut, the expert, whose opinion was rendered after reviewing the relevant deposition transcripts, failed to identify a basis for concluding that the object at issue was a "beam" or otherwise explain why a contractor's lift was required to hold the object at issue, and thereby establish that this was "a situation where a hoisting or securing device of the kind enumerated in the statute would have been necessary or even expected" ... . **Romero v 2200 N. Steel, LLC, 2017 NY Slip Op 02075, 2nd Dept 3-22-17**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF WAS NOT INJURED ON THE CONSTRUCTION SITE, LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED, LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION WERE VIABLE HOWEVER)/CIVIL PROCEDURE (PLAINTIFF WAS NOT INJURED ON THE CONSTRUCTION SITE, LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED, LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION WERE VIABLE HOWEVER, USE OF ALIAS WAS NOT A FRAUD UPON THE COURT)/ALIAS (BRINGING SUIT USING AN ALIAS WAS NOT A FRAUD ON THE COURT)/FRAUD (FRAUD UPON THE COURT, BRINGING SUIT USING AN ALIAS WAS NOT A FRAUD ON THE COURT)

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

PLAINTIFF WAS NOT INJURED ON THE CONSTRUCTION SITE, LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED, LABOR LAW 200 AND NEGLIGENCE CAUSES OF ACTION WERE VIABLE HOWEVER, USE OF ALIAS WAS NOT A FRAUD UPON THE COURT.

The Second Department determined the Labor Law 241(6) cause of action should have been dismissed because plaintiff was not injured on the construction site but rather on a storage site a few blocks away. Plaintiff was injured when he stepped in a hole. However the Labor Law 200 cause of action was viable. The Second Department also determined the plaintiff's use of an alias to bring suit was not a fraud upon the court (plaintiff is an undocumented immigrant) but held that the complaint should be amended to reflect his actual name:

> Turning to the plaintiff's Labor Law § 241(6) cause of action, Royal and Vista established, prima facie, that at the time of the accident the plaintiff was not working in a construction area within the meaning of Labor Law § 241(6) ... . They submitted evidence which established that the lot where the accident occurred was located several blocks away from the construction area, and was used to store materials. There was no construction taking place at the lot, and the plaintiff's accident occurred as he was taking materials to a truck so they could be transported to the construction site. In opposition to this prima facie showing by Royal and Vista, the plaintiff failed to raise a triable issue of fact. ...
>
> With respect to the plaintiff's Labor Law § 200 and common-law negligence causes of action, this accident arose not from the manner in which the work was performed, but rather from an allegedly dangerous condition at the work site. Under such circumstances, liability may be imposed if the property owner created the condition or had actual or constructive notice of it, and failed to remedy the condition within a reasonable amount of time ... . Similarly, a general contractor may be held liable in common-law negligence and under Labor Law § 200 if it had control over the work site and actual or constructive notice of the dangerous condition ... . **Bessa v Anflo Indus., Inc., 2017 NY Slip Op 02013, 2nd Dept 3-22-17**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF'S INABILITY TO PINPOINT THE CAUSE OF HIS FALL FROM A LADDER DID NOT WARRANT SUMMARY JUDGMENT, THERE WAS CIRCUMSTANTIAL EVIDENCE OF THE CAUSE)/EVIDENCE (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF'S INABILITY TO PINPOINT THE CAUSE OF HIS FALL FROM A LADDER DID NOT WARRANT SUMMARY JUDGMENT, THERE WAS CIRCUMSTANTIAL EVIDENCE OF THE CAUSE)/LADDERS (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF'S INABILITY TO PINPOINT THE CAUSE OF HIS FALL FROM A LADDER DID NOT WARRANT SUMMARY JUDGMENT, THERE WAS CIRCUMSTANTIAL EVIDENCE OF THE CAUSE)

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF'S INABILITY TO PINPOINT THE CAUSE OF HIS FALL FROM A LADDER DID NOT WARRANT SUMMARY JUDGMENT, THERE WAS CIRCUMSTANTIAL EVIDENCE OF THE CAUSE.

The First Department determined plaintiff's inability to state exactly how the accident happened did not warrant summary judgment. Circumstantial evidence established that the bottom of plaintiff's ladder slid out from under him:

"A plaintiff's inability to testify exactly as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence" ... . Plaintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim, despite his admitted inability to remember the specifics of the accident, through the submission of a workers' compensation report and the statement of defendant ... , both of which established that the accident occurred when the bottom of the ladder from which plaintiff was descending suddenly slipped out from under him, causing him to fall to the ground ... . **Weicht v City of New York, 2017 NY Slip Op 01995, 1st Dept 3-21-17**

LABOR LAW-CONSTRUCTION LAW (TREE CUTTING NOT COVERED, PILE OF DEBRIS NOT A STRUCTURE, OUT OF POSSESSION LANDLORD NOT LIABLE UNDER LABOR LAW 200)/TREE CUTTING (LABOR LAW-CONSTRUCTION LAW, TREE CUTTING NOT COVERED, PILE OF DEBRIS NOT A STRUCTURE, OUT OF POSSESSION LANDLORD NOT LIABLE UNDER LABOR LAW 200)/STRUCTURE (LABOR LAW-CONSTRUCTION LAW, TREE CUTTING NOT COVERED, PILE OF DEBRIS NOT A STRUCTURE, OUT OF POSSESSION LANDLORD NOT LIABLE UNDER LABOR LAW 200)/LANDLORD-TENANT (LABOR LAW-CONSTRUCTION LAW, TREE CUTTING NOT COVERED, PILE OF DEBRIS NOT A STRUCTURE, OUT OF POSSESSION LANDLORD NOT LIABLE UNDER LABOR LAW 200)

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT.

TREE CUTTING NOT COVERED, PILE OF DEBRIS NOT A STRUCTURE, OUT OF POSSESSION LANDLORD NOT LIABLE UNDER LABOR LAW 200.

The Second Department, in the course of a decision addressing the exclusivity of a Workers' Compensation recovery and Labor Law 240(1), 241(6) and 200 causes of action, noted that tree cutting was not covered under Labor Law 240(1) and a pile of debris was not a structure within the meaning of Labor Law 240(1) and 241(6). The court further noted that defendant (LLC), as an out of possession landlord, was not liable under Labor Law 200 for either the manner in which work is done or a dangerous condition:

The Supreme Court ... properly granted that branch of the respondents' motion which was for summary judgment dismissing the causes of action alleging violations of Labor Law §§ 240(1) and 241(6) insofar as asserted against the LLC, as tree cutting and removal are not activities covered by those statutory provisions ... , and the evidence established, as a matter of law, that the mound of old tennis court clay, sand, rocks, and other construction debris was not a "structure" under the Labor Law ... . Moreover, the respondents established, prima facie, that the tree cutting and removal was " routine maintenance outside of a construction or renovation context'" ... .

The Supreme Court also properly granted that branch of the respondents' motion which was for summary judgment dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence insofar as asserted against the LLC. "Labor Law § 200 is a codification of a property owner's common-law duty to provide workers at a site with a reasonably safe place to work" ... . To the extent that the plaintiff's claims are based on the manner in which the work was performed, the respondents established, prima facie, that the LLC did not have authority to supervise or control the means and method of the work ... . Likewise, to the extent the plaintiff's claims were based on a dangerous condition on the premises, by presenting the lease between the LLC and the camp, the respondents also established, prima facie, that the LLC, as an out-of-possession landlord, was not responsible for the plaintiff's injuries ... . The LLC relinquished control of the subject property to the camp and placed all responsibility for landscaping and maintenance work on the camp ... . Although the LLC reserved a right of entry under the lease, here, this did not provide a sufficient basis on which to impose liability upon the LLC for injuries caused by a dangerous condition, as the condition did not violate a specific statute, nor was it a significant structural or design defect ... . **Derosas v Rosmarins Land Holdings, LLC, 2017 NY Slip Op 02019, 2nd Dept 3-22-17**

LABOR LAW-CONSTRUCTION LAW (NOTICE OF CLAIM REQUIREMENT FOR LABOR LAW ACTION AGAINST CITY NOT PREEMPTED BY LONGSHOREMAN'S AND HARBOR WORKERS' COMPENSATION ACT)/MUNICIPAL LAW (NOTICE OF CLAIM REQUIREMENT FOR LABOR LAW ACTION AGAINST CITY NOT PREEMPTED BY LONGSHOREMAN'S AND HARBOR WORKERS' COMPENSATION ACT)/NOTICE OF CLAIM (MUNCIPAL LAW, NOTICE OF CLAIM REQUIREMENT FOR LABOR LAW ACTION AGAINST CITY NOT PREEMPTED BY LONGSHOREMAN'S AND HARBOR WORKERS' COMPENSATION ACT)/LONGSHOREMAN'S AND HARBOR WORKERS' COMPENSATION ACT (NOTICE OF CLAIM REQUIREMENT FOR LABOR LAW ACTION AGAINST CITY NOT PREEMPTED BY LONGSHOREMAN'S AND HARBOR WORKERS' COMPENSATION ACT)

LABOR LAW-CONSTRUCTION LAW, MUNICIPAL LAW, LONGSHOREMAN'S AND HARBOR WORKERS' COMPENSATION ACT.

NOTICE OF CLAIM REQUIREMENT FOR LABOR LAW ACTION AGAINST CITY NOT PREEMPTED BY LONGSHOREMAN'S AND HARBOR WORKERS' COMPENSATION ACT.

The Second Department determined plaintiff was required to file a notice of claim in his Labor Law action against the city. The notice of claim requirement was not preempted by the Longshoreman's and Harbor Workers' Compensation Act (LHWCA). Plaintiff was injured while doing overhaul work in a the Brooklyn Navy Yard:

> The LHWCA provides nonseaman maritime workers with the right to bring no-fault workers' compensation claims against their employer, pursuant to 33 USC § 904(b), and negligence claims against the vessel, pursuant to 33 USC § 905(b). As to those two categories of defendants, 33 USC § 905(a) and (b) expressly preempt all other claims, but 33 USC § 933(a) expressly preserves all claims against third parties ... . "Importantly, § 933 recognizes that a covered employee may have tort remedies against third parties under federal or state law. Section 933 preserves and codifies a maritime worker's common law right to pursue a negligence claim against a third party that is not the employer or a coworker; it does not create a cause of action nor establish a third party's liability for negligence" ... . **Fernandez v City of New York, 2017 NY Slip Op 02022, 2nd Dept 3-22-17**

LANDLORD-TENANT

LANDLORD-TENANT (NYC) (DEFENDANT LANDLORD DEMONSTRATED RENOVATIONS TO THE APARTMENT, WHICH WAS ONCE RENT-CONTROLLED, WERE SUFFICIENT TO WARRANT CHARGING MARKET RENT (FIRST RENT), COMPLAINT DISMISSED BASED ON LANDLORD'S DOCUMENTARY EVIDENCE)/MARKET RENT (DEFENDANT LANDLORD DEMONSTRATED RENOVATIONS TO THE APARTMENT, WHICH WAS ONCE RENT-CONTROLLED, WERE SUFFICIENT TO WARRANT CHARGING MARKET RENT (FIRST RENT), COMPLAINT DISMISSED BASED ON LANDLORD'S DOCUMENTARY EVIDENCE)/FIRST RENT (DEFENDANT LANDLORD DEMONSTRATED RENOVATIONS TO THE APARTMENT, WHICH WAS ONCE RENT-CONTROLLED, WERE SUFFICIENT TO WARRANT CHARGING MARKET RENT (FIRST RENT), COMPLAINT DISMISSED BASED ON LANDLORD'S DOCUMENTARY EVIDENCE)/RENT STABILIZATION (NYC) (DEFENDANT LANDLORD DEMONSTRATED RENOVATIONS TO THE APARTMENT, WHICH WAS ONCE RENT-CONTROLLED, WERE SUFFICIENT TO WARRANT CHARGING MARKET RENT (FIRST RENT), COMPLAINT DISMISSED BASED ON LANDLORD'S DOCUMENTARY EVIDENCE)

LANDLORD-TENANT (NYC).

DEFENDANT LANDLORD DEMONSTRATED RENOVATIONS TO THE APARTMENT, WHICH WAS ONCE RENT-CONTROLLED, WERE SUFFICIENT TO WARRANT CHARGING MARKET RENT (FIRST RENT), COMPLAINT DISMISSED BASED ON LANDLORD'S DOCUMENTARY EVIDENCE.

The First Department, over an extensive dissent, determined plaintiff landlord was entitled to dismissal of tenant's complaint (based on documentary evidence). The complaint alleged the landlord was not entitled to charge market rent

("first rent") but rather the apartment was subject to rent control. The landlord demonstrated that renovations, including the addition of a second floor, substantially altered the apartment such that first rent could be charged:

> The documentary evidence submitted by landlord was designed to refute plaintiff's claim that the conversion of the apartment into a duplex did not meet the criteria for first rent or high rent vacancy deregulation. A landlord may charge first rent, pursuant to the Rent Stabilization Code, where the landlord "substantially alters the outer dimensions of a vacant housing accommodation, which qualifies for a first rent equal to or exceeding the applicable amount qualifying for deregulation" (9 NYCRR 2520.11[r][12]) which in this case, was $2,000 or more per month" (9 NYCRR 2520.11[r][4]). Stated somewhat differently, first rent is permitted "when the perimeter walls of the apartment have been substantially moved and changed and where the previous apartment, essentially, ceases to exist, thereby rendering its rental history meaningless" ... . This Court has described the test for whether alterations qualify for first rent as "reconfiguration plus obliteration of the prior apartment's particular identity" ... . * * *
>
> Landlord satisfied its burden of demonstrating that it made the necessary improvements to qualify for first rent, since it established that it substantially altered the character of the apartment by connecting it to the new penthouse. * * *
>
> We similarly find that the documents submitted by landlord established that it properly claimed a rent increase based on the costs of its project to substantially increase the space in the apartment. **Dixon v 105 W. 75th St. LLC, 2017 NY Slip Op 02504, 1st Dept 3-30-17**

LANDLORD-TENANT (LEASE PROVISION ALLOWING THE COLLECTION OF RENT AFTER EVICTION BY SUMMARY PROCEEDINGS VALID AND ENFORCEABLE)/CONTRACT LAW (LANDLORD-TENANT, LEASE PROVISION ALLOWING THE COLLECTION OF RENT AFTER EVICTION BY SUMMARY PROCEEDINGS VALID AND ENFORCEABLE)

LANDLORD-TENANT, CONTRACT LAW.

LEASE PROVISION ALLOWING THE COLLECTION OF RENT AFTER EVICTION BY SUMMARY PROCEEDINGS VALID AND ENFORCEABLE.

The Second Department determined the clause in the lease which allowed the landlord to collect rent after eviction by summary proceedings was valid and enforceable:

> "Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please" ... . "Where a lease provides that a landlord is under no duty to mitigate damages after its reentry by virtue of its successful prosecution of a summary proceeding, and that the tenant remains liable for damages, [the tenant] remain[s] liable for all monetary obligations arising under the lease'" ... . Here, the lease did not obligate the plaintiff to mitigate damages after a dispossession by summary proceeding and specifically provided that [tenant] would remain liable for rent after eviction. In addition, the lease clearly stated that if [tenant] breached the lease, the plaintiff was not precluded from any other remedy in law or equity. Consequently, the lease did not limit the plaintiff to recovery of only pretermination rent in the event that it commenced a summary eviction proceeding to regain possession of the premises ... . **L'Aquila Realty, LLC v Jalyng Food Corp., 2017 NY Slip Op 02027, 2nd Dept 3-22-17**

MENTAL HYGIENE LAW

MENTAL HYGIENE LAW (PURPORTED WAIVER OF JURY TRIAL NOT VALID, NOTHING ON THE RECORD)/JURY TRIAL (MENTAL HYGIENE LAW, PURPORTED WAIVER OF JURY TRIAL NOT VALID, NOTHING ON THE RECORD)

MENTAL HYGIENE LAW.

PURPORTED WAIVER OF JURY TRIAL NOT VALID, NOTHING ON THE RECORD.

The Second Department determined the sex offender did not validly waive his right to a jury trial. Although there was evidence he intended to waive a jury trial (emails) there was no on-the-record waiver:

> The State moves to enlarge the record on appeal to include emails from the appellant's trial counsel which, the State contends, demonstrate that the appellant validly waived his right to a jury trial. However, in Matter of State of New York v Ted B. (132 AD3d 28), we held that a respondent in a Mental Hygiene article 10 proceeding may validly waive the right to a jury trial only where an on-the-record colloquy shows that the respondent made a knowing and voluntary waiver of such right, after an opportunity for consultation with his or her attorney. As an alternative to a personal appearance in court, a respondent may participate in such a colloquy via video conferencing ... . While the State urges us to find a valid waiver based on emails from the appellant's trial counsel, such off-the-record communications, regardless of content, are insufficient to ensure that a respondent's decision to "forgo his [or her] state constitutional and statutory right to a jury trial is the product of an informed and intelligent judgment and, thereby, protect the important liberty interests at stake in article 10 proceedings'" ... . **Matter of State of New York v Jesus M., 2017 NY Slip Op 01557, 2nd Dept 3-1-17**

MUNICIPAL LAW

MUNICIPAL LAW (CITIZEN REVIEW BOARD HAS THE CAPACITY TO SUE AND STANDING TO BRING AN ARTICLE 78-DECLARATORY JUDGMENT ACTION SEEKING THE POLICE DEPARTMENT'S COMPLIANCE WITH POLICE-ACTION-REVIEW PROCEDURES)/POLICE (CITIZEN REVIEW BOARD HAS THE CAPACITY TO SUE AND STANDING TO BRING AN ARTICLE 78-DECLARATORY JUDGMENT ACTION SEEKING THE POLICE DEPARTMENT'S COMPLIANCE WITH POLICE-ACTION-REVIEW PROCEDURES)/CITIZEN REVIEW BOARD (CITIZEN REVIEW BOARD HAS THE CAPACITY TO SUE AND STANDING TO BRING AN ARTICLE 78-DECLARATORY JUDGMENT ACTION SEEKING THE POLICE DEPARTMENT'S COMPLIANCE WITH POLICE-ACTION-REVIEW PROCEDURES)

MUNICIPAL LAW.

CITIZEN REVIEW BOARD HAS THE CAPACITY TO SUE AND STANDING TO BRING AN ARTICLE 78-DECLARATORY JUDGMENT ACTION SEEKING THE POLICE DEPARTMENT'S COMPLIANCE WITH POLICE-ACTION-REVIEW PROCEDURES.

The Fourth Department, in a full-fledged opinion by Justice Curran, in a matter of first impression, determined the Citizen Review Board of Syracuse (CRB) had the capacity to sue and had standing to bring Article 78/declaratory judgment proceedings against the Syracuse Police Department seeking compliance with the citizen review procedures:

> Here, the CRB's enabling legislation provides that it was formed to "establish an open citizen-controlled process for reviewing grievances involving members of the Syracuse Police Department" and that "citizen complaints regarding members of the Syracuse Police Department shall be heard and reviewed fairly and impartially by the review

board." Further, the CRB is required by the ordinance to report and publish the number of cases in which sanctions were imposed. Inasmuch as the CRB cannot perform its legislative mandate without the Chief of Police's compliance with the corresponding legislative mandate that he "advise the [CRB] in writing as to what type of actions or sanctions were imposed, and the reasons if none were imposed," we conclude that the CRB has sustained a sufficiently particularized injury that falls squarely within the zone of interests set forth in the ordinance ... . **Matter of Citizen Review Bd. of The City of Syracuse v Syracuse Police Dept., 2017 NY Slip Op 02181, 4th Dept 3-24-17**

MUNICIPAL LAW (SECOND DEPARTMENT JOINS THE THIRD AND FOURTH DEPARTMENTS IN HOLDING INDIVIDUAL MUNICIPAL EMPLOYEES NEED NOT BE NAMED AS DEFENDANTS IN A NOTICE OF CLAIM)/NOTICE OF CLAIM (SECOND DEPARTMENT JOINS THE THIRD AND FOURTH DEPARTMENTS IN HOLDING INDIVIDUAL MUNICIPAL EMPLOYEES NEED NOT BE NAMED AS DEFENDANTS IN A NOTICE OF CLAIM)

MUNICIPAL LAW.

SECOND DEPARTMENT JOINS THE THIRD AND FOURTH DEPARTMENTS IN HOLDING INDIVIDUAL MUNICIPAL EMPLOYEES NEED NOT BE NAMED AS DEFENDANTS IN A NOTICE OF CLAIM.

The Second Department decided to follow the Third and Fourth Departments and did not require the naming of individual municipal employees as defendants in a notice of claim. The decision in this false arrest, malicious prosecution and civil rights violation case is substantive and deals with several issues not summarized here, including the District Attorney's immunity from suit. With respect to the notice of claim, the court wrote:

> The Appellate Division, First Department, has held that "General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim" ... . * * * The plurality opinion in that case stated that the names of individual employees, if unknown, should still be named as John or Jane Does to enable the municipality to properly investigate the claims and to put individual defendants on notice that they will be sued. ...
>
> In contrast, the Appellate Division, Fourth Department, has held that naming individual municipal employees in a notice of claim is not a condition precedent to joining those individuals as defendants in the action ... . In Goodwin, the Fourth Department noted that General Municipal Law § 50-e(2), which sets forth the requirements for a notice of claim, does not include a requirement that specific individual employees be named, and concluded that "[t]he underlying purpose of the statute may be served without requiring a plaintiff to name the individual agents, officers or employees in the notice of claim" (id. at 216). In Pierce v Hickey (129 AD3d 1287, 1289), the Appellate Division, Third Department, followed Goodwin, stating that there was no requirement that "an individual municipal employee be named in the notice of claim."
>
> We agree with the Third and Fourth Departments. * * * Listing the names of the individuals who allegedly committed the wrongdoing is not required ... . **Blake v City of New York, 2017 NY Slip Op 02399, 2nd Dept 3-29-17**

MUNICIPAL LAW (THREE YEAR STATUTE OF LIMITATIONS FOR A FALSE ARREST CAUSE OF ACTION UNDER 42 USC 1983 BEGAN TO RUN UPON ARRAIGNMENT)/CIVIL RIGHTS LAW (42 USC 1983) (THREE YEAR STATUTE OF LIMITATIONS FOR A FALSE ARREST CAUSE OF ACTION UNDER 42 USC 1983 BEGAN TO RUN UPON ARRAIGNMENT)/CIVIL PROCEDURE (THREE YEAR STATUTE OF LIMITATIONS FOR A FALSE ARREST CAUSE OF ACTION UNDER 42 USC 1983 BEGAN TO RUN UPON ARRAIGNMENT)/FALSE ARREST (THREE YEAR STATUTE OF LIMITATIONS FOR A FALSE ARREST CAUSE OF ACTION UNDER 42 USC 1983 BEGAN TO RUN UPON ARRAIGNMENT)

MUNICIPAL LAW, CIVIL RIGHTS LAW (42 USC 1983), CIVIL PROCEDURE.

THREE YEAR STATUTE OF LIMITATIONS FOR A FALSE ARREST CAUSE OF ACTION UNDER 42 USC 1983 BEGAN TO RUN UPON ARRAIGNMENT.

The First Department noted that the three year statute of limitations for a false arrest cause of action under 42 USC 1983 began to run upon arraignment:

> The three-year limitations period on a section 1983 claim based on false arrest begins to run "when the alleged false imprisonment ends" — that is, when the arrestee becomes subject to the legal process such as being "bound over by a magistrate or arraigned on charges" ... . Here, because plaintiff was arraigned on July 16, 2011, the limitations period on his section 1983 claim based on false arrest ended on July 16, 2014, approximately three months before plaintiff filed this action. Accordingly, the claim is time-barred. **Cruz v City of New York, 2017 NY Slip Op 02386, 1st Dept 3-28-17**

MUNICIPAL LAW (LATE NOTICE OF CLAIM SHOULD HAVE BEEN ALLOWED DESPITE LACK OF A REASONABLE EXCUSE AND DEFENDANT'S LACK OF KNOWLEDGE OF THE INJURY)/NOTICE OF CLAIM (LATE NOTICE OF CLAIM SHOULD HAVE BEEN ALLOWED DESPITE LACK OF A REASONABLE EXCUSE AND DEFENDANT'S LACK OF KNOWLEDGE OF THE INJURY)/NEGLIGENCE (MUNICIPAL LAW, LATE NOTICE OF CLAIM SHOULD HAVE BEEN ALLOWED DESPITE LACK OF A REASONABLE EXCUSE AND DEFENDANT'S LACK OF KNOWLEDGE OF THE INJURY)

MUNICIPAL LAW, NEGLIGENCE.

LATE NOTICE OF CLAIM SHOULD HAVE BEEN ALLOWED DESPITE LACK OF A REASONABLE EXCUSE AND DEFENDANT'S LACK OF KNOWLEDGE OF THE INJURY.

The First Department determined plaintiff's motion for leave to file a late notice of claim against the NYC Housing Authority should have been granted, despite the lack of a reasonable excuse and defendant's lack of knowledge of the injury. The infant plaintiff was nine months old when he was burned by an exposed water pipe. The infancy and the lack of prejudice to the defendant warranted allowing the claim to be filed after a 10-month delay:

> The infant plaintiff was approximately nine months old at the time that he allegedly sustained injuries as a result of an exposed hot water pipe in his family's apartment, in a building owned and operated by defendant. This infancy weighs in favor of granting leave to serve a late notice of claim, regardless of the lack of a nexus between the delay and infancy ... . In addition, defendant failed to address plaintiff's showing that defendant would not be substantially prejudiced by the 10-month delay in seeking leave since the condition of the exposed pipes remained unchanged from the time of the accident ... . Given these factors, which the motion court failed to address, and given the remedial nature of the statute, the motion court improvidently exercised its discretion in dismissing the infant plaintiff's claim ... . **Eboni B. v New York City Hous. Auth., 2017 NY Slip Op 01816, 1st Dept 3-15-17**

MUNICIPAL LAW (LATE NOTICE OF CLAIM PROPERLY ALLOWED DESPITE ABSENCE OF REASONABLE EXCUSE AND LACK OF TIMELY NOTICE OF THE UNDERLYING FACTS)/NOTICE OF CLAIM (MUNICIPAL LAW, LATE NOTICE OF CLAIM PROPERLY ALLOWED DESPITE ABSENCE OF REASONABLE EXCUSE AND LACK OF TIMELY NOTICE OF THE UNDERLYING FACTS)/NEGLIGENCE (MUNICIPAL LAW, LATE NOTICE OF CLAIM PROPERLY ALLOWED DESPITE ABSENCE OF REASONABLE EXCUSE AND LACK OF TIMELY NOTICE OF THE UNDERLYING FACTS)

MUNICIPAL LAW, NEGLIGENCE.

LATE NOTICE OF CLAIM PROPERLY ALLOWED DESPITE ABSENCE OF REASONABLE EXCUSE AND LACK OF TIMELY NOTICE OF THE UNDERLYING FACTS.

The Fourth Department determined the application for leave to file a late notice of claim was properly granted, despite the absence of an adequate excuse and the lack of timely notice of the underlying facts:

> Here, even assuming, arguendo, that claimants failed to provide a reasonable excuse for their delay, we conclude that the remaining factors support the court's exercise of discretion in granting their application. Although respondents did not obtain knowledge of the facts underlying the claim until approximately nine months after the expiration of the 90-day period, we conclude under the circumstances of this case that "this was a reasonable time, particularly in light of the fact that respondent[s] do[ ] not contend that there has been any subsequent change in the condition of the [premises] which might hinder the investigation or defense of this action' " ... . Moreover, claimants made a sufficient showing that the late notice will not substantially prejudice respondents, and respondents failed to "respond with a particularized evidentiary showing that [they] will be substantially prejudiced if the late notice is allowed" ... . We therefore conclude that the court "properly exercised its broad discretion in granting [claimants'] application pursuant to General Municipal Law § 50-e (5)" ... . **Matter of Diegelman v City of Buffalo, 2017 NY Slip Op 02316, 4th Dept 3-24-17**

MUNICIPAL LAW (SLIP AND FALL, SIDEWALK, 19 YEAR OLD NOTICE OF CLAIM WAS NOT SUFFICIENT WRITTEN NOTICE OF SIDEWALK DEFECT)/NEGLIGENCE (MUNICIPAL LAW, SLIP AND FALL, SIDEWALK, 19 YEAR OLD NOTICE OF CLAIM WAS NOT SUFFICIENT WRITTEN NOTICE OF SIDEWALK DEFECT)/SLIP AND FALL (MUNICIPAL LAW, 19 YEAR OLD NOTICE OF CLAIM WAS NOT SUFFICIENT WRITTEN NOTICE OF SIDEWALK DEFECT)/SIDEWALKS (SLIP AND FALL, MUNICIPAL LAW, 19 YEAR OLD NOTICE OF CLAIM WAS NOT SUFFICIENT WRITTEN NOTICE OF SIDEWALK DEFECT)

MUNICIPAL LAW, NEGLIGENCE.

19 YEAR OLD NOTICE OF CLAIM WAS NOT SUFFICIENT WRITTEN NOTICE OF SIDEWALK DEFECT.

The Second Department determined a 19-year-old notice of claim did not meet the written notice requirement for a sidewalk defect in this slip and fall case:

> "Administrative Code of the City of New York § 7-201(c) limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location" ... . Accordingly, "prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City" ... .
>
> Here, the City established its prima facie entitlement to judgment as a matter of law by submitting proof that a search of its records revealed that it had not received any prior written notice of the allegedly defective condition ... . In opposition, the plaintiffs failed to raise a triable issue of fact. "To satisfy a prior written notice statute, the notice relied upon by a plaintiff must not be too remote in time" ... . Here, the plaintiffs' submission of a notice of claim, filed almost 19 years prior to the accident complained of, was insufficient to raise a triable issue of fact since it was too remote in time to constitute prior written notice within the meaning of Administrative Code of the City of New York § 7-201(c) ... . **Gellman v Cooke, 2017 NY Slip Op 02404, 2nd Dept 3-29-17**

NEGLIGENCE

NEGLIGENCE (PLAINTIFF'S ALLEGATION SHE SAW A DENT IN A WAXY SUBSTANCE MADE BY HER SHOE AS SHE FELL WAS SUFFICIENT TO DEFEAT DEFENDANT'S SUMMARY JUDGMENT MOTION, SUPREME COURT REVERSED)/SLIP AND FALL (PLAINTIFF'S ALLEGATION SHE SAW A DENT IN A WAXY SUBSTANCE MADE BY HER SHOE AS SHE FELL WAS SUFFICIENT TO DEFEAT DEFENDANT'S SUMMARY JUDGMENT MOTION, SUPREME COURT REVERSED)

NEGLIGENCE.

PLAINTIFF'S ALLEGATION SHE SAW A DENT IN A WAXY SUBSTANCE MADE BY HER SHOE AS SHE FELL WAS SUFFICIENT TO DEFEAT DEFENDANT'S SUMMARY JUDGMENT MOTION, SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, over a two-justice dissent, determined defendant should not have been granted summary judgment in this slip and fall case. Plaintiff alleged she slipped on a waxy substance on a marble floor and alleged she saw a "dent" in the substance made by her shoe when she fell. Defendant submitted evidence that the floor was never waxed:

> Here, there is a triable issue of fact as to whether there was a slippery substance on the bathroom floor that caused plaintiff to fall notwithstanding defendant's assertion that it never used wax in that particular bathroom. Contrary to the motion court's findings, plaintiff's proof was not speculative and was sufficient to defeat the motion, because she set forth a specific reason for the slippery condition on the floor, namely a build-up of wax ... . Indeed, as noted above, she "saw a big line, the dent of my shoe in the wax all the way that I fell," suggesting that her shoe gouged out some of the waxy substance where she fell. This was more than just leaving a streak ... , which would happen regardless of the condition of the floor. Villa v Property Resources Corp. (137 AD3d 454 [1st Dept 2016]), recently decided by this Court, is also not dispositive. There, plaintiff merely felt a wetness on her pants and hands that smelled like wax or ammonia, while here, plaintiff saw the dent of her shoe in the waxy substance ... . **De Paris v Women's Natl. Republican Club, Inc., 2017 NY Slip Op 01625, 1st Dept 3-2-17**

NEGLIGENCE (WRONGFUL DEATH VERDICT AWARDING ZERO DAMAGES FOR LOSS OF PARENTAL GUIDANCE NOT AGAINST THE WEIGHT OF THE EVIDENCE)/WRONGFUL DEATH (WRONGFUL DEATH VERDICT AWARDING ZERO DAMAGES FOR LOSS OF PARENTAL GUIDANCE NOT AGAINST THE WEIGHT OF THE EVIDENCE)/DAMAGES (WRONGFUL DEATH VERDICT AWARDING ZERO DAMAGES FOR LOSS OF PARENTAL GUIDANCE NOT AGAINST THE WEIGHT OF THE EVIDENCE)/PARENTAL GUIDANCE (WRONGFUL DEATH VERDICT AWARDING ZERO DAMAGES FOR LOSS OF PARENTAL GUIDANCE NOT AGAINST THE WEIGHT OF THE EVIDENCE)

NEGLIGENCE.

WRONGFUL DEATH VERDICT AWARDING ZERO DAMAGES FOR LOSS OF PARENTAL GUIDANCE NOT AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department determined the jury verdict in this wrongful death case which awarded zero damages for loss of parental guidance was not against the weight of the evidence:

> "In a wrongful death action, an award of damages is limited to the fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought" .... "In the case of a decedent who was not a wage earner, pecuniary injuries may be calculated, in part, from the increased expenditures required to continue the services she [or he] provided, as well as the compensable losses of a

personal nature, such as loss of guidance" ... . "The determination of pecuniary damages in a wrongful death action is peculiarly within the province of the jury" ... . Here, we find that the evidence on the issue of the loss of the decedent's parental guidance did not so preponderate in favor of the plaintiff such that the verdict could not have been reached on any fair interpretation of the evidence ... . **Estevez v Tam, 2017 NY Slip Op 01675, 2nd Dept 3-8-17**

NEGLIGENCE (QUESTION OF FACT WHETHER FAILURE TO SAND OR SALT STEPS CREATED OR EXACERBATED A DANGEROUS CONDITION)/SLIP AND FALL (QUESTION OF FACT WHETHER FAILURE TO SAND OR SALT STEPS CREATED OR EXACERBATED A DANGEROUS CONDITION)

NEGLIGENCE.

QUESTION OF FACT WHETHER FAILURE TO SAND OR SALT STEPS CREATED OR EXACERBATED A DANGEROUS CONDITION.

The First Department, finding that summary judgment was properly denied in this slip and fall case, noted that there was a question of fact whether the failure to sand or salt the steps created or exacerbated a dangerous condition:

Plaintiff alleges that she was injured when she slipped on icy steps in front of defendants' residence. The record shows that defendant Kenneth Clarke testified that sheets of icy rain had been falling all morning on the day of the accident, and that the steps had been cleared earlier that morning by a man he had hired to clear snow and ice. However, plaintiff and a neighbor who lived across the street testified that there was no precipitation on the morning of the accident, but that it had snowed two and three days earlier. Plaintiff also stated that she had not seen the man defendant had hired to clear the steps, either after the previous snowfall or that morning, although she was home and would have been aware of his presence. Moreover, there are conflicting opinions of expert meteorologists regarding the weather conditions on the morning of plaintiff's fall. Under these circumstances, summary judgment was properly denied, since triable issues of fact exist as to whether there was a storm in progress on the morning of plaintiff's accident, which would have suspended defendants' obligation to clear the steps of snow and ice ... .

Furthermore, assuming that there was no storm in progress, the record also presents issues of fact as to whether anyone acting on defendants' behalf ever inspected and cleared the steps, either on the morning of the accident or after the prior snowfall, and, if so, whether such person's "failure to place sand or salt on the stairs created or exacerbated a dangerous condition" after the prior storm ... . **Arroyo v Clarke, 2017 NY Slip Op 01809, 1st Dept 3-15-17**

NEGLIGENCE (SLIP AND FALL, QUESTION OF FACT WHETHER NEGLIGENT WAXING WAS CAUSE OF PLAINTIFF'S FALL)/SLIP AND FALL (QUESTION OF FACT WHETHER NEGLIGENT WAXING WAS CAUSE OF PLAINTIFF'S FALL)/WAX (SLIP AND FALL, QUESTION OF FACT WHETHER NEGLIGENT WAXING WAS CAUSE OF PLAINTIFF'S FALL)

NEGLIGENCE.

QUESTION OF FACT WHETHER NEGLIGENT WAXING WAS CAUSE OF PLAINTIFF'S FALL.

The First Department determined there was a question of fact whether plaintiff's slip and fall was caused by excessive wax on the floor:

Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she slipped on a floor that was negligently waxed. Defendants submitted evidence showing that the floor was last waxed approximately three months before plaintiff's fall ... . In opposition, plaintiff raised triable issues as to whether "a dangerous residue of wax was present" ... . She stated that after she fell, there was wax on her hands and, when she stepped on the waxy area, she saw a "scuff mark" running through a circular area, creating a "sunken stripe through the wax." Plaintiff slid her foot back and forth on the circular patch, and felt the "accumulated, raised, substance on the floor" move with the pressure of her foot, and these actions were captured on the building's security footage. **Sanchez v Mitsui Fudosan Am., Inc., 2017 NY Slip Op 01821, 1st Dept 3-15-17**

NEGLIGENCE (DEFENDANT HEAVY METAL CLUB DID NOT DEMONSTRATE PLAINTIFF ASSUMED THE RISK OF COLLIDING WITH A SLAM DANCER, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED)/ASSUMPTION OF THE RISK (SLAM DANCING, (DEFENDANT HEAVY METAL CLUB DID NOT DEMONSTRATE PLAINTIFF ASSUMED THE RISK OF COLLIDING WITH A SLAM DANCER, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED)/SLAM DANCING (DEFENDANT HEAVY METAL CLUB DID NOT DEMONSTRATE PLAINTIFF ASSUMED THE RISK OF COLLIDING WITH A SLAM DANCER, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED)

NEGLIGENCE.

DEFENDANT HEAVY METAL CLUB DID NOT DEMONSTRATE PLAINTIFF ASSUMED THE RISK OF COLLIDING WITH A SLAM DANCER, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant heavy metal club did not demonstrate plaintiff assumed the risk of colliding with a slam dancer. Plaintiff was not participating in the slam dancing:

The doctrine of primary assumption of risk "applies when a consenting participant in a qualified activity is aware of the risks; has an appreciation of the nature of the risks; and voluntary assumes the risks'" ... . A person who chooses to engage in such an activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" ... . The doctrine has generally been restricted "to particular athletic and recreative activities in recognition that such pursuits have enormous social value' even while they may involve significantly heightened risks'" ... , and are, therefore, "worthy of insulation from a breach of duty claim" ... . Here, even assuming, without deciding, that attending a heavy metal concert where slam dancing takes place is a qualified activity to which the doctrine may properly be applied ... , under the facts presented, the defendants, as the organizers and sponsors of the event, failed to eliminate triable issues of fact as to whether they met their duty to exercise care to make the conditions at the subject venue as safe as they appeared to be ... and did not unreasonably increase the usual risks inherent in the activity of concert going ... . **Brosnan v 6 Crannell St., LLC, 2017 NY Slip Op 01840, 2nd Dept 3-15-17**

NEGLIGENCE (EVEN THOUGH THERE WAS A STORM IN PROGRESS, QUESTION OF FACT RAISED WHETHER SNOW REMOVAL EFFORTS CREATED OR EXACERBATED THE DANGEROUS ICY CONDITION)/SLIP AND FALL (EVEN THOUGH THERE WAS A STORM IN PROGRESS, QUESTION OF FACT RAISED WHETHER SNOW REMOVAL EFFORTS CREATED OR EXACERBATED THE DANGEROUS ICY CONDITION)/STORM IN PROGRESS DOCTRINE (EVEN THOUGH THERE WAS A STORM IN PROGRESS, QUESTION OF FACT RAISED WHETHER SNOW REMOVAL EFFORTS CREATED OR EXACERBATED THE DANGEROUS ICY CONDITION)/SIDEWALKS (EVEN THOUGH THERE WAS A STORM IN PROGRESS, QUESTION OF FACT RAISED WHETHER SNOW REMOVAL EFFORTS CREATED OR EXACERBATED THE DANGEROUS ICY CONDITION)

NEGLIGENCE.

EVEN THOUGH THERE WAS A STORM IN PROGRESS, QUESTION OF FACT RAISED WHETHER SNOW REMOVAL EFFORTS CREATED OR EXACERBATED THE DANGEROUS ICY CONDITION.

The First Department determined defendants' summary judgment motion in this slip and fall case was properly denied. Although there was a snow storm in progress at the time of the fall, there was evidence plaintiff slipped on a sheet of ice which, because the temperature was well below freezing, could not have formed during the storm:

> Here, as plaintiffs concede, there was a storm in progress at the time of the accident. Thus, the burden shifted to plaintiffs to demonstrate the existence of a triable issue of fact as to whether Sterling created or exacerbated the hazardous condition through its snow removal activities. Plaintiffs have met that burden, as they have both testified that they saw an ice patch at the scene of the accident. * * * This evidence supports plaintiffs' argument that ice could not have formed after the snowclearing efforts by [defendant's] employees. Accordingly, an issue of fact was raised as to whether [defendant's] actions created or exacerbated a hazardous condition by employing a snowblower to remove snow without taking further steps to de-ice the sidewalk ... . **Baumann v Dawn Liquors, Inc., 2017 NY Slip Op 01986, 1st Dept 3-21-17**

NEGLIGENCE (DEFENDANT DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF A HOLE WHICH CAUSED PLAINTIFF TO FALL)/SLIP AND FALL (DEFENDANT DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF A HOLE WHICH CAUSED PLAINTIFF TO FALL)/NOTICE (SLIP AND FALL, DEFENDANT DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF A HOLE WHICH CAUSED PLAINTIFF TO FALL)

NEGLIGENCE.

DEFENDANT DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF A HOLE WHICH CAUSED PLAINTIFF TO FALL, SUMMARY JUDGMENT PROPERLY DENIED.

The First Department determined the defendant owner (In LIne) and restaurant manager (Spanburgh) did not demonstrate entitlement to summary judgment in this slip and fall case. Plaintiff, a restaurant patron, was injured when he stepped in a hole in the front lawn of the property while playing a game (apparently sanctioned by the restaurant):

> Defendants failed to establish that In Line did not create the hole in its front lawn by submitting Spanburgh's deposition testimony and affidavit, because Spanburgh did not state that the lawn was inspected after it was last maintained by the outside company In Line had hired to mow the grass. They also failed to satisfy their initial burden to show that In Line lacked actual notice of the hole in its lawn, because they submitted no evidence that its employees and the outside company had received no complaints about the defect prior to the incident and that there were no similar accidents at the subject location ... . The fact that Spanburgh testified and averred that he did not receive any complaints about the condition of the lawn does not establish that In Line lacked actual notice, because he did not state that he was working when the accident happened.
>
> Defendants also failed to satisfy their initial burden to show that In Line lacked constructive notice of the hole in its lawn, because Spanburgh's testimony and averment that he would inspect the entire premises every time the

restaurant was open is insufficient to establish when the lawn was last checked before the accident ... . **Clarkin v In Line Rest. Corp., 2017 NY Slip Op 02004, 1st Dept 3-21-17**

NEGLIGENCE (DEFENDANT DID NOT DEMONSTRATE NONNEGLIGENT EXPLANATION FOR REAR-END COLLISION, PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED)/REAR-END COLLISION (DEFENDANT DID NOT DEMONSTRATE NONNEGLIGENT EXPLANATION FOR REAR-END COLLISION, PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED)/COMPARATIVE NEGLIGENCE (REAR-END COLLISION, DEFENDANT DID NOT DEMONSTRATE NONNEGLIGENT EXPLANATION FOR REAR-END COLLISION, PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED)

NEGLIGENCE.

DEFENDANT DID NOT DEMONSTRATE NONNEGLIGENT EXPLANATION FOR REAR-END COLLISION, PLAINTIFF'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this rear-end collision case. The defendant city owned the sanitation truck (driven by McPhillips) which struck the car in which plaintiff was a passenger:

> ... [T]he plaintiffs submitted, inter alia, transcripts of the parties' deposition testimony, which demonstrated, prima facie, that the injured plaintiff was not comparatively at fault for the happening of the subject accident, and that McPhillips was negligent. Contrary to the City's contention, the transcript of McPhillips's deposition testimony did not reveal a triable issue of fact as to whether he demonstrated a nonnegligent explanation for the rear-end collision into the other vehicle. Even if, as McPhillips testified, the other vehicle came to a sudden stop at the subject intersection's yellow traffic light, McPhillips should have anticipated that the other vehicle might come to a stop at the intersection ... . Furthermore, McPhillips's deposition testimony did not rebut the inference of negligence from the rear-end collision, as he testified that he knew that the road was wet from a recent rain shower and he failed to demonstrate that his skid on known road conditions was unavoidable ... . **Tumminello v City of New York, 2017 NY Slip Op 02083, 2nd Dept, 3-22-17**

NEGLIGENCE (LEAD PAINT, DEFENDANTS DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF LEAD-PAINT CONDITION, DEFENDANTS DID NOT HAVE A DUTY TO TEST FOR LEAD, COMPLAINT SHOULD HAVE BEEN DISMISSED)/LEAD PAINT (DEFENDANTS DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF LEAD-PAINT CONDITION, DEFENDANTS DID NOT HAVE A DUTY TO TEST FOR LEAD, COMPLAINT SHOULD HAVE BEEN DISMISSED)

NEGLIGENCE.

DEFENDANTS DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF LEAD-PAINT CONDITION, DEFENDANTS DID NOT HAVE A DUTY TO TEST FOR LEAD, COMPLAINT SHOULD HAVE BEEN DISMISSED.

The Fourth Department determined the lead paint poisoning complaint should have been dismissed because plaintiff was unable to show defendants had actual or constructive knowledge of the condition and defendants were not under a duty to test for lead:

> Defendants submitted affidavits and deposition testimony establishing that they were not aware of any peeling or chipping paint on the premises prior to the inspection conducted by the [Monroe County Department of Health].

Defendants also established that neither plaintiff nor the relatives with whom plaintiff resided at the premises ever complained to either defendant of any peeling or chipping paint on the premises. Contrary to plaintiff's contention, he failed to raise an issue of fact whether defendants were aware of chipping and peeling paint on the premises ... , or whether defendants retained the requisite right of entry to the apartment to sustain a claim for constructive notice ... . Furthermore, "[w]ithout evidence legally sufficient to permit a jury to rationally infer that the defendant had constructive notice of a dangerous condition, the defendant cannot be held liable for failure to warn or to remedy the defect" ... . Consequently, absent evidence raising a triable issue of fact whether defendants had actual or constructive notice of a dangerous condition on the premises, the court erred in denying that part of the motion seeking dismissal of the failure to warn claim. ...

"The Court of Appeals in Chapman (97 NY2d at 21) expressly decline[d] to impose a new duty on landlords to test for the existence of lead in leased properties based solely upon the general knowledge of the dangers of lead-based paints in older homes" ... . **Taggart v Fandel, 2017 NY Slip Op 02177, 4th Dept 3-24-17**

NEGLIGENCE (ALTHOUGH THERE WAS A STORM IN PROGRESS, DEFENDANT'S SNOW REMOVAL MAY HAVE EXACERBATED THE SLIPPERY CONDITION, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED)/SLIP AND FALL (ALTHOUGH THERE WAS A STORM IN PROGRESS, DEFENDANT'S SNOW REMOVAL MAY HAVE EXACERBATED THE SLIPPERY CONDITION, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED)/SIDEWALKS (ALTHOUGH THERE WAS A STORM IN PROGRESS, DEFENDANT'S SNOW REMOVAL MAY HAVE EXACERBATED THE SLIPPERY CONDITION, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED)/STORM IN PROGRESS (ALTHOUGH THERE WAS A STORM IN PROGRESS, DEFENDANT'S SNOW REMOVAL MAY HAVE EXACERBATED THE SLIPPERY CONDITION, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED)

NEGLIGENCE.

ALTHOUGH THERE WAS A STORM IN PROGRESS, DEFENDANT'S SNOW REMOVAL MAY HAVE EXACERBATED THE SLIPPERY CONDITION, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED.

The Second Department, reversing Supreme Court, determined plaintiff had raised a question of fact in this slip and fall case. Although there was a storm in progress, defendant's snow removal efforts may have exacerbated the ice condition (facts not described in decision):

Here, in support of its motion, the defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence, which included the affidavit of its meteorologist, as well as certified climatological data, which demonstrated that the subject accident occurred while a storm was in progress ... . In opposition, the evidence relied upon by the plaintiff, which included her affidavit and the affidavit of her meteorologist, raised a triable issue of fact as to whether any snow removal efforts the defendant undertook prior to the accident in relation to the storm either created or exacerbated the ice condition which allegedly caused the plaintiff to fall ... . **Dylan v CEJ Props., LLC, 2017 NY Slip Op 02403, 2nd Dept 3-29-17**

NEGLIGENCE (FOOT OF A DECORATIVE FENCE OVER WHICH PLAINTIFF TRIPPED WAS OPEN AND OBVIOUS AS A MATTER OF LAW)/SLIP AND FALL (FOOT OF A DECORATIVE FENCE OVER WHICH PLAINTIFF TRIPPED WAS OPEN AND OBVIOUS AS A MATTER OF LAW)/OPEN AND OBVIOUS (SLIP AND FALL, FOOT OF A DECORATIVE FENCE OVER WHICH PLAINTIFF TRIPPED WAS OPEN AND OBVIOUS AS A MATTER OF LAW)

NEGLIGENCE.

FOOT OF A DECORATIVE FENCE OVER WHICH PLAINTIFF TRIPPED WAS OPEN AND OBVIOUS AS A MATTER OF LAW.

The Second Department determined the foot of a decorative fence over which plaintiff tripped was open and obvious as a matter of law and not actionable:

> While a landowner has a duty to maintain its premises in a reasonably safe condition ... , "there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" ... . "While the issue of whether a hazard is . . . open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence" ... .
>
> Here, the defendants established, prima facie, that the fence, including the "leg" or foot of the fence, was open and obvious, as it was readily observable by those employing the reasonable use of their senses and, as a matter of law, was not inherently dangerous ... .
>
> In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to her contention, she did not raise a triable issue of fact as to whether the foot of the fence constituted a "trap for the unwary" because it was somehow obscured ... . **Gerner v Shop-Rite of Uniondale, Inc., 2017 NY Slip Op 02407, 2nd Dept 3-29-17**

NEGLIGENCE (NO SHOWING RUG OVER WHICH PLAINTIFF TRIPPED WAS NOT FLUSH TO THE FLOOR, HEIGHT DIFFERENTIAL WAS TRIVIAL, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED)/SLIP AND FALL (NO SHOWING RUG OVER WHICH PLAINTIFF TRIPPED WAS NOT FLUSH TO THE FLOOR, HEIGHT DIFFERENTIAL WAS TRIVIAL, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED)/TRIVIAL DEFECT (SLIP AND FALL, (NO SHOWING RUG OVER WHICH PLAINTIFF TRIPPED WAS NOT FLUSH TO THE FLOOR, HEIGHT DIFFERENTIAL WAS TRIVIAL, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED)/RUGS (SLIP AND FALL, (NO SHOWING RUG OVER WHICH PLAINTIFF TRIPPED WAS NOT FLUSH TO THE FLOOR, HEIGHT DIFFERENTIAL WAS TRIVIAL, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED)

NEGLIGENCE.

NO SHOWING RUG OVER WHICH PLAINTIFF TRIPPED WAS NOT FLUSH TO THE FLOOR, HEIGHT DIFFERENTIAL WAS TRIVIAL, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, over a dissent, reversing Supreme Court, determined plaintiff's slip and fall complaint should have been dismissed. Plaintiff alleged he tripped on the corner of a rug. The Fourth Department found, as a matter of law, the rug was in place and plaintiff's foot went under it. The height of the rug was a trivial, nonactionable defect:

> ... [W]e conclude that defendant established as a matter of law that the alleged defect created by the placement of a rug in the vestibule and any apparent height differential between the rug and the floor "is too trivial to be actionable" ... . "[T]he test established by the case law in New York is not whether a defect is capable of catching a pedestrian's shoe. Instead, the 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" ... . Defendant's submissions established that the accident occurred between approximately 10:00 and 10:30 a.m., when it was "bright enough to see." Plaintiff was entering defendant's restaurant behind his son, and there were no other customers in the vicinity. The photograph submitted by defendant depicting the rug does not reveal any defect or irregularity with the rug, and the videotape of the incident shows that the area where plaintiff fell was unobstructed, no other patrons had an issue traversing through the doors and over the rug, and there was no appreciable ripple or other height differential present in the rug to cause a tripping hazard. Thus, after examining the photograph and the video depicting the placement of the rug in the vestibule, and " in view of the time, place, and circumstances of plaintiff's injury,' " we conclude that defendant established as a matter of law that any defect in the rug was too trivial to be actionable ... . **Langgood v Carrols, LLC, 2017 NY Slip Op 02528, 4th Dept 3-31-17**

NEGLIGENCE (RACE TRACK WAIVER OF LIABILITY INVALID, PRIMARY ASSUMPTION OF RISK NOT APPLICABLE, IMPLIED ASSUMPTION OF RISK APPLICABLE, LAW OF THE CASE DID NOT PRECLUDE DIRECTED VERDICT AFTER DENIAL OF SUMMARY JUDGMENT ON THE SAME ISSUES)/CIVIL PROCEDURE (RACE TRACK WAIVER OF LIABILITY INVALID, PRIMARY ASSUMPTION OF RISK NOT APPLICABLE, IMPLIED ASSUMPTION OF RISK APPLICABLE, LAW OF THE CASE DID NOT PRECLUDE DIRECTED VERDICT AFTER DENIAL OF SUMMARY JUDGMENT ON THE SAME ISSUES)/GENERAL OBLIGATIONS LAW (RACE TRACK WAIVER OF LIABILITY INVALID, PRIMARY ASSUMPTION OF RISK NOT APPLICABLE, IMPLIED ASSUMPTION OF RISK APPLICABLE, LAW OF THE CASE DID NOT PRECLUDE DIRECTED VERDICT AFTER DENIAL OF SUMMARY JUDGMENT ON THE SAME ISSUES)/PRIMARY ASSUMPTION OF THE RISK (RACE TRACK WAIVER OF LIABILITY INVALID, PRIMARY ASSUMPTION OF RISK NOT APPLICABLE, IMPLIED ASSUMPTION OF RISK APPLICABLE, LAW OF THE CASE DID NOT PRECLUDE DIRECTED VERDICT AFTER DENIAL OF SUMMARY JUDGMENT ON THE SAME ISSUES)/IMPLIED ASSUMPTION OF THE RISK (RACE TRACK WAIVER OF LIABILITY INVALID, PRIMARY ASSUMPTION OF RISK NOT APPLICABLE, IMPLIED ASSUMPTION OF RISK APPLICABLE, LAW OF THE CASE DID NOT PRECLUDE DIRECTED VERDICT AFTER DENIAL OF SUMMARY JUDGMENT ON THE SAME ISSUES)/ASSUMPTION OF THE RISK (RACE TRACK WAIVER OF LIABILITY INVALID, PRIMARY ASSUMPTION OF RISK NOT APPLICABLE, IMPLIED ASSUMPTION OF RISK APPLICABLE, LAW OF THE CASE DID NOT PRECLUDE DIRECTED VERDICT AFTER DENIAL OF SUMMARY JUDGMENT ON THE SAME ISSUES)/LAW OF THE CASE (RACE TRACK WAIVER OF LIABILITY INVALID, PRIMARY ASSUMPTION OF RISK NOT APPLICABLE, IMPLIED ASSUMPTION OF RISK APPLICABLE, LAW OF THE CASE DID NOT PRECLUDE DIRECTED VERDICT AFTER DENIAL OF SUMMARY JUDGMENT ON THE SAME ISSUES)

NEGLIGENCE, CIVIL PROCEDURE, GENERAL OBLIGATIONS LAW.

RACE TRACK WAIVER OF LIABILITY INVALID, PRIMARY ASSUMPTION OF RISK NOT APPLICABLE, IMPLIED ASSUMPTION OF RISK APPLICABLE, LAW OF THE CASE DID NOT PRECLUDE DIRECTED VERDICT AFTER DENIAL OF SUMMARY JUDGMENT ON THE SAME ISSUES.

The Fourth Department, in a substantive decision dealing with several liability and damages issues not summarized here, determined the trial court properly granted plaintiff's motion for a directed verdict finding the liability waiver invalid and the doctrine of primary assumption of risk inapplicable. The Fourth Department concluded the doctrine of implied assumption of risk was applicable, however. The Fourth Department further held that the law of the case doctrine did not preclude the court from directing a verdict in plaintiff's favor after denying plaintiff's motion for summary judgment on the same issues. Plaintiff's son was in an auto race at defendant race track. Plaintiff was in the pit area when defendant driver (Holland) backed his car into plaintiff:

> Contrary to defendants' contention, the court properly granted plaintiff's motion for a directed verdict establishing that the liability waiver was invalid and that the action was not barred by the doctrine of primary assumption of the risk, inasmuch as there was "no rational process" by which the jury could have found in favor of defendants on those issues ... . With respect to the waiver, General Obligations Law § 5-326 voids any such agreement entered into in connection with, as relevant here, the payment of a fee by a "user" to enter a place of recreation. Plaintiff testified at trial that he was a mere spectator on the night of the accident, thereby establishing that he was a user entitled to the benefit of section 5-326 ... , and there was no evidence from which the jury could have rationally

found that plaintiff was a participant in the event whose attendance was "meant to further the speedway venture" ... .

With respect to the doctrine of primary assumption of the risk, we conclude that the risk that a pedestrian will be struck by a driver backing up in the pit area, well before the driver is participating in a race, is not inherent in the activity of automobile racing ... , and thus that the doctrine is inapplicable to this case ... .

We reject defendants' further contention that the doctrine of law of the case precluded the court from directing a verdict in plaintiff's favor after it had denied prior motions by plaintiff directed at the issues of waiver and primary assumption of the risk, including a motion for partial summary judgment. " A denial of a motion for summary judgment is not necessarily . . . the law of the case that there is an issue of fact in the case that will be established at the trial' "... . ...

We further agree with defendants that a charge on implied assumption of the risk should have been given because there was evidence that plaintiff "disregard[ed] a known risk by voluntarily being in a dangerous area" ... . Inasmuch as the jury was properly instructed on comparative negligence and apportioned 20% of the liability for the accident to plaintiff, however, we conclude that this error did not prejudice a substantial right of defendants and thus does not warrant reversal ... . **Knight v Holland, 2017 NY Slip Op 02525, 4th Dept 3-31-17**

NEGLIGENCE (TRIVIAL DEFECT IN SIDEWALK NOT ACTIONABLE, DESPITE ABSENCE OF NEGLIGENCE BROAD INDEMNFICATION CLAUSE MANDATED PAYMENT OF DEFENDANT'S COSTS ASSOCIATED WITH THE ACTION)/CONTRACT LAW (INDEMNFICATION CLAUSE, TRIVIAL DEFECT IN SIDEWALK NOT ACTIONABLE, DESPITE ABSENCE OF NEGLIGENCE BROAD INDEMNFICATION CLAUSE MANDATED PAYMENT OF DEFENDANT'S COSTS ASSOCIATED WITH THE ACTION)/INDEMNIFICATION CLAUSE TRIVIAL DEFECT IN SIDEWALK NOT ACTIONABLE, DESPITE ABSENCE OF NEGLIGENCE BROAD INDEMNFICATION CLAUSE MANDATED PAYMENT OF DEFENDANT'S COSTS ASSOCIATED WITH THE ACTION)/SLIP AND FALL (TRIVIAL DEFECT IN SIDEWALK NOT ACTIONABLE, DESPITE ABSENCE OF NEGLIGENCE BROAD INDEMNFICATION CLAUSE MANDATED PAYMENT OF DEFENDANT'S COSTS ASSOCIATED WITH THE ACTION)/TRIVIAL DEFECT (SLIP AND FALL, TRIVIAL DEFECT IN SIDEWALK NOT ACTIONABLE, DESPITE ABSENCE OF NEGLIGENCE BROAD INDEMNFICATION CLAUSE MANDATED PAYMENT OF DEFENDANT'S COSTS ASSOCIATED WITH THE ACTION)

NEGLIGENCE, CONTRACT LAW.

TRIVIAL DEFECT IN SIDEWALK NOT ACTIONABLE, DESPITE ABSENCE OF NEGLIGENCE BROAD INDEMNFICATION CLAUSE MANDATED PAYMENT OF DEFENDANT'S COSTS ASSOCIATED WITH THE ACTION.

The First Department determined the sidewalk defect was trivial and not actionable but the costs associated with defending the action were recoverable under the broad language of an indemnification clause (despite the absence of negligence):

Plaintiff's description of the alleged defect that caused her fall as an "uneven spot" that "wasn't as level as the other side" of a "little ridge" of concrete in the ground, without more, establishes that the alleged defect was trivial and nonactionable ... . Moreover, defendants established that they had no notice of the alleged defect ... .

The indemnification provision in Montesano's contract was ... broad and required Montesano to indemnify defendants for liability, damage, etc., "resulting from, arising out of or occurring in connection with the execution of the Work," including attorneys' fees. Thus, although there was no negligence here, to the extent defendants incurred costs connected with Montesano's execution of its work, which included constructing/resurfacing roads and sidewalks on this shopping center renovation project, Montesano is required to indemnify defendants. **Robinson v Brooks Shopping Ctrs., LLC, 2017 NY Slip Op 01972 1st Dept 3-16-17**

NEGLIGENCE (CLAIMANT STRUCK A DOWNED LIGHT POLE WHICH HAD ROTTED BELOW GROUND, STATE DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION)/HIGWAYS AND ROADS (CLAIMANT STRUCK A DOWNED LIGHT POLE WHICH HAD ROTTED BELOW GROUND, STATE DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION)/LIGHT POLES (CLAIMANT STRUCK A DOWNED LIGHT POLE WHICH HAD ROTTED BELOW GROUND, STATE DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION)

NEGLIGENCE, COURT OF CLAIMS.

CLAIMANT STRUCK A DOWNED LIGHT POLE WHICH HAD ROTTED BELOW GROUND, STATE DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION.

The Second Department determined the state did not have actual or constructive notice that a light pole was rotten. Claimant was injured when his vehicle struck a downed pole. The rot was not visible above ground. Evidence that rot was visible on other poles did not provide adequate notice:

> Here, the Court of Claims correctly concluded that the claimant failed to establish that the State had either actual or constructive notice of any dangerous condition of the subject light pole. Rather, the evidence established that the rot on the pole was at the bottom of the pole, which was buried between six and seven feet below ground. Thus, a reasonable inspection would not have revealed the dangerous condition. The claimant's evidence that a witness noticed rot on some of the wooden poles along Ocean Parkway during the prior 15 years is insufficient to provide notice regarding the specific pole involved in the accident. "A general awareness of a recurring problem in insufficient, without more, to establish constructive notice of the particular condition that caused the accident" ... . **Jeffries v State of New York, 2017 NY Slip Op 02409, 2nd Dept 3-29-17**

NEGLIGENCE (ELEVATORS, REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY ON RES IPSA LOQUITUR AND MULTIPLE DWELLING LAW LIABILITY IN THIS ELEVATOR ACCIDENT CASE)/EVIDENCE (RES IPSA LOQUITUR, MULTIPLE DWELLING LAW, (ELEVATORS, REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY ON RES IPSA LOQUITUR AND MULTIPLE DWELLING LAW LIABILITY IN THIS ELEVATOR ACCIDENT CASE)/ELEVATORS (REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY ON RES IPSA LOQUITUR AND MULTIPLE DWELLING LAW LIABILITY IN THIS ELEVATOR ACCIDENT CASE)/RES IPSA LOQUITUR (ELEVATORS, REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY ON RES IPSA LOQUITUR AND MULTIPLE DWELLING LAW LIABILITY IN THIS ELEVATOR ACCIDENT CASE)/MULTIPLE DWELLING LAW (ELEVATORS, REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY ON RES IPSA LOQUITUR AND MULTIPLE DWELLING LAW LIABILITY IN THIS ELEVATOR ACCIDENT CASE)

NEGLIGENCE, EVIDENCE.

REVERSIBLE ERROR TO REFUSE TO INSTRUCT THE JURY ON RES IPSA LOQUITUR AND MULTIPLE DWELLING LAW LIABILITY IN THIS ELEVATOR ACCIDENT CASE.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing Supreme Court and ordering a new trial, determined the trial judge should have instructed the jury on res ipsa loquitur and Multiple Dwelling Law 78 in this elevator accident case. Plaintiff alleged the elevator door closed on her causing her to fall to the floor. There was evidence the door had malfunctioned the day before and a building representative was made aware of the malfunction. There was evidence the door would not have struck plaintiff absent a malfunction, and there was a log of incidents with the elevator which was erroneously excluded from evidence:

> Res ipsa loquitur is an evidentiary doctrine which "permits the inference of negligence to be drawn from the circumstances of the occurrence" when a plaintiff can establish that (1) the event is of a kind that ordinarily does not occur in the absence of negligence; (2) the event was caused by an agency or instrumentality within the

exclusive control of defendant; and (3) the event was not caused by the plaintiff's actions ... . "To rely on res ipsa loquitur a plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that it is more likely than not' that the injury was caused by the defendant's negligence" ... .

The doctrine of res ipsa loquitur has frequently been applied in cases involving elevator malfunctions, including those involving doors which unexpectedly closed upon and injured plaintiffs while attempting to enter and exit an elevator ... . * * *

The trial court erred in refusing to instruct the jury regarding the owner's nondelegable duty under Multiple Dwelling Law § 78. A building owner's duty under the statute extends to elevator maintenance and repair ... . The court's refusal to charge section 78 erroneously led the jury to believe that the owner's negligence could only be predicated on its actual or constructive notice of an elevator problem. **Barkley v Plaza Realty Invs. Inc., 2017 NY Slip Op 01664, 1st Dept 3-7-17**

NEGLIGENCE (SPOLIATION, FAILURE TO PRESERVE SURVEILLANCE VIDEO WHICH ALLEGEDLY SHOWED HOW PLAINTIFF WAS INJURED WARRANTED A SANCTION, EVEN THOUGH PLAINTIFF DID NOT DEMAND THE TAPE OR ASK THAT IT BE PRESERVED)/EVIDENCE (NEGLIGENCE, SPOLIATIION, FAILURE TO PRESERVE SURVEILLANCE VIDEO WHICH ALLEGEDLY SHOWED HOW PLAINTIFF WAS INJURED WARRANTED A SANCTION, EVEN THOUGH PLAINTIFF DID NOT DEMAND THE TAPE OR ASK THAT IT BE PRESERVED)/SPOLIATION (EVIDENCE, FAILURE TO PRESERVE SURVEILLANCE VIDEO WHICH ALLEGEDLY SHOWED HOW PLAINTIFF WAS INJURED WARRANTED A SANCTION, EVEN THOUGH PLAINTIFF DID NOT DEMAND THE TAPE OR ASK THAT IT BE PRESERVED)

NEGLIGENCE, EVIDENCE.

FAILURE TO PRESERVE SURVEILLANCE VIDEO WHICH ALLEGEDLY SHOWED HOW PLAINTIFF WAS INJURED WARRANTED A SANCTION, EVEN THOUGH PLAINTIFF DID NOT DEMAND THE TAPE OR ASK THAT IT BE PRESERVED.

The Second Department determined defendants should have been sanctioned for not preserving a videotape which allegedly showed plaintiff deliberately allowing a car to run over her toes. Plaintiff had not asked that the videotape be preserved. The Second Department determined the appropriate sanction is to prohibit the defendants from introducing any evidence of the contents of the tape. The Second Department further held that plaintiff was not entitled to summary judgment because her conclusory affidavit was not sufficient to demonstrate the absence of comparative fault:

Here, the Supreme Court improvidently exercised its discretion in failing to impose any sanction. The plaintiff sustained her burden of establishing that spoliation occurred, given that the defendants failed to preserve the surveillance video despite their knowledge of a reasonable likelihood of litigation regarding the incident, and the highly relevant nature of the video evidence to that litigation ... . However, since the destruction of the evidence did not deprive the plaintiff of her ability to prove her claim so as to warrant the drastic sanction of striking the defendants' answer, the appropriate sanction for the spoliation herein is to preclude the defendants from offering any evidence in this action regarding the alleged contents of the erased surveillance video ... . **Rokach v Taback, 2017 NY Slip Op 02456, 2nd Dept 3-29-17**

NEGLIGENCE (LANDLORD DID NOT OWE A DUTY TO PLAINTIFF'S SUBROGEE TO PREVENT A MENTALLY ILL TENANT FROM SMOKING IN THE APARTMENT WHERE A FIRE STARTED)/INSURANCE LAW (LANDLORD DID NOT OWE A DUTY TO PLAINTIFF'S SUBROGEE TO PREVENT A MENTALLY ILL TENANT FROM SMOKING IN THE APARTMENT WHERE A FIRE STARTED)/LANDLORD-TENANT (LANDLORD DID NOT OWE A DUTY TO PLAINTIFF'S SUBROGEE TO PREVENT A MENTALLY ILL TENANT FROM SMOKING IN THE APARTMENT WHERE A FIRE STARTED)

NEGLIGENCE, INSURANCE LAW, LANDLORD-TENANT.

LANDLORD (SUBLESSOR) DID NOT OWE A DUTY TO PLAINTIFF'S SUBROGEE TO PREVENT A MENTALLY ILL TENANT FROM SMOKING IN THE APARTMENT WHERE A FIRE STARTED.

The Second Department determined defendant nonprofit did not owe a duty of care to plaintiff's subrogee for the actions of a tenant which apparently started a fire in the tenant's apartment. Defendant nonprofit leased apartments to tenants suffering from mental illness. The tenants lived independently with little supervision:

> Under limited circumstances, the relationship between a lessor and a lessee can give rise to a duty of care inasmuch as the lessor "must exercise reasonable care not to expose third persons to an unreasonable risk of harm" ... . [T]he relevant inquiry [is] whether the defendant, as sublessor, exposed the plaintiff's insured in this case to an unreasonable risk of harm. Moreover, in evaluating the existence and scope of the duty of care, we are mindful that where, as here, the action involves only property damage, "the public policies, factors, and other analytical considerations used in setting the orbit of duty are different from those at play in cases involving physical injury" ... .
>
> Under the circumstances presented, the defendant established, prima facie, that it owed no duty to the plaintiff's insured to take affirmative steps to prevent the tenant from smoking in the demised premises ... . The evidence showed, inter alia, that all participants in the defendant's housing program had to be able to live independently, and the degree of oversight provided by the defendant under the terms of its agreement with the tenant was limited. ...
>
> "[I]n the absence of fault or a specific contract provision to the contrary, neither the landlord nor the tenant is obligated to perform repairs after a fire" ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the breach of contract cause of action by showing that the subject lease did not impose an obligation on it to repair the premises after a fire ... , or to answer in damages for a fire caused by its sublessee ... . **Tower Ins. Co. of N.Y. v Hands Across Long Is., Inc., 2017 NY Slip Op 02082, 2nd Dept 3-22-17**

NEGLIGENCE (DISMISSAL OF INTENTIONAL TORT CAUSES OF ACTION PRECLUDED SUBSEQUENT ACTION SOUNDING IN NEGLIGENCE, NO NEGLIGENT ASSAULT IN NEW YORK)/INTENTIONAL TORTS (DISMISSAL OF INTENTIONAL TORT CAUSES OF ACTION PRECLUDED SUBSEQUENT ACTION SOUNDING IN NEGLIGENCE, NO NEGLIGENT ASSAULT IN NEW YORK)/CIVIL PROCEDURE (RES JUDICATA, DISMISSAL OF INTENTIONAL TORT CAUSES OF ACTION PRECLUDED SUBSEQUENT ACTION SOUNDING IN NEGLIGENCE, NO NEGLIGENT ASSAULT IN NEW YORK)/RES JUDICATA (DISMISSAL OF INTENTIONAL TORT CAUSES OF ACTION PRECLUDED SUBSEQUENT ACTION SOUNDING IN NEGLIGENCE, NO NEGLIGENT ASSAULT IN NEW YORK)/ASSAULT (INTENTIONA TORT, DISMISSAL OF INTENTIONAL TORT CAUSES OF ACTION PRECLUDED SUBSEQUENT ACTION SOUNDING IN NEGLIGENCE, NO NEGLIGENT ASSAULT IN NEW YORK)

NEGLIGENCE, INTENTIONAL TORTS, CIVIL PROCEDURE.

DISMISSAL OF INTENTIONAL TORT CAUSES OF ACTION PRECLUDED SUBSEQUENT ACTION SOUNDING IN NEGLIGENCE, NO NEGLIGENT ASSAULT IN NEW YORK.

The Second Department noted that New York does not recognize an action for negligent assault. Plaintiff's intentional tort causes stemming from an arrest by a security guard were dismissed as time-barred. Plaintiff then brought suit under a negligence theory:

"[U]nder New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" ... . Here, the purported negligence cause of action asserted in the plaintiff's second action arose from the same operative facts as the dismissed intentional tort claims, and could have been raised in the first action. Accordingly, in view of the previous litigation between the parties, the Supreme Court properly directed the dismissal of that cause of action on the ground that it was barred by the doctrine of res judicata ... .

Furthermore, the Supreme Court properly dismissed the negligence cause of action on the additional ground that the allegations in support of it failed to state a cause of action. The allegations that Doe physically injured the plaintiff while restraining and arresting him did not transform the plaintiff's time-barred cause of action alleging assault into a timely cause of action alleging negligence, as New York does not recognize a cause of action to recover for negligent assault ... . **Johnson v City of New York, 2017 NY Slip Op 02410, 2nd Dept 3-29-17**

NEGLIGENCE (MEDICAL MALPRACTICE, CERTIFICATE OF MERIT INADEQUATE, COMPLAINT DISMISSED)/MEDICAL MALPRACTICE (CERTIFICATE OF MERIT INADEQUATE, COMPLAINT DISMISSED)/CERTIFICATE OF MERIT (MEDICAL MALPRACTICE, CERTIFICATE OF MERIT INADEQUATE, COMPLAINT DISMISSED)

NEGLIGENCE, MEDICAL MALPRACTICE.

CERTIFICATE OF MERIT INADEQUATE, COMPLAINT DISMISSED.

The Third Department determined the certificate of merit filed in this medical malpractice action was inadequate. The complaint alleged malpractice by a surgeon. The certificate was based on the affidavit of plaintiff's (Calcagno's) physical therapist:

A certificate of merit "merely ensures that counsel has satisfied himself or herself that there is a reasonable basis for the commencement of an action" ... . The statute requires counsel to submit a certificate of merit declaring that he or she has consulted with at least one licensed physician who is knowledgeable regarding the relevant issues in the action, has reviewed the facts of the case, and has thus concluded that such a reasonable basis exists ... .

We agree with Supreme Court that the certificate proffered by plaintiffs is inadequate. The allegations of malpractice arise from defendants' diagnosis and surgical treatment, and the certificate of merit is based upon an affidavit of Calcagno's physical therapist, who opined, "as a physical therapist," that defendants' actions were "departures from good and accepted medical practice." However, by definition, a physical therapist cannot diagnose and is incompetent to attest to the standard of care applicable to physicians and surgeons ... . Moreover, we find no merit in plaintiffs' contention that the certificate of merit should be deemed adequate, as it was also based on certain medical reports, Calcagno's testimony, and the pleadings. Review of these documents, standing alone, cannot suffice. Expert analysis is required to establish whether there was any departure from established standards of care, and whether any such departure was the proximate cause of injury to Calcagno ... . **Calcagno v Orthopedic Assoc. of Dutchess County, PC, 2017 NY Slip Op 01616, 3rd Dept 3-2-17**

NEGLIGENCE (LEAD PAINT, NEW YORK CITY HOUSING AUTHORITY NOT ENTITLED TO PRESUMPTION BUILDING CONSTRUCTED IN 1974 DID NOT HAVE LEAD PAINT, SUMMARY JUDGMENT PROPERLY DENIED)/MUNICIPAL LAW (LEAD PAINT, NEW YORK CITY HOUSING AUTHORITY NOT ENTITLED TO PRESUMPTION BUILDING CONSTRUCTED IN 1974 DID NOT HAVE LEAD PAINT, SUMMARY JUDGMENT PROPERLY DENIED)/LEAD PAINT (NEW YORK CITY HOUSING AUTHORITY NOT ENTITLED TO PRESUMPTION BUILDING CONSTRUCTED IN 1974 DID NOT HAVE LEAD PAINT, SUMMARY JUDGMENT PROPERLY DENIED)

NEGLIGENCE, MUNICIPAL LAW (NYC).

NEW YORK CITY HOUSING AUTHORITY NOT ENTITLED TO PRESUMPTION BUILDING CONSTRUCTED IN 1974 DID NOT HAVE LEAD PAINT, SUMMARY JUDGMENT PROPERLY DENIED.

The First Department determined the New York City Housing Authority's (NYCHA's) motion for summary judgment in this lead-paint poisoning case was properly denied. The NYCHA argued that the building was constructed in 1974 and lead paint was banned in 1960:

> Although NYCHA relies on its own testing that was negative for lead paint, DOH's [Department of Health's] lead testing came back positive. NYCHA's arguments that these were false positives due to the manner in which, and location from where, the samples were taken is insufficient to disregard them as a matter of law. * * *
>
> Nor did NYCHA prove as a matter of law, that it had no actual or constructive notice of the existence of lead paint in the building. Pursuant to the City's Childhood Lead Poisoning Prevention Act (Local Law 1 of 2004), lead-based paint is presumed to exist in a multiple dwelling unit if the building was built before 1960. Where, as here, the building is built between 1960 and 1978, the presumption will apply only if the owner knows that there is lead-based paint, and a child under the age of six lives in the apartment. Although in a pre-1960 building, paint is presumed to contain lead, the opposite is not true; there is no presumption that paint in a building constructed after 1960 is not lead-based. Given plaintiff's claim, that NYCHA maintains the premises and assumed the duty to have the apartments painted, the absence of any evidence concerning the history of painting in the subject apartments is insufficient for the court to rule out, as a matter of law, notice. **Dakota Jade T. v New York City Hous. Auth., 2017 NY Slip Op 01987, 1st Dept 3-21-17**

NEGLIGENCE (PLAINTIFF INJURED IN COLLSION WITH A POLICE CAR, POLICE REPORT PROVIDED CITY WITH NOTICE OF THE CLAIM, PETITION TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED DESPITE LACK OF EXCUSE)/MUNICIPAL LAW (NOTICE OF CLAIM, PLAINTIFF INJURED IN COLLSION WITH A POLICE CAR, POLICE REPORT PROVIDED CITY WITH NOTICE OF THE CLAIM, PETITION TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED DESPITE LACK OF EXCUSE)/NOTICE OF CLAIM (MUNICIPAL LAW, PLAINTIFF INJURED IN COLLSION WITH A POLICE CAR, POLICE REPORT PROVIDED CITY WITH NOTICE OF THE CLAIM, PETITION TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED DESPITE LACK OF EXCUSE)

NEGLIGENCE, MUNICIPAL LAW.

PLAINTIFF INJURED IN COLLSION WITH A POLICE CAR, POLICE REPORT PROVIDED CITY WITH NOTICE OF THE CLAIM, PETITION TO FILE LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED DESPITE LACK OF EXCUSE.

The Second Department determined the petition for leave to file a late notice of claim should have been granted, despite of the lack of an adequate excuse. The plaintiff was involved in an accident with a police car. The police report noted that plaintiff was injured. Therefore the city had timely notice of essential elements of the claim:

Here, the City and the NYPD acquired timely actual notice of the facts underlying the claim. The subject motor vehicle accident involved a police department vehicle and police department employee. The NYPD responded to the scene and conducted an investigation into the facts and circumstances surrounding the accident. Indeed, the police accident report specifically noted that the petitioner, as well as the driver of the vehicle in which she was a passenger, made statements alleging that [the officer] was liable. The police accident report also noted that the petitioner was injured and that a copy of the report was being provided to the Office of the Comptroller, as well as the Motor Transport Division and Personal Safety Unit of the NYPD. Thus, the overall circumstances of this matter support an inference that the City effectively received actual notice of the essential facts constituting the claim ... . In light of the City's actual knowledge of the essential facts constituting the claim, there is no substantial prejudice to the City in maintaining a defense ... . "[W]here there is actual notice and an absence of prejudice, the lack of reasonable excuse will not bar the granting of leave to serve a late notice of claim" ... . **Matter of Jaffier v City of New York, 2017 NY Slip Op 02039, 2nd Dept 3-22-17**

NEGLIGENCE (PLAINTIFF COULD NOT IDENTIFY CAUSE OF HIS FALL, COMPLAINT PROPERLY DISMISSED)/MUNICIPAL LAW (SLIP AND FALL, SIDEWALKS, PLAINTIFF COULD NOT IDENTIFY CAUSE OF HIS FALL, COMPLAINT PROPERLY DISMISSED)/SLIP AND FALL (PLAINTIFF COULD NOT IDENTIFY CAUSE OF HIS FALL, COMPLAINT PROPERLY DISMISSED)/SIDEWALKS (SLIP AND FALL, PLAINTIFF COULD NOT IDENTIFY CAUSE OF HIS FALL, COMPLAINT PROPERLY DISMISSED)

NEGLIGENCE, MUNICIPAL LAW.

PLAINTIFF COULD NOT IDENTIFY CAUSE OF HIS FALL, COMPLAINT PROPERLY DISMISSED.

The Second Department determined plaintiff's slip and fall complaint was properly dismissed because plaintiff could not identify the cause of his fall:

During his 50-h hearing, the injured plaintiff testified that he was walking on the sidewalk and was about to cross the street when his right foot caught on "some sort of stone," causing him to fall. He did not see the stone before the accident, but after he fell, he looked and saw stones embedded in the earth around a tree, which caught his foot. At his deposition, however, the injured plaintiff testified that as he was about to cross the street, he was paying attention to traffic and his foot "hit something" causing him to lose his balance and fall. This time, he identified a raised portion of the sidewalk, approximately three feet away from the tree, as the cause of his fall. He distinguished this area from the cobblestones around the tree and testified that he did not make contact with the cobblestones, as he was "further down, to the side of the tree." Contrary to the plaintiffs' contention, the injured plaintiff's own contradictory testimony does not create a question of fact ... . Rather, it demonstrates that he is unable to identify the cause of his fall and any determination by the trier of fact as to causation would be based upon sheer speculation ... . **Vojvodic v City of New York, 2017 NY Slip Op 02085, 2nd Dept 3-22-17**

NEGLIGENCE (LEAD POISONING, STATUTE OF LIMITATIONS RUNS FROM WHEN THE SYMPTOMS ARE FIRST DISCOVERED, NOT WHEN THE CAUSE OF THE SYMPTOMS IS LEARNED)/TOXIC TORTS (LEAD POISONING, STATUTE OF LIMITATIONS RUNS FROM WHEN THE SYMPTOMS ARE FIRST DISCOVERED, NOT WHEN THE CAUSE OF THE SYMPTOMS IS LEARNED/LEAD POISONING (STATUTE OF LIMITATIONS RUNS FROM WHEN THE SYMPTOMS ARE FIRST DISCOVERED, NOT WHEN THE CAUSE OF THE SYMPTOMS IS LEARNED)

NEGLIGENCE, TOXIC TORTS.

LEAD POISONING, STATUTE OF LIMITATIONS RUNS FROM WHEN THE SYMPTOMS ARE FIRST DISCOVERED, NOT WHEN THE CAUSE OF THE SYMPTOMS IS LEARNED.

The Third Department determined an action by a 28-year-old woman alleging lead paint poisoning was time-barred. Plaintiff was first diagnosed with high levels of lead in 1990. The statute of limitations runs from when the symptoms are first discovered, not when the cause of the symptoms is learned:

> ... [D]efendants' submissions were sufficient to demonstrate that plaintiff was cognizant of her claimed injuries, or, at a minimum, reasonably should have been, such that the action is barred by the statute of limitations. Although CPLR 214-c (2) permits an action to proceed within three years from the "discovery of the injury," this means the "discover[y of] the primary condition on which the claim is based" ... , or, put differently, "the discovery of the manifestations or symptoms of the latent disease that the harmful substance produced" ... . Here, accepting that lead was the causative harmful substance, plaintiff was aware of her injuries, which first manifested when she started public education in 1990 and, according to plaintiff, continued throughout her school years. Although plaintiff argues that her action is timely because she first discovered that she suffered lead poisoning when her attorney sent a solicitation letter to her mother in 2012, we disagree. Where, as here, a plaintiff is seeking the benefit of the discovery rule applicable to toxic torts, the statute runs from the date the condition or symptom is discovered or reasonably should have been discovered, not the discovery of the specific cause of the condition or symptom ... . **Vasilatos v Dzamba, 2017 NY Slip Op 01615, 3rd Dept 3-2-17**

NEGIGENCE (WORKERS' COMPENSATION LAW, ALTHOUGH PLAINTIFF INJURED BY CO-WORKER, QUESTION OF FACT WHETHER DEFENDANT'S ACTIONS WERE GROSSLY NEGLIGENT AND THEREFORE NOT WITHIN THE SCOPE OF EMPLOYMENT, ALSO A QUESTION OF FACT WHETHER EMPLOYER CONDONED DEFENDANT'S ACTIONS, PLAINTIFF'S SUIT NOT PRECLUDED BY WORKERS' COMPENSATION LAW)/WORKERS' COMPENSATION LAW (NEGLIGENCE, (ALTHOUGH PLAINTIFF INJURED BY CO-WORKER, QUESTION OF FACT WHETHER DEFENDANT'S ACTIONS WERE GROSSLY NEGLIGENT AND THEREFORE NOT WITHIN THE SCOPE OF EMPLOYMENT, ALSO A QUESTION OF FACT WHETHER EMPLOYER CONDONED DEFENDANT'S ACTIONS, PLAINTIFF'S SUIT NOT PRECLUDED BY WORKERS' COMPENSATION LAW)/EMPLOYMENT LAW (WORKERS' COMPENSATION LAW, ALTHOUGH PLAINTIFF INJURED BY CO-WORKER, QUESTION OF FACT WHETHER DEFENDANT'S ACTIONS WERE GROSSLY NEGLIGENT AND THEREFORE NOT WITHIN THE SCOPE OF EMPLOYMENT, ALSO A QUESTION OF FACT WHETHER EMPLOYER CONDONED DEFENDANT'S ACTIONS, PLAINTIFF'S SUIT NOT PRECLUDED BY WORKERS' COMPENSATION LAW)

NEGLIGENCE, WORKERS' COMPENSATION LAW, EMPLOYMENT LAW.

ALTHOUGH PLAINTIFF INJURED BY CO-WORKER, QUESTION OF FACT WHETHER DEFENDANT'S ACTIONS WERE GROSSLY NEGLIGENT AND THEREFORE NOT WITHIN THE SCOPE OF EMPLOYMENT, ALSO A QUESTION OF FACT WHETHER EMPLOYER CONDONED DEFENDANT'S ACTIONS, PLAINTIFF'S SUIT NOT PRECLUDED BY WORKERS' COMPENSATION LAW.

The Third Department determined plaintiff could sue in negligence, despite the fact that defendant was a co-worker. Defendant struck plaintiff with a golf club inflicting an injury that required the removal of a testicle. There was a question of fact whether defendant's actions were grossly negligent or reckless and there not within the scope of defendant's employment. There was also a question of fact whether the employer condoned defendant's actions:

There is no dispute that plaintiff and defendant were coemployees, that plaintiff was injured in the course of his employment and that he collected workers' compensation benefits for his injuries. Pursuant to Workers' Compensation Law § 29 (6), these benefits are the exclusive remedy for an employee injured "by the negligence or wrong of another in the same employ." Having the same employer is not synonymous with being "in the same employ" and, to be shielded from liability, a defendant "must himself [or herself] have been acting within the scope of his [or her] employment and not have been engaged in a willful or intentional tort" ... . Here, there is no indication that plaintiff was involved in any horseplay ... . The differing versions of the event presented by the parties, as well as the two club employees who supported plaintiff's version, raise genuine questions of fact as to whether defendant intended to strike plaintiff and did so in an excessive manner given the sensitive area of impact. Although defendant was not directly disciplined by the club and resigned to take a new position a few months after the incident, a question of fact also remains as to whether the club condoned defendant's actions. As such, we conclude that Supreme Court properly determined that questions of fact existed as to whether defendant acted in a "grossly negligent and/or reckless" manner when he swung the golf club shaft and struck plaintiff, as alleged in the complaint ... . **Montgomery v Hackenburg, 2017 NY Slip Op 01744, 3rd Dept 3-9-17**

PRODUCTS LIABILITY

PRODUCTS LIABILITY (PRODUCTS LIABILITY ACTION AGAINST ELEVATOR MANUFACTURER SHOULD HAVE SURVIVED SUMMARY JUDGMENT, LABOR LAW 240(1) INAPPLICABLE TO ELEVATOR ACCIDENT)/ELEVATORS (PRODUCTS LIABILITY ACTION AGAINST ELEVATOR MANUFACTURER SHOULD HAVE SURVIVED SUMMARY JUDGMENT, LABOR LAW 240(1) INAPPLICABLE TO ELEVATOR ACCIDENT)/LABOR LAW-CONSTRUCTION LAW (PRODUCTS LIABILITY ACTION AGAINST ELEVATOR MANUFACTURER SHOULD HAVE SURVIVED SUMMARY JUDGMENT, LABOR LAW 240(1) INAPPLICABLE TO ELEVATOR ACCIDENT)

PRODUCTS LIABILITY, LABOR LAW-CONSTRUCTION LAW.

PRODUCTS LIABILITY ACTION AGAINST ELEVATOR MANUFACTURER SHOULD HAVE SURVIVED SUMMARY JUDGMENT, LABOR LAW 240(1) INAPPLICABLE TO ELEVATOR ACCIDENT.

The First Department, reversing Supreme Court, determined there was a question fact whether a defective elevator part caused the elevator to fall when plaintiff, who was repairing the elevator, was in the elevator car. The court further determined plaintiff's Labor Law 240(1) was properly dismissed because securing the elevator to prevent a fall would have made repairing the elevator impossible:

> ... [P]aintiff raised issues of fact whether the shim was defective and a cause of the accident and whether there was a failure to warn. Plaintiff's expert opined that the cracked shoe caused the elevator car to get wedged in the hoistway in the manner that plaintiff described, and ... [an] engineer involved in the design of the elevator acknowledged that the car could come out of the rails and get hung up if a guide shoe cracked while the elevator was descending. The engineer also testified that, after a previous instance in which a similar guide shoe by the same manufacturer had cracked because bolts had been over-tightened, [the manufacturer] had redesigned the shim in 2003 to prevent the guide shoe from cracking because of over-tightening of the bolts, but had made no effort to notify customers whose elevators had the older shims.
>
> The elevator was not a safety device within the meaning of Labor Law § 240(1) ... . Plaintiff's reliance on McCrea v Arnlie Realty Co. LLC (140 AD3d 427 [1st Dept 2016]) is unavailing. In that case, the elevator on which the plaintiff was engaged in repair work fell onto the plaintiff because it had not been secured. In this case, plaintiff was inside the elevator, riding up and down to test it. To the extent plaintiff may have been engaged in "repair" within the meaning of Labor Law § 240(1), the statute does not apply, because any securing device would have defeated the purpose of his work by precluding him from riding the elevator ... . **Versace v 1540 Broadway L.P., 2017 NY Slip Op 01813, 1st Dept 3-15-17**

REAL PROPERTY LAW

REAL PROPERTY (MINERAL RIGHTS INCLUDE THE RIGHT TO REMOVE SAND AND GRAVEL)/MINERAL RIGHTS (MINERAL RIGHTS INCLUDE THE RIGHT TO REMOVE SAND AND GRAVEL)/SAND AND GRAVEL (REAL PROPERTY, (MINERAL RIGHTS INCLUDE THE RIGHT TO REMOVE SAND AND GRAVEL)/MINERAL RIGHTS (MINERAL RIGHTS INCLUDE THE RIGHT TO REMOVE SAND AND GRAVEL)

REAL PROPERTY.

MINERAL RIGHTS INCLUDE THE RIGHT TO REMOVE SAND AND GRAVEL.

The Third Department explained the meaning of mineral rights (as opposed to surface rights) as that term appeared in a 1917 deed. The court held that the term encompassed all inorganic material, including sand and gravel:

> Supreme Court correctly determined as a matter of law that those mineral rights that plaintiffs owned and that were originally derived from a 1917 deed from a grantor, who was the common grantor of plaintiffs' mineral rights and at least certain of [defendant's] surface rights, included the right to extract and remove sand and gravel. The Court of Appeals has directly passed on the meaning of the term "minerals" as used in a conveyance and concluded that the term "will include all inorganic substances [that] can be taken from the land" where the term's meaning is not restricted "b[y] qualifying words, or language, evidencing that the parties contemplated something less general than all substances legally cognizable as minerals" ... . Thus, unless qualifying and restrictive language related to the term minerals renders the term ambiguous in any particular conveyance, the meaning of minerals is determinable as a matter of law and is not subject to extrinsic proof ... . The 1917 deed conveyed a minerals estate that included "all . . . minerals in, under and upon" the specified properties together with the right to "dig, mine and remove" those minerals from the land free from any liability for damage. Accordingly, given that the language in the 1917 deed does not qualify or restrict the term minerals, the Court of Appeals' interpretation controls. Therefore, as sand and gravel are "inorganic substances [that] can be taken from the land," they fall within the mineral rights conveyed by the 1917 deed ... . **Champlain Gas & Oil, LLC v People of The State of New York, 2017 NY Slip Op 01610, 3rd Dept 3-2-17**

REAL PROPERTY TAX LAW

REAL PROPERTY TAX LAW (FIBER OPTIC CABLES NOT TAXABLE UNDER THE REAL PROPERTY TAX LAW)/TAX LAW (FIBER OPTIC CABLES NOT TAXABLE UNDER THE REAL PROPERTY TAX LAW)/FIBER OPTIC CABLES (FIBER OPTIC CABLES NOT TAXABLE UNDER THE REAL PROPERTY TAX LAW)

REAL PROPERTY TAX LAW.

FIBER OPTIC CABLES NOT TAXABLE UNDER THE REAL PROPERTY TAX LAW.

The Fourth Department, reversing Supreme Court, determined fiber optic cables were not included in the statutory definition of real property and therefore were not taxable under the Real Property Tax Law (RPTL). However, because the fiber optic company paid the taxes voluntarily and without protest, it was not entitled to a refund:

The word distribution means "a spreading out or scattering over an area or throughout a space" or "delivery or conveyance (as of newspapers or goods) to the members of a group" (Webster's Third New International Dictionary [2002]). Examples include "the distribution of the oil throughout the engine parts" and "the distribution of telephone directories to customers" (id.). In other words, distribution implies an "apportioning of something" more or less evenly, or as a due or right, to an "appropriate person or place" ... . Given the context in which the word distribution appears in RPTL 102 (12) (f), that definition makes sense. Undoubtedly, the kinds of equipment enumerated in the statute, such as boilers, plumbing, and lighting apparatus, distribute heat, liquids, and light to consumers. By contrast, although "the fiber optic cables at issue undeniably transmit light signals from one end of the network to the other, such transmission does not result in the distribution' of light, but rather data" ... . Thus, we cannot conclude that petitioner's fiber optic installations distribute light " without resorting to an artificial or forced construction' " ... . **Matter of Level 3 Communications, LLC v Chautauqua County, 2017 NY Slip Op 02322, 4th Dept 3-24-17**

RETIREMENT AND SOCIAL SECURITY LAW

RETIREMENT AND SOCIAL SECURITY LAW (POLICE OFFICER DID NOT DEMONSTRATE HIS PULMONARY HYPERTENSION WAS RELATED TO HIS SERVICE AT THE WORLD TRADE CENTER ON 9-11)/WORLD TRADE CENTER (9-11) (POLICE OFFICER DID NOT DEMONSTRATE HIS PULMONARY HYPERTENSION WAS RELATED TO HIS SERVICE AT THE WORLD TRADE CENTER ON 9-11)/POLICE OFFICERS (9-11, POLICE OFFICER DID NOT DEMONSTRATE HIS PULMONARY HYPERTENSION WAS RELATED TO HIS SERVICE AT THE WORLD TRADE CENTER ON 9-11)/HYPERTENSION (9-11, POLICE OFFICER DID NOT DEMONSTRATE HIS PULMONARY HYPERTENSION WAS RELATED TO HIS SERVICE AT THE WORLD TRADE CENTER ON 9-11)

RETIREMENT AND SOCIAL SECURITY LAW.

POLICE OFFICER DID NOT DEMONSTRATE HIS PULMONARY HYPERTENSION WAS RELATED TO HIS SERVICE AT THE WORLD TRADE CENTER ON 9-11.

The First Department, in an extensive decision, determined petitioner, a police officer who worked over 100 hours at the World Trade Center (WTC) beginning on September 11, 2001, was not entitled to accident disability retirement benefits (ADR) based upon pulmonary hypertension. There was no showing the pulmonary hypertension was related to the time spent at the WTC:

The record establishes that, long before the events of September 11, 2001, petitioner suffered from a number of medical conditions that are risk factors for the development of pulmonary hypertension. * * *

The record is devoid of any medical study linking exposure to WTC site contaminants to pulmonary hypertension, nor does it contain any evidence that other WTC site responders have been diagnosed with this condition in numbers greater than would be predicted from general epidemiological experience. **Matter of Stavropoulos v Bratton, 2017 NY Slip Op 01779, 1st Dept 3-9-17**

SECURITIES

SECURITIES (PUTBACK ACTION STEMMING FROM THE PURCHASE OF RESIDENTIAL MORTGAGE BACKED SECURITIES SURVIVED MOTIONS TO DISMISS)/CONTRACT LAW (PUTBACK ACTION STEMMING FROM THE PURCHASE OF RESIDENTIAL MORTGAGE BACKED SECURITIES SURVIVED MOTIONS TO DISMISS)/RESIDENTIAL MORTGAGE BACKED SECURITIES (PUTBACK ACTION STEMMING FROM THE PURCHASE OF RESIDENTIAL MORTGAGE BACKED SECURITIES SURVIVED MOTIONS TO DISMISS)/PUTBACK ACTIONS (RESIDENTIAL MORTGAGE BACKED SECURITIES, PUTBACK ACTION STEMMING FROM THE PURCHASE OF RESIDENTIAL MORTGAGE BACKED SECURITIES SURVIVED MOTIONS TO DISMISS)

SECURITIES, CONTRACT LAW.

PUTBACK ACTION STEMMING FROM THE PURCHASE OF RESIDENTIAL MORTGAGE BACKED SECURITIES SURVIVED MOTIONS TO DISMISS.

The First Department, in a full-fledged opinion by Justice Renwick, determined the action alleging breach of warranties and representations in connection with the purchase of residential mortgage backed securities (RMBS) properly survived motions to dismiss. The opinion is fact-specific and turns on the terms of the contracts. The issues, all of which survived the dismissal motions, were summarized by the court as follows:

> This appeal stems from a transaction involving residential mortgage backed securities (RMBS). Plaintiff, the administrator of the securitized trust, seeks to enforce the loan repurchase rights, more commonly referred to as putback rights, against defendant sponsor of the securitized transaction for breach of the representations and warranties defendant made regarding the quality of the mortgage loans. This action raises a number of issues that regularly recur in putback actions, including whether the action was timely commenced, whether or not the action is unripe for failing to comply with a condition precedent to commencement of the action, and whether plaintiff adequately pleaded a cause of action for breach of the representations and warranties. This action also raises an issue of first impression of whether enforcement of putback rights is within the exclusive domain of a RMBS's trustee so as to deny plaintiff Securities Administrator standing to commence this action. **Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC, 2017 NY Slip Op 01796, 1st Dept 3-9-17**

SECURITIES (PLAINTIFF'S LOSS WAS DUE TO THE MARKET COLLAPSE OF RESIDENTIAL-BACKED MORTGAGE SECURITIES, LOSS CAUSATION ELEMENT OF FRAUD CAUSE OF ACTION THEREFORE NOT DEMONSTRATED)/RESIDENTIAL-BACKED MORTGAGE SECURITIES (PLAINTIFF'S LOSS WAS DUE TO THE MARKET COLLAPSE OF RESIDENTIAL-BACKED MORTGAGE SECURITIES, LOSS CAUSATION ELEMENT OF FRAUD CAUSE OF ACTION THEREFORE NOT DEMONSTRATED)/FRAUD (RESIDENTIAL-BACKED MORTGAGE SECURITIES, PLAINTIFF'S LOSS WAS DUE TO THE MARKET COLLAPSE OF RESIDENTIAL-BACKED MORTGAGE SECURITIES, LOSS CAUSATION ELEMENT OF FRAUD CAUSE OF ACTION THEREFORE NOT DEMONSTRATED)/LOSS CAUSATION (FRAUD, RESIDENTIAL-BACKED MORTGAGE SECURITIES, PLAINTIFF'S LOSS WAS DUE TO THE MARKET COLLAPSE OF RESIDENTIAL-BACKED MORTGAGE SECURITIES, LOSS CAUSATION ELEMENT OF FRAUD CAUSE OF ACTION THEREFORE NOT DEMONSTRATED)

SECURITIES, FRAUD.

PLAINTIFF'S LOSS WAS DUE TO THE MARKET COLLAPSE OF RESIDENTIAL-BACKED MORTGAGE SECURITIES, LOSS CAUSATION ELEMENT OF FRAUD CAUSE OF ACTION THEREFORE NOT DEMONSTRATED.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Kapnick, determined defendant TCW's motion for summary judgment in this residential-backed mortgage securities (RBMS) fraud action should have

been granted. TCW represented it could select less risky RBMS's and plaintiff invested $27,000,000 . The market subsequently collapsed. The First Department found the proof of "loss causation" lacking:

> " Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff'" ... . To establish loss causation a plaintiff must prove that the " subject of the fraudulent statement or omission was the cause of the actual loss suffered'" ... . Moreover, " when the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff's loss was caused by the fraud decreases', and a plaintiff's claim fails when it has not . . . proven . . . that its loss was caused by the alleged misstatements as opposed to intervening events'" ... . Indeed, when an investor suffers an investment loss due to a "market crash [] of such dramatic proportions that [the] losses would have occurred at the same time and to the same extent regardless of the alleged fraud," loss causation is lacking ... . **Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co., 2017 NY Slip Op 01644, 1st Dept 3-2-17**

TAX LAW

TAX LAW (IN THIS PROSECUTION ALLEGING DEFENDANT CELL PHONE COMPANY'S UNDERPAYMENT OF SALES TAX, DEFENDANT WAS ENTITLED TO THE SALES TAX RETURNS OF OTHER CELL PHONE SERVICE PROVIDERS)/SALES TAX (CELL PHONE SERVICE PROVIDERS, IN THIS PROSECUTION ALLEGING DEFENDANT CELL PHONE COMPANY'S UNDERPAYMENT OF SALES TAX, DEFENDANT WAS ENTITLED TO THE SALES TAX RETURNS OF OTHER CELL PHONE SERVICE PROVIDERS)/CELL PHONE SERVICE PROVIDERS (SALES TAX, IN THIS PROSECUTION ALLEGING DEFENDANT CELL PHONE COMPANY'S UNDERPAYMENT OF SALES TAX, DEFENDANT WAS ENTITLED TO THE SALES TAX RETURNS OF OTHER CELL PHONE SERVICE PROVIDERS)

TAX LAW.

IN THIS PROSECUTION ALLEGING DEFENDANT CELL PHONE COMPANY'S UNDERPAYMENT OF SALES TAX, DEFENDANT WAS ENTITLED TO THE SALES TAX RETURNS OF OTHER CELL PHONE SERVICE PROVIDERS.

The First Department determined defendant Sprint Communications was entitled to the state's sales tax returns and records of other providers of mobile telecommunications voice services, but with the names of the providers redacted. The action was brought by the state and alleged the underpayment of sales tax:

> The People claim that they will use only material obtained from third-party discovery and that they have disclosed those materials to defendants. However, the fact that the People have chosen to restrict the materials they will use to prosecute defendants does not mean that defendants must restrict the materials they will use to defend themselves. Moreover, defendants cannot obtain ... [the] documents from third parties.
>
> If a document that shows another cell phone company's or DTF's position about debundling, etc., happens to mention the other cell phone company's name, the People may not withhold the entire document. ... Instead, the People should replace the taxpayers' names with "Cell Phone Company No. 1" and "Cell Phone Company No. 2," or the like. **People v Sprint Communications Inc., 2017 NY Slip Op 01801, 1st Dept 3-15-17**

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS (TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS CAUSE OF ACTION PROPERLY SURVIVED A MOTION TO DISMISS, LAW OF THE CASE DOCTRINE APPLIES ONLY TO COURTS OF COORDINATE JURISDICTION)/APPEALS (TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS CAUSE OF ACTION PROPERLY SURVIVED A MOTION TO DISMISS, LAW OF THE CASE DOCTRINE APPLIES ONLY TO COURTS OF COORDINATE JURISDICTION)/LAW OF THE CASE (TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS CAUSE OF ACTION PROPERLY SURVIVED A MOTION TO DISMISS, LAW OF THE CASE DOCTRINE APPLIES ONLY TO COURTS OF COORDINATE JURISDICTION)

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS, APPEALS.

TORTIOUS INTERFERENCE WITH BUSINESS RELATIONS CAUSE OF ACTION PROPERLY SURVIVED A MOTION TO DISMISS, LAW OF THE CASE DOCTRINE APPLIES ONLY TO COURTS OF COORDINATE JURISDICTION.

The First Department determined plaintiff had stated a cause of action for tortious interference with business relations. Plaintiff, a Broadway musical producer, alleged defendant made false statements implicating plaintiff in investor fraud (committed by a nonparty). The court noted that the law of the case doctrine applies only to courts of coordinate jurisdiction, not to the appellate courts:

> The tortious interference claim was properly sustained insofar as it was premised on emails sent by defendant to a key investor, but not insofar as it was premised on comments made by defendant's attorney that were quoted in various news articles.
>
> As to the emails, plaintiff adequately pled that defendant's conduct was unlawful or for the sole purpose of inflicting intentional harm on plaintiff ... - as we observed in a related action premised on these same emails (see Rebecca Broadway L.P. v Hotton, 143 AD3d 71, 77 [1st Dept 2016]). Specifically, plaintiff alleged that, in sending the emails, defendant misappropriated confidential information he was privy to as a result of his position as the musical's press agent and committed the independent tort of defamation ... . **Sprecher v Thibodeau, 2017 NY Slip Op 02519, 1st Dept 3-30-17**

TRUSTS AND ESTATES

TRUSTS AND ESTATES (DEFENDANT FOUND NOT GUILTY BY REASON OF INSANITY CAN BE SUED FOR WRONGFUL DEATH UNDER THE EPTL, BOTH FOR THE STABBING DEATH OF HIS MOTHER AND THE RELATED SUICIDE OF HIS BROTHER)/WRONGFUL DEATH (DEFENDANT FOUND NOT GUILTY BY REASON OF INSANITY CAN BE SUED FOR WRONGFUL DEATH UNDER THE EPTL, BOTH FOR THE STABBING DEATH OF HIS MOTHER AND THE RELATED SUICIDE OF HIS BROTHER)/MENTAL ILLNESS (DEFENDANT FOUND NOT GUILTY BY REASON OF INSANITY CAN BE SUED FOR WRONGFUL DEATH UNDER THE EPTL, BOTH FOR THE STABBING DEATH OF HIS MOTHER AND THE RELATED SUICIDE OF HIS BROTHER)

TRUSTS AND ESTATES.

DEFENDANT FOUND NOT GUILTY BY REASON OF INSANITY CAN BE SUED FOR WRONGFUL DEATH UNDER THE EPTL, BOTH FOR THE STABBING DEATH OF HIS MOTHER AND THE RELATED SUICIDE OF HIS BROTHER.

The First Department, reversing Supreme Court, determined the fact that defendant was found not guilty by reason of insanity in connection with the stabbing of his mother did not preclude wrongful death claims against him pursuant to EPTL 5-4.1, both for the death of his mother and the related suicide of his brother:

> Although defendant was found not guilty by reason of mental disease or defect in connection with the stabbing death of his mother, the complaint stated a viable wrongful death claim against him pursuant to EPTL 5-4.1, since an insane person may be liable in tort for his actions ... . A wrongful death claim was also stated on behalf of defendant's brother, who committed suicide after his mother's murder. **Rosen v Schwartz, 2017 NY Slip Op 02517, 1st Dept 3-30-17**

UNEMPLOYMENT INSURANCE LAW

UNEMPLOYMENT INSURANCE LAW (BUILDING AND HOME INSPECTORS WERE EMPLOYEES OF ENGINEERING FIRM)/BUILDING INSPECTORS (UNEMPLOYMENT INSURANCE, BUILDING AND HOME INSPECTORS WERE EMPLOYEES OF ENGINEERING FIRM)

UNEMPLOYMENT INSURANCE LAW.

BUILDING AND HOME INSPECTORS WERE EMPLOYEES OF ENGINEERING FIRM.

The Third Department determined architects and engineers hired by Tauscher to conduct building and home inspections were employees entitled to unemployment insurance benefits:

> Here, although the inspectors signed a standard agreement identifying them as independent contractors, the agreement contained a noncompete clause prohibiting the inspectors from working directly or indirectly with competing engineering firms within Tauscher's geographic region, including 100 miles from the Empire State Building in New York City. The agreement further provided that the inspectors perform their inspections in accordance with industry and professional standards and that their post-inspection reports be drafted on forms

provided by Tauscher and submitted to Tauscher within a limited time frame. The inspectors were also required to participate in Tauscher's self-insurance fund, as well as pay for professional liability insurance obtained by Tauscher, and to share in the costs of any litigation arising out of the inspections. Tauscher scheduled the time of the inspections, which were not subject to modification by the inspectors, and would seek a replacement inspector if the original inspector was unavailable. Tauscher also provided the inspectors with business cards bearing Tauscher's name to provide to its clients.

With regard to compensation, Tauscher established the fees that clients were required to pay for the inspections and also unilaterally set the percentage of the fees that constituted payment for the inspectors. In order for the inspectors to receive payment, they were required to submit invoices to Tauscher, which in turn would pay the inspectors directly. In addition, Tauscher managed the billing of, and collection from, clients. Notwithstanding the proof in the record that could support a contrary result, the foregoing evidence demonstrates that Tauscher retained overall control over important aspects of the services performed by the inspectors, and we therefore find that substantial evidence supports the determination of the Board assessing Tauscher additional unemployment insurance contributions for remuneration paid to the inspectors ... . **Matter of Tauscher Cronacher PE PC (Commissioner of Labor). 2017 NY Slip Op 02488. 3rd Dept 3-30-17**

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION LAW (EXERTIONAL ABILITY OF LESS THAN SEDENTARY WORK DOES NOT EQUATE TO A FINDING OF PERMANENT TOTAL DISABILITY, PERMANENT PARTIAL DISABILTIY FINDING AFFIRMED)/EXERTIONAL ABILITY (WORKERS' COMPENSATION LAW, EXERTIONAL ABILITY OF LESS THAN SEDENTARY WORK DOES NOT EQUATE TO A FINDING OF PERMANENT TOTAL DISABILITY, PERMANENT PARTIAL DISABILTIY FINDING AFFIRMED)

WORKERS' COMPENSATION LAW.

EXERTIONAL ABILITY OF LESS THAN SEDENTARY WORK DOES NOT EQUATE TO A FINDING OF PERMANENT TOTAL DISABILITY, PERMANENT PARTIAL DISABILTY FINDING AFFIRMED.

The Third Department, over a two-justice dissent, determined the evidence supported the Workers' Compensation Board's permanent partial disability finding. Claimant argued she was totally disabled and contended the Board's finding she has an exertional ability of "less than sedentary work" equated to a finding of permanent total disability. On that issue, the Third Department wrote:

Under the Board guidelines, physicians are required to perform an evaluation of a claimant's functional capabilities, including his or her exertional abilities (see New York State Guidelines for Determining Permanent Impairment and Loss of Wage Earning Capacity at 44-46 [2012]). The finding of a claimant's exertional ability is a factor to be considered by the Board in determining the claimant's loss of wage-earning capacity ... . The loss of wage-earning capacity is used to establish the duration of benefits for claimants that have sustained a permanent partial disability ... . "In contrast, a permanent total disability is established where the medical proof shows a claimant is totally disabled and unable to engage in any gainful employment. The duration of benefits is not an issue in the permanent total disability context for the simple reason that there is no expectation that a claimant found to have such a disability will rejoin the work force" ... . Accordingly, a finding that a claimant has an exertional ability of performing less than sedentary work, while a factor to consider in setting the duration of a permanently partially disabled claimant's benefits, is not dispositive in the context of establishing the claimant's overall disability. Rather, the exertional ability to work is applicable only to those claimants already found to have sustained a permanent partial disability and, therefore, are expected to rejoin the work force. **Matter of Burgos v Citywide Cent. Ins. Program, 2017 NY Slip Op 02489, 3rd Dept 3-30-17**

ZONING

ZONING (PLANNING BOARD ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT DENIED PETITIONER'S CHALLENGE TO A WOODLOT ENVIRONMENTAL PROTECTION OVERLAY DISTRICT (EPOD) FINDING, PLANNING BOARD DID NOT CONSIDER THE CRITERIA LAID OUT IN THE TOWN CODE)/ENVIROMENTAL LAW (ENVIRONMENTAL PROTECTION OVERLAY DISTRICT, (PLANNING BOARD ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT DENIED PETITIONER'S CHALLENGE TO A WOODLOT ENVIRONMENTAL PROTECTION OVERLAY DISTRICT (EPOD) FINDING, PLANNING BOARD DID NOT CONSIDER THE CRITERIA LAID OUT IN THE TOWN CODE)/PLANNIG BOARD (PLANNING BOARD ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT DENIED PETITIONER'S CHALLENGE TO A WOODLOT ENVIRONMENTAL PROTECTION OVERLAY DISTRICT (EPOD) FINDING, PLANNING BOARD DID NOT CONSIDER THE CRITERIA LAID OUT IN THE TOWN CODE)

ZONING, ENVIRONMENTAL LAW.

PLANNING BOARD ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT DENIED PETITIONER'S CHALLENGE TO A WOODLOT ENVIRONMENTAL PROTECTION OVERLAY DISTRICT (EPOD) FINDING, PLANNING BOARD DID NOT CONSIDER THE CRITERIA LAID OUT IN THE TOWN CODE.

The Fourth Department determined the respondent town planning board acted arbitrarily and capriciously when it denied petitioner's challenge to the finding his property was within the boundaries of a woodlot environmental protection overlay district (EPOD). The Fourth Department held that the respondent was obligated to consider the EPOD criteria laid out in the Town Code and failed to do so:

> Petitioner owns property located within a Woodlot Overlay Protection District in the Town of Irondequoit, as set forth on the Woodlots Map of the Town of Irondequoit. Irondequoit Town Code (Town Code) § 235-43 provides that the locations and boundaries of an environmental protection overlay district (EPOD) shall be delineated on the official set of maps, but further states that those maps "shall be used for reference purposes only and shall not be used to delineate specific or exact boundaries of the various overlay districts. Field investigations and/or other environmental analyses may be required in order to determine whether or not a particular piece of property is included within one or more of the overlay districts." Section 235-44 then provides that the "Town Department of Planning and Zoning shall be responsible for interpreting [EPOD] boundaries based on an interpretation of the Official Town of Irondequoit EPOD Maps, as well as the use of various criteria set forth in this article for determining such district boundaries." For a Woodlot EPOD, those criteria are set forth at section 235-53 (B) of the Town Code and include, inter alia, that the property have "communities" of certain species of trees. Finally, section 235-44 provides that "[a]ppeals from a determination of the Town Department of Planning and Zoning regarding boundaries of overlay districts shall be made to the Town Planning Board in accordance with the public hearing procedures." * * *
>
> We conclude that petitioner stated a claim that respondent acted arbitrarily and capriciously in denying the appeal because the criteria set forth in Town Code § 235-53 (B) were not considered by respondent. Based on Town Code §§ 235-43 and 235-44, respondent is responsible for interpreting the boundary of the particular Woodlot EPOD encompassing petitioner's property, based on the criteria set forth in Town Code ... . **Matter of Gilbert v Planning Bd. of Town of Irondequoit, 2017 NY Slip Op 02210, 4th Dept 3-24-17**

COURT OF APPEALS

CIVIL PROCEDURE (COA)

CIVIL PROCEDURE (STATE'S RULING SCHOOL DISTRICT VIOLATED INDIVIDUALS WITH DISABILITIES ACT NOT FINAL, ARTICLE 78 PROCEEDING CHALLENGING RULING PROPERLY DISMISSED)/ADMINISTRATIVE LAW (STATE'S RULING SCHOOL DISTRICT VIOLATED INDIVIDUALS WITH DISABILITIES ACT NOT FINAL, ARTICLE 78 PROCEEDING CHALLENGING RULING PROPERLY DISMISSED)/EDUCATION-SCHOOL LAW (STATE'S RULING SCHOOL DISTRICT VIOLATED INDIVIDUALS WITH DISABILITIES ACT NOT FINAL, ARTICLE 78 PROCEEDING CHALLENGING RULING PROPERLY DISMISSED)/ARTICLE 78 (STATE'S RULING SCHOOL DISTRICT VIOLATED INDIVIDUALS WITH DISABILITIES ACT NOT FINAL, ARTICLE 78 PROCEEDING CHALLENGING RULING PROPERLY DISMISSED)

CIVIL PROCEDURE, ADMINSTRATIVE LAW, EDUCATION-SCHOOL LAW.

STATE'S RULING SCHOOL DISTRICT VIOLATED INDIVIDUALS WITH DISABILITIES ACT NOT FINAL, ARTICLE 78 PROCEEDING CHALLENGING RULING PROPERLY DISMISSED.

The Court of Appeals determined the petitioner school district could not bring an Article 78 proceeding to challenge the state's finding that the district's dispute resolution practices for placing students with disabilities violated federal (Individuals with Disabilities Education Act [IDEA]) and state law because the state's decision was not final:

> In 2012, the State found that the District's dispute resolution practices violated federal and state law and directed the District to take corrective action. Although the State informed the District that failure to comply could result in further enforcement actions, including withholding federal funds, the State did not make a final decision to withhold funds.
>
> A proceeding under CPLR article 78 "shall not be used to challenge a determination which is not final or can be adequately reviewed by appeal to a court or to some other body or officer" ... . Likewise, this Court has recognized that "[t]o challenge an administrative determination, the agency action must be final and binding upon the petitioner" ... . In addition, in the absence of injury, there is no standing to bring an article 78 proceeding ... .
>
> Assuming, without deciding, that a school district may bring an article 78 proceeding to challenge a final determination by the State under the IDEA, here, the State has not made a final determination, the District has not shown that it has exhausted its administrative remedies, and the District is unable to articulate any actual, concrete injury that it has suffered at this juncture. Accordingly, the District's petition was properly dismissed. **Matter of East Ramapo Cent. Sch. Dist. v King, 2017 NY Slip Op 02360, CtApp 3-28-17**

CRIMINAL LAW (COA)

CRIMINAL LAW (DEFENDANT DID NOT CONSENT TO THE ENTRY AND SEARCH OF HIS HOME, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED)/SUPPRESS, MOTION TO (CRIMINAL LAW, DEFENDANT DID NOT CONSENT TO THE ENTRY AND SEARCH OF HIS HOME, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED)/SEARCH AND SEIZURE (CRIMINAL LAW, DEFENDANT DID NOT CONSENT TO THE ENTRY AND SEARCH OF HIS HOME, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED)

CRIMINAL LAW.

DEFENDANT DID NOT CONSENT TO THE ENTRY AND SEARCH OF HIS HOME, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Court of Appeals, reversing the Appellate Division, determined the evidence did not support the conclusion that defendant consented to the entry and search of his home. The motion to suppress, therefore, should have been granted. The decision does not discuss the facts and indicates the reasoning of the Appellate Division dissent was followed. **People v Freeman, 2017 NY Slip Op 02090, CtApp 3-23-17**

CRIMINAL LAW (WHETHER DEFENDANT MADE AN UNEQUIVOCAL REQUEST FOR COUNSEL IS A MIXED QUESTION OF LAW AND FACT WHICH CANNOT BE HEARD BY THE COURT OF APPEALS)/ATTORNEYS (CRIMINAL LAW, APPEALS, WHETHER DEFENDANT MADE AN UNEQUIVOCAL REQUEST FOR COUNSEL IS A MIXED QUESTION OF LAW AND FACT WHICH CANNOT BE HEARD BY THE COURT OF APPEALS)/APPEALS (CRIMINAL LAW, WHETHER DEFENDANT MADE AN UNEQUIVOCAL REQUEST FOR COUNSEL IS A MIXED QUESTION OF LAW AND FACT WHICH CANNOT BE HEARD BY THE COURT OF APPEALS)

CRIMINAL LAW, ATTORNEYS, APPEALS.

WHETHER DEFENDANT MADE AN UNEQUIVOCAL REQUEST FOR COUNSEL IS A MIXED QUESTION OF LAW AND FACT WHICH CANNOT BE HEARD BY THE COURT OF APPEALS.

The Court of Appeals determined the issue whether defendant made an unequivocal request for counsel presented a mixed question of law and fact which cannot be heard by the Court of Appeals. **People v Slocum, 2017 NY Slip Op 02089, CtApp 3-23-17**

CRIMINAL LAW (POSSESSION OF COCAINE CAN BE PROVEN WITHOUT SUBMITTING THE COCAINE ITSELF AS EVIDENCE)/EVIDENCE (CRIMINAL LAW, POSSESSION OF COCAINE CAN BE PROVEN WITHOUT SUBMITTING THE COCAINE ITSELF AS EVIDENCE)/CONTROLLED SUBSTANCE, POSSESSION OF (POSSESSION OF COCAINE CAN BE PROVEN WITHOUT SUBMITTING THE COCAINE ITSELF AS EVIDENCE)

CRIMINAL LAW, EVIDENCE.

POSSESSION OF COCAINE CAN BE PROVEN WITHOUT SUBMITTING THE COCAINE ITSELF AS EVIDENCE.

The Court of Appeals, in a short memorandum decision, noted that possession of cocaine can be proven without submitting the cocaine itself as evidence:

> Although the People did not recover or introduce any of the cocaine that defendant was charged with possessing, "direct evidence in the form of contraband or other physical evidence is not the only adequate proof" (People v Samuels , 99 NY2d 20, 24 [2002]). The People presented sufficient evidence in the form of, among other things, defendant's intercepted phone calls replete with drug-related conversations, visual surveillance, and the testimony of cooperating witnesses. **People v Whitehead, 2017 NY Slip Op 02358, CtApp 3-28-17**

CRIMINAL LAW (EVIDENCE OF AN ALLEGED PRIOR IDENTICAL SEXUAL ASSAULT NOT ADMISSIBLE TO SHOW INTENT, MOTIVE, OR AS BACKGROUND EVIDENCE, CONVICTION REVERSED)/EVIDENCE (CRIMINAL LAW, EVIDENCE OF AN ALLEGED PRIOR IDENTICAL SEXUAL ASSAULT NOT ADMISSIBLE TO SHOW INTENT, MOTIVE, OR AS BACKGROUND EVIDENCE, CONVICTION REVERSED)/MOLINEUX EVIDENCE (EVIDENCE OF AN ALLEGED PRIOR IDENTICAL SEXUAL ASSAULT NOT ADMISSIBLE TO SHOW INTENT, MOTIVE, OR AS BACKGROUND EVIDENCE, CONVICTION REVERSED)

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF AN ALLEGED PRIOR IDENTICAL SEXUAL ASSAULT NOT ADMISSIBLE TO SHOW INTENT, MOTIVE, OR AS BACKGROUND EVIDENCE, CONVICTION REVERSED.

The Court of Appeals, in a full-fledged opinion by Justice Abdus-Salaam, reversing defendant's conviction, determined evidence of an alleged prior sexual assault, identical to the charged offense, should not have been admitted to show intent or motive, or as background evidence:

> Here, ... the victim's testimony as to the alleged prior sexual abuse was not necessary to show the nature of the relationship between her and defendant or to "sort out ambiguous but material facts" ... . The victim testified as to her relationship with defendant, stating that they are relatives who lived, at certain times, in the same home and that on the night of the indicted sexual assault, she and her boyfriend went to defendant's home to spend time together and drink alcohol. The introduction of the prior alleged assault was not necessary to clarify their relationship or to establish a narrative of the relevant events.
>
> Further, the evidence of the uncharged crime was not admissible to show intent. The intent here — sexual gratification — can be inferred from the act. * * *
>
> To the extent the evidence was admissible to show defendant's motive in getting the victim drunk, the evidence was highly prejudicial, as it showed that defendant had allegedly engaged in the exact same behavior on a prior occasion with the same victim — classic propensity evidence. The prejudicial nature of the Molineux evidence far outweighed any probative value that may be attributed to it. **People v Leonard, 2017 NY Slip Op 02359, CtApp 3-28-17**

CRIMINAL LAW (DEFENDANT'S HAND UNDER HIS HOODIE WAS SUFFICIENT TO SUPPORT THE ELEMENT OF ROBBERY FIRST WHICH REQUIRES THE DISPLAY OF WHAT APPEARS TO BE A FIREARM)/EVIDENCE (CRIMINAL LAW, ROBBERY, DEFENDANT'S HAND UNDER HIS HOODIE WAS SUFFICIENT TO SUPPORT THE ELEMENT OF ROBBERY FIRST WHICH REQUIRES THE DISPLAY OF WHAT APPEARS TO BE A FIREARM)/ROBBERY (DEFENDANT'S HAND UNDER HIS HOODIE WAS SUFFICIENT TO SUPPORT THE ELEMENT OF ROBBERY FIRST WHICH REQUIRES THE DISPLAY OF WHAT APPEARS TO BE A FIREARM)

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S HAND UNDER HIS HOODIE WAS SUFFICIENT TO SUPPORT THE ELEMENT OF ROBBERY FIRST WHICH REQUIRES THE DISPLAY OF WHAT APPEARS TO BE A FIREARM.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a full-fledged dissenting opinion, determined the evidence was sufficient to support the element of robbery first degree which requires the display of what appears to be a firearm. The defendant threatened to shoot the teller and, at some point in time, one of his hands was under his hoodie. The defendant was quickly apprehended and no firearm was found:

> We reject defendant's assumption that the timing of the moment at which the defendant places a hand under his clothing is dispositive of the legal sufficiency analysis. A victim may reasonably believe that a gun is being used, on the basis of conduct that makes it appear that the defendant is holding a gun, regardless of whether the defendant makes a movement while addressing the victim or keeps his hand concealed throughout the encounter in a manner and location suggesting the presence of a gun. Whether a defendant displays what appears to be a firearm does not depend on when precisely the defendant begins the display, provided it occurs "in the course of the commission of the crime or of immediate flight therefrom" (Penal Law § 160.15 [4]). **People v Smith, 2017 NY Slip Op 02362, CtApp 3-28-17**

CRIMINAL LAW (ALTHOUGH THE MURDER WAS A NECESSARY ELEMENT OF THE BURGLARY CHARGE, THE PEOPLE JUSTIFIED CONSECUTIVE SENTENCES BY PRESENTING PROOF THE TWO CRIMES ENCOMPASSED DISTINCT ACTS)/EVIDENCE (CRIMINAL LAW, SENTENCING, ALTHOUGH THE MURDER WAS A NECESSARY ELEMENT OF THE BURGLARY CHARGE, THE PEOPLE JUSTIFIED CONSECUTIVE SENTENCES BY PRESENTING PROOF THE TWO CRIMES ENCOMPASSED DISTINCT ACTS)/SENTENCING (ALTHOUGH THE MURDER WAS A NECESSARY ELEMENT OF THE BURGLARY CHARGE, THE PEOPLE JUSTIFIED CONSECUTIVE SENTENCES BY PRESENTING PROOF THE TWO CRIMES ENCOMPASSED DISTINCT ACTS)/CONSECUTIVE SENTENCES (ALTHOUGH THE MURDER WAS A NECESSARY ELEMENT OF THE BURGLARY CHARGE, THE PEOPLE JUSTIFIED CONSECUTIVE SENTENCES BY PRESENTING PROOF THE TWO CRIMES ENCOMPASSED DISTINCT ACTS)/BURGLARY SENTENCING, ALTHOUGH THE MURDER WAS A NECESSARY ELEMENT OF THE BURGLARY CHARGE, THE PEOPLE JUSTIFIED CONSECUTIVE SENTENCES BY PRESENTING PROOF THE TWO CRIMES ENCOMPASSED DISTINCT ACTS)

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE MURDER WAS A NECESSARY ELEMENT OF THE BURGLARY CHARGE, THE PEOPLE JUSTIFIED CONSECUTIVE SENTENCES BY PRESENTING PROOF THE TWO CRIMES ENCOMPASSED DISTINCT ACTS.

The Court of Appeals, in a full-fledged opinion by Judge Klein, determined there was sufficient evidence the burglary and murder were separate acts to justify consecutive sentences. The defendant was charged with breaking and entering his girlfriend's home, dragging her downstairs and then murdering her:

"By definition, the act of causing death is subsumed within the element causing . . . physical injury" ... and, thus, the act constituting murder here was a material element of that burglary count. The People therefore concede that, with respect to the latter burglary charge, they were required to identify facts establishing that defendant committed this offense and murder through separate and distinct acts. Because "the People offer[ed] evidence of the existence of . . . separate and distinct act[s]" with respect to that count of burglary in the first degree — indeed, with respect to both counts — "the trial court ha[d] discretion to order consecutive sentences" ... . **People v Brahney, 2017 NY Slip Op 02465, CtApp 3-30-17**

CRIMINAL LAW (TRIAL COURT CORRECTLY REFUSED TO CHARGE THE JURY ON THE JUSTIFICATION DEFENSE IN THIS ASSAULT CASE)/JUSTIFICATION DEFENSE (CRIMINAL LAW, TRIAL COURT CORRECTLY REFUSED TO CHARGE THE JURY ON THE JUSTIFICATION DEFENSE IN THIS ASSAULT CASE)/JURY INSTRUCTION (CRIMINAL LAW, TRIAL COURT CORRECTLY REFUSED TO CHARGE THE JURY ON THE JUSTIFICATION DEFENSE IN THIS ASSAULT CASE)

CRIMINAL LAW, EVIDENCE.

TRIAL COURT CORRECTLY REFUSED TO CHARGE THE JURY ON THE JUSTIFICATION DEFENSE IN THIS ASSAULT CASE.

The Court of Appeals determined the trial court properly refused to charge the jury with the justification defense in this assault case:

Contrary to defendant's contention, the trial court properly refused to instruct the jury on the defense of justification. Viewing the record in the light most favorable to defendant, as we must ... , we conclude there is no reasonable view of the evidence that would have permitted the factfinder to conclude that defendant's conduct was justified ... . That is, we agree with the People that there is no evidence that objectively supports a belief that defendant was in danger of being physically harmed by the victim at the time defendant used force against him ... .

Here, after "knocking [the victim] out," defendant was able to freely and safely walk away from the bodega. Moreover, there simply is no evidence that, once he returned to the bodega, defendant needed to leave that store to strike the victim to defend himself. Even if defendant's trial testimony establishes that he actually believed that the victim was lying in wait for him with a weapon ... , there is no reasonable view of the evidence that "a reasonable person in . . . defendant's circumstances would have believed" the victim to have threatened him with the imminent use of unlawful physical force ... . Put simply, the surveillance footage reflects that defendant's ambush of the victim with the milk crate cannot be considered self defense. **People v Sparks, 2017 NY Slip Op 02469, CtApp 3-30-17**

CRIMINAL LAW (TRIAL COURT PROPERLY CHARGED THE JURY WITH THE INITIAL AGGRESSOR EXCEPTION TO THE JUSTIFICATION DEFENSE, APPELLATE DIVISION REVERSED)/EVIDENCE (CRMINAL LAW, (TRIAL COURT PROPERLY CHARGED THE JURY WITH THE INITIAL AGGRESSOR EXCEPTION TO THE JUSTIFICATION DEFENSE, APPELLATE DIVISION REVERSED)/JUSTIFICATION DEFENSE (CRIMINAL LAW, TRIAL COURT PROPERLY CHARGED THE JURY WITH THE INITIAL AGGRESSOR EXCEPTION TO THE JUSTIFICATION DEFENSE, APPELLATE DIVISION REVERSED)/INITIAL AGGRESSOR (CRIMINAL LAW, JUSTIFICATION DEFENSE TRIAL COURT PROPERLY CHARGED THE JURY WITH THE INITIAL AGGRESSOR EXCEPTION TO THE JUSTIFICATION DEFENSE, APPELLATE DIVISION REVERSED)/JURY INSTRUCTIONS (CRMINAL LAW, JUSTIFICATION, INITIAL AGGRESSOR, TRIAL COURT PROPERLY CHARGED THE JURY WITH THE INITIAL AGGRESSOR EXCEPTION TO THE JUSTIFICATION DEFENSE, APPELLATE DIVISION REVERSED)

CRIMINAL LAW, EVIDENCE.

TRIAL COURT PROPERLY CHARGED THE JURY WITH THE INITIAL AGGRESSOR EXCEPTION TO THE JUSTIFICATION DEFENSE, APPELLATE DIVISION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over a three-judge dissenting opinion, reversing the Appellate Division, determined the trial court properly charged the initial aggressor exception to the justification defense in this homicide case. The evidence was not clear about the timing, but the victim (McWillis) pursued the defendant with a plastic mop handle and swung at the defendant close in time to the shooting:

> Here, as the Appellate Division dissent noted, "[n]o matter what the court charged in relation to the initial aggressor issue, [the jury could have reasonably concluded] there was simply no evidentiary support for a finding that defendant was justified in using deadly physical force against McWillis when faced with McWillis's either threatened or actual use of a mop handle" ... . Our law has "never required that an actor's belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified, but [it has] uniformly required that the belief comport with an objective notion of reasonableness" ... . Thus, the jury could have concluded that defendant's choice to respond to a swinging plastic mop handle with a loaded and operable gun was not reasonable, especially in light of his prior comments to police about taking the law into his own hands ... . **People v Valentin, 2017 NY Slip Op 02470, CtApp 3-30-17**

CRIMINAL LAW (ALTHOUGH DEFENDANT OBJECTED TO THE SANDOVAL RULING AT TRIAL, THE OBJECTION WAS NOT ON THE PRECISE GROUND RAISED ON APPEAL, THE ISSUE WAS THEREFORE NOT PRESERVED)/EVIDENCE (CRIMINAL LAW, ALTHOUGH DEFENDANT OBJECTED TO THE SANDOVAL RULING AT TRIAL, THE OBJECTION WAS NOT ON THE PRECISE GROUND RAISED ON APPEAL, THE ISSUE WAS THEREFORE NOT PRESERVED)/APPEALS (CRIMINAL LAW, ALTHOUGH DEFENDANT OBJECTED TO THE SANDOVAL RULING AT TRIAL, THE OBJECTION WAS NOT ON THE PRECISE GROUND RAISED ON APPEAL, THE ISSUE WAS THEREFORE NOT PRESERVED)/SANDOVAL EVIDENCE (ALTHOUGH DEFENDANT OBJECTED TO THE SANDOVAL RULING AT TRIAL, THE OBJECTION WAS NOT ON THE PRECISE GROUND RAISED ON APPEAL, THE ISSUE WAS THEREFORE NOT PRESERVED)/PRESERVATION (CRIMINAL LAW, APPEALS, ALTHOUGH DEFENDANT OBJECTED TO THE SANDOVAL RULING AT TRIAL, THE OBJECTION WAS NOT ON THE PRECISE GROUND RAISED ON APPEAL, THE ISSUE WAS THEREFORE NOT PRESERVED)

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH DEFENDANT OBJECTED TO THE SANDOVAL RULING AT TRIAL, THE OBJECTION WAS NOT ON THE PRECISE GROUND RAISED ON APPEAL, THE ISSUE WAS THEREFORE NOT PRESERVED.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge concurring opinion, determined defendant's objection to a Sandoval ruling about the admissibility of evidence of a juvenile delinquency adjudication did not preserve the precise issue which was the subject of the appeal. The concurring opinion argued the error had been preserved, but was harmless. The People sought to introduce evidence of the facts underlying the juvenile delinquency adjudication, but not the adjudication itself. The defendant objected arguing that the defendant should not be judged by actions taken when his mind and values were undeveloped. The court ruled the People could elicit the fact that defendant

was adjudicated a juvenile delinquent, but could not elicit the facts. On appeal defendant argued it was a legal error to admit evidence of the juvenile delinquency adjudication:

> Under the unique factual circumstances of this case and based on the trial court's colloquy with counsel, we conclude that defendant's challenge to the Sandoval ruling is unpreserved. Defendant did not make the argument he now asserts at the time of the alleged erroneous ruling, or at any time at all. Instead, he argued, against the People's initial proffer, that the court should deny the request because defendant's actions should not be judged based on a young offender's undeveloped mind and sense of values. Defendant failed to argue that it would be legal error to permit the People to elicit that defendant was adjudicated a juvenile delinquent ... . Defendant did not make that argument before or after the compromise ruling, or at any point during the proceedings "when the court had the 'opportunity of effectively chang[ing]' its ruling" ... and avoiding the error of which defendant now complains. **People v Jackson, 2017 NY Slip Op 02361, CtApp 3-28-17**

CRIMINAL LAW (WHERE THE RELEVANT OFFENSES WERE COMMITTED IN TWO COUNTIES, NO NEED FOR TWO SORA RISK ASSESSMENT PROCEEDINGS)/SEX OFFENDER REGISTRATION ACT (SORA) (WHERE THE RELEVANT OFFENSES WERE COMMITTED IN TWO COUNTIES, NO NEED FOR TWO SORA RISK ASSESSMENT PROCEEDINGS)

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

WHERE THE RELEVANT OFFENSES WERE COMMITTED IN TWO COUNTIES, NO NEED FOR TWO SORA RISK ASSESSMENT PROCEEDINGS.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined only one SORA risk assessment proceeding should have been held. Defendant had simultaneously pled guilty to crimes committed in two counties. All of the crimes were taken into consideration in the first SORA assessment proceeding:

> Where, as here, a single RAI [risk assessment instrument] addressing all relevant conduct is prepared, the goal of assessing the risk posed by the offender is fulfilled by a single SORA adjudication. To hold otherwise — that is, to permit multiple risk level determinations based on conduct included in a single RAI — would result in redundant proceedings and constitute a waste of judicial resources. Here, for instance, once the Division of Criminal Justice Services was notified of the Richmond County SORA court's determination, "it had the information it needed to serve SORA's goal of 'protect[ing] the public from' this particular sex offender" ... . Any further proceedings then became duplicative. **People v Cook, 2017 NY Slip Op 02467, CtApp 3-30-17**

CRIMINAL LAW (DEFENDANT SHOULD NOT HAVE BEEN ASSESSED POINTS UNDER RISK FACTOR 7, DEFENDANT HAD LONG-TERM NON-SEXUAL RELATIONSHIPS WITH THE VICTIMS BEFORE THE ABUSE STARTED, DEFENDANT DID NOT ESTABLISH THE RELATIONSHIPS FOR THE PRIMARY PURPOSE OF VICTIMIZATION)/SEX OFFENDER REGISTRATION ACT (SORA) (DEFENDANT SHOULD NOT HAVE BEEN ASSESSED POINTS UNDER RISK FACTOR 7, DEFENDANT HAD LONG-TERM NON-SEXUAL RELATIONSHIPS WITH THE VICTIMS BEFORE THE ABUSE STARTED, DEFENDANT DID NOT ESTABLISH THE RELATIONSHIPS FOR THE PRIMARY PURPOSE OF VICTIMIZATION)/RISK FACTOR 7 (SEX OFFENDER REGISTRATION ACT, DEFENDANT SHOULD NOT HAVE BEEN ASSESSED POINTS UNDER RISK FACTOR 7, DEFENDANT HAD LONG-TERM NON-SEXUAL RELATIONSHIPS WITH THE VICTIMS BEFORE THE ABUSE STARTED, DEFENDANT DID NOT ESTABLISH THE RELATIONSHIPS FOR THE PRIMARY PURPOSE OF VICTIMIZATION)

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT SHOULD NOT HAVE BEEN ASSESSED POINTS UNDER RISK FACTOR 7, DEFENDANT HAD LONG-TERM NON-SEXUAL RELATIONSHIPS WITH THE VICTIMS BEFORE THE ABUSE STARTED, DEFENDANT DID NOT ESTABLISH THE RELATIONSHIPS FOR THE PRIMARY PURPOSE OF VICTIMIZATION.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissenting opinion, determined defendant should not have been assessed points under risk factor 7. Risk factor 7 applies when a defendant establishes a relationship with a victim for the primary purpose of victimization. Here the victims were the children of defendant's long-time friends. Defendant had long-term non-sexual relationships with the children before the abuse began:

> The People bore the burden of establishing by clear and convincing evidence that defendant promoted his relationship with one or more of the victims for the primary purpose of sexually abusing them (see Correction Law § 168-n [3]...). That burden was not met here. The record reflects that he had long-term, pre-existing relationships with the children, continued those relationships in the role of a close family friend who regularly spent substantial amounts of time with the children and their families, and did not begin to offend against them until the eldest child was approximately 11 years old ... . Therefore, the evidence in this record does not support Supreme Court's determination that defendant "promoted" his relationships with these children for purposes of victimization ... , as opposed to redirecting his longstanding close and involved relationships with them in such a way as to allow for sexual abuse. **People v Cook, 2017 NY Slip Op 02468, CtApp 3-30-17**

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW (QUESTION OF FACT, CREATED BY CONFLICTING EXPERTS, WHETHER OUTSIDE STEEL STAIRCASE WAS SAFE FOR USE IN WET WEATHER, PLAINTIFF SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION)/STAIRS (LABOR LAW-CONSTRUCTION LAW, QUESTION OF FACT, CREATED BY CONFLICTING EXPERTS, WHETHER OUTSIDE STEEL STAIRCASE WAS SAFE FOR USE IN WET WEATHER, PLAINTIFF SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION)

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT, CREATED BY CONFLICTING EXPERTS, WHETHER OUTSIDE STEEL STAIRCASE WAS SAFE FOR USE IN WET WEATHER, PLAINTIFF SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a three-judge dissenting opinion, determined plaintiff's summary judgment motion on his Labor Law 240(1) cause of action should not have been granted. Plaintiff fell down a temporary steel staircase which was wet from rain. There were conflicting expert affidavits about the safety of the stairs:

To the extent the Appellate Division opinion below can be read to say that a statutory violation occurred merely because plaintiff fell down the stairs, it does not provide an accurate statement of the law. As we have made clear, the fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240 (1) ... . Moreover, the present case is distinguishable from "cases involving ladders or scaffolds that collapse or malfunction for no apparent reason" where we have applied "a presumption that the ladder or scaffolding device was not good enough to afford proper protection" ... .

Here, by contrast, there are questions of fact as to whether the staircase provided adequate protection. As noted above, defendants' expert opined that the staircase was designed to allow for outdoor use and to provide necessary traction in inclement weather. Moreover, defendants' expert opined that additional anti-slip measures were not warranted. In addition, he disputed the assertions by plaintiff's expert that the staircase was worn down or that it was unusually narrow or steep. In light of the above, plaintiff was not entitled to summary judgment on the issue of liability. **O'Brien v Port Auth. of N.Y. & N.J., 2017 NY Slip Op 02466, CtApp 3-30-17**

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