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IN THIS ISSUE

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FEATURED DECISION

Question of Fact Whether City Liable for Shooting by an Off-Duty Police Officer Under Negligent Hiring, Retention and Supervision Theory---Akin to Negligently Entrusting a Dangerous Instrumentality (Weapon) to Another

The First Department, in a full-fledged opinion by Justice Renwick, determined plaintiff had raised a question of fact whether the city was liable for the death of the police officer's girlfriend (plaintiff's decedent) under a negligent hiring/retention/supervision theory. The shooting occurred when the officer, Maselli, was off duty in his home. Plaintiff alleged the city had notice of Maselli's violent propensities:

RENWICK, J.

This action arises from the shooting death of Shirley Fontanez by her boyfriend, Police Officer Frederick Maselli, at his home, on July 23, 2007. After the shooting, Maselli killed himself. Fontanez was 16 years old when she began her relationship with Maselli, who was then 38 years old. Fontanez is survived by her infant daughter, Angeshely Sasha Gonzalez, the sole distributee of Fontanez's estate. Plaintiff Keyla Virginia Gonzalez, as administrator of the Estate of Fontanez, alleges that numerous complaints were made to the City of New York concerning Maselli's abusive conduct toward Fontanez and Sasha, that the City was negligent in hiring, training, supervising and retaining Maselli, and in failing to take action to remove his firearm, and thereby caused Fontanez's wrongful death. Supreme Court, however, granted the City summary judgment dismissing the action on the ground that any negligence on defendant City's part for failing to discharge a police officer with violent propensities could not have been the proximate cause of Fontanez's death, since at the time of the fatal shooting, Maselli was off-duty and was acting outside the scope of his employment. Thus, the dispositive issue that we must resolve is whether the fact that the police officer was off duty when he committed the fatal shooting breaks any connection, as a matter of law, between the fatal injuries and the employer's alleged negligence regarding an employee with violent propensities. For the reasons explained below, we find that it does not.

FROM THE EDITOR

This is the 18th issue of the Digest---an indexed compilation of the summaries of New York State appellate decisions posted weekly in September, 2015, on the "Just Released" page of NewYorkAppellateDigest.com

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The Index is at the end of the Digest (p. 39) I suggest printing out just the Index to easily locate every discussion of all the covered topics.

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This case raises classic issues of duty and proximate cause. Integral to each element is a question of foreseeability. However, the questions of foreseeability are distinct. In determining duty, a court must determine whether the injured party was a foreseeable plaintiff - whether she was within the zone of danger created by defendant's actions (*Palsgraf v Long Is. R.R. Co.,* 248 NY 339 [1928]). A plaintiff must show that defendant's actions constituted a wrong against her, not merely that defendant acted beneath a required standard of care and that plaintiff was injured thereby (*id*.). She must show that a relationship existed by which defendant was legally obliged to protect the interest of plaintiff (*id.* at 342). The existence of a duty is a question of policy to be determined with reference to legal precedent, statutes, and other principles comprising the law (*id*.; see also Prosser & Keeton's Torts § 37 [5th ed 1984])

In determining proximate cause, an element of foreseeability is also present - the question then is whether the injury to plaintiff was a foreseeable result of defendant's breach, i.e., what manner of harm is foreseeable? *(see* Fowler V. Harper, Fleming James, Jr., & Oscar S. Gray, The Law of Torts § 16.9, at 466-469 [2d ed 1986] [discussing the history of the nexus between breach and foreseeability]). The question of proximate cause is generally a question of fact for a jury.

In this case, the alleged duty owed to plaintiff stems from New York's long recognized tort of negligent hiring and retention (*see Haddock v City of New York*, 75 NY2d 478 [1990]; *Ford v Gildin*, 200 AD2d 224 [1st Dept 1994]; Detone v Bullit Courier Serv., 140 AD2d 278 [1st Dept 1988], *lv denied* 73 NY2d 702 [1988]). This tort applies equally to municipalities and private employers (*see Haddock,* 75 NY2d 478). This theory of employer liability should be distinguished from the established legal doctrine of "respondeat superior," where an employer is held liable for the wrongs or negligence of an employee acting within the scope of the employee's duties or in furtherance of the employer's interests (*see* Restatement [Second] Agency §§ 219[1], 228). In contrast, under the theory of negligent hiring and retention, an employer may be liable for the acts of an employee acting outside the scope of his or her employment (*see id.* at § 219[2]; *see also id.* at § 213 [comment d]); Restatement [Second] of Torts § 317).

Thus, in this case, plaintiffs' negligence claims do not depend on whether Maselli acted within the scope of his employment or whether the City participated in, authorized, or ratified Maselli's tortious conduct. Rather, the alleged breach of duty stems from the claim that during Maselli's employment with the City, the City became aware or should have become aware of problems with Maselli that indicated he was unfit (i.e. possessed violent propensities), that the City failed to take further action such as an investigation, discharge, or reassignment, and that plaintiff's damages were caused by the City's negligent retention, or supervision of Maselli.

The negligent retention or supervision of a police officer, which results in the employee having possession of a dangerous instrumentality, is similar to if not indistinguishable from the tort of entrusting a dangerous instrumentality to another. The duty analysis should be the same. "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them" (Restatement [Second] of Torts § 388. The duty not to entrust a gun to a dangerous or incompetent police officer thus extends to any person injured as a result of the negligent entrustment.

Consistent with this theory of liability, New York courts have held governmental employers liable for placing employees, like police officers who are known to be violent, in positions in which they can harm others (*see e.g. Haddock*, 75 NY2d at 480; *Hall v Smathers*, 240 NY 486 [1925]; *McCrink v City of New York*, 296 NY 99 [1947]). For instance, in *McCrink,* an off-duty New York City police officer, while intoxicated, shot and killed one citizen and seriously wounded another. In three separate disciplinary proceedings prior to the incident, he was found guilty of intoxication and punished for the offense. However, the City retained the officer in its employ despite the fact that his retention as a police officer who was permitted to carry a revolver at all times posed a potential danger to the public. The Court of Appeals held that this disciplinary record was proof from which a jury might find that the Police Department was fully aware that the officer was not to be trusted to perform the duties of a police officer and that it could be found negligent for retaining him. Thus, the Court of Appeals held that when the retention of an officer may involve a risk of bodily harm to others, the government has a duty to abate the risk of dangers to others *(McCrink*, 296 NY at 106).

Similarly, in *Wyatt v State* (176 AD2d 574 [1991]), this Court held the State liable for placing a correction officer who was known to be violent in a position in which he could harm others. In 1984, Robinson, an off-duty Department of Correctional Services officer, shot a puppy named "Princess" for barking too loudly (*id*. at 575). When Princess's owner, Marquez, confronted him, Robinson responded, "I going [sic] to shoot you too" (*id*.)

The police soon arrived, but did not arrest Robinson after he displayed his correction officer's badge (*id*.). Marquez notified Corrections of the incident and was told an investigation would be made (*id*.). Apparently accepting Robinson's account that the puppy was about to attack him, and in violation of the Department's own rules, the Department never performed a full investigation (*id*.). The file was subsequently closed and no disciplinary action was ever taken (*id*.). Robinson was not suspended and his privilege to carry a pistol while off duty was not revoked (*id*. at 576).

Two years later, while off duty, Robinson shot and wounded two men following a traffic dispute (*id*. at 574). After shooting one of the men in the hip and one in the abdomen, Robinson approached and kicked one of them in the head (*id*.). Despite his assertion that the two men had attacked him, the only injury Robinson sustained was a bruised right foot (*id*.). After a bifurcated nonjury trial, the State was found not liable. This Court reversed the trial court's dismissal, finding that the negligent supervision and retention claim was supported by the fact that Corrections had failed to comply with its own disciplinary rules (*id*. at 576) This Court reasoned, "[S]uch omission cannot be cured by later supposition that, had a proper investigation been made of the 1984 incident, the employee's status would have remained unchanged" (*id*. at 576-577).

Likewise, in *Jones v City of Buffalo* (267 AD2d 1101 [1999]), the Appellate Division, Fourth Department, found that the City of Buffalo could be held liable for placing a police officer who was known to be violent in a position in which he could harm others. In Jones, the off-duty police officer, who was estranged from his wife, shot and seriously wounded her. Prior to the shooting, the officer had informed his superiors of a previous assault and arrest, but no action was taken against him. The wife's claims included negligent retention and failure to provide psychological services. The Fourth Department upheld the motion court's denial of the City's motion for summary judgment as to those claims because there were genuine issues of material fact as to whether the City negligently retained the officer and failed to provide him with psychological services following his first violent assault on his wife.

As *McCrink*, *Wyatt* and *Jones* illustrate, the torts of negligent retention and supervision of governmental employees with dangerous propensities do not specifically require allegations that the employees' misconduct occur within the course and scope of the employment. Rather, what the plaintiff must demonstrate is a connection or nexus between the plaintiff's injuries and the defendant's malfeasance. In this case, plaintiff alleges such a connection or nexus. The City is alleged to have played a part in both creating the danger (by training and arming an officer) and rendering the public more vulnerable to the danger (by allowing him to retain his weapon and ammunition after it allegedly learned of his dangerous propensities). Thus, Officer Maselli's alleged tort was made possible through the use of his pistol, which he carried by authority of the City.

In our view, both the type of harm that occurred and the person on whom the injury was inflicted were foreseeable within a degree of acceptability recognized by New York law. Clearly, the government has a duty to minimize the risk of injury to members of the public that is presented by the policy of permitting police officers to carry guns off duty. The City could reasonably have anticipated that its negligence in failing to discipline an officer who had violent propensities would result in the officer injuring someone with his gun. Thus, when an officer misuses his weapon, a jury might reasonably find that the misuse was proximately caused by the government's negligence, if proven, in supervising or retaining a police officer with known violent propensities. Furthermore, it was reasonably foreseeable that such an officer would injure a member of his own family, including his girlfriend. "An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent" *(Derdiarian v Felix Contr. Corp*., 51 NY2d 308, 316 [1980]; *see also Nallan v Helmsley-Spear*, Inc., 50 NY2d 507, 520-521 [1980]; *Pagan v Goldberger*, 51 AD2d 508 [2nd Dept 1976]), and the occurrence of that act did not approach that degree of attenuation condemned *in Palsgraf (*248 NY at 342-344; Restatement [Second] of Torts §§ 448- 449).

We are not persuaded that the cases relied on by defendant mandate a different result. In *Maldonado v Hunts Point Coop. Mkt.* (82 AD3d 510 [1st Dept 2011], *lv denied* 17 NY3d 702 [2011]), the plaintiff was shot and injured by her boyfriend, Machado, during a domestic dispute in their home. Machado used a revolver he had surreptitiously removed from Hunts Point Produce Market, where he worked as a security guard, and concealed before leaving work. After shooting the plaintiff, Machado shot and killed himself. This Court found that Hunts Point was not negligent in entrusting Machado with a weapon to use for security purposes at his employer's premises. Apparently, in this Court's view, the injured party was not a foreseeable plaintiff - that is, she was not within the zone of danger created by the defendant's action. In that respect we agree with *Maldonado*, that the security guard's unauthorized and surreptitious removal of a revolver from his place of employment and subsequent use during a domestic dispute was not a risk created by entrusting the gun to the security guard to use only at work.

Maldonado, however, also held, albeit in dicta, that even if the employer breached a duty of care arising from entrustment of a firearm to the security guard, any such breach did not proximately cause the girlfriend's

injuries because the guard was not acting within the scope of his employment when he shot the girlfriend, and his independent intervening acts arising out of their personal relationship severed any nexus between the employer's alleged negligence and the girlfriend's injuries. Thus, while not explicitly discussed, it appears that in *Maldonado*, in the private employment context, this Court viewed New York law as limiting a foreseeable plaintiff and harm, both in the context of duty and proximate cause, to only those members of the public who have a connection to the defendant employer's business.

The instant case, however, involves the type of governmental inaction like that in *McCrink*, *Wyatt* and *Jones*, where the Court of Appeals, the Fourth Department and this Court all have declined to draw a bright line rule that would preclude recovery in a negligent hiring or retention claim in situations where, as here, the City employee was not acting within the course of his employment. In our view, whether the City employee was acting within the course and scope of employment in this factual scenario is a relevant factor that the jury may consider in determining foreseeability of harm in the context of proximate cause, but it is not dispositive as a matter of law, in all instances.

Nor are we persuaded that *Cardona v Cruz* (271 AD2d 221 [1st Dept 2000]) should control here. In that case, a police officer entered a restaurant while off duty and in civilian clothes, and, with his off-duty revolver in his hand, approached within four or five feet of the plaintiff, yelled and cursed at him, shot him once in the head, and then threw at him a summons and temporary order of protection issued on behalf of a woman who was the officer's ex-wife and the plaintiff's girlfriend. This Court found that the City couldn't be held liable, under a theory of respondeat superior, for those actions because the defendant police officer was acting purely out of personal motives, and not within the scope of his employment or in furtherance of the City's interests.

With regard to negligent hiring and training claims, the *Cardona* court also held that "[l]eave to amend the complaint was also properly denied, as plaintiff's factual allegations were insufficient to support his claim that the City was negligent in hiring, training, supervising or retaining defendant police officer" (271 AD2d at 222). Significantly, *Cardona* did not find that the tort claim (negligence in hiring, training, supervising or retaining defendant police officer) was deficient because of the lack of any factual allegation on the issue of notice of any violent propensity on the part of the officer. Rather, Cardona held that such tort claim was deficient because "[a]s the officer was not acting within the scope of his employment or under the City's control, any alleged deficiency in its hiring or training procedures could not have proximately caused plaintiff's injuries" (*id*.).

We find the implications of this secondary holding in *Cardona* problematic. Carried to its logical conclusion, *Cardona* appears to hold that a connection between a police officer's employment and the injured plaintiff (i.e. that the officer's misconduct toward the injured plaintiff occurred while he was on duty) is a sine qua non for imposing liability on the City under the theory of negligent hiring and retention of a police officer with violent propensities. Such limitations, however, would be inconsistent with the Court of Appeals holding in *McCrink* and its progeny, and we therefore decline to follow it. Significantly, the cases cited by *Cardona*, namely *K. I. v New York City Bd. of Educ*. (256 AD2d 189, 192 [1st Dept. 1998]) and *McDonald v Cook* (252 AD2d 302, 305 [3rd Dept 1998], *lv denied* 93 NY2d 812 [1999]), do not support such a limited scope of liability toward the City for negligently hiring, retaining or supervising a police officer with violent propensities. In fact, neither case relied upon by *Cardona* addresses, let alone distinguishes, the Court of Appeals precedent, clearly applicable here, of *McCrink* and its progeny, as to whether the City negligently retained or supervised a police officer by placing the officer who was known to be violent in a position in which he could harm others.

Finally, we are cognizant of the fact that all police officers involved in this case have adamantly denied ever receiving even a single complaint about the offending officer's alleged violent propensities. In contrast, plaintiff has presented evidence that the City was informed on numerous occasions, prior to the fatal shooting, about the officer's abusive conduct toward Fontanez and her daughter. Under the circumstances, this case presents genuine issues of material fact as to whether the City negligently supervised and retained an officer with violent propensities, and whether the intervening intentional tort of the off-duty officer was itself a foreseeable harm that shaped the duty imposed upon the City when it failed to guard against a police officer with violent propensities. When such questions of breach of duty and proximate cause exist, summary judgment is not proper. These questions of fact must be reserved for the jury. The City's motion for summary judgment on the issue of proximate cause should have been denied.

Accordingly, the order of the Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 13, 2014, which granted defendant's motion for summary judgment dismissing the complaint should be reversed, on the law, without costs, and defendant's motion denied.

All concur.

Gonzalez v City of the New York, 2015 NY Slip Op 06869, 1st Dept 9-22-15

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APPELLATE DIVISION

ADMINISTRATIVE LAW

ADMINISTRATIVE LAW (PERFORMANCE RATING OF SCHOOL EMPLOYEE)/EDUCATION-SCHOOL LAW (PERFORMANCE RATING OF SCHOOL EMPLOYEE)/PERFORMANCE-RATING PROCEDURES (SCHOOL SOCIAL WORKER)

Principal's Failure to Follow the Performance-Rating Procedures Required by the School District and Collective Bargaining Agreement Deprived a School Social Worker of a Fair Review Process--- Unsatisfactory Rating (U-Rating) Annulled

The First Department determined the principal's failure to comply with the relevant performance-rating procedures deprived petitioner, a school social worker, of a fair review process. Petitioner's unsatisfactory rating (U-rating) was annulled:

> Petitioner establishes that in evaluating her performance, respondents did not adhere to their procedures or those provided in the parties' collective bargaining agreement. Special Circular No. 45, a memorandum issued by respondents in response to the mandate set forth in the Commissioner of Education Regulations (8 NYCRR) § 100.2(o), outlines the procedures for rating professional personnel, as does the related manual produced by the New York City Public Schools, entitled Rating Pedagogical Staff Members. Specifically, as a pedagogical employee, petitioner was to be given at least one full period of review during the school year by her principal, followed by a meeting with the principal to discuss her strengths and any areas in need of improvement. Additionally, as a social worker employed at a school, she should have been evaluated by the school principal in consultation with the in-discipline supervisor, in accordance with the collective bargaining agreement. * * *
>
> ...[T]he complete absence of constructive criticism and warnings during the entire school year, compounded by the lack of a formal observation and accompanying feedback during the school year, "undermined the integrity and fairness of the process" ... . Accordingly, the judgment should be reversed, and the petition granted to the extent of annulling the U-rating. **Matter of Murray v Board of Educ. of the City School Dist. of the City of N.Y., 2015 NY Slip Op 06866, 1st Dept 9-22-15**

ARBITRATION

ARBITRATION (LIMITED ROLE OF THE COURTS)/MUNICIPAL LAW (PUBLIC EMPLOYEES, ARBITRATION UNDER COLLECTIVE BARGAINING AGREEMENT)/EMPLOYMENT LAW (PUBLIC EMPLOYEES, ARBITRATION UNDER COLLECTIVE BARGAINING AGREEMENT)/UNIONS (PUBLIC EMPLOYEES, ARBITRATION UNDER COLLECTIVE BARGAINING AGREEMENT)/COLLECTIVE BARGAINING AGREEMENT (ARBITRATION)

Criteria for Arbitrability of Dispute Involving Public Employees Succinctly Explained

Reversing Supreme Court, the Second Department determined the dispute about compensation for police officers during Hurricane Sandy was arbitrable under the terms of the Collective Bargaining Agreement (CBA). The court explained the relevant analytical criteria:

> Public policy in New York favors arbitral resolution of public sector labor disputes ... . However, a dispute between a public sector employer and employee is only arbitrable if it satisfies a two-prong test ... . "Initially, the court must determine whether there is any statutory, constitutional, or public policy prohibition against arbitrating the grievance" ... . If there is no prohibition against the arbitration, the court must determine whether the parties agreed to arbitrate the particular dispute by examining their collective bargaining agreement ... .
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> Here, the Village does not assert on appeal that arbitration of this grievance was prohibited by statute or public policy, and we find no such prohibition. "In analyzing whether the parties in fact agreed to arbitrate the particular dispute, a court is merely to determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA'" ... . Here, the relevant

arbitration provisions of the CBA are broad, as they provide for arbitration of any grievance, defined as "any claimed violation, misinterpretation or inequitable application of this Agreement," which remains unresolved following completion of step three of the grievance procedure. Moreover, there is a reasonable relationship between the subject matter of the dispute, which involves compensation over a specific time period, and the general subject matter of the CBA ... . Contrary to the Village's contention, whether the evidence supports the grievance is a question for the arbitrator, and not the courts, to decide ... .

Moreover, the Village's contention that arbitration of the grievance was precluded because the PBA failed to comply with a condition precedent is without merit. The "threshold determination of whether a condition precedent to arbitration exists and whether it has been complied with, is for the court to determine" ... . By contrast, "[q]uestions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators, particularly in the absence of a very narrow arbitration clause or a provision expressly making compliance with the time limitations a condition precedent to arbitration" ... . **Matter of Incorporated Vil. of Floral Park v Floral Park Police Benevolent Assn., 2015 NY Slip Op 07026, 2nd Dept 9-30-15**

BANKING LAW

BANKING LAW (UNAUTHORIZED WITHDRAWAL)/UCC (UNAUTHORIZED WITHDRAWAL)

Question of Fact Whether Withdrawal Was Authorized, Despite Absence of Signature

The Second Department, over a dissent, determined the bank had raised a question of fact about whether a $50,000 withdrawal, where the withdrawal slip was not signed, was authorized. The assistant branch manager submitted an affidavit stating that he received authorization by phone from the account holder. The court explained the relevant analytical criteria:

> Generally, an unauthorized signature—defined as a signature made without authority, including a forgery (see UCC 1-201[41])—is ineffective to pass title or authorize a drawee bank to pay ... . The UCC imposes strict liability on a bank that charges against a customer's account any item not properly payable, such as a check bearing a forgery of the customer's signature (see UCC 4-401[2][a]; UCC 4-104[1][g], [j]...). A bank, however, avoids such liability if it demonstrates that the customer's negligence substantially contributed to the forgery and that the bank acted in good faith and in accordance with reasonable commercial standards (see UCC 3-406 ...). **Proactive Dealer Servs., Inc. v TD Bank, 2015 NY Slip Op 07016, 2nd Dept 9-30-15**

CIVIL PROCEDURE

CIVIL PROCEDURE (MANDATORY SETTLEMENT CONFERENCE)/FORECLOSURE (MANDATORY SETTLEMENT CONFERENCE)/COOPERATIVE APARTMENT, LOAN SECURED BY SHARES IN/REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (DEFINITION OF "HOME LOAN")

Loan Secured by Shares in a Cooperative Apartment Was Not a "Home Loan" Subject to the Pre-Foreclosure Settlement Conference Required by CPLR 3408

The Second Department determined defendant was not entitled to a pre-foreclosure settlement conference under CPLR 3408. The underlying loan was secured by shares in the cooperative apartment where defendant resided. Such a loan was not a "home loan" within the meaning of Real Property Actions and Proceedings Law (RPAPL) 1304, and therefore was not subject to the mandatory settlement conference under the CPLR:

> CPLR 3408 requires, in relevant part, that a court hold a mandatory settlement conference in "any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceeding law" (CPLR 3408[a]). RPAPL 1304 does not include, in its definition of "home loan," a loan secured by shares of stock and a proprietary lease from a corporation formed for the purpose of cooperative ownership in real estate (RPAPL 1304[5][a][iii]; cf. Banking Law §§ 6-l[1][e][iv]; 6-m[1][d][iv]). Accordingly, because the subject loan is not a home loan within the meaning of RPAPL 1304, the plaintiff is not entitled to a mandatory settlement conference pursuant to CPLR 3408. **DaCosta-Harris v Aurora Bank, FSB, 2015 NY Slip Op 06879, 2nd Dept 9-23-15**

CIVIL PROCEDURE (HYBRID ACTION)/MUNICIPAL LAW (HYBRID ACTION)/ARTICLE 78 (HYBRID ACTION)/STATUTE OF LIMITATIONS (ARTICLE 78-HYBRID ACTION)

Causes of Action Seeking Monetary Damages Were Not Incidental to the Article 78 Causes of Action and, Therefore, Were Not Subject to the Four-Month Statute of Limitations

The Second Department determined certain causes of action in plaintiffs' complaint should not have been dismissed because they were not incidental to the Article 78 causes of action which were time-barred. Plaintiffs brought a hybrid proceeding (1) to annul a town resolution assessing taxes to pay for the town's demolition of some of plaintiffs' property which was deemed unsafe, and (2) seeking damages for destruction of property and interruption of plaintiffs' business. The Second Department explained the criteria for determining whether causes of action seeking monetary damages should be deemed incidental to the Article 78 causes of action (and therefore subject to the four-month statute of limitations):

> Pursuant to CPLR 7806, where a CPLR article 78 petitioner seeks damages as well as the annulment of a governmental determination, "[a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he [or she] might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity" (CPLR 7806). "[W]here the thrust of the lawsuit is the review of an adverse . . . agency determination, with the monetary relief incidental, [the] Supreme Court may entertain the entire case under CPLR article 78" ... . "Whether the essential nature of the claim is to recover money, or whether the monetary relief is incidental to the primary claim, is dependent upon the facts and issues presented in a particular case" ... . Contrary to the Supreme Court's determination, the claims asserted in the first, second, and eighth causes of action were not incidental to the plaintiffs' CPLR article 78 challenges to the Resolution and the special tax assessment ... . Therefore, these causes of action were not asserted in connection with the CPLR article 78 portion of this hybrid action/proceeding, and were not barred by the four-month statute of limitations applicable to CPLR article 78 proceedings ... . **Hertzel v Town of Putnam Val., 2015 NY Slip Op 06708, 2nd Dept 9-2-15**

CIVIL PROCEDURE/NAIL AND MAIL SERVICE/DUE DILIGENCE (NAIL AND MAIL SERVICE)

"Due Diligence" Demonstrated---"Nail and Mail" Service Appropriate

In a foreclosure action, the Second Department determined plaintiff bank demonstrated "due diligence" in attempting personal service on the homeowner, such that the "nail and mail" service was appropriate:

> Service pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) and (2) cannot be made with due diligence (see CPLR 308[4]...). The term "due diligence," which is not defined by statute, has been interpreted and applied on a case-by-case basis ... . Indeed, the Court of Appeals has stated that "in determining the question of whether due diligence has been exercised, no rigid rule could properly be prescribed" ... . As a general matter, the "due diligence" requirement may be met with "a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times" ... .
>
> Here, the affidavit of the process server demonstrated that three visits were made to the homeowner's residence on three different occasions and at different times, when the homeowner could reasonably have been expected to be found at that location ... . The process server also described in detail his unsuccessful attempt to obtain an employment address for the homeowner ... . Contrary to the homeowner's contention, under these circumstances, the due diligence requirement was satisfied... . **Wells Fargo Bank, NA v Besemer, 2015 NY Slip Op 06806, 2nd Dept 9-16-15**

CIVIL PROCEDURE/NOTE OF ISSUE (EXTENSION OF TIME TO FILE)/NINETY-DAY NOTICE, EXTENSION OF

Supreme Court Should Not Have Denied Plaintiffs' Motion to Extend the 90-Day Period for Filing a Note of Issue

In finding Supreme Court abused its discretion in denying plaintiffs' motion to extend the 90-day period for filing a note of issue, the Second Department explained the analytical criteria:

Once the plaintiffs were in receipt of the 90-day notice, they were required to serve and file a timely note of issue, or move before the default date to either vacate the 90-day notice or extend the 90-day period pursuant to CPLR 2004 ... . Here, there is no dispute that the plaintiffs timely moved, inter alia, to extend the 90-day period. However, notwithstanding the plaintiff's timely motion, the Supreme Court directed the dismissal of the complaint pursuant to CPLR 3216. This was an improvident exercise of discretion.

The determination as to whether to vacate a 90-day notice and grant an extension of time to file a note of issue lies within the court's discretion, and this determination may be guided by the length of the delay in prosecuting the action, the reason for the delay, the prejudice to the defendants, and whether the moving party was in default before seeking the extension ... . The Court of Appeals has observed that CPLR 3216 is "extremely forgiving" ..., in that it "never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" ... . **Amos v Southampton Hosp., 2015 NY Slip Op 06700, 2nd Dept 9-2-15**

CIVIL PROCEDURE (SET ASIDE VERDICT, MOTION TO)/SET ASIDE VERDICT, MOTION TO (INTEREST OF JUSTICE)/ATTORNEYS (MOTION TO SET ASIDE VERDICT BASED UPON IMPROPER CONDUCT)

Defense Counsel's Conduct Did Not Warrant Setting Aside the Verdict

The Second Department determined Supreme Court abused its discretion when it set aside the verdict in a personal injury trial based upon the conduct of the defense attorney:

> The plaintiffs moved to set aside the verdict pursuant to CPLR 4404(a): (1) in the interest of justice, contending that defense counsel's improper and inflammatory remarks during summation deprived them of a fair trial; and (2) contending that the verdict as to damages was contrary to the weight of the evidence. The Supreme Court granted the motion on the first ground, and the defendants appeal.
>
> Under CPLR 4404(a), a trial court has the discretion to order a new trial "in the interest of justice" (CPLR 4404[a]...). In considering whether to exercise its discretionary power to order a new trial based on errors at trial, the court "must decide whether substantial justice has been done, whether it is likely that the verdict has been affected . . . and must look to [its] own common sense, experience and sense of fairness rather than to precedents in arriving at a decision' ... . On appeal, however, this Court is invested with the power to decide whether the trial court providently exercised its discretion ... .
>
> Here, we conclude that the Supreme Court improvidently exercised its discretion in ordering a new trial. The plaintiffs' claims regarding defense counsel's conduct center on remarks made by defense counsel during her summation, although they also challenge her cross-examination of certain witnesses. Some of the challenged conduct was certainly improper, and we do not condone it ... . Nonetheless, viewing defense counsel's conduct in the context of the entire trial, we conclude that it was not pervasive or prejudicial, or so inflammatory as to deprive the plaintiffs of a fair trial ... . **Lariviere v New York City Tr. Auth., 2015 NY Slip Op 06894, 2nd Dept 9-23-15**

CIVIL PROCEDURE (STATUTE OF LIMITATIONS)/STATUTE OF LIMITATIONS (BREACH OF FIDUCIARY DUTY, CIVIL RICO, DECLARATORY JUDGMENT)/FIDUCIARY DUTY, BREACH OF (STATUTE OF LIMITATIONS)/RICO, CIVIL (STATUTE OF LIMITATIONS)/DECLARATORY JUDGMENT (STATUTE OF LIMITATIONS)/FRAUD (BREACH OF FIDUCIARY DUTY, STATUTE OF LIMITATIONS)/CONSTRUCTIVE TRUST (STATUTE OF LIMITATIONS)

Appropriate Statutes of Limitations and Accrual Dates Explained for "Breach of Fiduciary Duty," Civil RICO," and "Declaratory Judgment" Causes of Action

The Second Department described the analytical criteria for determining the statutes of limitations and accrual dates for (1) breach of fiduciary duty claims where allegations of fraud are essential; (2) civil RICO claims; (3) and declaratory judgment actions seeking a constructive trust:

> "New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is

purely monetary in nature, courts construe the suit as alleging injury to property' within the meaning of CPLR 214(4), which has a three-year limitations period. Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies" ... .

"[W]here an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8)" ... . "An exception to this rule . . . is that courts will not apply the fraud Statute of Limitations if the fraud allegation is only incidental to the claim asserted; otherwise, fraud would be used as a means to litigate stale claims'" ... . "Thus, where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name" ... .

CPLR 213(8) provides, in part, "the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." "The discovery accrual rule also applies to fraud-based breach of fiduciary duty claims. An inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered the fraud turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred" ... .

"The statute of limitations for civil RICO claims is four years" ... . "A RICO claim is deemed to have accrued when the plaintiff knew or should have known of his or her injury, regardless of when he or she discovered the underlying fraud'" ... .

"Actions for declaratory judgments are not ascribed a certain limitations period. The nature of the relief sought in a declaratory judgment action dictates the applicable limitations period. Thus, if the action for a declaratory judgment could have been brought in a different form asserting a particular cause of action, the limitations period applicable to the particular cause of action will apply" ... .

The ... action for a declaratory judgment could have been brought ... as a cause of action to impose a constructive trust ... . A constructive trust is equitable in nature and governed by a six-year statute of limitations ... . **DiRaimondo v Calhoun, 2015 NY Slip Op 07002, 2nd Dept 9-30-15**

CIVIL PROCEDURE (ORAL ARGUMENT, FAILURE TO APPEAR)/SUMMARY JUDGMENT (ORAL ARGUMENT)/ORAL ARGUMENT (SUMMARY JUDGMENT)

Supreme Court Erred When It Ruled Plaintiff Had "Defaulted" on Its Summary Judgment Motion by Failing to Appear for Oral Argument

The First Department affirmed the denial of plaintiff's summary judgment on the merits in a breach of contract action. However, the First Department noted that the alternative ground for Supreme Court's ruling, i.e., that plaintiff had "defaulted" on its motion by failing to appear for oral argument, was not appropriate:

> We find ... that Supreme Court erred in finding that plaintiff had "default[ed]" on this motion. We fail to perceive the conduct that constituted plaintiff's default. It was plaintiff who submitted the motion for summary judgment. Typically, a motion for summary judgment can be readily decided on the papers unless oral argument is mandated by the motion court as "necessary." Nothing in the record before us suggests that the parties were on notice that oral argument was indispensable for resolution of plaintiff's motion. Indeed, when Supreme Court ultimately rendered its decision on the record, counsel for both parties were present. Under the circumstances, Supreme Court abused its discretion as a matter of law by disposing of the motion on the procedural ground sua sponte imposed by the court. **All State Flooring Distribs., L.P. v MD Floors, LLC, 2015 NY Slip Op 06751, 1st Dept 9-8-15**

CIVIL PROCEDURE (CHANGE OF VENUE)/VENUE, MOTION TO CHANGE (APPEARANCE OF IMPROPRIETY)

Plaintiff Is a Retired Judge---Change of Venue Appropriate to Avoid Appearance of Impropriety

The Second Department determined defendants' motion to change venue in a wrongful death action should have been granted. Plaintiff is a retired Supreme Court justice in the county where the action was brought. Change of venue was appropriate to avoid the appearance of impropriety:

> A court, upon motion, may change the place of trial of an action where there is reason to believe that an impartial trial cannot be had in the proper county (see CPLR 510[2]). Generally, a motion for a change of venue is committed to the sound discretion of the trial court ..., and the resolution of

such an application will not be disturbed absent an improvident exercise of that discretion ... .

To succeed on a motion to change venue pursuant to CPLR 510(2), the movant is required to produce admissible factual evidence demonstrating a strong possibility that an impartial trial cannot be obtained in the county where venue was properly placed ... .

Under the circumstances of this case, the Supreme Court improvidently denied the defendants' motion to change venue. Although he is now retired, the plaintiff's tenure as a Justice of the Supreme Court, Queens County, supports a change of venue of the action from Queens County to Nassau County to "protect[ ] the court from even a possible appearance of impropriety" ... . **Lisa v Parikh, 2015 NY Slip Op 06897, 2nd Dept 9-23-15**

CIVIL PROCEDURE (VERIFICATION OF PLEADINGS)/VERIFICATION OF PLEADINGS

Rejection of Answer Based Upon a Defective Verification Was Ineffective Because the Rejection Was Not Accompanied by an Adequate Description of the Defect---Supreme Court Properly Ignored Defect Because there Was No Prejudice to Plaintiffs

The Second Department affirmed the denial of plaintiffs' motion to enter a judgment on the ground defendant failed to appear in the action. The plaintiffs had rejected defendant's answer because the verification was defective. The Second Department noted (1) the rejection of the answer was not effective because the rejection was not accompanied by an explanation of the nature of the alleged defect and (2), because plaintiffs suffered no prejudice, Supreme Court properly ignored the defect:

> "Pursuant to CPLR 3022, when a pleading is required to be verified, the recipient of an unverified or defectively verified pleading may treat it as a nullity provided that the recipient with due diligence returns the [pleading] with notification of the reason(s) for deeming the verification defective" ... . Here, at the outset, the plaintiffs' rejection of the defendant's answer was ineffective, as it failed to specify the reasons or objections with sufficient specificity ... . Moreover, as the Supreme Court properly found, the plaintiffs suffered no prejudice. Accordingly, the complained-of defect was properly "ignored" by the Supreme Court ... . **Gaffey v Shah, 2015 NY Slip Op 06779, 2nd Dept 9-16-15**

CIVIL RIGHTS LAW

CIVIL RIGHTS LAW (RIGHT TO PRIVACY) /RIGHT TO PRIVACY (USE OF IMAGE AND VOICE)/CIVIL PROCEDURE/CONFLICT OF LAWS

Law of Plaintiff's Residence Applied to Action Alleging Injury from Use of Plaintiff's Image and Voice (Video Clip) on a Television Show

The Second Department determined New York law, not California law, applied to plaintiff's complaint alleging injury stemming from the use of a video clip, in which plaintiff appeared, on a television show. The plaintiff resided in New York, and the video clip was edited in California. The complaint alleged violation of California law. The Second Department explained why New York law applied and further determined that the video clip did not violate New York's Civil Rights Law (sections 50 and 51) because the clip was not used for advertising:

> New York uses an interest analysis, under which "the law of the jurisdiction having the greatest interest in resolving the particular issue" is given controlling effect ... . Pursuant to the interest analysis, "[a] distinction [is made] between laws that regulate primary conduct (such as standards of care) and those that allocate losses after the tort occurs" ... . If the conflicting laws regulate conduct, the law of the place of the tort "almost invariably obtains" because "that jurisdiction has the greatest interest in regulating behavior within its borders" ... . "[W]here the plaintiff and defendant are domiciled in different states, the applicable law in an action where civil remedies are sought for tortious conduct is that of the situs of the injury" ... .
>
> Applying these principles, the law of New York, where the alleged injury or damage occurred, applies. Although the alleged tortious conduct, the editing of the video clip, occurred in California, the plaintiff's alleged injury occurred in New York, where he is domiciled and resides. Moreover, New York is the state with the greater interest in protecting the plaintiff, its citizen and resident. **Sondik v Kimmel, 2015 NY Slip Op 06803, 2nd Dept 9-16-15**

CIVIL RIGHTS LAW (SLAPP SUITS)/SLAPP SUITS

Plaintiffs Raised a Question of Fact Whether "SLAPP" Suit Has a Substantial Basis in Fact and Law

The Second Department, over a long and detailed dissent, determined defendant, Petrucci, was entitled to summary judgment on the question whether the action against her constituted a SLAPP suit under the Civil Rights Law, but was not entitled to summary judgment on the merits. SLAPP stands for "strategic lawsuit against public participation." The statute, Civil Rights law 76-a(1), seeks to prohibit lawsuits brought against citizens who are critical of public bodies. Although finding that the suit is properly characterized as a SLAPP suit, the majority further determined the plaintiffs had raised questions of fact about whether their action "has a substantial basis in fact and law." Plaintiffs have leases with the Port Authority. Plaintiffs alleged that Petrucci falsely reported to the Port Authority's Office of Inspector General that plaintiffs had underreported their revenues and therefore were paying less rent than was owed:

> Civil Rights Law § 76-a(1) provides, in relevant part:
>
> > "(a) An action involving public petition and participation' is an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.
> > "(b) Public applicant or permittee' shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission."
>
> Here, the plaintiffs are "public permittees" within the meaning of the statute, since that term encompasses those who have obtained a lease from a government body, and the plaintiffs have obtained concessionary leases from the Port Authority of New York and New Jersey (hereinafter the Port Authority). Moreover, those causes of action specifically asserted against Petrucci in the complaint are "materially related" to her efforts to report on those leases, since they are premised upon her statements to the Port Authority's Office of the Inspector General (hereinafter the OIG) regarding whether the plaintiffs, inter alia, intentionally underreported their revenues and thus paid less rent than was owed under the leases. Inasmuch as the complaint alleges that Petrucci affirmatively instigated the subject investigations by the OIG in a calculated attempt to undermine the plaintiffs' leases with the Port Authority, and that she made her statements directly to the governing body responsible for the leases ..., Petrucci demonstrated her prima facie entitlement to judgment as a matter of law determining that this action is a SLAPP suit, and the plaintiffs failed to raise a triable issue of fact in opposition. Accordingly, this action is properly characterized as a SLAPP suit ... .
>
> However, Petrucci was not entitled to summary judgment dismissing those causes of action specifically asserted against her in the complaint, or on her counterclaim pursuant to Civil Rights Law § 70-a. While we share the dissent's concern for safeguarding the rights of citizens to comment on matters of public concern, and we acknowledge that "Civil Rights Law § 76-a was enacted to provide special protection for defendants in actions arising from the exercise of their rights of public petition and participation by deterring SLAPP actions" ... , we conclude that the plaintiffs sustained their statutory burdens in opposition to the motion by demonstrating that the action "has a substantial basis in fact and law" (CPLR 3212[h]...). **International Shoppes, Inc. v At the Airport, LLC, 2015 NY Slip Op 06710, 2nd Dept 9-2-15**

CONTRACT LAW

CONTRACT LAW (AMBIGUITY) /AMBIGUITY (CONTRACT INTERPRETATION)

Plaintiff Not Entitled to Summary Judgment--- Plaintiff Could Not Demonstrate Plaintiff's Interpretation of the Contract Was the Only Reasonable Interpretation (Rendering the Contract Ambiguous)

Plaintiff sued under a brokerage agreement alleging entitlement to a fee in connection with the sale of defendant's property. By the terms of the agreement, no fee was owed if the property was sold to "a private party identified as James Walker." Ultimately the property was sold to "James Walker," but defendant alleged the buyer was not James Walker but was merely using the name as a pseudonym to protect his privacy. The Second Department determined plaintiff was not

entitled to summary judgment because it could not be found as a matter of law that plaintiff's interpretation of the contract was the only reasonable interpretation. The court explained the relevant analytical criteria:

> "The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" ... . "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" ... . "To determine whether a writing is unambiguous, language should not be read in isolation because the contract must be considered as a whole" ... . If the language of the contract is susceptible of more than one reasonable interpretation, the contract will be considered ambiguous ... .
>
> The threshold question of whether a contract is unambiguous, and the subsequent construction and interpretation of an unambiguous contract, are issues of law within the province of the court ... . "[W]hen interpreting a contract, the court should arrive at a construction which will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" ... . Extrinsic and parol evidence of the parties' intent may not be admitted to create ambiguity in a contract that is unambiguous on its face, but such evidence may be considered where a contract is determined to be ambiguous ... .
>
> * * * ... [Here it] cannot be determined as a matter of law that the plaintiff's interpretation ... was the only reasonable interpretation ... . **NRT N.Y., LLC v Harding, 2015 NY Slip Op 06719, 2nd Dept 9-2-15**

CONTRACT LAW (FORUM SELECTION CLAUSE)/FORUM SELECTION CLAUSE

Forum Selection Clause in a "Release of Liability" Form Is Enforceable

The Second Department determined the forum selection clause in an "Equipment Rental Form and Release of Liability" signed by plaintiff prior to taking snowboarding lessons at defendant ski resort was enforceable. Plaintiff alleged injury caused by improper instruction and argued the form was an invalid contract of adhesion:

> Contrary to the plaintiff's contentions, the "Equipment Rental Form and Release of Liability" was not an unenforceable contract of adhesion, and enforcement of the forum selection clause contained therein does not contravene public policy ... . **Karlsberg v Hunter Mtn. Ski Bowl, Inc., 2015 NY Slip Op 06890, 2nd Dept 9-23-15**

CONTRACT LAW (RESCISSION, IMPOSSIBILITY)/RESCISSION OF CONTRACT (IMPOSSIBILITY)

Zoning Change Prohibiting Subdivision Was Foreseeable, Developer Not Entitled to Rescind Contract for Land Purchase

The Second Department determined plaintiff-developer's (RW's) complaint seeking rescission of a contract for the purchase of land was properly denied and the cross-motion to dismiss the complaint was properly granted. RW argued that the zoning changes enacted by the town, which prohibited the subdivision plan contemplated by the contract, was not foreseeable. The court found that defendants had demonstrated the zoning change was, in fact, foreseeable and rescission was therefore not an available remedy:

> " [T]he law of impossibility provides that performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable'" ... . Contrary to RW's contention, a party seeking to rescind a contract must show that the intervening act was unforeseeable, even if the intervening act consisted of the actions of a governmental entity or the passage of new legislation ... .
>
> Here, RW did not show that it was unforeseeable that a change in the Town's Zoning Code would render it impossible to subdivide the property as initially planned, and did not raise a triable issue of fact in opposition to [defendants'] showing that such a change was foreseeable ... . **RW Holdings, LLC v Mayer, 2015 NY Slip Op 07020, 2nd Dept 9-30-15**

CORPORATION LAW

CORPORATION LAW (ASSET PURCHASE AGREEMENT)/CONTRACT LAW (ASSET PURCHASE AGREEMENT)/ASSET PURCHASE AGREEMENT/DE FACTO MERGER (CORPORATION LAW)/MERGER (CORPORATION LAW)/DEBTOR-CREDITOR

Fees Owed by Seller to "Financial Advisor" Hired by Seller to Facilitate the Sale Were Excluded from the Asset Purchase Agreement (APA)---Doctrine of "De Facto Merger" Did Not Apply in Absence of "Continuity of Ownership"

The First Department, in a full-fledged opinion by Justice Friedman, over a full-fledged dissenting opinion by Justice Manzanet-Daniels, determined that the buyer of a business (TBA Buyer) did not assume the seller's (TBA Seller's) obligation to pay a financial advisor (Fidus) hired by TBA Seller to find a buyer and facilitate a sale. The opinion focused on the precise language of the asset purchase agreement (APA) and held that any monies owed by TBA Seller to Fidus were excluded, by the terms of the APA, from the assets and liabilities TBA Buyer purchased. Much of the opinion addresses the arguments made by the dissent. With respect to the dissent's argument that TBA Buyer assumed TBA Seller's obligation to pay Fidus under the "de facto merger" doctrine, the majority wrote:

> While the general rule is that, absent a merger or consolidation, an entity purchasing the assets of another entity does not thereby acquire liabilities of the seller not expressly transferred in the sale …, a purchase-of-assets transaction may be deemed to constitute a de facto merger between seller and buyer, even if not formally structured as such, under certain conditions … . We have recognized, however, that "the essence of a merger" … is the element of continuity of ownership, which
>
> > "exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction. Stated otherwise, continuity of ownership describes a situation where the parties to the transaction become owners together of what formerly belonged to each'" … . * * *
>
> … [U]nder New York law, continuity of ownership is "the touchstone of the [de facto merger] concept" and "thus a necessary predicate to a finding of de facto merger" … . The purpose of requiring continuity of ownership is "to identify situations where the shareholders of a seller corporation retain some ownership interest in their assets after cleansing those assets of liability" … . Stated otherwise, "[t]he fact that the seller's owners retain their interest in the supposedly sold assets (through their ownership interest in the purchaser) is the substance' which makes the transaction inequitable" … . By contrast, where a "buyer pays a bona fide, arms-length price for the assets, there is no unfairness to creditors in . . . limiting recovery to the proceeds of the sale — cash or other consideration roughly equal to the value of the purchased assets would take the place of the purchased assets as a resource for satisfying the seller's debts" … . Thus, "allowing creditors to collect against the purchasers of insolvent debtors' assets would give the creditors a windfall by increasing the funds available compared to what would have been available if no sale had taken place" … .
>
> In this case, there is no continuity of ownership between TBA Seller and TBA Buyer because, as the record establishes (and Fidus does not dispute), none of TBA Seller's owners acquired a direct or indirect interest in TBA Buyer (and thus in the transferred assets) as a result of the asset purchase transaction … . **Matter of TBA Global, LLC v Fidus Partners, LLC, 2015 NY Slip Op 06698, 1st Dept 9-1-15**

CRIMINAL LAW

CRIMINAL LAW (RIGHT TO PRESENT DEFENSE)/DEFENSE, RIGHT TO PRESENT

[Harmless] Error to Deny Defense a Hearing to Determine Admissibility of Testimony of Private Investigator About What Could Be Seen from a Certain Vantage (Calling Into Question Testimony Identifying the Defendant)

The Second Department, over a vehement and detailed dissent, affirmed defendant's assault and attempted murder convictions. The majority and dissent agreed that defendant should have been allowed to present the testimony of a private investigator about what could be seen from a certain vantage point (calling into question testimony identifying defendant), but disagreed about whether the error was harmless. The dissent explained the defendant's right to present a defense:

FROM THE DISSENT:

> The People correctly concede that it was error by the court to preclude the defense counsel from calling his private investigator as a witness. A defendant's right to call witnesses in his or her behalf is a constitutional right essential to due process of law ... . In the absence of bad faith, the general rule is that where the defendant seeks to call a witness, the witness should be sworn and asked questions, to permit the court, upon proper objection, to rule upon the admissibility of the evidence offered ... .
>
> Here, the defense counsel's request for a hearing on the admissibility of the witness's testimony was improperly denied on the ground that opinion testimony from lay witnesses is inadmissible. However, there is no categorical proscription against the admission of opinions from lay witnesses ... . Further, the proposed testimony about the ability to see a point from another stated vantage point constituted testimony as to the facts—and would not necessarily include opinions ... . Since the defendant had a constitutional right to put forth a defense, contrary to the conclusion of my colleagues, the error cannot be deemed harmless ... . **People v Smith, 2015 NY Slip Op 07043, 2nd Dept 9-30-15**

CRIMINAL LAW/EVIDENCE (FALSE CONFESSIONS)/EXPERT TESTIMONY (FALSE CONFESSIONS)/FALSE CONFESSIONS (EXPERT TESTIMONY)/AMENDMENT OF BILL OF PARTICULARS/PRIOR TESTIMONY OF WITNESS ADMISSIBLE

Defendant Should Have Been Allowed to Present Expert Evidence Re: False Confessions---Criteria Explained---New Trial Ordered

The Second Department addressed several significant issues in a lengthy decision ordering a new trial in a murder case (which will be the defendant's fifth trial in the matter). Although the defendant's girlfriend had testified against the defendant in prior proceedings, she feigned a loss of memory and refused to testify in the most recent trial. County Court properly held that the girlfriend was "unavailable" within the meaning of Criminal Procedure Law 670.10 thereby allowing her prior testimony to be read into evidence. County Court should not, however, have allowed the People to amend the bill of particulars which, in response to the defendant's alibi evidence presented in prior trials, extended the time period in which the crimes were alleged to have occurred. The focus of the decision, and the reason for reversal, was County Court's error in excluding defendant's expert testimony about false confessions. The confession was the principal evidence in the People's case and was the product of seven hours of interrogation, 75 minutes of which was videotaped. The Second Department addressed the issue in depth:

> Here … the proffered expert testimony was relevant to this particular defendant and the particular circumstances of the case, including the approximately seven-hour interrogation, the videotaped confession, and the lack of physical evidence or eyewitness testimony linking the defendant to the crime … .
>
> In addition to reports from two relevant experts, the County Court was presented with a 75-minute video of the defendant's late-night confession, taken after the defendant was in custody for almost 14 hours and interrogated for approximately 7 of those almost 14 hours. Among other things, the video shows that the defendant, whose hands were cuffed in front of him during the interview, spoke slowly and sat in a slouched position for a substantial portion of the interview. Further, the officers repeatedly employed suggestive and leading questions, fed the defendant specific details related to the crime scene, and used rapport-building techniques. * * *
>
> Upon our consideration of the submissions and opinions of both experts, we find that the defendant made a thorough proffer that he was "more likely to be coerced into giving a false confession" than other individuals. His proffer clearly indicated that he was intellectually impaired, highly compliant, and suffered from a diagnosable psychiatric disorder, and also that the techniques used during the interrogation were likely to elicit a false confession from him … . Moreover, in light of the foregoing, the fact that no one had videotaped the nearly six hours of the interrogation that had been conducted before the confession was made raises significant concerns. **People v Days, 2015 NY Slip Op 06731, 2nd Dept 9-2-15**

CRIMINAL LAW (EXCULPATORY EVIDENCE, GRAND JURY)/EVIDENCE (EXCULPATORY EVIDENCE IN GRAND JURY)/JUSTIFICATION DEFENSE, PRESENTATION IN GRAND JURY/GRAND JURY, PROSECUTOR'S DUTY TO PRESENT EXCUPATORY EVIDENCE

Under the Facts, the Prosecutor Was Not Obligated to Present Exculpatory Evidence to the Grand Jury---Defendant Did Not Exercise His Right to Testify Before the Grand Jury

The First Department determined defendant's motion to set aside the verdict on the ground the prosecutor did not charge the grand jury on the justification defense was properly denied. The indictment alleged the defendant attacked the victim, Valdez, with a machete. At trial, the defendant testified that Valdez attacked him with a baton and he used a knife in self-defense. It was revealed at trial that Valdez did in fact have a baton at the time of incident, that Valdez had not told the police about the baton, and that, months later, he told the prosecutor about the baton before the matter was presented to the grand jury. The defendant chose not to testify before the grand jury. No mention of the baton, or that the defendant made a statement claiming he acted in self-defense, was made in the grand jury proceedings and the grand jury was not instructed on the justification defense. The First Department held that the prosecutor's failure, in the grand jury proceedings, to present evidence the victim had a baton, or that defendant stated he acted in self-defense, did not amount to misconduct justifying the dismissal of the indictment. The court emphasized the defendant's failure to exercise his right to testify before the grand jury to present exculpatory evidence, and explained the nature of the prosecutor's duty to present exculpatory evidence to the grand jury:

> It is axiomatic that a prosecutor, in presenting evidence and potential charges to a grand jury, is " charged with the duty not only to secure indictments but also to see that justice is done'" ... . The role of the grand jury is not only to investigate criminal activity to see whether criminal charges are warranted but also to protect individuals from needless and unfounded charges ... . For that reason, justification, as an exculpatory defense that if accepted eliminates any grounds for prosecution, should be presented to the grand jury when warranted by the evidence ... . However, a prosecutor, in presenting a case to a grand jury, is "not obligated to search for evidence favorable to the defense or to present all evidence in [the People's] possession that is favorable to the accused . . . In the ordinary case, it is the defendant who, through the exercise of his own right to testify . . . , brings exculpatory evidence to the attention of the Grand Jury" ... . Thus, a prosecutor is not obligated to present to the grand jury a defendant's exculpatory statement made to the police upon arrest ... . Where, however, a prosecutor introduces a defendant's inculpatory statement to the grand jury, he is obligated to introduce an exculpatory statement given during the course of the same interrogation which amplifies the inculpatory statement if it supports a justification defense ... . * * *
>
> Assuming arguendo that, as claimed by defendant and denied by the People, the ADA did know about the ... baton at the time of the grand jury proceedings, dismissal of the indictment based on the failure to charge the grand jury on justification still would not be warranted. "[A] Grand Jury proceeding is not a mini trial . . . The prosecutor . . . need not disclose certain forms of exculpatory evidence . . . [Nor is] the prosecutor . . . obligated to present the evidence or make statements to the grand jurors in the manner most favorable to the defense" ... . As previously noted, a prosecutor is "not obligated to search for evidence favorable to the defense or to present all evidence in [the People's] possession that is favorable to the accused . . . In the ordinary case, it is the defendant who, through the exercise of his own right to testify . . . , brings exculpatory evidence to the attention of the Grand Jury"... . **People v Morel, 2015 NY Slip Op 06865, 1st Dept 9-22-15**

CRIMINAL LAW (CONTINUING CRIME, GRAND LARCENY)/GRAND LARCENY (SINGLE CONTINUING CRIME)

Several Similar Thefts from the Same Store Constituted a Single, Continuing Crime

The Second Department, over a dissent, determined defendant, who stole items from a store on a series of separate occasions, had committed a continuing crime and therefore was properly prosecuted for stealing merchandise worth more than $1000.00:

> The evidence presented at trial demonstrated that the defendant took similar expensive electronic merchandise from the same store on each occasion, under virtually the same circumstances, and with the assistance of the driver of the minivan. Contrary to the position of our dissenting colleague, we find that this evidence sufficiently established that the defendant stole merchandise "with a single [ongoing] intent, carried out in

successive stages" (People v Rossi, 5 NY2d at 401), and that this was not merely a series of distinct petty thefts (see People v Daghita, 301 NY 223, 225 [affirming the defendant's conviction of a single continuing grand larceny where he stole a "considerable quantity of merchandise over a period of time" from the same store and "used a large portion of it to furnish his home and to outfit his family"]; see also People v Henderson, 163 AD2d 888; cf. People v Seymour, 77 AD3d 976, 980 [insufficient proof that two thefts from the same store constituted a common scheme or plan, where the defendant stole one television during the first incident, a variety of merchandise during the second incident, and each theft was perpetrated in a different manner, since "there was no evidence of the defendant's intent to commit fraud or of his intent to engage in a plan of continuous fraud"]). **People v Malcolm, 2015 NY Slip Op 06829, 2nd Dept 9-16-15**

CRIMINAL LAW (WITHDRAWAL OF PEREMPTORY CHALLENGE)/PEREMPTORY CHALLENGES (WITHDRAWAL)/WITHDRAWAL OF PEREMPTORY CHALLENGE

The Unjustified Denial of Defense Counsel's Request to Withdraw a Peremptory Challenge Was, Under the Facts, Subject to a Harmless Error Analysis

The Second Department determined the trial court erred when it denied defense counsel's request to withdraw a peremptory challenge to a juror. However, the error was deemed harmless because of the nature of the evidence against the defendant. On appeal the Second Department primarily addressed whether the harmless error analysis applied to the withdrawal of a peremptory challenge:

> The defendant contends that the Supreme Court's improper denial of his request to withdraw his peremptory challenge is not subject to harmless error analysis, since the error deprived him of his constitutional right to a jury in whose selection he had a voice ... . We disagree. While peremptory challenges "are a mainstay in a litigant's strategic arsenal," they are "not a trial tool of constitutional magnitude" ... . The right to exercise peremptory challenges "is protected by the Criminal Procedure Law, which provides that each party must be allowed' an equal number of peremptory challenges and that a court must exclude' any juror challenged" ... . Therefore, "the unjustified denial of a peremptory challenge violates CPL 270.25(2) and requires reversal without regard to harmless error" ... . However, there is no statutory right to withdraw a peremptory challenge. Further, the instant case does not involve a situation in which the People attempted to peremptorily challenge a juror who had been accepted by the defense in violation of CPL 270.15(2), inasmuch as the People did not object to the defendant's request to withdraw the peremptory challenge ... . Moreover, the defendant was not prejudiced by the loss of the peremptory challenge since, at the conclusion of jury selection, defense counsel had exercised only 9 of his 15 peremptory challenges ... . Accordingly, under the circumstances of this case, the error was harmless. **People v Marshall, 2015 NY Slip Op 06830, 2nd Dept 9-16-15**

CRIMINAL LAW (PROBABLE-REASONABLE CAUSE FOR VEHICLE STOP)/VEHICLE STOP (PROBABLE-REASONABLE CAUSE)

Ornaments Hanging from Rear-View Mirror Justified Vehicle Stop

The Second Department, over a dissent, determined the police officer had probable/reasonable cause to believe defendant had committed a traffic infraction. Therefore, the vehicle stop and the subsequent search of the vehicle (which turned up a weapon) were proper. There was an ornamental sandal and necklace hanging from the rear-view mirror. The court held the officer had reasonable cause to believe the sandal and necklace obstructed the driver's view in violation of Vehicle and Traffic Law 375 (30):

> Under the Fourth Amendment to the United States Constitution and article I, § 12, of the New York State Constitution, a police officer may stop a vehicle when the officer has probable cause to believe that the driver of the vehicle has committed a traffic infraction ... . In this case, the credible evidence adduced at the suppression hearing established that the police had probable cause to stop the Altima. The officer who stopped the Altima testified that when he stopped his patrol car behind the Altima, he saw an ornamental sandal on a string and a necklace hanging from the Altima's rearview mirror. The officer further testified that the sandal was four to five inches long and "[p]ossibly about [two] inches in width," and that it was hanging about four to five inches beneath the rearview mirror. Contrary to the defendant's contention and to our colleague's dissent, this testimony demonstrated that the officer had reasonable cause to believe that the sandal was hung "in such a manner as to obstruct or interfere with the view of the operator

through the windshield" (Vehicle and Traffic Law § 375[30]...). Accordingly, the officer's stop of the Altima was not improper .. . Probable cause does not require certainty, and the officer's testimony about the size and location of the ornaments was sufficient to establish probable cause. **People v Bookman, 2015 NY Slip Op 07037, 2nd Dept 9-30-15**

CRIMINAL LAW (YOUTHFUL OFFENDER STATUS)/YOUTHFUL OFFENDER STATUS

Failure to Provide Reason for Denial of Youthful Offender Status Required Remittal

The Second Department remitted the matter to Supreme Court because Supreme Court did not place on the record its reasons for denying youthful offender status to the defendant, and there was no indication that Supreme Court considered whether to afford defendant youthful offender status:

> In People v Rudolph (21 NY3d 497, 499), the Court of Appeals held that compliance with CPL 720.20(1), which provides that the sentencing court "must" determine whether an eligible defendant is to be treated as a youthful offender, "cannot be dispensed with, even where defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request." Compliance with CPL 720.20(1) requires that the sentencing court actually consider and make an independent determination of whether an eligible youth is entitled to youthful offender treatment ... . Here, the Supreme Court stated that "[t]here is no youthful offender adjudication" when it imposed sentence in accordance with the defendant's plea agreement. However, the court did not place on the record any reason for not adjudicating the defendant a youthful offender, and there is nothing in the record to indicate that it actually independently considered youthful offender treatment instead of denying such treatment because it was not part of the plea agreement. Under these circumstances, we vacate the defendant's sentence, and remit the matter ... for a determination of whether the defendant should be afforded youthful offender treatment. **People v T.E., 2015 NY Slip Op 06827, 2nd Dept 9-16-15**

DISCIPLINARY HEARINGS (INMATES)

DISCIPLINARY HEARINGS (INMATES)

Hearing Officer's Failure to Ascertain Why a Witness Called by the Inmate Refused to Testify Required Annulment of the Disciplinary Determination

The Third Department determined the inmate-petitioner's disciplinary determination must be annulled because the inmate was effectively denied his right to call a witness:

> … [T]he determination must be annulled because petitioner was denied his right to call a witness … . After petitioner requested that his cellmate at the time of the cell search be called to testify, the Hearing Officer sent two correction officers to retrieve him; the officers returned and merely reported that the prospective witness had refused to testify because "he didn't want to come out." One of the officers signed a witness refusal to testify form that provided no reason for the refusal and indicated that the prospective witness had refused to sign the form. As the Hearing Officer made no attempt to verify the witness's refusal or ascertain his reasons for refusing to testify, despite petitioner's repeated requests, petitioner's right to call witnesses was violated … . **Matter of Figueroa v Prack, 2015 NY Slip Op 06846, 3rd Dept 9-17-15**

ELECTION LAW

ELECTION LAW (RESIDENCE)/RESIDENCE (ELECTION LAW)

Use of an Address to Which the Respondent Was in the Process of Moving Did Not Constitute a False Statement within the Meaning of the Election Law

In an action seeking to invalidate a nominating petition, the Fourth Department determined the respondent (a candidate for Common Council Member in Utica) did not provide a false address when she witnessed signatures on her nominating petition. Respondent was in the process of moving to the address used on the petition. Although she had spent time at the new address, the certificate of occupancy for the property had not yet been issued and she, therefore, could not yet formally reside there. The Fourth Department explained the law

relevant to the use of an address where one intends to reside:

> We explained in Matter of McManus v Relin (286 AD2d 855, lv denied 96 NY2d 718) that where, as here, "[t]he witness was in the process of moving from one apartment to another during the period in which signatures were being obtained and he provided his new address as a current address on . . . designating petitions signed before he actually moved," the witness complied with Election Law § 6-132 (2). Although respondent had not yet moved to the address at the time she witnessed the signatures, the record establishes that the address was intended to be "that place where [she] maintains a fixed, permanent and principal home" (§ 1-104 [22]). "The determination of an individual's residence is dependent upon an individual's expressed intent and conduct …, and we conclude that the record establishes that respondent's conduct reflects her intent that the address is her residence …, despite her inability to move in for reasons beyond her control. Thus, the witness statement using that address does not, under the circumstances of this case, constitute "a material false statement" (§ 6-132 [2]), and there is no indication of fraud … . Where an alleged impropriety "does not involve the substantive requirements of witness eligibility[,]' [i.e., that respondent is a duly qualified voter of the state and an enrolled voter of the same political party as the voters qualified to sign the petition] and there is no implication of fraud, resort to strict construction should be avoided if it would lead to injustice in the electoral process or the public perception of it' " … . We therefore conclude, contrary to petitioner's contention, that strict construction of Election Law § 6-132 (2) is not necessary with respect to respondent's specification of the address on the witness statement. **Matter of Vescera v Karp, 2015 NY Slip Op 06755, 4th Dept 9-8-15**

EMPLOYMENT LAW

EMPLOYMENT LAW (RACIAL DISCRIMINATION)/RACIAL DISCRIMINATION (EMPLOYMENT)/EXECUTIVE LAW (RACIAL DISCRIMINATION)/NEW YORK STATE HUMAN RIGHTS LAW (EMPLOYMENT DISCRIMINATION)/NEW YORK CITY HUMAN RIGHTS LAW (EMPLOYMENT DISCRIMINATION)

Unlike a "State Human Rights Law" Cause of Action, a "New York City Human Rights Law" Cause of Action Is Supported If Racial Bias Played "Any Role" (As Opposed to a "Motivating and Substantial Role") In the Discriminatory Action

The plaintiff alleged he was terminated from employment due to racial bias and sued under the Executive Law (New York State Human Rights Law) and under New York City Human Rights Law. Plaintiff acknowledged that he was sleeping on the job, a legitimate reason for termination. Plaintiff's New York State Human Rights Law cause of action was dismissed because plaintiff could not show that racial bias played a "motivating or substantial role" in the termination. But, because the criteria for a cause of action under the New York City Human Rights Law are broader, the New York City Human Rights Law cause of action survived summary judgment. Under the New York City Human Rights Law, if termination was motivated "in part" by racial bias, even though there was a legitimate reason for termination, the termination is actionable:

> The Court of Appeals has recognized that the New York City Human Rights Law must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible" ... . Thus, the New York City Human Rights Law is to be more broadly interpreted than similarly worded federal or State antidiscrimination provisions ... . The Appellate Division, First Department, has interpreted the New York City Human Rights Law as requiring that unlawful discrimination play " no role'" in an employment decision ... . Our Court has expressed general agreement with the First Department's interpretation of the New York City Human Rights Law ... . Thus, under the broadly worded and broadly interpreted New York City Human Rights Law, if the supervisor's decision to report the plaintiff was motivated by racial or

ethnic animus, even in part, the defendant may be held liable.

The evidence undisputedly established that the plaintiff's employment was terminated by the defendant because the plaintiff was found to be asleep while on duty, in violation of its rules. Additionally, there was evidence that the defendant had a zero-tolerance policy with respect to violations of that rule. Further, it is also not disputed that the defendant's no-tolerance policy regarding the termination of the employment of employees found sleeping while on duty is a legitimate policy. Nevertheless, the plaintiff presented evidence that his supervisor reported him to the defendant's management in part out of racial animus, and did not report other, non-Indian employees who were found sleeping while on duty. Thus, the plaintiff raised a triable issue of fact as to whether his supervisor's unlawful discrimination, which is to be imputed to the defendant, played a role in the termination of the plaintiff's employment. Accordingly, the Supreme Court erred in granting that branch of the defendant's motion which was for summary judgment dismissing the cause of action alleging a violation of the New York City Human Rights Law ... . **Singh v Covenant Aviation Sec., LLC, 2015 NY Slip Op 06911, 2nd Dept 9-23-15**

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW (FINDINGS INCONSISTENT WITH FINAL ENVIRONMENTAL IMPACT STATEMENT [FEIS])/ADMINISTRATIVE LAW (FINDINGS INCONSISTENT WITH FINAL ENVIRONMENTAL IMPACT STATEMENT [FEIS])/STATE ENVIRONMENTAL QUALITY REVIEW ACT [SEQRA] (FINDINGS INCONSISTENT WITH FINAL ENVIRONMENTAL QUALITY REVIEW STATEMENT [FEIS])

Town Board's "Adverse Effects" Findings Annulled as Inconsistent with Final Environmental Impact Statement (FEIS)

The Second Department determined Supreme Court properly annulled the town board's findings that a project would have adverse environmental effects because the board's findings were not consistent with the Final Environmental Impact Statement (FEIS). The court explained the board's obligations and the courts' review powers in this context:

> Judicial review of an agency determination under SEQRA [State Environmental Quality Review Act] is limited to whether the agency procedures were lawful and "whether the agency identified the relevant areas of environmental concern, took a hard look' at them, and made a reasoned elaboration' of the basis for its determination" ... . "In a statutory scheme whose purpose is that the agency decision-makers focus attention on environmental concerns, it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively" ... . The agency decision should be annulled only if it is arbitrary, capricious, or unsupported by the evidence ... .
>
> "The purpose of an environmental impact statement is to provide detailed information about the effect which a proposed action is likely to have on the environment, to list ways in which any adverse effects of such an action might be minimized, and to suggest alternatives to such an action so as to form the basis for a decision whether or not to undertake or approve such action" (ECL 8-0109[2]). In a findings statement, the lead agency "considers the relevant environmental impacts presented in an EIS, weighs and balances them with social, economic and other essential considerations, provides a rationale for the agency's decision and certifies that the SEQRA requirements have been met" (6 NYCRR 617.2[p]...). Agencies have considerable latitude in evaluating environmental effects and choosing between alternatives ... .
>
> While an agency's ultimate conclusion is within the discretion of the agency, it must be based upon factual evidence in the record and not generalized, speculative community objections ... . "While an EIS does not require a public agency to act in any particular manner, it constitutes evidence which must be considered by the public agency along with other evidence which may be presented to such agency" ... .
>
> Here, the Supreme Court properly annulled the Board's findings statement as unsupported by the evidence. The Board was required to render its conclusions regarding the sufficiency of mitigation measures, the propriety of permit approvals, and a balancing of considerations, based on the evidence contained in the environmental review. The Board's conclusions in the findings statement were based, at least in part, on factual findings which were contradicted by the scientific and

technical analyses included in the FEIS and not otherwise supported by empirical evidence in the record ... .

The findings statement also failed to give sufficient consideration to the various alternative plans reviewed in the FEIS ... . **Matter of Falcon Group Ltd. Liab. Co. v Town/Village of Harrison Planning Bd., 2015 NY Slip Op 07025, 2nd Dept 9-30-15**

FAMILY LAW

FAMILY LAW (EVIDENCE IN CUSTODY DETERMINATION)/EVIDENCE (CUSTODY DETERMINATION)

Controverted Custody-Related Issues Cannot Be Decided Based Upon "In Chambers" Conferences, A Full Hearing Is Required

The Second Department determined a new trial on all custody issues was necessary because Supreme Court refused to allow testimony on certain controverted allegations (parental alienation and use of corporal punishment). Supreme Court erroneously relied upon extensive "in camera" discussions which, Supreme Court determined, had revealed the issues to be "sporadic and inconsequential." The Second Department noted that all controverted custody issues should be decided only after the issues are addressed in a hearing:

> " '[A]s a general rule, it is error to make an order respecting custody based upon controverted allegations without the benefit of a full hearing' ... . Here, the Supreme Court, after holding 'extensive' in camera discussions with counsel on the issues of excessive corporal punishment and parental alienation, refused to allow testimony on these controverted issues, stating that they were 'sporadic and inconsequential.' Instead, the Supreme Court directed that only 'positive' aspects of the parties' parenting be presented on the record. This was error, since the court cannot base a significant portion of its decision on off-the-record conferences ...". **Minjin Lee v Jianchuang Xu, 2015 NY Slip Op 06784, 2nd Dept 9-16-15**

FORECLOSURE

FORECLOSURE (MANDATORY SETTLEMENT CONFERENCE)/CIVIL PROCEDURE (FORECLOSURE, SETTLEMENT CONFERENCE)/SETTLEMENT CONFERENCE (FORECLOSURE)/HOME LOAN (SETTLEMENT CONFERENCE, FORECLOSURE)

Question Whether Loan At Issue Was a "Home Loan" Requiring a Settlement Conference, Hearing Ordered

The Second Department found that a hearing was required to determine whether the loan at issue was a "home loan" such that a settlement conference pursuant to CPLR 3408 was required. The court explained the analytical factors:

> "CPLR 3408 does not apply to every residential foreclosure action" ... . CPLR 3408 only mandates a settlement conference in a residential foreclosure action involving a "home loan" as that term is defined by RPAPL 1304, and when the "defendant is a resident of the property subject to foreclosure" (see CPLR 3408...).
>
> RPAPL 1304(5)(a)(i)-(iv) defines a qualifying home loan as one in which, inter alia, the borrower is a natural person; the borrower incurs the debt primarily for personal, family, or household purposes; and the loan is secured by a mortgage on real property in this state "used or occupied, or intended to be used or occupied wholly or partly, as the home or [the] residence of one or more persons and which is or will be occupied by the borrower as the borrower's principal dwelling" ... .
>
> Here, the conflicting affidavits submitted by the parties reveal a sharp factual dispute, inter alia, as to whether the subject loan was made for the defendant's personal, family, or household use, and whether the mortgaged premises was to be occupied as the defendant's principal dwelling. **Richlew Real Estate Venture v Grant, 2015 NY Slip Op 07018, 2nd Dept 9-30-15**

FORECLOSURE (STANDING)/CIVIL PROCEDURE (STANDING-FORECLOSURE)/STANDING (FORECLOSURE)/SUA SPONTE DISMISSAL (STANDING NOT A JURISDICTIONAL DEFECT)

Lack of Standing Not a Jurisdictional Defect, Sua Sponte Dismissal of Complaint Not Warranted

The Second Department, in reversing Supreme Court's sua sponte dismissal of a foreclosure action on "lack of standing" grounds, noted that the "lack of standing" defense was waived by the defendants (not raised in answer), sua sponte dismissal was an abuse of discretion, and "lack of standing" is not a jurisdictional defect. The court explained:

> "The Supreme Court abused its discretion in, sua sponte, directing the dismissal of the complaint for lack of standing. 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, the Supreme Court was not presented with extraordinary circumstances warranting the sua sponte dismissal of the complaint. Since the defendants … did not answer the complaint, and did not make a pre-answer motion to dismiss the complaint, they waived the defense of lack of standing ... . Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint ...". **FCDB FF1 2008-1 Trust v Videjus, 2015 NY Slip Op 06777, 2nd Dept 9-16-15**

FRAUD

FRAUD (PLEADING)/FRAUD, AIDING AND ABETTING (PLEADING)/CIVIL PROCEDURE (FRAUD, SUFFICIENT ALLEGATIONS)

Pleading Requirements for "Fraud" and "Aiding and Abetting Fraud" Causes of Action Succinctly Described

The Second Department, in affirming the denial of a motion to dismiss "fraud" and "aiding and abetting fraud" causes of action, explained the elements which must be alleged in the complaint:

> To state a cause of action sounding in fraud, a plaintiff must allege that "(1) the defendant made a representation or a material omission of fact which was false and the defendant knew to be false, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) there was justifiable reliance on the misrepresentation or material omission, and (4) injury" ... . To plead a cause of action to recover damages for aiding and abetting fraud, the complaint "must allege the existence of [the] underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud". Moreover, pursuant to CPLR 3016(b), where a cause of action is based upon fraud or aiding and abetting fraud, the "circumstances constituting the wrong" must be "stated in detail." **Caravello v One Mgt. Group, LLC, 2015 NY Slip Op 07000, 2nd Dept 9-30-15**

INSURANCE LAW

INSURANCE LAW (NO-FAULT INDEPENDENT MEDICAL EXAM)/NO-FAULT INSURANCE (INDEPENDENT MEDICAL EXAM)/EVIDENCE (NO-FAULT, COMPLIANCE WITH NOTICE REQUIREMENT FOR INDEPENDENT MEDICAL EXAMINATION)/INDEPENDENT MEDICAL EXAM (30-DAY NOTICE REQUIREMENT, PROOF OF COMPLIANCE)

Insurer Must Demonstrate Compliance with 30-Day Notice Requirement Re: an Independent Medical Examination (IME)

The First Department, over a dissent, affirmed Supreme Court's denial of plaintiff-insurer's motion for summary judgment which argued the insurer was not obligated to provide no-fault insurance coverage because defendant did not appear for a scheduled independent medical examination (IME). In order to be entitled to summary judgment, the insurer was required to show that it notified defendant of the IME within 30 days of the insurer's receipt of the verification form from the defendant. Plaintiff's papers did not state when the verification form was received by it. Therefore, the plaintiff could not show it complied with the 30-day-notice requirement. The court noted that the issue could be determined as a matter of law and the defect could not be cured in reply papers:

> "Contrary to the position taken by the dissent, the issue of whether plaintiff has failed to establish that the notices for the IMEs were timely, pursuant to 11 NYCRR 65-3.5(d), presents a

question of law which this Court can review. Unlike the dissent, we find that plaintiff was required to submit proof of the timely notice in order to make a prima facie showing of entitlement to judgment as a matter of law. Any belated attempt by plaintiff to cure this deficiency in its prima facie showing by submitting evidence for the first time in reply would have been improper...". **American Tr. Ins. Co. v Longevity Med. Supply, Inc., 2015 NY Slip Op 06761, 1st Dept 9-15-15**

INTENTIONAL TORTS

INTENTIONAL TORTS (PRIMA FACIE TORT, TORTIOUS INTERFERENCE WITH CONTRACT)/PRIMA FACIE TORT/TORTIOUS INTERFERENCE WITH A CONTRACT

Rare Example of Sufficiently Pled Cause of Action for Prima Facie Tort---Elements of Tortious Interference with a Contract Outlined

The Second Department determined plaintiff had stated a cause of action for prima facie tort and tortious interference with a contract. The complaint alleged the defendant set up websites and organized public protests accusing plaintiff of child abuse and had communicated with plaintiff's employer, causing plaintiff to be terminated without cause. The decision is noteworthy because it demonstrates the extreme nature of allegations deemed sufficient to support a prima facie tort cause of action. With respect to the tortious interference with contract cause of action, the court explained:

> The elements of tortious interference with a contract are: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff" ... . The amended complaint sufficiently sets forth a cause of action based on tortious interference with a contract, alleging, in pertinent part, that [defendant's] intentional interference with the subject employment contract rendered performance impossible. **Hersh v Cohen, 2015 NY Slip Op 06888, 2nd Dept 9-23-15**

LABOR LAW

LABOR LAW (DAMAGES)/CIVIL PROCEDURE (MOTION TO SET ASIDE VERDICT)/VERDICT, MOTION TO SET ASIDE (INADEQUATE DAMAGE AWARD)/VERDICT (INCONSISTENT VERDICT)/VERDICT (AGAINST THE WEIGHT OF THE EVIDENCE)/INCONSISTENT VERDICT/DAMAGES (INADEQUATE AWARD)/LOSS OF CONSORTIUM (INADEQUATE AWARD)/PAIN AND SUFFERING (INADEQUATE AWARD)/COMPARATIVE NEGLIGENCE (ERROR TO CHARGE)

Error to Charge Jury on Comparative Negligence/Inadequate Awards for Pain and Suffering and Loss of Consortium

The First Department determined the jury should not have been charged on comparative negligence in this Labor Law 241 (6) action. Plaintiff's decedent was injured when he tripped and fell over construction debris. Because defendant was obligated to keep the area clear of debris, and because there was no clear path plaintiff's decedent could use, the comparative negligence jury instruction was not warranted. The First Department further determined that the award for pain of suffering ($100,000) was inadequate and the failure to award any damages for loss of consortium was against the weight of the evidence and rendered the verdict inconsistent. Pursuant to plaintiff's motion to set aside the verdict, a new trial was ordered unless defendant agreed to a $400,000 award for pain and suffering and a $50,000 award for loss of consortium:

> The evidence established that, as a result of his hand injury, [plaintiff's decedent] developed, inter alia, nerve damage, painful symptoms consistent with reflex sympathetic dystrophy, anxiety, and significant limitation of the use of his left hand due to permanent contracture of the fingers. Upon a review of other relevant cases, we find that the award of $100,000 for pain and suffering materially deviates from reasonable compensation ... .
>
> The jury's decision not to award damages to plaintiff (wife) for loss of consortium was against the weight of the evidence ... . Plaintiff (wife) described significant changes in [plaintiff's decedent's] behavior after his accident and explained the impact this had on their

relationship. On this record, the jury's decision to award damages for pain and suffering, but none for loss of consortium, is inconsistent. **Kutza v Bovis Lend Lease LMB, Inc., 2015 NY Slip Op 06753, 1st Dept 9-8-15**

LABOR LAW (NATURE AND EFFECT OF INJURIES)/EVIDENCE (NATURE AND EFFECTS OF INJURIES)

Testimony Which Could Have Added Relevant Evidence About the Nature of Plaintiff's Work (Pre-Injury) and the Effects of the Injuries Should Not Have been Excluded as "Cumulative"

The First Department determined the plaintiff in a Labor Law 240 (1) action was entitled to a new trial because the trial judge should not have excluded the testimony of a co-worker and plaintiff's wife as "cumulative:" The court explained:

> "... [A] new trial on damages is necessitated, because we disagree with the court's preclusion of testimony by plaintiff's wife and coworker. Testimony is properly precluded as cumulative when it would neither contradict nor add to that of other witnesses ... . Here, the testimony of plaintiff's wife and his coworker would have added to the testimony of other witnesses. First, the coworker saw plaintiff fall, and his testimony as to the impact to plaintiff's foot could have been highly probative of plaintiff's claim that the continuing pain in his foot was caused by the accident and did not pre-exist it, as defendants argued. Further, the coworker could have testified as to the particular duties carried out by plaintiff as a heavy-construction carpenter, which would have supported plaintiff's position that as a result of his injury he could no longer perform that kind of work. To be sure, plaintiff testified about his job duties, but the coworker's status as a disinterested witness would have given his testimony added value to the jury ... . Nor was the proffered testimony of plaintiff's wife likely to be cumulative, notwithstanding her not having asserted a derivative claim. The wife had a unique perspective on her husband's condition before and after the accident, and could have assisted the jury in further understanding the extent of his disability and of his pain and suffering." **Segota v Tishman Constr. Corp. of N.Y., 2015 NY Slip Op 06764, 1st Dept 9-15-15**

LABOR LAW (HOMEOWNER'S EXCEPTION)/HOMEOWNER'S EXCEPTION/CIVIL PROCEDURE (SUA SPONTE DISMISSAL IN ABSENCE OF MOTION)

Homeowner's Exception Did Not Apply to a Horse Barn Used for Commercial Purposes Despite Presence of an Apartment in the Barn

The Second Department determined the "homeowner's exception" to the applicability of the Labor Law did not apply to a barn used to house horses for commercial purposes, even though the barn included an apartment used by one of the horse farm's shareholders. The court also noted that the "recalcitrant worker" affirmative defense should not have been dismissed "sua sponte" in the absence of a motion to dismiss it. With respect to the homeowner's exception, the court explained:

> "... [T]he plaintiff met his prima facie burden of demonstrating that he was not performing work at a residence within the meaning of the homeowner's exemption under Labor Law §§ 240(1) and 241(6) ... . Among other things, the plaintiff demonstrated that the defendant described itself as "essentially . . . a business for keeping horses," its owners were extensively involved in both keeping and racing horses, and approximately eight horses were boarded at the subject property at the time of the accident. The plaintiff's submissions also established that when the defendant corporation originally purchased the subject property, the large barn was in a state of disrepair. The defendant renovated the large barn and added many improvements to the property, including multiple paddocks, an additional barn, and an "Equicisor," a "72-foot circular automated horse exercising machine." One of the defendant's shareholders described the apartment in the rear of the barn as a part-time "office residence" where he might stay a 'few days' per week, although the amount of time he stayed varied depending on the season and the horse racing schedule. Under these circumstances, the plaintiff established, prima facie, that the defendant's boarding stable, which was used primarily for commercial purposes, did not constitute a residence within the meaning of the homeowner's exemption ...". **Rossi v Flying Horse Farm, Inc., 2015 NY Slip Op 06798, 2nd Dept 9-16-15**

LABOR LAW (TREE REMOVAL)/TREE REMOVAL (LABOR LAW)

Tree Removal Was First Step in Making Structural Repairs, Injury During Tree Removal Covered Under Labor Law 240 (1)

The Second Department determined removal of a tree which had fallen on a house, causing structural damage, was the first step in repairing the structure. Therefore, plaintiff, who fell while attempting the remove the tree, was engaged in an activity covered by Labor Law 240 (1) and 241 (6):

> "… [T]he protections of Labor Law § 240(1) are to be afforded to tree removal when undertaken during the repair of a structure ... . * * * Since the plaintiff was engaged in activities ancillary to the repair of the building from which he fell, the provisions of Labor Law § 241(6) are also applicable to the facts of this case." **Moreira v Osvaldo J. Ponzo, 2015 NY Slip Op 06792, 2nd Dept. 9-16-15**

LABOR LAW (WET STAIRCASE)/WET STAIRCASE (LABOR LAW)

Plaintiff Entitled to Summary Judgment on His Labor Law 240 (1) Cause of Action---Plaintiff Fell from Temporary Staircase Which Was Wet from Rain

The First Department, over an extensive dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon his fall from a temporary staircase which was wet from rain. The dissent argued that there was a question of fact whether a safer temporary staircase could have been provided, and, therefore, summary judgment in plaintiff's favor was not appropriate. The majority wrote:

> Plaintiff is entitled to partial summary judgment on his Labor Law § 240(1) claim. As the dissent recognizes, plaintiff was engaged in a covered activity at the time he slipped and fell down the stairs of a temporary tower scaffold. A fall down a temporary staircase is the type of elevation-related risk to which section 240(1) applies, and the staircase, which had been erected to allow workers access to different levels of the worksite, is a safety device within the meaning of the statute ... . As we stated in Ervin v Consolidated Edison of N.Y. (93 AD3d 485, 485 [1st Dept 2012]), involving a worker who fell when the temporary structure he was descending gave way, "It is irrelevant whether the structure constituted a staircase, ramp, or passageway since it was a safety device that failed to afford him proper protection from a gravity-related risk." We are thus at a loss to comprehend the dissent's reasoning that although the temporary staircase was a safety device and although it admittedly did not prevent plaintiff's fall, there is nonetheless a factual issue which would defeat plaintiff's entitlement to partial summary judgment on his section 240(1) claim.
>
> The fact that the affidavits of plaintiff's and defendant's experts conflict as to the adequacy and safety of the temporary stairs does not preclude summary judgment in plaintiff's favor. A plaintiff is entitled to partial summary judgment on a section 240(1) claim where, as here, stairs prove inadequate to shield him against harm resulting from the force of gravity, and his injuries are at least in part attributable to the defendants' failure to take mandated safety measures to protect him against an elevation-related risk ... . Plaintiff's expert opined, inter alia, that the stairs showed obvious signs of longstanding use, wear and tear; therefore, a decrease in anti-slip properties was to be expected. Given that it is undisputed that the staircase, a safety device, malfunctioned or was inadequate to protect plaintiff against the risk of falling, plaintiff is entitled to summary judgment, whatever the weather conditions might have been. **O'Brien v Port Auth. of N.Y. & N.J., 2015 NY Slip Op 06749, 1st Dept 9-8-15**

LANDLORD-TENANT

LANDLORD-TENANT (RIGHT TO PASS ON APARTMENT TO FAMILY MEMBERS)/RENT-STABILIZATION LAW (NYC)/APARTMENTS, RIGHT TO PASS ON TO FAMILY MEMBERS (RENT-STABILIZATION LAW [NYC])

Question of Fact Whether Former Tenants Entitled to Pass Apartment to Their Son Under the Rent Stabilization Law

The First Department determined there was a question of fact whether former tenants had stopped using their apartment as a primary residence, or whether they had permanently vacated the apartment. Under the terms of an agreement (Settlement Agreement), if the former tenants had permanently vacated the apartment, they were entitled to pass the apartment to their son, who had been living there most of his life. If, on the other hand, the former tenants merely stopped using the apartment

as their primary residence, they could not pass the apartment to their son. The former tenants had moved to Uganda, where they had a home. They returned to New York every year to visit and used the apartment during the visits:

> Although the parents no longer have rights to the apartment, there are still disputed issues of fact regarding whether at the time the parents moved to Uganda, they permanently vacated the apartment or continued to use the apartment as nonprimary residents. This issue and disputed facts directly affect the son's right (if any) to a successor tenancy. If the parents permanently vacated, then the son would have rights as a successor. If, however, the parents continued to use the apartment as non-primary residents, the son's claim would fail This issue precludes the grant of summary judgment to either side on the issue of whether the son has successor rights. **Waterside Plaza Ground Lessee, LLC v Rwambuya, 2015 NY Slip Op 06867, 1st Dept 9-22-15**

LIEN LAW

LIEN LAW (MECHANIC'S LIEN)/MECHANIC'S LIEN/CONTRACT LAW (MECHANIC'S LIEN)

Although Plaintiff Could Not Establish a Valid Mechanic's Lien, Supreme Court Should Have Allowed the Action to Proceed As If it Were Brought As a Breach of Contract

The Second Department determined plaintiff's complaint seeking foreclosure of a mechanic's lien (re: work done pursuant to a contract) should not have been dismissed on the ground the notice of pendency (of the mechanic's lien) had expired. Because the complaint alleged the existence of a contract, performance of plaintiff's obligation thereunder, the amount unpaid balance, and sought a personal judgment for any deficiency after the foreclosure sale, plaintiff's action should have been allowed to proceed:

> "... [U]nder the plain language of the Lien Law, the Supreme Court had the authority to retain the action and award a money judgment even though the lien had expired ... . Section 17 of the Lien Law provides that the 'failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person.' The same rule applies where, as here, the notice of pendency expired during the pendency of the plaintiff's action ... . Section 54 of the Lien Law provides that if 'the lienor shall fail, for any reason, to establish a valid lien in an action under the provisions of this article, he may recover judgment therein for such sums as are due him, or which he might recover in an action on a contract, against any party to the action.' The complaint in this action alleged the existence of the contract, the plaintiff's performance of its obligation thereunder, and the unpaid balance of the agreed price. Additionally, the ad damnum clause included a request for a personal judgment against the defendants for any deficiency remaining after a foreclosure sale. These allegations were sufficient to support an award of a personal judgment against the defendants even if the mechanic's lien was defective ...". **Aluminum House Corp. v Demetriou, 2015 NY Slip Op 06767, 2nd Dept 9-16-15**

MEDICAID

MEDICAID (ELIGIBILITY, PROPERTY TRANSFERS)/ADMINSTRATIVE LAW (MEDICAID ELIGIBILITY)

Substantial Evidence Did Not Support Department of Health's Finding that Property Transfers Rendered Petitioner Ineligible for Medicaid Benefits

The Second Department annulled the Department of Health's (DOH's) finding that petitioner was ineligible for Medicaid benefits based on transfers of property made well before she exhibited signs of dementia. The court explained the analytical criteria:

> In reviewing a Medicaid eligibility determination made after a fair hearing, the court must review the record as a whole to determine if the agency's decisions are supported by substantial evidence and are not affected by an error of law ... . Substantial evidence has been defined as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" ... . While the level of proof is less than a preponderance of the evidence, substantial evidence does not arise from bare surmise, conjecture, speculation, or rumor (see id. at 180), or from the absence of evidence supporting a contrary conclusion ... . When determining Medicaid eligibility, an agency is required to "look back" for a period of 60 months immediately preceding the first date the applicant was both "institutionalized" and had applied for Medicaid benefits to determine if any asset transfers were uncompensated or made for less than fair market value (42 USC § 1396p[c][1][A], [B]; Social

Services Law § 366[5][e][1][vi]). If such a transfer was made during that period, the applicant may become ineligible for Medicaid benefits for a specified period of time (see 42 USC § 1396p[c][1][A], [E]; Social Services Law § 366[5][e][3]), unless there is a "satisfactory showing" that, inter alia, the assets were transferred exclusively for a purpose other than to qualify for medical assistance (42 USC § 1396p[c][2][C][i], [iii]; Social Services Law § 366[5][e][4][iii]). It is the petitioner's burden to rebut the presumption that the transfer of funds was motivated, in part if not in whole, by anticipation of a future need to qualify for medical assistance ... .

Here, the evidence at the fair hearing showed that the latest of the subject transfers was made approximately two years before the petitioner started to exhibit signs of dementia. At the time of the transfers and in the years preceding her need for nursing home care, the petitioner was in good health and living independently. She was driving, cooking, exercising, and paying her own bills. The transfers themselves constituted gifts to her relatives, and the petitioner still had more than $250,000, not including Social Security benefits, following the transfers. Under these circumstances, the petitioner met her burden of rebutting the presumption that the subject transfers were motivated by the anticipation of a future need to qualify for medical assistance ... . **Matter of Sandoval v Shah, 2015 NY Slip Op 07034, 2nd Dept 9-30-15**

MUNICIPAL LAW

MUNICIPAL LAW (DUTY TO DEFEND EMPLOYEES)/TOWN LAW (DUTY TO DEFEND EMPLOYEES)/EMPLOYMENT LAW (PUBLIC EMPLOYEES, DUTY TO DEFEND)/DUTY TO DEFEND (PUBLIC EMPLOYEES)

Town Has Duty to Defend Former Town Clerk Accused of Sexual Harassment Within the Scope of Employment

The Second Department determined the Town Law required the town to pay for the defense of the former town clerk accused of sexual harassment within the scope of his employment:

> The duty to defend is broader than the duty to indemnify ..., and it is triggered if the civil complaint includes allegations that the employee was acting within the scope of his or her employment at the time of the alleged wrongdoing ... . Here, the underlying federal complaint specifically alleges, among other things, that the petitioner committed sexual harassment while acting in the scope of his employment as the Town Clerk, the Town facilitated a hostile work environment, and the Town failed to prevent workplace harassment. Contrary to the Town's contention, the Supreme Court correctly determined that the allegations in the federal complaint were sufficient to trigger the Town's broad duty to defend the petitioner ... . **Matter of Bonilla v Town of Hempstead, 2015 NY Slip Op 06916, 2nd Dept 9-23-15**

MUNICIPAL LAW (STATUTORY INTERPRETATION)/TOWN LAW (STATUTORY INTERPRETATION)/STATUTORY INTERPRETATION (LEGISLATIVE HISTORY)

Trustees Were Not Required by Town Law to Turn Over to the Town Board Trust Revenues Generated by Water Management in the Town of Southampton

In a detailed decision which traces the history of a trust and statutes governing town finances in the Town of Southampton from pre-colonial times to the present, the Second Department determined that the "Trustees of the Freeholders and Commonality of the Town of Southampton" (Trustees) were not obligated by Town Law to turn over trust revenues from water management to the Town Board:

> For nearly 400 years, the Trustees of the Freeholders and Commonalty of the Town of Southampton (hereinafter the Trustees or the Trust) have had the right, derived from royal land grants and patents, to control and manage the waters of the town. In the present day, the Trustees raise revenue from issuing licenses for activities including commercial fishing, charging permit fees for seasonal boat docking, dock and bulkhead construction, and dredging, and selling sand excavated from Mecox Bay. The Trustees deposit their revenues into several bank accounts, which, at the time this action was commenced, had an aggregate balance of close to $1 million. On this appeal, we are called upon to determine whether Town Law § 64(1) requires the Trustees to turn over control of their revenues to the Town Board of the Town of Southampton (hereinafter the Town Board) and whether the expenditure of such revenues must therefore

comply with the same statutes which govern town finances and expenditures. We conclude that Town Law § 64(1) does not require the Trustees to turn over control of their revenues to the Town Board, and that the statutes governing town finances and expenditures relied upon by the plaintiffs are inapplicable to the Trust. **Gessin v Throne-Holst, 2015 NY Slip Op 06885, 2nd Dept 9-23-15**

NEGLIGENCE

NEGLIGENCE (ASSUMPTION OF RISK)/ASSUMPTION OF RISK/GO-KARTS (ASSUMPTION OF RISK)

Passenger in Recreational Go-Kart Assumed the Risk of Injury Caused by Being "Bumped" by Another Go-Kart

The First Department determined plaintiff, a passenger in an electric, recreational go-kart, assumed the risk of injury alleged to have been caused by the go-kart being "bumped" by other go-karts. The court noted that (1) the written waiver of liability signed by the plaintiff was void as against public policy, and (2) the go-kart operator had a written policy prohibiting intentional "bumping," but held that the common-law assumption of risk doctrine nevertheless applied:

> [The "assumption of risk"] doctrine applies to "certain types of athletic or recreational activities," where "a plaintiff who freely accepts a known risk commensurately negates any duty on the part of the defendant to safeguard him or her from the risk'" … . While "participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced" …, the concept of a "known" risk includes "apparent or reasonably foreseeable" risks inherent in the activity … .
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> The activity in which plaintiff engaged is a type to which the assumption of risk doctrine is appropriately applied. "In riding the go-cart, the plaintiff . . . assumed the risks inherent in the activity" … . Those risks included the risk "that the go-cart would bump into objects" … . Of course, the "apparent or reasonably foreseeable" risks inherent in go-karting also include the risk that vehicles racing around the track may intentionally or unintentionally collide with or bump into other go-karts. It is that inherent risk which "negates any duty on the part of the defendant to safeguard [plaintiff] from the risk" … . **Garnett v Strike Holdings LLC, 2015 NY Slip Op 06694, 1st Dept 9-1-15**

NEGLIGENCE (JUDGMENT AS A MATTER OF LAW)/CIVIL PROCEDURE (JUDGMENT AS A MATTER OF LAW)/JUDGMENT AS A MATTER OF LAW, MOTION FOR (CPLR 4401)

Where the Complaint Alleged Only that the Driveway Was Defective and the Complaint Against the Company Which Renovated the Driveway Was Dismissed, the Complaint Against the Property Owners Should Have Been Dismissed As Well—There Was No Viable Theory for Liability on the Part of the Property Owners

The Second Department determined Supreme Court should have granted defendant property owners' motion for a judgment as a matter of law after the close of proof. Plaintiff, who tripped over the lip on defendants' driveway, alleged the driveway was defective. After proof was closed, Supreme Court dismissed the complaint against the company which renovated the driveway, but denied the property owners' motion to dismiss. Because plaintiff's only theory was that the driveway was defective, and the property owners could only be liable for a hazardous condition caused by a failure to properly maintain the property, the complaint against the property owners should have been dismissed as well:

> Dismissal of an action insofar as asserted against a contractor who performs work on premises does not mandate dismissal of the action insofar as asserted against the owner of the premises, since the owner has a duty to maintain the premises in a reasonably safe condition … . Here, however, the plaintiff's theory of liability was that the driveway was defective. …[T]here was no evidence that the lip of the driveway was in a hazardous condition. Therefore, it was inconsistent to direct the dismissal of the complaint insofar as asserted against [contractor] while denying such relief to the appellants as homeowners, since no viable alternative theory of liability was asserted against the appellants … . **Cioffi v Klein, 2015 NY Slip Op 06704, 2nd Dept 9-2-15**

NEGLIGENCE (HEARSAY IN HOSPITAL RECORDS)/EVIDENCE (HEARSAY IN HOSPITAL RECORDS)/HOSPITAL RECORDS (HEARSAY)

Plaintiff Entitled to Summary Judgment in Rear-End Collision Case---Plaintiff's Statements in Hospital Record Not Admissible---No Relation to Diagnosis and Not Admissions

The Second Department determined plaintiff was entitled to summary judgment on liability in a rear-end collision case. Plaintiff was driving 30 miles an hour when her car was struck from behind, indicating defendant-driver did not maintain a safe distance between the two cars. The court noted that statements made by the plaintiff which were memorialized in a hospital record were inadmissible because the statements were not necessary for diagnostic purposes and were not admissions:

> Here, the plaintiff established her prima facie entitlement to judgment as a matter of law by demonstrating, through her affidavit, that she was operating her vehicle in a lane of the Cross Bronx Expressway, proceeding straight ahead at approximately 30 miles per hour with her foot on the gas pedal, when her vehicle was struck in the rear within her lane of travel, suddenly and without warning, by the defendants' vehicle. Thus, the plaintiff established, prima facie, that [defendant-driver] was negligent in failing to maintain a safe distance behind her vehicle, and that she did not contribute to the happening of the accident ... . * * *
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> ... [T]he defendants could not rely on certain statements in the plaintiff's hospital records to raise a triable issue of fact, since, under the circumstances presented here, the details of how the plaintiff sustained particular injuries and how the accident occurred in this matter were not useful for purposes of her medical diagnosis or treatment and, accordingly, a medical chart entry containing such hearsay statements could not be considered to have been prepared in the regular course of the hospital's business ... . Accordingly, the statements contained in the chart entry are not admissible under the business records exception to the hearsay rule. Moreover, the entry was not inconsistent with the plaintiff's description of the accident, as provided in her affidavit. Consequently, the entry was not admissible as an admission by the plaintiff ... . **Service v McCoy, 2015 NY Slip Op 06801, 2nd Dept 9-16-15**

NEGLIGENCE (HEARSAY IN POLICE REPORT)/EVIDENCE (HEARSAY IN POLICE REPORT)/POLICE REPORT (HEARSAY)

Source of Information in Police Report Unknown---Reversible Error to Admit Hearsay in the Report

The Second Department determined a new trial was necessary in this pedestrian-injury case because defendant was allowed to place inadmissible hearsay, contained within a police report, in evidence. Plaintiff alleged she was struck by defendants' car when she was crossing the street in a crosswalk with the light in her favor. Defendants alleged plaintiff was riding a bicycle and darted out between two cars. The police report supported defendants' version. However, the officer who wrote the report testified he had no recollection of the source of the information in the report. The Second Department explained why none of the exceptions to the hearsay rule applied to the information in the report:

> "Facts stated in a police report that are hearsay are not admissible unless they constitute an exception to the hearsay rule" ... . Pursuant to CPLR 4518(a), a police accident report is admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties ... . If information contained in a police accident report was not based upon the police officer's personal observations, it may nevertheless be admissible as a business record "if the person giving the police officer the information contained in the report was under a business duty to relate the facts to him [or her]" ... . If the person giving the police officer the information was not under a business duty to give the statement to the police officer, such information "may be proved by a business record only if the statement qualifies [under some other] hearsay exception, such as an admission" ... . In other words, "each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception" ... . "The proponent of hearsay evidence must establish the applicability of a hearsay-rule exception" ... . **Memenza v Cole, 2015 NY Slip Op 06789, 2nd Dept 9-16-15**

NEGLIGENCE (MEDICAL MALPRACTICE, RES IPSA LOQUITUR)/MEDICAL MALPRACTICE (RES IPSA LOQUITUR)/EVIDENCE/RES IPSA LOQUITUR (MEDICAL MALPRACTICE)

Plaintiff Raised a Triable Issue of Fact Under the Doctrine of Res Ipsa Loquitur---Plaintiff Alleged a Bone Was Fractured During Surgery

The Second Department determined plaintiff had raised a triable issue fact in a medical malpractice action under the doctrine of res ipsa loquitur. The complaint alleged that, during surgery on her shoulder, a bone was fractured. The court explained the analytical criteria:

> "[R]es ipsa loquitur [is] available in a narrow category of factually simple medical malpractice cases requir[ing] no expert to enable the jury to reasonably conclude that the accident would not happen without negligence" ... . The doctrine is available when (1) the event is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) the event is caused by an agent or instrumentality within the exclusive control of the defendant; and (3) the event was not caused by any voluntary action or contribution on the part of the plaintiff ... . "The doctrine is generally available to establish a prima facie case when an unexplained injury in an area which is remote from the treatment site occurs while the patient is anesthetized" ... . "In a multiple defendant action in which a plaintiff relies on the theory of res ipsa loquitur, a plaintiff is not required to identify the negligent actor [and] [t]hat rule is particularly appropriate in a medical malpractice case . . . in which the plaintiff has been anesthetized" ... . "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. Stated otherwise, all that is required is that the likelihood of other possible causes of the injury be so reduced that the greater probability lies at defendant's door" ... . **Swoboda v Fontanetta, 2015 NY Slip Op 06804, 2nd Dept 9-16-15**

NEGLIGENCE (MEDICAL MALPRACTICE, NEGLIGENT HIRING AND SUPERVISION)/MEDICAL MALPRACTICE (NEGLIGENT HIRING AND SUPERVISION)/NEGLIGENT HIRING AND SUPERVISION (MEDICAL MALPRACTICE)/CIVIL PROCEDURE (RELATION BACK DOCTRINE)

Relation Back Doctrine Did Not Apply to Causes of Action in Amended Complaint---Amendment Should Not Have Been Allowed

The Second Department determined Supreme Court should not have allowed the amendment of a medical malpractice complaint to add causes of action for negligent hiring and supervision. The negligent hiring and supervision allegations were time barred and were different from the medical malpractice allegations such that the relation back doctrine did not apply:

> Pursuant to CPLR 203(f), claims asserted in an amended complaint are "deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" (CPLR 203[f]). Thus, when the nature of a newly asserted cause of action is distinct from the causes of action asserted in the original complaint, and requires different factual allegations as to the underlying conduct than were contained in the original complaint, the new claims will not "relate back" in time to the interposition of the causes of action in the original complaint ... . Here, the Supreme Court erred in determining that the allegations in the original complaint in support of the causes of action alleging medical malpractice and lack of informed consent gave [defendant] notice of the "transactions, occurrences, or series of transactions or occurrences, to be proved" with respect to the claims of negligent hiring and supervision ... . The causes of action alleging medical malpractice and lack of informed consent are distinct not only as to the conduct alleged, but also as to the dates on which the conduct occurred and who engaged in it ... . The mere reference to "negligence" in the original complaint did not give [defendant] notice of the transactions, occurrences, or series of transactions or occurrences, to be proved with respect to the proposed causes of action alleging negligent hiring and negligent supervision. Thus, those proposed causes of action could not be deemed to relate back to the interposition of the causes of action in the original complaint ... . **Calamari v**

Panos, 2015 NY Slip Op 06875, 2nd Dept 9-23-15

NEGLIGENCE (NEGLIGENT HIRING, RETENTION AND SUPERVISION OF POLICE OFFICER)/MUNICIPAL LAW (NEGLIGENT HIRING, RETENTION AND SUPERVISION OF POLICE OFFICER)/NEGLIGENT HIRING, RETENTION AND SUPERVISION (POLICE OFFICERS)/POLICE OFFICERS (NEGLIGENT HIRING, RETENTION AND SUPERVISION)

Question of Fact Whether City Liable for Shooting by an Off-Duty Police Officer Under Negligent Hiring, Retention and Supervision Theory---Akin to Negligently Entrusting a Dangerous Instrumentality (Weapon) to Another

The First Department, in a full-fledged opinion by Justice Renwick, determined plaintiff had raised a question of fact whether the city was liable for the death of the police officer's girlfriend (plaintiff's decedent) under a negligent hiring/retention/supervision theory. The shooting occurred when the officer, Maselli, was off duty in his home. Plaintiff alleged the city had notice of Maselli's violent propensities:

> In this case, the alleged duty owed to plaintiff stems from New York's long recognized tort of negligent hiring and retention ... . This tort applies equally to municipalities and private employers ... . This theory of employer liability should be distinguished from the established legal doctrine of "respondeat superior," where an employer is held liable for the wrongs or negligence of an employee acting within the scope of the employee's duties or in furtherance of the employer's interests ... . In contrast, under the theory of negligent hiring and retention, an employer may be liable for the acts of an employee acting outside the scope of his or her employment ... .
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> Thus, in this case, plaintiffs' negligence claims do not depend on whether Maselli acted within the scope of his employment or whether the City participated in, authorized, or ratified Maselli's tortious conduct. Rather, the alleged breach of duty stems from the claim that during Maselli's employment with the City, the City became aware or should have become aware of problems with Maselli that indicated he was unfit (i.e. possessed violent propensities), that the City failed to take further action such as an investigation, discharge, or reassignment, and that plaintiff's damages were caused by the City's negligent retention, or supervision of Maselli.
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> The negligent retention or supervision of a police officer, which results in the employee having possession of a dangerous instrumentality, is similar to if not indistinguishable from the tort of entrusting a dangerous instrumentality to another. The duty analysis should be the same. "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them" ... . The duty not to entrust a gun to a dangerous or incompetent police officer thus extends to any person injured as a result of the negligent entrustment. **Gonzalez v City of the New York, 2015 NY Slip Op 06869, 1st Dept 9-22-15**

NEGLIGENCE (WRITTEN NOTICE OF DEFECT)/MUNICIPAL LAW (WRITTEN NOTICE OF DEFECT)/WRITTEN NOTICE OF DEFECT TO MUNICIPALITY

A Phone Call, Even When Reduced to Writing, Does Not Satisfy the City's "Written Notice of a Defect" Requirement

The Second Department determined the requirement that the city be notified in writing of a defect (here, a raised portion of a sidewalk) before liability for failing to repair will attach was not met. A phone call from the abutting property owner to the municipality, even if the communication is reduced to writing, is not sufficient. The court further held that the "open request" generated by the abutting property owner's "311" call did not constitute the city's "written acknowledgment" of a defective condition (an alternative to the "written notice" requirement):

> The City demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by submitting evidence showing that no written notice of any defect was received with regard to the subject sidewalk … . In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, neither [the abutting property owner's] "311" call nor the records generated by the City's Department of Parks and Recreation (hereinafter the DPR) from that call provided the City with prior written notice of the

sidewalk defect. A verbal or telephonic communication to a municipal body, even if reduced to writing, cannot satisfy the prior written notice requirement … . Nor did the "open request" generated from that "311" call, which was received by the DPR clerk on the computer system, constitute a "written acknowledgment" by the City of a defective condition … . **Tortorici v City of New York, 2015 NY Slip Op 06721, 2nd Dept 9-2-15**

NEGLIGENCE (NEGLIGENT SUPERVISION OF STUDENT)/NEGLIGENT SUPERVISION (STUDENT)/BULLYING (NEGLIGENT SUPERVISION)/EDUCATION-SCHOOL LAW (NEGLIGENT SUPERVISION)

School's Knowledge that Infant-Plaintiff Was Being Taunted and Bullied Did Not Constitute Notice that Another Student Would Act Violently Toward Infant-Plaintiff---Supervision Could Not Have Prevented the Sudden Action by the Student Who Pushed Infant-Plaintiff

The First Department, over a dissent, determined the defendant New York City public school was entitled to summary judgment dismissing infant-plaintiff's "negligent supervision" complaint. Infant-plaintiff had been taunted and bullied by a fellow student, referred to in the decision as WEM. Infant-plaintiff was injured when WEM pushed him into a bookcase. Although infant-plaintiff's teacher had been notified of WEM's bullying on the day of the incident, and the school administration had been notified infant-plaintiff was being taunted and bullied by (unidentified) students, the majority concluded the school was not on notice that WEM would act violently toward infant-plaintiff, and, even if the school had been so notified, the sudden incident could not have been prevented by supervision. The majority wrote:

> Initially, while "schools have a duty to adequately supervise their students, and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" ..., "unanticipated third-party acts causing injury upon a fellow student will generally not give rise to a school's liability in negligence absent actual or constructive notice of prior similar conduct" ... . Here, the record contains no evidence that the school had notice that WEM had a proclivity to engage in physically aggressive conduct. The evidence that plaintiff had complained to his teacher and others that WEM was "picking on him" and calling him names, and that his mother had called the principal's office and reported that some unidentified boys were "picking on her son," when viewed in the light most favorable to plaintiff, shows only that the school knew that WEM had been picking on plaintiff verbally. Knowledge of such taunting, however, did not give the school "sufficiently specific knowledge or notice" of "prior conduct similar to the unanticipated injury-causing act" by WEM to support a finding of actual or constructive notice of the risk that he would engage in violent or physically aggressive behavior against plaintiff ... .
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> Summary judgment is also warranted because plaintiff has not raised an issue as to proximate causation. There is no non-speculative basis for finding that any greater level of supervision than was provided would have prevented the sudden and spontaneous altercation between the two students. "Schools are not insurers of safety" and "cannot reasonably be expected to continuously supervise and control all movements and activities of students" ... . **Emmanuel B. v City of New York, 2015 NY Slip Op 06750, 1st Dept 9-8-15**

NEGLIGENCE (NEGLIGENT SUPERVSION OF STUDENT)/NEGLIGENT SUPERVISION (STUDENT)/EDUCATION-SCHOOL LAW (NEGLIGENT SUPERVISION)

School District Not On Notice Such that the Assault by Another Student Was Foreseeable

The Second Department determined defendant school district's motion for summary judgment in a student's "negligent supervision" action was properly granted. The student was grabbed by another student and had been the subject of bullying. The court found that the school was not on notice such that the act complained of was foreseeable:

> To establish a breach of the duty to provide adequate supervision in a case involving injuries caused by the acts of fellow students, a plaintiff must demonstrate that school authorities " had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated'" … . Actual or constructive notice of prior similar conduct is generally required, and injury caused by the "impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act" … .
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> Here, the defendant established, prima facie, that the alleged assault by a student in the cafeteria

was an 33nforeseeable act and that it had no actual or constructive notice of prior conduct similar to the incident in the cafeteria … . **Maldari v Mount Pleasant Cent. Sch. Dist., 2015 NY Slip Op 06788, 2nd Dept 9-16-15**

NEGLIGENCE (NEGLIGENT SUPERVISION OF STUDENT)/NEGLIGENT SUPERVISION (STUDENT)/EDUCATION-SCHOOL LAW (NEGLIGENT SUPERVISION)/MUNICIPAL LAW (LATE NOTICE OF CLAIM)/NOTICE OF CLAIM (LEAVE TO SERVE LATE NOTICE)

Leave to File Late Notice of Claim Should Have Been Granted

The Second Department determined Supreme Court should have granted leave to file a late notice of claim in an action stemming from an assault by students against plaintiff (also a student). Plaintiff had been confronted and threatened by two students. Plaintiff's mother informed the school and asked for a meeting with the two students' parents. Nothing was done by the school. One week later, the plaintiff was beaten by the two students. Plaintiff sought to file a notice of claim a month after the 90-day deadline. The court explained the relevant analytical criteria:

> General Municipal Law § 50-e(5) permits a court, in its discretion, to extend the time to serve a notice of claim … . "Whether the public corporation acquired timely actual knowledge of the essential facts constituting the claim within 90 days after the claim arose or a reasonable time thereafter is seen as a factor which should be accorded great weight in determining whether or not to grant leave to serve a late notice of claim" … . The court must also consider other relevant circumstances, including: (1) whether the claimant was an infant at the time the claim arose and, if so, whether there was a nexus between the petitioner's infancy and the delay in service of a notice of claim; (2) whether the claimant had a reasonable excuse for the delay; and (3) whether the public corporation was prejudiced by the delay in its ability to maintain its defense on the merits (see General Municipal Law § 50-e[5]…).
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> Timely notice of the facts underlying the claim must be acquired within the 90-day period "or a reasonable time thereafter"… . Here the [defendants]received the petition for leave to serve a late notice of claim approximately one month after the expiration of the 90-day period. Thus, the [defendants] acquired actual knowledge of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day period … .
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> Because the [defendants] acquired timely knowledge of the essential facts constituting the petitioners' claim, the petitioners met their initial burden of showing a lack of prejudice … . The [defendants'] conclusory assertions of prejudice, based solely on the petitioners' one-month delay in serving the notice of claim, were insufficient to rebut the petitioners' showing … . **Matter of Regan v City of New York, 2015 NY Slip Op 06826, 2nd Dept 9-16-15**

NEGLIGENCE (OPEN AND OBVIOUS CONDITION)/OPEN AND OBVIOUS CONDITION

Slip and Fall on a Sloped, Grassy Area Not Actionable

The Second Department determined summary judgment was properly granted to the defendant in a slip and fall case. The plaintiff alleged she slipped and fell on a sloped, grassy area on defendant's property. The court held that the condition was "open and obvious and not inherently dangerous." **Correnti v Chinchilla, 2015 NY Slip Op 06878, 2nd Dept 9--23-15**

REAL PROPERTY

REAL PROPERTY (ADVERSE POSSESSION)/ADVERSE POSSESSION/TACKING (ADVERSE POSSESSION)

Requirements of Adverse Possession by "Tacking" Explained (Not Met Here)

In affirming the grant of defendant's motion for summary judgment dismissing the complaint claiming adverse possession of a strip of land, the Second Department explained the requirements for adverse possession by "tacking" the possession of prior owners:

> A party claiming adverse possession may establish possession for the statutory period by "tacking" the time that the party possessed the property onto the time that the party's predecessor adversely possessed the property ... . Tacking is permitted where there is an "unbroken chain of privity between the adverse possessors" ... . For tacking to apply, a party must

show that the party's predecessor "intended to and actually turned over possession of the undescribed part with the portion of the land included in the deed" ... . In order to succeed on a claim of adverse possession, a party must provide clear and convincing evidence that the possession was "hostile and under a claim of right"; (2) actual; (3) open and notorious; (4) exclusive; and (5) "continuous for the statutory period of 10 years" ... . The party must also show that the disputed property was "usually cultivated or improved" or "protected by a substantial inclosure" (RPAPL former § 522 ...). **Munroe v Cheyenne Realty, LLC, 2015 NY Slip Op 06902, 2nd Dept 9-23-15**

REAL PROPERTY (DEEDS HELD IN ESCROW)/DEEDS (HELD IN ESCROW)

Deed-Escrow Conditions Never Satisfied---Transfer Never Took Place

The Second Department explained that property is not transferred until the escrow conditions (re: a deed held in escrow) are satisfied:

> "When a deed is delivered to be held in escrow, the actual transfer of the property does not occur until the condition of the escrow is satisfied and the deed is subsequently delivered to the grantee by the escrow agent" ... . Here, in support of their motion for summary judgment dismissing the complaint, the defendants established their prima facie entitlement to judgment as a matter of law ... by submitting, inter alia, an escrow agreement ... entered into by the plaintiff and the defendant ... . Pursuant to the agreement, an escrow agent was required to hold the deed to the subject property until the plaintiff paid certain sums due on a purchase money mortgage. The evidence proffered by the defendants established, prima facie, that the plaintiff failed to satisfy the aforementioned condition of the escrow agreement and, thus, actual transfer of the subject property to the plaintiff never took place. **Xui v Iron City Properties, Inc., 2015 NY Slip Op 06898, 2nd Dept 9-23-15**

SEPULCHER, RIGHT OF

SEPULCHER, RIGHT OF/MUNICIPAL LAW (RIGHT TO PERFORM AUTOPSY)/AUTOPSY (STATUTORY RIGHT TO PERFORM)

Plaintiffs Entitled to Damages Re: City's Failure to Timely Notify Plaintiffs of the Death of a Family Member

The First Department, in a full-fledged opinion by Justice Tom, affirmed Supreme Court's rulings re: allegations that (1) the City of New York failed to timely notify plaintiffs of the death of a family member (a 36-hour delay in violation of the right of sepulcher) and (2) the City negligently performed an autopsy, which violated the family's religious beliefs. The First Department determined plaintiffs were entitled to summary judgment on the "failure to timely notify" causes of action, and the City was entitled to summary judgment dismissing the "negligent performance of an autopsy" cause of action (by statute, in the absence of receipt of an objection on religious grounds, the City has the authority to conduct an autopsy without first seeking consent from the family). With respect to the "failure to timely notify" causes of action, the court wrote:

> The first cause of action alleges that as a result of the failure to receive timely notification of the death of Darden Binakaj, plaintiffs sustained emotional injury. The second cause of action specifies that mental anguish resulted from defendants' interference with the family's right to the immediate possession of decedent's body. Thus, these causes of action can be read to advance a claim for violation of the common-law right of sepulcher. * * *
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> While emotional distress resulting from injury inflicted on another is not compensable under New York law, as the City argues, the emotional harm alleged in this matter is the direct result of the breach of a duty to timely communicate information about a death to plaintiffs themselves … . In Johnson v State of New York (37 NY2d 378 [1975]), the plaintiff alleged emotional harm as a result of receiving a message that negligently reported the death of her mother, a patient in a state hospital, when in fact the person who had died was another patient with the identical name. The Court of Appeals sustained recovery for emotional suffering on the reasoning that the particular circumstances were associated with " genuine and serious mental distress . . . which serves as a guarantee that the claim is not spurious'" … . The Court noted that the false message informing the plaintiff of the death and

the resulting psychological injury were within the orbit of duty owed by the hospital to the patient's daughter and that she was entitled to recover for breach of that duty … . Contrary to the City's contention, Johnson holds that in the case of negligent communications involving the death of a family member, damages are recoverable for purely emotional injury, expressly distinguishing negligent communication that causes emotional suffering from that sustained "solely as a result of injuries inflicted directly upon another, regardless of the relationship" … . The unavoidable implication is that such communication is a ministerial function, as opposed to the discretionary exercise envisioned by the City for which no recovery is available. While the injury alleged in this matter resulted from an untimely rather than false communication, the City's contention that it cannot be held liable for negligence in informing the plaintiffs about the death of their loved one finds no support under Johnson.

The second cause of action alleges that as a result of the untimely notification, which deprived plaintiffs of any opportunity to state their objection to the autopsy, the City interfered with their right to immediate possession of decedent's body. As this Court stated in Melfi v Mount Sinai Hosp. (64 AD3d 26, 31 [1st Dept 2009]), "the common-law right of sepulcher gives the next of kin an absolute right to the immediate possession of a decedent's body for preservation and burial, and . . . damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body." Damages are awarded as compensation to the next of kin for the "solely emotional injury" experienced as a result of the interference with their ability to properly bury their decedent … . * * *

As this Court stated:

> "[F]or a right of sepulcher claim to accrue (1) there must be interference with the next of kin's immediate possession of decedent's body and (2) the interference has caused mental anguish, which is generally presumed. Interference can arise either by unauthorized autopsy or by disposing of the remains inadvertently or, as in this case, by failure to notify the next of kin of the death" … .

The City states no compelling reason to depart from clear precedent to bar a cause of action for loss of sepulcher in this instance … . **Rugova v City of New York, 2015 NY Slip Op 06754, 1st Dept 9-8-15**

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE

Claimant, Who Worked from Her Home Pursuant to a Consulting Agreement, Was an Employee, Not an Independent Contractor

The Third Department determined claimant, who worked from her whom pursuant to a consulting agreement with Source Interlink Media (SIM), was an employee entitled to unemployment insurance benefits:

> "Whether an employer-employee relationship exists is a factual determination for the Board, and its decision will be upheld if supported by substantial evidence" … . "While no single factor is determinative, control over the results produced or the means used to achieve those results are pertinent considerations, with the latter being more important" … .
>
> Here, the consulting agreement indicates that SIM retained the services of claimant and set her hourly rate of pay. Further, claimant's wages were reported on an IRS 1099 tax form with SIM identified as the wage payer. Although claimant generally worked from home, she was required to work at [the] office every Friday from 9:00 a.m. to 5:00 p.m. On Fridays, she was provided a work space, computer, telephone and office supplies. If claimant was going to be late or absent, she was expected to inform an executive assistant at the office. She planned annual meetings, parties and boat shows and was reimbursed for her travel expenses. Her other duties included writing press releases, but she could not distribute the releases until her supervisor had reviewed and edited them. If claimant missed a deadline to complete an assignment, her supervisor could terminate the consulting agreement. **Matter of Morris (Commissioner of Labor), 2015 NY Slip Op 06741, 2nd Dept 9-3-15**

Flight Crew Member Deemed an Employee of a Service Which Provides Flight Crews for Corporate Clients

The Third Department determined claimant, who worked for Stecher Aviation Services, which provides flight crews for corporate clients, was an employee, not an independent contractor:

> Here, the record reflects that Stecher Aviation reviews and evaluates the resume of a

prospective crew member and other required certifications in deciding whether to add the crew member to its database. Once accepted, the crew member must sign a contract that requires him or her to take instructions directly from the client, prohibits substituting a third party to fulfill the assignment and requires the submission of an invoice by a specified time in order to be paid for services and reimbursed for expenses. Although a crew member may reject an assignment and can work for competitors, Stecher Aviation reviews its database and selects the crew member whom it deems qualified to perform the services required by its client, and the work hours and location are determined by the needs of the client. The crew member does not negotiate the rate of pay, as such rate is already set between Stecher Aviation and the client's flight department. Stecher Aviation handles the billing for the services provided and, after deducting its commission, pays the crew member. Additionally, Stecher Aviation finds replacements for a crew member who cancels an assignment and fields complaints about a crew member's performance; crew members also are covered under Stecher Aviation's workers' compensation insurance policy. Finally, Stecher Aviation's sole business is providing crew members for its clients. **Matter of Stecher Aviation Servs., Inc. (Commissioner of Labor), 2015 NY Slip Op 06743, 2nd Dept 9-3-15**

Claimant Was an Employee of an Outfit Which Advertises for Security Guards on Craigslist

The Third Department determined claimant was an employee of Precinct, which advertises for security guards on Craigslist:

> Precinct places advertisements on Craigslist seeking security guards, although we note that claimant was referred to Precinct by another security guard. Precinct interviews applicants about their experience and verifies that the applicants are licensed as security guards in New York. As to claimant, he was assigned by Precinct to a hotel. Precinct negotiated with the hotel in setting claimant's rate of pay. Precinct billed the hotel based upon the negotiated hourly rate and paid claimant after subtracting one third of claimant's pay as a commission. If claimant could not report to work on a certain day, he was required to inform Precinct, and claimant could not find his own replacement. **Matter of Lobban (Commissioner of Labor), 2015 NY Slip Op 06746, 2nd Dept 9-3-15**

Claimant, Who Worked Pursuant to a Consulting Agreement, Was Not an Employee

The Third Department determined claimant, who worked pursuant to a consulting agreement with two companies, was not an employee:

> Tomen America Inc. was eliminated when Toyota negotiated to purchase assets of Tomen and acquire many of its employees. Claimant negotiated and drafted an agreement with both Tomen and Toyota whereby he served as a consultant for both companies, during set periods, to provide post-integration support in human resource matters with regard to the Tomen employees being assimilated by Toyota. As a consultant with Toyota, claimant worked three to five days a month and set his own schedule. He was not required to report to any supervisor, was not given any direction by anyone, did not submit his work for review, did not participate in regular human resource meetings and was issued an identification badge indicating that he was a contractor. Claimant submitted a monthly invoice for an agreed-upon payment, which, pursuant to the agreement drafted by claimant, withheld no taxes. **Matter of Farley (Commissioner of Labor), 2015 NY Slip Op 06747, 2nd Dept. 9-3-15**

UNINCORPORATED VOLUNTARY MEMBERSHIP ASSOCIATIONS

UNINCORPORATED VOLUNTARY MEMBERSHIP ASSOCIATIONS (SUITS AGAINST)/ASSOCIATIONS (SUITS AGAINST)/CIVIL PROCEDURE (SUITS AGAINST UNINCORPORATED ASSOCIATIONS)/MARTIN RULE (SUITS AGAINST UNINCORPORATED ASSOCIATIONS)/UNIONS (SUITS AGAINST UNINCORPORATED ASSOCIATIONS)

The Martin Rule, Which Prohibits Actions Against Unincorporated Associations Unless the Actions Complained of Were Authorized or Ratified, Does Not Prohibit Actions Against Individual Association Members

The Second Department, over a dissent, determined that, although the Martin rule prohibited the "defamation/tortious interference with business relations"

actions against the union, the actions against individual union members were not prohibited. The Martin rule bars suit against unincorporated voluntary membership associations (here the union) unless the actions complained of were authorized or ratified by the union. But the Martin rule does not bar suit against union members in their individual capacities:

> ... [T]he Martin rule (see Martin v Curran, 303 NY 276...) ... bars all actions against an unincorporated voluntary membership association, and bars claims against the officers of such an association in their representative capacities where there is no allegation that the members of the association authorized or ratified the wrongful conduct complained of.
>
> However, neither the Martin rule nor any other authority precludes causes of action from being asserted against individual members of the union defendants in their individual capacities ... . In Martin, only the claims asserted against union members in their representative capacities as officers of the union were dismissed. Notably, the Court of Appeals specifically allowed the libel claims in that action to proceed against the same defendant union members, in their individual capacities ... . **Cablevision Sys. Corp. v Communications Workers of Am. Dist. 1, 2015 NY Slip Op 06873, 2nd Dept 9-23-15**

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION LAW

Plaintiff Barred from Recovery Against Special Employer by Exclusivity Provisions of Workers' Compensation Law

The Second Department determined plaintiff was defendant's special employee and recovery from defendant was therefore barred by the exclusivity provisions of the Workers' Compensation Law. Plaintiff worked for a staffing agency and was assigned to work for defendant. After plaintiff was injured working for defendant, he was paid Workers' Compensation benefits by the staffing agency. Because of the exclusivity provisions of the Workers' Compensation Law, plaintiff could not recover from the defendant, his special employer:

> " In general, workers compensation benefits are the exclusive remedy of an employee against an employer for any damages sustained from injury or death arising out of and in the course of employment'" (...see Workers' Compensation Law §§ 11, 29[6]). For purposes of the Workers' Compensation Law, a person may be deemed to have more than one employer, a general employer and a special employer ... . "The receipt of Workers' Compensation benefits from a general employer precludes an employee from commencing a negligence action against a special employer" ... .
>
> A special employee is "one who is transferred for a limited time of whatever duration to the service of another" ... . In determining whether a special employment relationship exists, a court should consider factors such as the right to control the employee's work, the method of payment, the furnishing of equipment, and the right to discharge ... . "A significant and weighty factor . . . is who controls and directs the manner, details and ultimate result of the employee's work'" ... .
>
> Here, the defendant established, prima facie, that this action was barred by the exclusivity provisions of the Workers' Compensation Law. Evidence submitted in support of the motion demonstrated, prima facie, that the defendant controlled and directed the manner, details, and ultimate result of the plaintiff's work, and that the defendant was the plaintiff's special employer ... . **Wilson v A.H. Harris & Sons, Inc., 2015 NY Slip Op 06808, 2nd Dept 9-16-15**

ZONING

ZONING (ENFORCEMENT OF ZONING ORDINANCES BY HOMEOWNES' ASSOCIATION)/TOWN LAW (ZONING)/HOME OWNERS' ASSOCIATIONS (ENFORCEMENT OF ZONING ORDINANCES)/COVENANTS RUNNING WITH THE LAND (COMMUNITY GOLF-COURSE SOCIAL MEMBERSHIP FEES)/RETIREMENT COMMUNITIES (ZONING POWER TO CREATE)/EASEMENTS RE: COMMON AREAS

A Town's Zoning Powers Include the Creation of a Zoning District for Senior Citizens---Residents of a Retirement Community Had the Power to Enforce the Zoning Ordinance Limiting the Use of the Community Portion of a Building to Community Residents---Agreement to Pay Social Membership

Fees Re: a Community Golf Course Constituted a Covenant Which Ran with the Land

The Second Department, in a detailed decision dealing with many issues, resolved a dispute concerning the use of the community portion of a building within a retirement community, which included a golf course. The plaintiffs (residents) alleged the community portion of the building was to be used solely by the community residents and should not be used for special events involving non-residents. The Second Department determined (1) the plaintiffs had the power to enforce the zoning ordinance requiring that the community portion of the building be for the exclusive use of the retirement-community (over 55) residents, (2) the residents were benefitted by easements over the common areas held by the defendants and therefore were obligated to share in the cost of maintenance of those areas, and (3) the requirement that the residents pay social membership fees (re: the golf course) was a covenant which ran with the land, binding subsequent purchasers. The Second Department specifically held that zoning ordinances may properly create a zoning district for senior citizens:

> ... Town Law § 268(2) permits the individual plaintiffs to enforce the Town Code § 198-21.2(F)(1)(b) to the extent it gives them exclusive use of the community building portion of the combined building. The defendants contend, however, that even if the individual plaintiffs may use Town Law § 268(2) to seek enforcement of this portion of Town Code § 198-21.2(F)(1)(b), it, in fact, may not be enforced because the Town lacked the authority to regulate who owns or occupies land ... . A town does not act in excess of its authority when it creates a zoning district for senior citizens ..., or when it limits the occupancy of dwelling units within a planned retirement community to persons aged 55 or over ... . Since these are valid exercises of a town's zoning power, it must follow that a town may also limit the use of a recreational facility within a senior residential community to those seniors living there. * * *
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> The defendants were given an easement over the common areas and common elements, including roadways, walkways, and landscaped areas, for ingress, egress, and the retrieval of golf balls. ... Generally, absent an express agreement, all persons benefitted by an easement must share ratably in the cost of its maintenance and repair ... . * * *
>
> ...[T]the defendants established that the covenant to pay social membership fees runs with the land, as the record demonstrates that the "grantor and grantee intended that the covenant should run with the land," "the covenant is one touching or concerning the land with which it runs," and "there is privity of estate between the . . . party claiming the benefit of the covenant and the right to enforce it, and the . . . party who rests under the burden of the covenant" ... . **Greens at Half Hollow Home Owners Assn., Inc. v Greens Golf Club, LLC, 2015 NY Slip Op 06887, 2nd Dept 9-23-15**

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