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IN THIS ISSUE

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FEATURED DECISION

New York State Can Issue a License to Practice Law to an Undocumented Immigrant Authorized to Be In the United States by the Deferred Action for Childhood Arrivals Policy of the Federal Government

The Second Department, in an extensive, full-fledged opinion (per curiam), dealing with a question of first impression, determined the State of New York could issue a license to practice law to an undocumented immigrant who was qualified for admission to the bar:

> APPLICATION by Cesar Adrian Vargas for admission to the Bar of the State of New York. In a written report dated August 19, 2013, a subcommittee of the Committee on Character and Fitness for the Second Judicial Department found, after a hearing, that the applicant "appears to have stellar character," but recommended against admission, solely "for the purpose of having the Court make a decision based on immigration status." The Full Committee on Character and Fitness for the Second, Tenth, Eleventh, and Thirteenth Judicial Districts adopted the subcommittee's report. In a Final Report dated November 26, 2013, the Committee on Character and Fitness transmitted to the Court pursuant to 22 NYCRR 690.15 Mr. Vargas' application for a determination. At the Court's request, amicus curiae briefs were submitted by the United States of America and the State of New York, in addition to a brief from Mr. Vargas, addressing specific issues raised by this application. …
>
> PER CURIAM.
>
> OPINION & ORDER
> We are called upon to determine whether an undocumented immigrant, who is authorized to be present in the United States under the auspices of the Deferred Action for Childhood Arrivals policy of the federal government, and who meets the statutory eligibility requirements and the rules of court governing admission to the practice of law in the State of New York, may satisfy the standard of good character and general fitness necessary for admission [FN1].

FROM THE EDITOR

This is the 15th issue of the Digest---an indexed compilation of the summaries of New York State appellate decisions posted weekly in May and June, 2015, on the "Just Released" page of NewYorkAppellateDigest.com

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The Index (p. 12), while helpful, does not include a reference to every occurrence of a legal term. The Digest is searchable using Google Chrome, Firefox and Internet Explorer (probably other browsers as well). In Google Chrome and Firefox click on the three small horizontal bars in the upper right hand corner of the screen and then click on "Find." In Internet Explorer, click on the gear symbol, "File" and "Find on this page."

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We are further called upon to determine whether such an individual is barred from admission to the practice of law by a federal statute, 8 USC § 1621, which generally prohibits the issuance of state professional licenses to undocumented immigrants unless an individual state has enacted legislation affirmatively authorizing the issuance of such licenses. This presents an issue of first impression in New York and, in terms of the applicability of 8 USC § 1621 and its compatibility with the Tenth Amendment of the United States Constitution, an issue of first impression nationwide.

We hold that a narrow reading of 8 USC § 1621(d), so as to require a state legislative enactment to be the sole mechanism by which the State of New York exercises its authority granted in 8 USC § 1621(d) to opt out of the restrictions on the issuance of licenses imposed by 8 USC § 1621(a), unconstitutionally infringes on the sovereign authority of the state to divide power among its three coequal branches of government. Further, we hold, in light of this state's allocation of authority to the judiciary to regulate the granting of professional licenses to practice law (*see* Judiciary Law § 53[1]), that the judiciary may exercise its authority as the state sovereign to opt out of the restrictions imposed by section 1621(a) to the limited extent that those restrictions apply to the admission of attorneys to the practice of law in the State of New York. Accordingly, we answer the first question in the affirmative and the second question in the negative.

I. *Facts Applicable to Cesar Adrian Vargas*

The applicant, Cesar Adrian Vargas, was born in Puebla, Mexico, in September 1983. His mother brought him and his siblings to the United States when Mr. Vargas was 5½ years old, without lawful documentation to enter or remain in the United States. The family settled in the New York City area, where Mr. Vargas continues to reside today. Mr. Vargas enrolled in, and graduated from, elementary school and high school in the public school system of the City of New York. He attended St. Francis College in Brooklyn, and graduated in December 2005. Mr. Vargas thereafter applied for admission to, was accepted to, and enrolled in, the law school of the City University of New York (hereinafter CUNY). While attending law school, he served as a law intern for Main Street Legal Services, Inc., the Office of the District Attorney of Kings County, and a New York State Supreme Court Justice. He also served as a legislative intern for a member of the United States Congress. Upon graduating from CUNY in 2011, Mr. Vargas sat for the examination administered by the New York State Board of Law Examiners in July of 2011. He obtained a passing score.

In accordance with the guidelines established by the Secretary of the United States Department of Homeland Security (hereinafter DHS), Mr. Vargas submitted an application for deferred action from removal under a program entitled Deferred Action for Childhood Arrivals (hereinafter DACA).

On October 25, 2012, while Mr. Vargas' DACA application was pending, he submitted an application for admission to practice law in the courts of the State of New York (hereinafter bar application) to the Committee on Character and Fitness for the Second Judicial Department (hereinafter the Character Committee). In his bar application, Mr. Vargas disclosed that he was not a citizen of the United States and that his immigration status was "without status." He further disclosed that he did not have a social security number, and reported his tax identification number in lieu thereof. However, Mr. Vargas also advised that he had submitted an application under DACA for deferred action from removal enforcement, and explained that upon approval of his DACA application, he would receive an employment authorization and would be eligible for a social security number. On or about February 19, 2013, Mr. Vargas' DACA application was approved by the DHS, Office of United States Citizenship and Immigration Services (hereinafter USCIS). On April 16, 2013, Mr. Vargas notified the Character Committee that his DACA application had been approved by USCIS. Thereafter, he supplemented his bar application with copies of the USCIS Notice of Approval, an employment authorization document,[FN2] a social security number and identification card issued by the Social Security Administration, a license to drive issued by the New York State Department of Motor Vehicles, and an updated employment authorization document issued by DHS. He further disclosed that he had applied for DACA renewal. More recently, Mr. Vargas submitted a copy of a USCIS Notice of Action dated February 26, 2015, which indicates that his application for renewal of deferred action relief had been approved.[FN3]

As required of all applicants for admission to the practice of law, Mr. Vargas' bar application was supported by several affidavits describing each respective affiant's relationship with Mr. Vargas and the affiant's opinion that he possessed the character and fitness necessary to practice law in the State of New York (*see* 22 NYCRR 520.12). A review of the affidavits reveals that Mr. Vargas disclosed to each affiant that he was an undocumented immigrant.

A subcommittee of the Character Committee conducted a hearing on Mr. Vargas' bar application on July 29, 2013 (*see* CPLR art 94; 22 NYCRR 690.6). In its written report, the subcommittee found that Mr. Vargas "appears to have stellar character," but recommended against his admission solely on the ground that it should be left to the Court to determine whether his eligibility for admission to practice law was barred by reason of his undocumented immigration status. Absent this legal issue, the subcommittee reported that it "would have no hesitation in recommending Mr. Vargas' admission to the New York Bar." The Full Committee on Character and

Fitness for the Second, Tenth, Eleventh, and Thirteenth Judicial Districts adopted the subcommittee's report by a vote of 28 to 8, with 2 abstentions. In accordance with 22 NYCRR 690.15 of the Rules of the Supreme Court, Appellate Division, Second Department, the Character Committee conveyed its findings to this Court.

II. *Law and Rules Governing the Admission of Attorneys and Counselors-at-Law in the State of New York*

In New York, by legislative enactment, the Court of Appeals—the state's highest court—is vested with the rule-making authority to regulate "the admission of attorneys and counsellors at law, to practice in all the courts of record of the state," subject to the State constitution and statutes (Judiciary Law § 53[1])[FN4]. Indeed, in the United States, the authority of the judiciary to regulate the practice of law, whether it be the admission of attorneys to the bar or the disciplining of attorneys, is recognized in every state in the union (*see In re Garcia,* 58 Cal 4th at 452, 315 P3d at 124-125). The United States Supreme Court has also acknowledged that "the courts have historically regulated admission to the practice of law before them" (*Gentile v State Bar of Nev.,* 501 US 1030, 1066).

The Court of Appeals has succinctly summarized the authority of the judiciary in the admission process as follows:

"Admission to the Bar is a two-part qualification process. Section 53 of the Judiciary Law vests the Court of Appeals with broad authority]to promulgate rules regulating the admission of attorneys to practice in this State, including the power to provide for a uniform system of examining candidates seeking admission (Judiciary Law § 53[1], [3]). Pursuant to that authority, this Court has promulgated rules governing uniform educational requirements (22 NYCRR 520.3, 520.4, 520.5), rules creating a uniform Bar examination (22 NYCRR 520.7, 520.8), and a rule governing admission without examination (22 NYCRR 520.9). Although a person may be admitted to the Bar only by order of the appropriate Appellate Division department (22 NYCRR 520.1[a]), no application may be entertained by that court unless the Board of Law Examiners, which oversees the examination, has certified that the applicant has successfully completed the examination process (*see,* 22 NYCRR 520.6, 520.7; 22 NYCRR part 6000; *see also,* Judiciary Law § 56).

"The second phase of the qualification process commences with certification by the Board, indicating that the candidate has demonstrated the requisite knowledge of the law and legal ability. The Appellate Division in each department is then charged with determining that the applicant for admission possesses the character and general fitness requisite for an attorney and counsellor-at-law' (Judiciary Law § 90[1][a]; *see also,* CPLR 9404; 22 NYCRR 520.10)" (*Matter of Anonymous,* 78 NY2d 227, 230 [footnote omitted, as exception noted therein is not applicable]).

As is relevant to the circumstances of Mr. Vargas' bar application, the governing statutory authority is limited, as it prescribes only that an applicant for admission to the practice of law obtain a certification from the New York State Board of Law Examiners that the applicant has passed the bar examination, that the applicant's character and general fitness for the practice of law has been favorably passed upon by the Appellate Division of the Supreme Court, and that the applicant has satisfied the requirements of General Obligations Law § 3-503 (*see* Judiciary Law § 90[1][a]; CPLR 9401 *et seq.*). The pertinent requirements of General Obligations Law § 3-503 are that the applicant submit his or her social security number and a certification that the applicant is not in violation of child support obligations, if any (*see* General Obligations Law § 3-503[2]). In all other respects, the rules governing the admission of attorneys and counselors-at-law, including the proof necessary to sit for the New York State bar examination, are established by the Court of Appeals of the State of New York and, significantly, for the purposes of our determination, not by the state legislature (*see* Judiciary Law §§ 53, 90*;* Rules of Ct of Appeals [22 NYCRR] part 520; *see generally Matter of Anonymous,* 78 NY2d at 230; *Koeppel v Wachtler,* 183 AD2d 808, 809; *Matter of Sugarman,* 51 AD2d 170, 171-172). There is no question that Mr. Vargas has met the relevant statutory eligibility standards.

Ultimately, it is the responsibility of the four judicial departments of the Appellate Division of the Supreme Court of the State of New York to pass upon the character and general fitness of each applicant who has been certified by the New York State Board of Law Examiners to that judicial department, as required by Judiciary Law § 90(1) and in accordance with each department's respective rules governing the procedures to be followed for the examination of the character and fitness of each applicant (*see* Judiciary Law §§ 53, 90; CPLR 9401 *et seq.;* Rules of Ct of Appeals [22 NYCRR] part 520; Rules of App Div, 1st Dept [22 NYCRR] part 602; Rules of App Div, 2d Dept [22 NYCRR] part 690; Rules of App Div, 3d Dept [22 NYCRR] part 805; Rules of App Div, 4th Dept [22 NYCRR] § 1022.34; *see generally Matter of Anonymous,* 78 NY2d at 230; *Koeppel v Wachtler,* 183 AD2d at 809; *Matter of Sugarman,* 51 AD2d at 171-172).

As explained by the Court of Appeals in *Matter of Anonymous* (78 NY2d at 230)*,* at the Appellate Division stage of the application process, the Court's jurisdiction is limited to a determination of whether the applicant "possesses the character and general fitness requisite for an attorney and counsellor-at-law" (Judiciary Law § 90[1][a]; *see Matter of Shaikh,* 39 NY2d 676, 680-681; *see also* Rules of Ct of Appeals [22 NYCRR] § 520.12[a]). The scope of the authority of the Appellate Division to review and rule upon a bar admission application includes circumstances, as relevant here, where an applicant for admission receives an adverse

decision from the Character Committee (*see e.g.* Rules of App Div, 2d Dept [22 NYCRR] § 690.17). Significantly, although the standard bar application employed by the Appellate Division, including the form submitted by Mr. Vargas, contains an inquiry as to citizenship and, in the absence of citizenship, immigration status, neither the statutes enacted by the legislature nor the rules promulgated by the judiciary governing the admission of attorneys and counselors to practice in the state limit that privilege to citizens, those with lawful immigration status, or those aliens who are not immigrants but are lawfully in this country for a limited period of time pursuant to a visa (*see* Judiciary Law § 90[1][a] [admission upon certification by New York State Board of Law Examiners], [b] [admission upon application "of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States or in a foreign country"]; 22 NYCRR 520.6[b] [education requirements for admission upon study in a foreign country]; *see generally* 2-18 Immigration Law and Procedure § 18.04 [Matthew Bender 2013]).

III. *Deferred Action for Childhood Arrivals*

On June 15, 2012, the Secretary of the Department of Homeland Security announced a new discretionary enforcement policy entitled Deferred Action for Childhood Arrivals. Generally, the DACA policy provides for, as a matter of federal prosecutorial discretion, the deferral of removal enforcement action against certain individuals who came to the United States as children and without lawful documentation (hereinafter DACA relief or deferral of removal enforcement).[FN5] More specifically, in order to qualify for deferral of removal enforcement, an applicant is required to demonstrate that he or she was under the age of 16 years when he or she entered the United States and had not attained the age of 31 years as of June 15, 2012; has continuously resided in the United States for at least five years prior to the initiation of the DACA program and presently resides in the United States; has no lawful status as of June 15, 2012; is enrolled in or has graduated from high school, has obtained a GED certificate, or was honorably discharged from the Armed Forces or Coast Guard of the United States; has not been convicted of a felony offense, significant misdemeanor, or multiple misdemeanors; and, following a background check founded upon, inter alia, a biometric submission, has individually been determined to pose no threat to the national security or public safety of the United States (*see* U.S. Department of Homeland Security, *Consideration of Deferred Action for Childhood Arrivals Process*;[FN6] *see generally* 8 USC § 1103[a][1], [3]; 6 USC § 202[5]; 8 CFR 274a.12[a][10]; *Arizona Dream Act]Coalition v Brewer,* 757 F3d 1053, 1058-1059 [9th Cir]; *Arpaio v Obama,* 27 F Supp 3d 185, 194-195 [D DC]; *Crane v Napolitano,* 2013 WL 1744422, *2-3, 2013 US Dist LEXIS 57788, *3-7 [ND Tex No. 3:12-CV-03247-0]). The recipient of DACA relief does not attain lawful immigration status in the United States. Rather, the recipient is merely authorized by DHS to be lawfully present in the United States without fear of deportation for a period of two years, subject to successive two-year renewals (*see Frequently Asked Questions*, Immigration Services). Nevertheless, persons granted DACA relief may be issued a driver's license and a social security number, and are issued employment authorization documents pursuant to which they may lawfully engage in employment in the United States without restriction (*see id.;* USA, Social Security Administration, Social Security Number and Card—Deferred Action For Childhood Arrivals, http://www.socialsecurity.gov/pubs/deferred_action.pdf [accessed June 2, 2015]; National Immigration Law Center, *Are Individuals Granted Deferred Action under the Deferred Action for Childhood Arrivals [DACA] Policy Eligible for State Driver's Licenses?* [last updated June 19, 2013], http://www.nilc.org/dacadriverslicenses.html [accessed June 2, 2015]; *Arizona Dream Act Coalition v Brewer*, 2015 WL 300376, 2015 US Dist LEXIS 8043 [D Ariz, Jan. 22, 2015, No. CV12-02546 PHX DGC]). Indeed, individuals granted DACA relief are not precluded by federal law from establishing domicile in the United States (*see Frequently Asked Questions*, Immigration Services). There is no question that Mr. Vargas has satisfied the standards established by DHS, as he was granted DACA relief in 2012 and, earlier this year, that relief was renewed. He has also obtained an employment authorization document issued by DHS, a social security number issued by the Social Security Administration, and a license to drive issued by the State of New York.

IV. *Mr. Vargas' Character and General Fitness to Practice Law*

In carrying out the responsibility of passing upon the character and general fitness of an applicant for admission to the practice of law, we recognize that the practice of law is "limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study" (*Matter of Co-operative Law Co.,* 198 NY 479, 483). A candidate for admission to the bar should generally possess those qualities of truth-speaking, honor, and strict observance of fiduciary responsibility "that have, throughout the centuries, been compendiously described as moral character'" (*Schware v Board of Bar Examiners of N.M.,* 353 US 232, 247 [Frankfurter, J., concurring]).

As previously indicated, absent the question raised by reason of Mr. Vargas' entry into, and remaining in, the United States without lawful documentation, the Character Committee found that he possessed the requisite character and general fitness for admission to the practice of law in the State of New York. We find that Mr. Vargas' undocumented immigration status, in and of itself, does not reflect adversely upon his general fitness to practice law. Mr. Vargas did not enter the United States in violation of the immigration laws of his own

volition, but rather, came to the United States at the age of five at the hand of his mother. When considering the weight to be accorded to his unlawful entry, we are guided by the United States Supreme Court's long-standing recognition that " [v]isiting . . . condemnation on the head of an infant is illogical and unjust'" (*Plyler v Doe,* 457 US 202, 220 [the undocumented status of the children vel non did not establish a sufficient rational basis for denying the educational benefits that the state afforded other residents], quoting *Weber v Aetna Casualty & Surety Co.,* 406 US 164, 175). The logic of the Supreme Court's pronouncement is no less apt here than it was in *Plyler.* Although, upon attaining his majority, Mr. Vargas continued to stay in the United States in violation of the federal immigration laws, we note that the United States Supreme Court has reaffirmed that, "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States" (*Arizona v United States,* ___ US at ___, 132 S Ct at 2505,. citing *INS v Lopez-Mendoza,* 468 US 1032, 1038). Further, it is not realistic to expect that Mr. Vargas would leave the only country he has known since the age of five and return to a country with which he now has little more than a connection by birth. In any event, that concern has been ameliorated by the implementation of the DACA policy and, as to Mr. Vargas individually, by DHS's USCIS grant of his DACA application and the renewal thereof. Indeed, as previously noted, this reality is at the heart of Department of Homeland Security's Deferred Action for Childhood Arrivals policy. The Secretary of Homeland Security declared that the United States' immigration laws were not designed "to remove productive young people to countries where they may not have lived or even speak the language," particularly when "many of these young people have already contributed to our country in significant ways" (U.S. Dept. of Homeland Security, Mem of Janet Napolitano, Secretary [June 15, 2012] at 2, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [accessed June 2, 2015]; *see Arizona Dream Act Coalition v Brewer,* 757 F3d at 1058-1059).

We find that the undocumented status of an individual applicant does not, alone, suggest that the applicant is not possessed of the qualities that enable attorneys to vigorously defend their client's interests within the bounds of the law, nor does it suggest that the applicant cannot protect, as an officer of the court, the rule of law and the administration of justice. Toward that end, we note that the states of California (*see* Cal Bus & Prof Code § 6064[b]) and Florida (*see* Fla Stat 454.021[3]) have enacted statutes which specifically authorize the admission of certain persons without lawful immigration status to the practice of law provided they otherwise meet the eligibility standards for admission. Our sister states have thereby determined that the absence of lawful immigration status does not, per se, adversely reflect on the character and fitness of a person for admission to the practice of law.

Just as the Secretary of Homeland Security directed that each DACA applicant must be examined on a case-by-case basis (*see* U.S. Dept. of Homeland Security, Mem of Janet Napolitano, Secretary [June 15, 2012] at 2, http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [accessed June 2, 2015]), so too is the Appellate Division required to examine each individual applicant (*see* Judiciary Law § 90[1]; 22 NYCRR 520.10). Upon our independent review of Mr. Vargas' application for admission to practice law and the documents submitted therewith, including the recent renewal of his DACA relief, we are satisfied that Mr. Vargas possesses the requisite character and fitness for admission to practice as an attorney and counselor-at-law.

To the extent the standard for the examination of the general fitness of an applicant to practice law in the State of New York shall include an evaluation of the applicant's familiarity with the law, that question is resolved by virtue of, inter alia, the applicant's graduation "with a first degree in law from an approved law school" (22 NYCRR 520.3[a][1]; *see* 22 NYCRR 520.4, 520.6) and having passed the examination administered by the New York State Board of Law Examiners (*see* Judiciary Law § 90[1]; 22 NYCRR 520.2[a]). Mr. Vargas graduated from and received a juris doctor degree from an approved law school and thereafter passed the New York State bar examination. Having satisfied the eligibility standards equally applicable to those similarly situated, and having been so certified by the New York State Board of Law Examiners, we find no rational basis to conclude that Mr. Vargas' status as an undocumented immigrant reflects adversely on his competence to practice law in the State of New York.

V. *The Application of the Personal Responsibility and Work Opportunity Reconciliation Act and 8 USC § 1621 et seq.*

While the role of the Appellate Division in the bar admission process is ordinarily limited to the question of whether an individual candidate possesses the character and general fitness required for admission to the practice of law, 8 USC § 1621 compels us, as a matter of necessity, to consider not only Mr. Vargas' character and fitness, but also, whether that statute prevents us from exercising our authority. More directly, we are presented with a legal question: Does the application of 8 USC § 1621, as part of the immigration laws of the United States, render an undocumented immigrant ineligible for admission to practice law in the State of New York?

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter PRWORA), as it relates to the issues before the Court, restricts the states from conferring certain state or local public benefits, including professional licenses, upon defined "aliens" in the absence of the enactment of a state law opting out of

the federal restrictions (*see* 8 USC § 1621[a], [c][1][A]; [d]).

In furtherance of our examination of the impact of 8 USC § 1621 on the question of bar admissions in New York, the Court solicited and received a brief from Mr. Vargas, and amicus curiae briefs from the Attorney General of the United States and the New York State Attorney General.

PRWORA, as applicable here, is codified in Title 8 (Aliens and Nationality), chapter 14 (Restricting Welfare and Public Benefits for Aliens), subchapter II (Eligibility for State and Local Public Benefits Programs), and section 1621 (Aliens who are not qualified or nonimmigrants ineligible for state and local public benefits) of the United States Code. Section 1621 is a complex and highly nuanced set of rules, definitions, exceptions, and exemptions, commencing in the first instance with a double negative qualified by an exception: "*except* as provided . . . an alien who is *not* [e.g., a qualified alien] . . . is *not* eligible for any State or local public benefit" (8 USC § 1621[a] [emphasis added]). More specifically, the legislation restricts the granting of state and local public benefits to aliens unless: the alien is rendered exempt under § 1621(a)(1-3); the particular state or local public benefit is among those excluded under § 1621(b) and not among those defined in § 1621(c); or, as particularly applicable here, pursuant to § 1621(d), where the state has exercised its authority to opt out of the restrictions by the enactment of a state law after August 22, 1996, to affirmatively provide for such eligibility.

Mr. Vargas is not exempt from the restrictions imposed by 8 USC § 1621, as he is not a "qualified alien," "nonimmigrant alien," or parolee, as those terms have been defined by the United States Congress (*see* 8 USC § 1621[a]; *see also* 8 USC §§ 1641, 1101 *et seq.*, 1182[d][5]; *see generally* Tara Kennedy, Comment, *Barred From Practice? Undocumented Immigrants and Bar Admissions,* 63 DePaul L Rev 833, 851-852 [Spring 2014]).[FN7]

Bar admissions fall within the scope of the restrictions imposed by the federal statute because professional licenses are included among the specifically defined state and local benefits and because attorney admissions are financed by "appropriated funds" of the state (8 USC § 1621[c][1][A]). Indeed, New York State's annual judiciary budget measurably funds the expenses of administering the state bar examinations, office rents for the staff of the character committee that oversees the screening of candidates for admission, the courtrooms where successful applicants are administered the oath of office of attorney and counselor-at-law, the salaries of the nonjudicial staff who assist in the administration of the application process, and, of course, the salaries of the members of the judiciary who ultimately pass on each individual application (*see* NY Const, art VI, § 28[b]; art VII, § 1; Judiciary Law §§ 211[1][c]; 212[1][a]; L 2015, ch 51 [eff April 1, 2015]).

Two state courts that have already examined the impact of the federal legislation on the bar admission process have both recognized that 8 USC § 1621(d) authorizes a state to enact legislation making undocumented immigrants eligible for admission. In *In re Garcia* (58 Cal 4th 440, 315 P3d 117), the Supreme Court of California, like our Court, was presented with an inquiry from its Committee of Bar Examiners as to whether an undocumented immigrant, who otherwise met the standards for admission to the bar, may be admitted to the practice of law (*see In re Garcia,* 58 Cal 4th at 446, 449, 315 P3d at 120-121, 122-123)[FN8]. Following oral argument, but prior to the issuance of the court's determination, the State of California, by an act of the state legislature signed into law by the governor, enacted a limited opt-out provision effective January 1, 2014. That provision allowed undocumented immigrants admission to the practice of law within the state, so long as such applicants otherwise fulfilled all admission requirements. In granting the applicant admission based upon the newly enacted opt-out provision, the California Supreme Court determined that section 1621(d) authorized a state "to make undocumented immigrants eligible for the types of public benefits for which such persons would otherwise be ineligible under section 1621(a) and 1621(c)," through the enactment of a state law, and that the newly enacted legislation removed any potential statutory obstacle posed by section 1621(a) to Mr. Garcia's admission (*In re Garcia,* 58 Cal 4th at 457, 315 P3d at 128, citing *Martinez v Regents of Univ. of California,* 50 Cal 4th 1277, 1294-1296, 241 P3d 855, 866-867).

In *Florida Bd. of Bar Examiners re Question as to Whether Undocumented Immigrants are Eligible for Admission to the Fla. Bar* (134 So3d 432 [Fla Sup Ct]), the Supreme Court of Florida was called upon to issue an advisory opinion as to whether an undocumented immigrant, who graduated from an accredited law school and who passed the state bar examination, and others who may be similarly situated, were eligible for admission to the Florida Bar (*see id.* at 433). The Supreme Court of Florida held, "[t]he plain language of the statute and case law indicate that the phrase enactment of a State law' requires a state legislature to address this appropriations-related issue and pass legislation, which the governor must either approve or permit to become the law of the State" (*id.* at 435, quoting 8 USC § 1621[d]). In response to the advisory opinion, the Florida legislature enacted Fla Stat § 454.021(3), which authorizes the Supreme Court of Florida to admit to the Florida Bar certain unauthorized immigrants who were brought to the United States as minors, provided, inter alia, the applicant fulfills the requirements for the practice of law (*see* Florida Laws 1955, ch 29796, §§ 1, 2, 7; Laws 1961, ch 61-530, § 10, amended by Laws 2014, ch 2014-35, 3 [eff May 12,

2014]).[FN9]

In his appellate brief, Mr. Vargas takes the position that New York need not enact new legislation expressly permitting the admission of undocumented immigrants because an existing statute, Judiciary Law § 460, effectively operates as an opt-out provision authorized by 8 USC § 1621(d). We disagree.

Initially, we note that Judiciary Law § 460 became law well before August 22, 1996—the threshold set forth in 8 USC § 1621(d) after which a state may exercise its authority to opt out of the restrictions imposed by § 1621(a). Since Judiciary Law § 460 predated 8 USC § 1621(a), it cannot be viewed as a deliberately considered legislative determination to opt out of the restrictions imposed by the federal statute. For this reason alone, Judiciary Law § 460 cannot qualify as an opt-out provision as contemplated by 8 USC § 1621(d). In any event, even if a preexisting statute could qualify as an opt-out provision, we reject Mr. Vargas' contention that Judiciary Law § 460 is a legislative enactment sufficient to override the barriers imposed by section 1621(a).

Judiciary Law § 460 provides: "Race, creed, color, national origin, *alienage* or sex shall constitute no cause for refusing any person examination or admission to practice" (emphasis added). The term "alienage," which was added to the statute in 1982 (L 1982, ch 133, § 29), is not defined in the Judiciary Law.

The term "alienage, " as used in Judiciary Law § 460, is ambiguous. On the one hand, it may be expansively interpreted to prohibit the denial of New York law licenses to any person based upon the country of his or her birth, which would necessarily include Mr. Vargas despite his undocumented immigration status. Alternatively, "alienage" could more narrowly be construed as referring to persons who, while not citizens of the United States, are nevertheless present in the country only through legal means.

In view of this ambiguity, we may look to the history of Judiciary Law § 460 to help determine and give effect to the intent of the legislature (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 286; *Majewski v Broadalbin-Perth Cent. School Dist.,* 91 NY2d 577, 584; *Patrolmen's Benevolent Assn. of City of N.Y. v City of New York,* 41 NY2d 205, 208). The 1982 amendment to Judiciary Law § 460, which added the term "alienage" to the statute, was part of a broader package of amendments to several different state laws (L 1982, ch 133). The preamble of chapter 133 declared that the amendments were to eliminate discrimination against aliens who were residing legally within the state. This purpose is confirmed by the Memorandum of the Law Revision Commission which was attached to Senate Bill S-2950-A, and which described the amendments as intended to eliminate statutory language that discriminated against persons "lawfully admitted for permanent residence in the U.S. under federal immigration laws" (Mem of Law Rev Commn, Bill Jacket, L 1982, ch 133). Moreover, some of the statutes amended by chapter 133, such as Civil Service Law § 53, specifically speak of aliens "lawfully admitted for permanent residence in the United States" (Civil Service Law § 53; *see* L 1982, ch 133, § 4).

We thus conclude that the legislative intent behind the word "alienage" as used in Judiciary Law § 460 does not extend to undocumented immigrants and, therefore, does not qualify as an opt out from 8 USC § 1621. The Judiciary Law's prohibition of discrimination in the issuance of law licenses based on alienage cannot extend to persons present in the United States under DACA, as DACA does not confer upon the individual lawful immigration status (*see Arizona Dream Act Coalition v Brewer,* 757 F3d at 1058; *Florida Bd. of Bar Examiners*, 134 So3d at 436; U.S. Citizenship & Immigration Servs., *Consideration of Deferred Action for Childhood Arrivals [DACA],* http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca [updated Feb. 19, 2015]).

VI. *The Application of the Tenth Amendment*

It is well settled that the federal government is possessed of broad and undoubted plenary authority over matters involving immigration arising from its constitutional power to, inter alia, "establish a[ ] uniform Rule of Naturalization" (US Const, art I, § 8, cl 4; *see Arizona v United States,* ___ US at ___, 132 S Ct at 2498; *Toll v Moreno,* 458 US 1, 10; *Florida Bd. of Bar Examiners,* 134 So3d at 437; *In re Garcia,* 58 Cal 4th at 452-453, 315 P3d at 125; *see also Mathews v Diaz,* 426 US 67, 79-80; *Graham v Richardson,* 403 US 365, 376-379; *Takahashi v Fish and Game Comm'n.,* 334 US 410, 418-419; *Hines v Davidowitz,* 312 US 52, 61-63; *Truax v Raich*, 239 US 33, 42). Absent a constitutional conflict, a federal statute limiting the conduct or activities of aliens, immigrants, and those who are present in the United States without legal authorization is binding upon the states by virtue of the Supremacy Clause of the United States Constitution (*see* US Const, art VI, cl 2; *Arizona v United States,* ___ US at ___ , 132 S Ct at 2500-2501; *Chamber of Commerce of U.S. v Whiting,* ___ US ___, ___, 131 S Ct 1968, 1974-1975; *Mathews v Diaz,* 426 US at 81-82; *Takahashi v Fish and Game Comm'n.,* 334 US at 419; *Hines v Davidowitz,* 312 US at 62-74; *League of United Latin Am. Citizens v Wilson,* 997 F Supp 1244, 1253-1254 [CD Cal]).

Narrowly read, it would appear that 8 USC § 1621 *et seq.* expressly preempt the authority of the state from issuing professional licenses. However, under a more holistic reading, including a consideration of the underlying purposes of PRWORA (*see* 8 USC § 1601),[FN10] the enactment of 8 USC § 1621(a) and (c)(1)(A) is not a considered judgment by the Congress

mandating the states to deny professional licenses to the defined groups of aliens, because those sections must be read together with section 1621(d), wherein Congress expressly left the ultimate policy judgment, as to whether to extend the defined public benefits to "illegal aliens," to the individual states through its opt-out provision. In pertinent part, 8 USC § 1621 provides:
"(d) State authority to provide for eligibility of illegal aliens for State and local public benefits. A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section *only through the enactment of a State law* after August 22, 1996, which affirmatively provides for such eligibility" (emphasis added).

In light of the opt-out provision offered by 8 USC § 1621(d), we reject the assertion of the United States that the statute constitutes a "comprehensive ban [or prohibition] on the receipt of benefits from the state."[FN11] As previously discussed, section 1621(d) has been construed by courts in California and Florida to require the passage of an act by a state legislature, and that it be signed into law by the state's governor, as the mechanism by which a state must express its intention to opt out of the restrictions imposed by section 1621(a) (*see Florida Bd. of Bar Examiners,* 134 So3d at 435; *In re Garcia,* 58 Cal 4th at 456, 315 P3d at 127; *Martinez v Regents of Univ. of California,* 50 Cal 4th at 1295-1296, 241 P3d at 866-868; *see generally League of United Latin Am. Citizens v Wilson,* 997 F Supp at 1253 [general description of the opt-out procedure to provide immigrant eligibility for state benefits]). However, neither the California Supreme Court nor the Florida Supreme Court was asked to consider the issue of whether 8 USC § 1621(d) violates the Tenth Amendment, which reserves to the individual states all powers not expressly delegated to the federal government (*see* US Const Amend X). That issue is squarely raised here by the State of New York, which argues that 8 USC § 1621(d), by prescribing the enactment of a state law as the method by which individual states can exercise the right to opt out of the restrictions imposed by section § 1621(a), is violative of the Tenth Amendment.

Turning now to that issue, we note that the prescribed process for opting out of the restrictions imposed by section 1621(a) is at odds with New York's bar eligibility and admission structure where, by legislative enactment, the authority over bar eligibility and the admission process rests neither with the executive nor the legislative branch of government, but with the coequal judiciary (*see* Judiciary Law §§ 53, 90; CPLR 9401 *et seq.*; *see generally Matter of Anonymous,* 78 NY2d at 230; *Koeppel v Wachtler,* 183 AD2d at 809; *Matter of Sugarman,* 51 AD2d at 171-172).

We recognize that it is unusual for a state court to pass judgment on the constitutionality of some aspect of a federal statute. However, this is not the first time that a state court has had occasion to do so (*see e.g. Pierce County v Guillen,* 537 US 129, 138-139 [upon certiorari from the Supreme Court of Washington, reviewing the enforceability of portions of 23 USC § 409]; *Harding v Harding,* 99 Cal App 4th 626 [reviewing enforceability of the Full Faith and Credit for Child Support Orders Act (28 USC § 1738B)]). We do so here mindful that our review must be exercised most sparingly. Nevertheless, we hold that the processes by which a state chooses to exercise, by one of its coequal branches of government, the authority granted by the federal legislation is not a legitimate concern of the federal government.
The ability, indeed the right, of the states to structure their governmental decision-making processes as they see fit is essential to the sovereignty protected by the Tenth Amendment. Accordingly, we reject the further argument advanced by the United States that the application of the Tenth Amendment to the question of whether the opt-out provision of section 1621(d) should be exercised by legislative enactment is not at issue [FN12]. Thus, we agree with the State of New York's contention that "[a] legislative-enactment requirement . . . would be unconstitutional because principles of state sovereignty recognized by the Tenth Amendment protect the integrity and independence of state governments against undue interference from the federal government."[FN13]

"[T]he States entered the federal system with their sovereignty intact" (*Blatchford v Native Village of Noatak,* 501 US 775, 779). The Tenth Amendment preserves the integrity of state sovereignty and rests on the principle that freedom is enhanced by the creation of two governments, not one (*see National Fed. of Ind. Bus. v Sebelius,* ___ US ___, ___, 132 S Ct 2566, 2602; *Bond v United States,* ___ US ___, ___, 131 S Ct 2355, 2364; *Alden v Maine,* 527 US 706, 713-714). Inherent in the respect for state sovereignty is the recognition that " the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions'" (*National Fed. of Ind. Bus. v Sebilius,* ___ US at ___, 132 S Ct at 2602, quoting *New York v United States,* 505 US 144, 162), and "that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system" (*Fry v United States,* 421 US 542, 547 n 7). Congress may not directly or indirectly compel a state to enact a specific law or implement a specific policy, nor may Congress "simply commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program'" (*New York v United States,* 505 US at 161, quoting *Hodel v Virginia Surface Mining & Reclamation Assn., Inc.,* 452 US 264, 288; *see Printz v United States,* 521 US 898). "Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature" (*FERC v Mississippi,* 456 US 742, 761).

The Tenth Amendment is implicated here because although Congress has left the ultimate determination whether to extend public benefits, including professional licensure, to the states, it has, at the same time, prescribed the mechanism by which the states may exercise that authority. Where, as here, New York, by its own legislative enactment, has determined that the state judiciary is the sovereign authority vested with the responsibility for formulating the eligibility qualifications and processes governing the admission of attorneys and counselors to the practice of law, that limitation cannot withstand scrutiny under the Tenth Amendment (*see Bates v State Bar of Ariz.,* 433 US 350, 360 [in its capacity as the "ultimate body wielding the State's power over the practice of law," the Supreme Court of Arizona, in its rule-making capacity, is acting as the state sovereign]; *see also Goldfarb v Virginia State Bar,* 421 US 773, 791).

An analogy may be found in *Gregory v Ashcroft* (501 US 452). In *Gregory,* the Supreme Court rejected a challenge by Missouri state judges who argued that a Missouri statute requiring their retirement at age 70 violated the federal Age Discrimination in Employment Act of 1967 (29 USC § 621 *et seq.*; hereinafter ADEA). The Court found it "essential to the independence of the States . . . that their power to prescribe the qualifications of their own officers" should be "exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States" (*id.* at 460 [internal quotation marks omitted]).

Although *Gregory* addressed the state's interest in determining *who* holds office, the State of New York has no less an interest in determining *which* of its branches of government is empowered to exercise the discretion authorized by section 1621(d) to determine *who* may be licensed as an attorney and counselor-at-law. Indeed, the role of New York courts in regulating attorneys is deliberate, well-considered, and time-tested. There are sound reasons why, in New York, the responsibility for attorney admissions is vested in the state's judiciary rather than in other branches or departments of government. As Judge Benjamin Cardozo declared nearly 90 years ago, an attorney is "an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice" (*People ex rel. Karlin v Culkin,* 248 NY 465, 470-471). Consistent therewith, the judicial branch is responsible for formulating and overseeing a variety of rules governing the admission and conduct of attorneys. These include the Rules of Professional Conduct (22 NYCRR part 1200), the State Board of Law Examiners (22 NYCRR part 6000), the 50-hour pro bono requirement for new attorney admissions (22 NYCRR 520.16), the licensure of legal consultants (22 NYCRR part 521), the admission of counsel pro hac vice (22 NYCRR 520.11), the payment of biennial attorney registration fees (22 NYCRR 118.1[g]), the parameters of attorney advertising (Rules of Professional Conduct [22 NYCRR 1200.0] rule 7.1), the requirements for attorney-client retainer agreements (22 NYCRR 1215.1, 1400.3), and the imposition of discipline upon attorneys who violate the state's ethics rules (Judiciary Law § 90[2]).

The mere fact that the state government decision here involves undocumented immigrants, whose presence in the United States is governed by federal immigration laws and the discretionary policy of DHS, does not and cannot, consistent with the core principles of state sovereignty guaranteed by the Tenth Amendment, vest in the federal government the right to take away from the state its authority to determine which coequal branch of government should exercise the power of the sovereign where the federal legislation has left to the states the ultimate policy determination whether to extend public benefits to such undocumented immigrants. We emphasize, however, that the Tenth Amendment concerns implicated here by the issuance of law licenses do not exist in regard to the issuance of other types of professional licenses by other arms of our state's government. Our focus here is solely upon the infringement of the judiciary's authority, as an independent and free-standing constitutional branch of state government, to issue law licenses.

Again, we note that chapter 14 of Title 8 specifically declares the policy of the federal government that aliens should be "self-sufficien[t]" and that they "not depend on public resources to meet their needs, but rather rely on their own capabilities" (8 USC § 1601[1], [2][A]). Considering the express federal immigration policy, we find that the imposition of a barrier to the granting of professional licenses to qualified persons that does not recognize the sovereignty of the state to determine which of its coequal branches of government should exercise the authority granted by section 1621(d) is counterproductive to the stated purposes of that policy.

Thus, giving all deference to the federal government's supreme authority to regulate immigration and to determine immigration policy, because the opt-out provision of 8 USC § 1621(d) as it applies to the question of the admission of attorneys and counselors-at-law to the practice of law in the State of New York is constitutionally infirm, we reject its authority to mandate the governmental mechanism by which the state may exercise its discretion to opt out of the restrictions imposed by section 1621(a). We hold that a decision to opt out from the restrictions imposed by 8 USC § 1621, to the limited extent that it governs the admission of attorneys as professional licensees, may be lawfully exercised by the judiciary in order to be consistent with the Judiciary Law of the State of New York and the sovereignty guaranteed by the Tenth Amendment.

Finding no legal impediment or rational basis for withholding the privilege of practicing law in the State of New York from undocumented immigrants who have been granted DACA relief, we exercise the discretion

authorized under section 1621(d) and declare that such persons may be admitted to the practice of law provided they otherwise, each individually, meet the standards for admission by which all candidates for admission to the practice of law are judged. In exercising our discretion to opt out of the restrictions imposed by section 1621(a) to the limited extent that they address the admission of attorneys and counselors to the practice of law as professional licensees, we find that New York State has taken no steps that may be construed as encouraging unauthorized entry into the United States (*see* 8 USC § 1601[2][B]). Rather, the determination to grant DACA relief and to grant employment authorization documents to such persons rests firmly with the Department of Homeland Security.

On the record before us, we are satisfied that Mr. Vargas meets the standards by which all candidates for admission to the practice of law are judged and that he is eligible for admission to practice law in the State of New York.

VII. *Publication of this Opinion and Order*

Admission decisions are ordinarily matters considered in camera by the Character Committee and ultimately determined by the Appellate Division upon the application of the Character Committee without a formal opinion determining the application. Recognizing the effect this determination will have on the practice of law in the State of New York and potentially on the practice of law in our sister states, we elect to publish this Opinion and Order to the public at large.

In light of the foregoing, the application of Cesar Adrian Vargas for admission to the practice of law in the State of New York is hereby granted, subject to his submission of satisfactory proof that he has completed the pro bono service requirement of 22 NYCRR 520.16, the taking of the required oath, and the signing of the roll of attorneys and counselors-at-law.

ENG, P.J., MASTRO, RIVERA, SKELOS and DILLON, JJ., concur.

ORDERED that the application of Cesar Adrian Vargas for admission to the practice of law in the State of New York is hereby granted, subject to his submission of satisfactory proof that he has completed the pro bono service requirement of 22 NYCRR 520.16, the taking of the required oath, and the signing of the roll of attorneys and counselors-at-law.

ENTER:

Aprilanne Agostino
Clerk of the Court

Footnotes

Footnote 1:. We use the term "immigrant" simply to denote an individual who has come from another country to live in the United States, in accordance with its commonly understood meaning. However, we note that the term "immigrant" has a complex definition spread across 16 pages of the United States Code (*see* 8 USC § 1101[a][15]; *see also In re Garcia,* 58 Cal 4th 440, 446 n 1, 315 P3d 117, 120 n 1 [discussing derivation and use of the term "undocumented immigrant"]).

Footnote 2:. "An alien granted withholding of deportation or removal for the period of time in that status, as evidenced by an employment authorization document issued by the Service," may seek employment in the United States for the period of said authorization (8 CFR 274a.12[a][10]). Such employment is "without restrictions as to location or type of employment" (8 CFR 274a.12[a]).

Footnote 3:. We do not employ the term "deferred action status" because the approval of an application for deferred action from removal enforcement does not confer immigration status on the applicant. It merely constitutes recognition that DHS has determined, as a matter of prosecutorial discretion, that it will not pursue removal enforcement against the individual for the period specified in the notice of action (*see* U.S. Dept. of Homeland Security, Mem of Janet Napolitano, Secretary [June 15, 2012], http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [accessed June 2, 2015]).

Footnote 4:. Although the Court of Appeals' rule-making authority is subject to the State constitution, the constitution addresses the eligibility of persons to practice law only to the limited extent of prohibiting certain enumerated judicial officers from engaging in the practice of law (*see* NY Const, art VI, § 20[b][4]).

Footnote 5:. *See* U.S. Dept. of Homeland Security, Mem of Janet Napolitano, Secretary (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (accessed June 2, 2015). The memorandum explains that, as with other policies by which enforcement authorities exercise prosecutorial discretion in the area of removal enforcement, the enforcement resources of DHS should be allocated in a manner that recognizes that certain individuals, here persons who came to the United States as children, without intent to violate the immigration laws and who otherwise are individually determined to pose no security risk or public safety concerns, are low priority cases from an enforcement perspective. *See generally Arizona v United States* (___ US ___, ___, 132 S Ct 2492, 2498-2500 [discussing the discretionary authority of DHS in implementing and carrying out removal enforcement policy]; U.S. Immigration and Customs Enforcement, Mem of John Morton, Director, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, at 4

(June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (accessed June 2, 2015) (listing 19 nonexclusive factors to be considered when exercising prosecutorial discretion, including lengthy residence in this country and successful pursuit of a college or advanced degree at a legitimate institution of higher education in the U.S.).

Footnote 6:. *Frequently Asked Questions*, Dept. of Homeland Security, U.S. Citizenship and Immigration Servs. (updated Oct. 23, 2014), http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions (accessed June 2, 2015) (hereinafter *Frequently Asked Questions*, Immigration Services); USCIS Form I-821D, Dept. of Homeland Security, U.S. Citizenship and Immigration Servs., http://www.uscis.gov/sites/default/files/form/i-821dinstr.pdf.

Footnote 7:. *But see* Jennesa Calvo-Friedman, Note, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 Geo LJ 1597, 1626 (June 2014) (The author argues, inter alia, that "[a]ll nonimmigrants broadly defined under all provisions of the INA are eligible for professional licenses, under 8 U.S.C. § 1621, despite the fact that the version of this provision codified in the U.S. Code appears to include only those nonimmigrants defined in 8 U.S.C. § 1101. The text of 8 U.S.C. § 1621[a][2] that was passed by Congress and published in the Statutes at Large defines eligible nonimmigrants as a nonimmigrant under the Immigration and Nationality Act.' The version published in the U.S. Code modifies this subpart to include a reference to 8 U.S.C. § 1101 et seq.,' purporting to define nonimmigrants under the INA by reference to this definitional section. The version published in the Statutes at Large trumps, because it is the legal evidence of the governing law, while the version in the U.S. Code is only prima facie evidence of the law").

Footnote 8:. Mr. Garcia, unlike Mr. Vargas, was not a recipient of DACA relief. Rather, while Mr. Garcia was still a minor, his father made an application for a change of Mr. Garcia's immigration status. That application for a change of immigration status was pending at the time of his application for admission to the bar and had been pending for some 19 years with immigration authorities (*see In re Garcia,* 58 Cal 4th at 447-448, 315 P3d at 121-122). Thus, neither Mr. Garcia nor Mr. Vargas fall within any of the three exempt categories of undocumented persons listed in section 1621(a).

Footnote 9:. As further discussed *infra*, neither the California Supreme Court nor the Supreme Court of Florida examined the question of whether 8 USC § 1621(d) violates the Tenth Amendment by prescribing the enactment of legislation as the sole method by which an individual state may exercise its authority to opt out of the restrictions of 8 USC § 1621(a).

Footnote 10:. As relevant to our determination, the declared purposes include:
"§ 1601. Statements of national policy concerning welfare and immigration
"The Congress makes the following statements concerning national policy with respect to welfare and immigration:
"(1) Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.
"(2) It continues to be the immigration policy of the United States that—
"(A) aliens within the Nation's borders not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations, and
"(B) the availability of public benefits not constitute an incentive for immigration to the United States."

Footnote 11:. *See* brief of the United States at 9 (ban) and 10 (prohibition).

Footnote 12:. *See* supplemental brief of the United States at 12.

Footnote 13:. *See* brief of the State of New York at 22-23. The Attorney General of New York is the chief law enforcement officer of the State of New York (*see Matter of Grand Jury Subpoena Duces Tecum [Museum of Modern Art],* 177 Misc 2d 985, 992, *revd on other grounds* 253 AD2d 211, *revd* 93 NY2d 729) and, as such, the brief submitted by the Attorney General represents the state's legal opinion on which branch of government may exercise the authority of the sovereign pursuant to 8 USC § 1621(d). **Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York., 2015 NY Slip Op 04657, 2nd Dept 6-3-15**

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ADMINISTRATIVE LAW

Resignation in the Face of Immediate Termination Constituted Termination by Final Agency Action (Reviewable by a Court)

The Third Department upheld the determination of the Division of State Police Hearing Board and the termination of the petitioner (a State Trooper). The fact that petitioner had resigned did not deprive the court of its review power, despite the resulting absence of a "final agency determination." The petitioner had been shown the superintendent's termination determination and was told he would be terminated if he did not immediately resign. Petitioner resigned. The Third Department held that resignation under such a circumstance is effectively a termination by a final agency action and is therefore reveiwable by a court:

> ... [W]e consider respondents' argument that, since petitioner resigned, there was no final agency action over which the Court has jurisdiction. Although a resignation "would ordinarily be beyond our review, exceptions exist where . . . the resignation was allegedly ineffective and involuntary" ... . It is undisputed that the Superintendent had signed a written decision terminating petitioner's employment. Significantly, the document was handed to petitioner and he was then told that he had 10 minutes to accept an "option" of resigning. Under the narrow circumstances, petitioner was effectively terminated by a final agency action when he was handed the signed termination document. **Matter of Lyons v Superintendent of State Police, Joseph D'Amico, 2015 NY Slip Op 04892, 3rd Dept 6-11-15**

ADMINISTRATIVE LAW/CIVIL SERVICE LAW

Statutory Prohibition of Court Review of Civil Service Commission's Determination (Where the Employee Elects to Appeal to the Commission Before Seeking Judicial Review) Does Not Apply When Constitutional Rights Are Implicated or Where the Agency Has Acted Illegally or In Excess of Its Jurisdiction

The Third Department determined, despite a statutory provision prohibiting judicial review when the employee elects to appeal to the Civil Service Commission before seeking judicial review, the courts have the power to review the agency's determination when the agency has acted in excess of its jurisdiction. Here the petitioner asserted her employment was terminated based on charges brought after the statute of limitations on those charges had passed. The Third Department agreed. Although there is an exception to the application of the one-year statute of limitations when the charges constitute crimes, here the allegations of misconduct did not include the requisite mens rea for the crime of official misconduct (intent to gain a benefit and knowledge the conduct was unauthorized). Therefore the one-year statute of limitations applied. With respect to the power to review the agency's determination, the Third Department wrote:

> Civil Service Law § 76 (3) provides that where, as here, an employee has elected to appeal to respondent before seeking judicial review, "[t]he decision of [respondent] shall be final and conclusive, and not subject to further review in any court" (see also Civil Service Law § 76 [1]). Such explicit statutory language ordinarily bars further appellate review ... . However, statutory preclusion of all judicial review of the decisions rendered by an administrative agency in every circumstance would constitute a grant of unlimited and potentially arbitrary power too great for the law to countenance ... . Thus, even when proscribed by statute, judicial review is mandated when constitutional rights are implicated by an administrative decision or "when the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction"... . **Matter of De Guzman v State of New York Civ. Serv. Commn., 2015 NY Slip Op 04712, 3rd Dept 6-4-15**

ADMINISTRATIVE LAW/DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD/VEHICLE AND TRAFFIC LAW/DRIVING WHILE INTOXICATED/REFUSAL OF CHEMICAL TEST/DRIVER'S LICENSE REVOCATION HEARING/CRIMINAL LAW/"REASONABLE SUSPICION" FOR VEHICLE STOP

No "Reasonable Suspicion" Justifying Vehicle Stop---Revocation of License for Refusal of Chemical Test Reversed

Petitioner was arrested for driving while intoxicated and refused the chemical test. As a result petitioner's license was revoked by an administrative law judge. The Second Department annulled the determination of the Department of Motor Vehicles Appeals Board (which upheld the revocation). The court determined the arresting officer did not have "reasonable suspicion" justifying the initial stop. Petitioner was in a parked car with the engine running. The officer parked behind petitioner's car, blocking any exit, and then approached the car. Only then did the officer notice signs of intoxication:

> At a hearing held pursuant to Vehicle and Traffic Law § 1194, the hearing officer is required to determine, inter alia, whether the police lawfully arrested the operator of the motor vehicle for operating such vehicle while under the influence of alcohol or drugs in violation of Vehicle and Traffic Law § 1192 ... . In order for an arrest to be lawful, the initial stop must itself be lawful (see People v De Bour, 40 NY2d 210, 222). Under the circumstances of this case, where the officer prevented the petitioner from departing, activated his vehicle's emergency lights, and shined a light into the petitioner's parked vehicle, a forcible stop and detention occurred ... . The Department of Motor Vehicles, however, failed to establish that there was reasonable suspicion to justify the forcible stop and detention of the petitioner's person or vehicle ... and, accordingly, the challenged determination cannot be sustained. **Matter of Stewart v Fiala, 2015 NY Slip Op 04857, 2nd Dept 6-10-15**

ADMINISTRATIVE LAW/EDUCATION-SCHOOL LAW

Agency's Failure to Follows Its Own Regulations Rendered Determination Arbitrary and Capricious

The Third Department determined that the NYS Education Department did not follow its own regulations in calculating the amounts due petitioner for special education services for preschool children with disabilities. Failure to follow the regulations rendered the calculation "arbitrary and capricious:"

> Petitioner contends that respondent failed to follow its own regulations and otherwise acted arbitrarily primarily by relying upon unaudited information from the municipalities, disregarding petitioner's audited CFR [Consolidated Fiscal Report] and financial data, and refusing to consider petitioner's explanation for the discrepancies between its audited information and the municipalities' data. Our review of an administrative agency's determination is limited to "ascertain[ing] whether there is a rational basis for the action in question or whether it is arbitrary and capricious" ..., and we have previously recognized that respondent has "broad discretion in setting the reconciliation rate" ... . However, an agency determination arrived at in a manner inconsistent with its own regulations is not supported by a rational basis ... . Although "an agency's interpretation of its own regulation is entitled to deference" ... , "courts are not required to embrace a regulatory construction that conflicts with the plain meaning of the promulgated language" ... . * * *
>
> The intent of the regulations, consistent with common sense and good government, is to gather and use correct data; hence, the repeated directives that service providers submit information — CFRs and financial statements — that has been independently audited and certified by an appropriate professional (see 8 NYCRR 200.9 [e] [1] [i] [a] [1]; [ii] [a]). The regulations provide no authority for relying solely on unaudited information from municipalities. This does not lead to the conclusion that such information from a municipality has no role. It can be considered to require clarification or explanation from a service provider and, if adequately verified, even incorporated in the calculus. However, at a minimum, a service provider that has adhered to the regulations and provided a CFR and financial statement, both audited, should be afforded a reasonable opportunity to explain and/or reconcile its information with the unaudited information of a municipality. Consistent with its own regulations,

respondent cannot simply reject audited information by reason of the existence of less reliable information without some articulable rational basis. **Matter of Mid Is. Therapy Assoc., LLC v New York State Educ. Dept., 2015 NY Slip Op 04707, 3rd Dept 6-4-15**

ADMINISTRATIVE LAW/EDUCATION-SCHOOL LAW

Termination of Teacher's Probationary Employment and Teaching Licenses Was "Abitrary and Capricious" Because the Ruling Was Based In Part Upon an Issue, Absenteeism, of Which the Teacher Had Not Been Given Notice

The First Department found the school district's termination of petitioner's probationary employment as a teacher and termination of her teaching licenses was "arbitrary and capricious" because it was based in part on an issue, absenteeism, of which the teacher had not been given notice. **Matter of Brower v New York City Dept. of Educ., 2015 NY Slip Op 04764, 1st Dept 6-9-15**

ADMINISTRATIVE LAW/EMPIRE ZONES/ECONCOMIC DEVELOPMENT ZONES/MUNICIPAL LAW/TAX LAW

Revocation of Empire-Zone-Business Certifications Upheld in 9 of 11 Instances

The Third Department, in a full-fledged opinion by Justice Lynch, considered the Empire Zone Designation Board's revocation of petitioners' certifications as empire zone businesses. The Department of Economic Development (DED) was directed, in 2009, to conduct a review of all certified businesses to determine whether decertification was warranted on one of two grounds: "First, DED could decertify a business enterprise if it was a "shirt-changer," that is, if the enterprise was certified prior to August 1, 2002, and it "caused individuals to transfer from existing employment with another business enterprise with similar ownership . . . to similar employment with [the enterprise] or if the enterprise acquired, purchased, leased, or had transferred to it real property previously owned by an entity with similar ownership, regardless of form of incorporation or ownership" (General Municipal § 959 [a] [v] [5]; see 5 NYCRR 11.9...). Second, DED could decertify a business enterprise if it failed to meet the 1:1 benefit-cost test ... . The latter test required decertification where it was determined that the enterprise "has submitted at least three years of business annual reports [and it] has failed to provide economic returns to the [s]tate in the form of total remuneration to its employees (i.e., wages and benefits) and investments in its facility that add to a greater value than the tax benefits the business enterprise used and had refunded to it" ... . Applying the standard criteria for review of administrative determinations, the Third Department upheld all but two of the 11 decertifications, but also determined retroactive decertifications were improper. **Matter of Lyell Mt. Read Bus. Ctr. LLC v Empire Zone Designation Bd., 2015 NY Slip Op 03906, 3rd Dept 5-7-15**

ADMINISTRATIVE LAW/LIQUOR LICENSE/500 FOOT RULE

Liquor Authority Properly Complied with the Requirements for Issuing a Liquor License When Three or More Licensed Premises Are Located Within 500 Feet

The First Department, in a full-fledged opinion by Justice Acosta, determined a petition to annul the NYS Liquor Authority's conditional approval of a liquor license was properly denied. The Liquor Authority properly considered the factors associated with the "500-foot-rule" requiring good cause for the issuance of a license when there are three or more licensed premises within 500 feet:

> Ordinarily, applications for licenses to sell liquor for consumption on premises "shall be issued to all applicants except for good cause shown" (ABCL § 64[1]); however, no such license shall be granted for any premises within 500 feet of three or more existing licensed and operating premises, unless the Authority "determines that granting such license would be in the public interest" (ABCL § 64[7][b], [f]). In determining whether the granting of a license will promote the public interest, the Authority may consider:
>
> > "(a) The number, classes and character of licenses in proximity to the location and in the particular municipality or subdivision thereof.
> > "(b) Evidence that all necessary licenses and permits have been obtained from the state and all other governing bodies.
> > "(c) Effect of the grant of the license on vehicular traffic and parking in proximity to the location.
> > "(d) The existing noise level at the location and any increase in noise level that would be generated by the proposed premises.
> > "(e) The history of liquor violations and reported criminal activity at the proposed premises.
> > "(f) Any other factors specified by law or regulation that are relevant to determine the public convenience and advantage and public interest of the community" (ABCL § 64[6-a]).

These factors are intended to guide the Authority "in assuring that appropriate factors are taken into consideration which relate to the business and the impact it has . . . [and] to assure that quality of life impacts are fully incorporated into the responsible state decision-making apparatus" ... .

In cases implicating this 500-foot rule, "[b]efore it may issue any such license, the [A]uthority shall conduct a hearing, upon notice to the applicant and the municipality or community board, and shall state and file in its office its reasons therefor" (ABCL § 64[7][f]).

"A reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious" ... . Courts look to whether the determination "is without sound basis in reason and is generally without regard to the facts" ... .

Regarding the substance of the reasons stated by the Authority, this Court has held that something more than a "perfunctory recitation" is needed to comply with the requirement that the Authority state its reasons for concluding that issuance of a license would be in the public interest ... .

Here, the Authority's written statement sets forth detailed, concrete reasons for its determination, made after a hearing, that issuance of a liquor license ... would be in the public interest (ABCL § 64[7][b], [f]). **Matter of BarFreeBedford v New York State Liq. Auth., 2015 NY Slip Op 05428, 1st Dept 6-23-15**

ADMINISTRATIVE LAW/NEW YORK CITY TAXI AND LIMOUSINE COMMISSION (TLC)

New York City Taxi and Limousine Commission (TLC) Did Not Have the Authority to Promulgate "Health Care Rules" and Mandate Deductions from Taxi Fares to Pay for Healthcare Services and Disability Coverage for "Medallion" Taxi Cab Drivers

The First Department determined the New York City Taxi and Limousine Commission (TLC) exceeded its authority and acted arbitrarily and capriciously when it promulgated "Health Care Rules" and determined six cents per taxi-fare could be deducted for the purpose of providing healthcare services and disability coverage for "medallion" taxi cab drivers.

TLC's "expansive mandate to develop and improve taxi and limousine service" notwithstanding ..., we find that TLC exceeded its authority in promulgating the Health Care Rules ... .

First, the record demonstrates that, in its attempt to establish a cost-effective structure for promoting driver health, TLC, motivated by broad "economic and social concerns," was making policy, and therefore was "operating outside of its proper sphere of authority" ... . Second, TLC manufactured a "comprehensive set of rules without benefit of legislative guidance" ... . TLC has certain delineated powers to ensure that drivers are capable of driving safely (see New York City Charter § 2300; Administrative Code of City of NY §§ 19-505[b][3], [d], [h], [l]; 19-512.1[a]). However, nothing in the Charter or the enabling Code provisions contemplates the establishment and outsourcing of a miniature health insurance navigation and disability insurance department. Third, no expertise in the field of health care services or disability insurance was involved in the development of the rule (indeed, this is not TLC's area of expertise), a fact highlighted by the lack of technical discussion at the hearings on the proposed rule amendments ... . **Matter of Ahmed v City of New York, 2015 NY Slip Op 04733, 1st Dept, 6-4-15**

ADMINISTRATIVE LAW/REVIEW POWERS RE: AGENCY-DETERMINATIONS/APPEALS

The Agency's Determination Was Based Upon Its Own Precedents and Related Jurisprudence and Was Therefore "Rationally Based"---The Determination Should Not, Therefore, Be Disturbed by a Court---A Court May Not Substitute Its Own Judgment for that of the Agency

The First Department, in a full-fledged opinion by Justice Acosta, reversed Supreme Court's denial of a motion to dismiss a petition to annul an agency-determination. The underlying proceedings involved two nurses accused of submitting false time sheets. In seeking a hearing allowed by the collective bargaining agreement, the union, on behalf of the nurses, requested certain documents relevant to the allegations from the New York City Human Resources Administration (HRA). HRA refused to turn over the documents, arguing that such "discovery" is not allowed in disciplinary actions (by the relevant regulations). The Board (of Collective Bargaining) ultimately ruled that some, but not all, of the requested documents (those kept in the regular course of business) should be turned over. HRA filed an Article 78 petition seeking to annul the Board's determination. Supreme Court denied the union's motion to dismiss the petition. The First Department held the petition should have been dismissed. In reviewing an agency determination, the court looks only at whether the

determination is rationally based. Here the Board's determination was based upon its own precedents and related jurisprudence. Therefore, the determination must stand. A court cannot substitute its own judgment for that of the agency:

> "In reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious" ... . "A court cannot simply substitute its judgment for that of an administrative agency when the agency's determination is reasonable" ... . Moreover, "[i]t is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" ... . "Broad deference must therefore be accorded determinations of the Board, which ... is the body charged with interpreting and implementing the [regulations] and determining the rights and duties of labor and management in New York City" ... .
>
> Given this deferential standard of review, we are compelled to hold that the petition should have been dismissed. The Board's decision had a rational basis and was not arbitrary and capricious. To be sure, the Board engaged in a relatively expansive interpretation of the duty to furnish information embodied in [the regulations], when it determined that the duty applies in the context of these disciplinary proceedings instituted pursuant to the Agreement. But its interpretation was based on the holdings of some nine prior decisions and was not irrational ... . The Board based its decision on its own precedents and related jurisprudence, and its interpretation of the [regulations], a statutory provision within its purview and expertise, was sufficiently reasonable to preclude our "substitut[ing] another interpretation" ... . **Matter of City of New York v New York State Nurses Assn., 2015 NY Slip Op 04437, 1st Dept 5-26-15**

PRACTICE POINT

Re: Review of an agency determination by a court: Find out exactly what the court's review powers are to more accurately assess the strength of your client's position. The court should first look only at whether the agency's determination is "rationally based," and should not make that decision based upon the relative merits of the positions taken by either side. Consider submitting a memorandum of law explaining the limits on the court's review powers.

ANIMAL LAW/DOG-BITE/STRICT LIABILITY/"HARBORING AN ANIMAL/LIABILITY OF COTENANTS WHO "HARBORED" BUT DID NOT OWN THE DOG/"VICIOUS PROPENSITIES"

Co-Tenants of Dog Owner Can Be Strictly Liable for Harboring a Dog with Vicious Propensities---Co-Tenants' Motions for Summary Judgment Should Have Been Denied

The Second Department, in a full-fledged opinion by Justice Austin, determined the summary judgment motions by co-tenants of the owner of a dog which injured plaintiff should have been denied. Although the cotenants did not own the dog, there was a question of fact whether the co-tenants "harbored" the dog. The court further determined a joint trial including the cotenants was proper. The meaning of "harboring" and the proof requirements for "vicious propensities" were explained:

> ... [W]e hold that cotenants can be held strictly liable for a vicious attack by dogs owned solely by another cotenant, provided that there is evidence that the cotenants participated in the care of the dogs in their household to a sufficient degree to support a finding that they joined with the dogs' owner in harboring the animals. We further determine that a unified trial is appropriate in this case. * * *
>
> Generally, the owner of a domestic animal who knows or should know that the animal has a vicious disposition or vicious propensity is strictly liable for an injury caused by the animal ... . Strict liability can also be imposed against a person other than the owner of an animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensity ... . However, no liability can be found against a defendant who neither owned, harbored, nor exercised dominion and control over the animal, and did not permit it to be on or in his or her premises ... . * * *
>
> "Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation'" ... . "Once this knowledge is established," the owner or anyone harboring the animal "faces strict liability" ... . "Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm" ... .

> The owner or harborer of a dog with vicious propensities is not entitled to the benefit of the so-called "one free bite" rule ... . Even a dog which has not previously bitten or attacked may subject its owner or harborer to strict liability where its propensities are apparent ... .
>
> Knowledge of an animal's vicious propensities may also be discerned, by a jury, from the nature and result of the attack ... . **Matthew H. v County of Nassau, 2015 NY Slip Op 05157, 2nd Dept 6-17-15**

APPEALS/INTERLOCUTORY APPEAL/NEGLIGENCE/EVIDENCE

No Interlocutory Appeal Lies from a Pre-Trial Ruling on the Admissibility of Evidence Which Did Not Limit the Scope of the Issues or Theories of Liability to Be Tried

Defendant was intoxicated when her vehicle collided with plaintiff's decedent's vehicle. Plaintiff, the administrator of decedent's estate, sought to introduce expert testimony demonstrating that, based upon defendant's blood-alcohol content six hours after the accident, she would have been visibly intoxicated and had a higher blood-alcohol content when she was served at defendant tavern. The tavern moved to preclude the expert testimony and, after a Frye hearing, the court granted the motion. The Third Department determined the court's ruling on the evidentiary issue did not limit the scope of the issues or theories of liability to be tried and was not, therefore, appealable as of right or by permission. Appeal would have to wait until the trial is concluded:

> It is well settled that "an order which merely determines the admissibility of evidence, even when made in advance of trial on motion papers, constitutes, at best, an advisory opinion which is neither appealable as of right nor by permission" ... . Supreme Court precluded plaintiff from offering an expert opinion as to "the extrapolated blood alcohol content [and] the physiological condition" of [defendant] while she was at the tavern, crediting the testimony of [the tavern's] expert that such an opinion could not be reliably drawn from the available proof. Regardless of whether Supreme Court abused its discretion in making that determination, it was plainly an evidentiary ruling that did not "limit[] the scope of the issues or the theories of liability to be tried" ... . Indeed, counsel for plaintiff acknowledged at oral argument that the preclusion of the proffered expert evidence is not fatal to his claims and that a trial will occur even if the evidence is not allowed. Appellate review thus must wait until after trial, when the relevance of the evidence and the effect of the evidentiary ruling may be properly assessed ... . **Hurtado v Williams, 2015 NY Slip Op 04912, 3rd Dept 6-11-15**

ARBITRATION

Court's Arbitration-Award Review Powers Explained

The Second Department determined the petition to vacate the arbitration award was properly denied. The court explained its review powers:

> "Judicial review of an arbitrator's award is extremely limited" ... . "A party seeking to overturn an arbitration award on one or more grounds stated in CPLR 7511(b)(1) bears a heavy burden,' and must establish a ground for vacatur by clear and convincing evidence" ... . An arbitration award may be vacated if the court finds that the rights of a party were prejudiced by (1) corruption, fraud, or misconduct in procuring the award; (2) partiality of an arbitrator; (3) an arbitrator who exceeded his or her power; or (4) the failure to follow the procedures of CPLR article 75 (see CPLR 7511[b]). An arbitration award may be vacated pursuant to CPLR 7511(b)(1)(iii) where "an arbitrator . . . exceeded his or her power," which includes those circumstances in which the award "violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" ... .
>
> The petitioner's contention that the arbitration award dated August 14, 2012, was against public policy is without merit. "An arbitration award violates public policy only where a court can conclude, without engaging in any extended fact-finding or legal analysis, that a law prohibits the particular matters to be decided by arbitration, or where the award itself violates a well-defined constitutional, statutory, or common law of this state" ... . **Matter of County of Nassau v Patalano, 2015 NY Slip Op 03837, 2nd Dept 5-6-15**

ARBITRATION/EMPLOYMENT LAW/PUBLIC EMPLOYEES/CIVIL SERVICE/COLLECTIVE BARGAINING AGREEMENTS/UNIONS/MUNICIPAL LAW/COUNTY LAW

Length of Probationary Term for New County Employees Is Arbitrable Under the Two-Prong Test

Reversing Supreme Court, the Third Department determined the grievance concerning the length of the probationary period for new employees was arbitrable. The union contended the county had imposed a longer period of probation on a new employee than the 26 weeks allowed by the collective bargaining agreement (CBA). The county civil service commission, prior to the execution of the CBA, had adopted a resolution describing the period of probation for new employees as ranging from 8 to 52 to weeks. The Third Department determined there was no statutory, constitutional or public policy prohibition to arbitration of the grievance. And the broad arbitration clause in the CBA covered the grievance at issue:

> The threshold determination of whether a dispute is arbitrable is well settled. Proceeding with a two-part test, we first ask whether the parties may arbitrate the dispute by inquiring if there is any statutory, constitutional or public policy prohibition against arbitration of the grievance. If no prohibition exists, we then ask whether the parties in fact agreed to arbitrate the particular dispute by examining their collective bargaining agreement. If there is a prohibition, our inquiry ends and an arbitrator cannot act" ... .
>
> To be sure, "[w]hen a county civil service commission, possessing the requisite authority, promulgates a rule establishing the length of a probationary term of service, that rule has the effect of law"... , and the public employer and the union cannot negotiate a contrary provision in a CBA. Here, however, the CBA executed by the County and the Union long after the Commission modified the probationary term is not inconsistent with the new Commission rule, as the probationary term negotiated by the parties falls squarely within the range promulgated by the Commission. Therefore, we discern no statutory or public policy bar to arbitration of the grievance in the first instance ... . Hence, we are satisfied that the parties may in fact arbitrate the underlying dispute. As to the second inquiry, i.e., whether the parties actually agreed to arbitrate this particular dispute, we note that the parties' CBA contains a broad arbitration clause, which encompasses "any claimed violation, misrepresentation or improper application" of the CBA. In light of such language, we similarly are persuaded that the Union's grievance falls within the scope of disputes that the parties agreed to submit to arbitration ... . **Matter of County of Greene (Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO, Greene County Unit 7000, Greene County Local 820), 2015 NY Slip Op 04709, 3rd Dept 6-4-15**

ARBITRATION/INSURANCE LAW

Parties' Agreement to "Litigate" Their Entitlement to Interest on a judgment Did Not Constitute a Waiver of the Relevant Insurance Policy's Arbitration Clause---The Arbitrability of the Claims Must Be Determined by the Arbitrator Not the Courts

The Fourth Department determined an agreement to litigate the parties' entitlement to interest on a judgment did not constitute a waiver of the relevant insurance policy's arbitration clause. The issue whether the parties' claims are arbitrable, therefore, must be determined by the arbitrator, not the courts:

> "Once the parties to a broad arbitration clause have made a valid choice of forum, as here, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator" ... . This is not a situation in which the parties engaged in litigation to such an extent that they "manifested a preference clearly inconsistent with [a] later claim that the parties were obligated to settle their differences by arbitration' " ... . Nor is this a situation in which the entire contract containing the arbitration provision has been cancelled or terminated, such that "the designation of the arbitration forum for the resolution of disputes is no longer binding upon the parties" ... . We thus conclude that the determination of the arbitrability of the parties' claims under the Policy should be made by an arbitrator. **Town of Amherst v Granite State Ins. Co., Inc., 2015 NY Slip Op 05352, 4th Dept 6-19-15**

ARTICLE 78/PROHIBITION/CRIMINAL LAW/DOUBLE JEOPARDY

Double Jeopardy Does Not Bar Prosecution of a Lesser Included Offense Never Considered by the Trier of Fact in the First Trial

The Fourth Department noted that an Article 78/prohibition action is a proper vehicle for raising double jeopardy as a bar to a prosecution. Defendant was charged with two counts of Driving While Intoxicated

(DWI) and one count of Driving While Ability Impaired (DWAI). In a bench trial, defendant was acquitted of one count of DWI and the second count of DWI, of which defendant was initially convicted, was subsequently dismissed pursuant to a post-trial motion because of the legal insufficiency of the evidence. Under these circumstances, because the DWAI count was never considered in the bench trial, a second trial on that charge alone does not violate the double jeopardy prohibition:

> "[I]n a bench trial, it is presumed that the Judge sitting as the trier of fact made his [or her] decision based upon appropriate legal criteria" ... . Here, the court, upon acquitting defendant of common-law DWI, would have applied the "acquit-first" rule ..., and next considered DWI, per se, before reaching DWAI as a lesser included offense under either count of DWI ... . Inasmuch as the court convicted defendant of the count charging DWI, per se, it could not have reached the lesser included offense of DWAI. Consequently, we conclude that "double jeopardy concerns . . . are not present in the case at hand . . . [because] the People here d[o] not seek to retry defendant on the count[, i.e., DWI, per se, or common-law DWI] of which he was acquitted at the first trial. Rather, the only count at issue in the retrial [will be] the lesser [DWAI] charge for which the [court did not] reach a verdict. At no point during the retrial [will] defendant [be] in jeopardy of conviction of the greater offense. Thus, there [i]s no constitutional double jeopardy bar to [a] second trial" on the lesser included offense of DWAI ... . **Matter of Case v Sedita, 2015 NY Slip Op 03630, 4th Dept 5-1-15**

ATTORNEYS/CHARGING LIEN/FAMILY LAW/DOMESTIC RELATIONS LAW/CHILD SUPPORT/JUDICIARY LAW

Attorney's Charging Lien Based Upon a Judgment for Child Support Arrears Was Proper---Relevant Law Explained

The Fourth Department, in the context of plaintiff's attempt to collect a judgment reflecting child support arrears, determined an attorney's charging lien was appropriately attached to the proceeds of the sale of defendant's property. The court rejected the argument that child support payments are exempt from an attorney's charging lien, at least under the facts of this case. Here the children were already emancipated and the nonpayment was not enforced for 16 years. The Fourth Department explained the law surrounding attorney's charging liens, and noted the exemptions for proceedings before "a department of labor" and an award of alimony or maintenance:

> Under the common law, "the attorney's lien was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained' "... . Judiciary Law § 475 "codifies and extends the common-law charging lien" ..., by providing an attorney with "a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come" (§ 475 ...). The statute is remedial in nature and therefore must "be construed liberally in aid of the object sought by the [L]egislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action" ... . "The lien comes into existence, without notice or filing, upon commencement of the action or proceeding," and "gives the attorney an equitable ownership interest in the client's cause of action" ... .
>
> The only exception contained in the statute is for proceedings before "a department of labor" (Judiciary Law § 475). In addition to that statutory exception, the Court of Appeals has held that, as a matter of public policy, a charging lien may not attach to an award of alimony or maintenance ... . **Mura v Mura, 2015 NY Slip Op 03639, 4th Dept 5-1-15**

ATTORNEYS/CHARGING LIEN/EXCESSIVE FEES

Supreme Court Should Have Held a Hearing to Determine Whether Attorneys Were Entitled to the Fees Sought by Them---Plaintiff Had Already Paid the Attorneys Nearly the Amount the Case Ultimately Settled For---the Attorneys, Who Had Been Discharged Without Cause, Sought 40% of the Settlement Pursuant to a Contingency Agreement Which Was Entered In Anticipation of Trial

The Second Department reversed Supreme Court and ordered a hearing to determine whether respondents-attorneys had received all the fees they were entitled to. The attorneys had been paid nearly $54,000 by the plaintiff. Then plaintiff then entered a 40% contingency arrangement prior to trial. The case ultimately settled for $57,500 and plaintiff discharged the attorneys:

> An attorney of record who is discharged without cause possesses a charging lien pursuant to Judiciary Law § 475 which constitutes an equitable ownership of the cause of action an attaches to any recovery ... . Additionally, "[i]f a client discharges an attorney without cause, the

attorney possesses a common-law retaining lien on the client's file in his or her possession and is entitled to recover compensation from the client measured by the fair and reasonable value of the services rendered, regardless of whether that amount is more or less than the amount provided in the contract or retainer agreement" ... . The retaining lien "is extinguished only when the court, which controls the functioning of the lien, orders turnover of the file in exchange for payment of the lawyer's fee or the posting of an adequate security therefor following a hearing" ... . "Absent exigent circumstances, the attorney may generally not be compelled to surrender the papers and files until an expedited hearing has been held to ascertain the amount of the fees or reimbursement to which he or she may be entitled" ... . A court may summarily determine that an attorney is charging excessive fees, limit those fees, and discharge the attorney's liens ... .

Here, the Supreme Court erred in denying the plaintiff's cross motion without holding a hearing to ascertain the amount of fees or reimbursement to which the respondents may be entitled ... . The gravamen of the plaintiff's cross motion was that the charging lien and retaining lien should be vacated because he had already paid the respondents a total of $53,763.99 in legal fees and he did not owe the respondents any additional legal fees. In contrast, the respondents sought to collect a contingency fee of $23,000, which was the full 40% of the $57,500 recovery, without crediting the plaintiff with the $5,000 which should have been credited against the contingency fee pursuant to their agreement. Thus, it appears that the respondents were seeking excessive fees.

Under these circumstances, we reverse the order insofar as appealed from and remit the matter to the Supreme Court, Westchester County, for a hearing on the issue of whether the respondents have received all of the fees owed to them for the reasonable value of their services ...
. **D'Ambrosio v Racanelli, 2015 NY Slip Op 05149, 2nd Dept 6-17-15**

ATTORNEYS/CONFLICT OF INTEREST/DISQUALIFICATION/ REPRESENTING DRIVER AND PASSENGER IN A REAR-END COLLISION/NEGLIGENCE

Conflicting Interests Prevented Attorney from Representing Both the Driver and Passenger in a Stopped Car Which Was Rear-Ended

The Second Department determined, once a counterclaim was made against the driver of the car which was stopped and rear-ended, a conflict of interest arose prohibiting an attorney from representing both the driver and the passenger (Earl):

> The general rule is that an attorney is not entitled to a fee in a personal injury action if the attorney violated the Rules of Professional Conduct (12 NYCRR 1200.0) by representing both the driver of an automobile involved in a collision and a passenger in that vehicle ... provides, in pertinent part, with respect to conflicts of interests involving current clients, that a lawyer shall not represent a client if a reasonable lawyer would conclude that "the representation will involve the lawyer in representing differing interests" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[a][1]) . Pursuant to rule 1.7(b) of the Rules of Professional Conduct (22 NYCRR 1200.0) the potential conflict may be waived if the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client, the representation is not prohibited by law, the representation does not involve the assertion of a claim by one client against the other in the same litigation, and each affected client gives informed consent, confirmed in writing. In the instant case, there was no written confirmation of informed consent to the potential conflict.
>
> [The attorney] contends that since Earl was a passenger in a stopped vehicle which was struck in the rear, the driver of the stopped vehicle was clearly not at fault, and there was no conflict of interest ... . However, once the defendant asserted a counterclaim, the pecuniary interests of the driver conflicted with those of the passenger... . **Shelby v Blakes, 2015 NY Slip Op 04839, 2nd Dept 6-10-15**

ATTORNEYS/DISQUALIFICATION/ APPEARANCE OF A CONFLICT OF INTEREST/MENTAL HYGIENE LAW/GUARDIANSHIP/INCAPACITATED PERSONS

Potential Conflict of Interest Arising from Representation of Co-Guardians Required that the Co-Guardians Each Have Their Own Counsel

The First Department, over a dissent, determined a single attorney representing co-guardians of an incapacitated person created the appearance of representing conflicting interests. The court held there was a potential conflict of interest because the co-guardians were dependent upon the incapacitated person and had competing financial interests in the terms of a trust and as beneficiaries of the incapacitated person's will:

> It is well settled that an attorney "must avoid not only the fact, but even the appearance, of representing conflicting interests" ... . "[W]ith rare and conditional exceptions, the lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship" ... . Moreover, "doubts as to the existence of a conflict of interest must be resolved in favor of disqualification" ... . Full disclosure and prior consent by the parties may, on occasion, obviate the objection to conflicting representation ... .
>
> Applying these principles to the facts of this case, we find that the motion court properly determined that joint representation of the co-guardians by a single counsel would be improper. While an actual conflict may not have arisen "at this time" and in this proceeding as the dissent posits, there is clearly a potential conflict of interest ... . **Matter of Strasser v Asher, 2015 NY Slip Op 04763, 1st Dept 6-9-15**

ATTORNEYS/DISQUALIFICATION OF ATTORNEYS/CONFLICT OF INTEREST/WAIVER OF CONFLICT

Awareness of a Conflict of Interest for Eight Months Constituted a Waiver of Any Objection to Opposing Counsel

In a custody proceeding, the Second Department determined mother's motion to disqualify father's counsel, based upon a conflict of interest, should not have been granted. The mother was aware of the conflict for eight months prior to making the motion and therefore had waived any objection to father's counsel:

> The disqualification of an attorney is a matter which lies within the sound discretion of the court ... . "A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized" ... . Where a party seeks to disqualify counsel of an adversary in the context of ongoing litigation, courts consider when the challenged interests became materially adverse to determine if the party could have moved at an earlier time ... . "If a party moving for disqualification was aware or should have been aware of the facts underlying an alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party's representation" ... . Here, the mother brought the issue of the potential conflict to the court's attention in April 2014, even though the record reflects that she had been aware of this issue for at least eight months at that time. Therefore, the mother waived any objection to the father's choice of counsel. **Matter of Valencia v Ripley, 2015 NY Slip Op 03852, 2nd Dept 5-6-15**

ATTORNEYS/FRIVOLOUS LAWSUIT/SANCTIONS

Frivolous Lawsuit Warranted Sanctions and the Award of Attorney's Fees

The First Department determined sanctions and the award of attorney's fees were appropriate for a frivolous lawsuit brought by an attorney who had represented himself in a related divorce proceeding. The lawsuit sought $27,000 allegedly loaned to the defendant-wife by plaintiff. However, the $27,000 claim was made in the divorce proceedings and, although the lower court did not directly rule on the loan, the claim was effectively rejected by the court in a "catch-all" provision denying all relief not specifically addressed:

> A court may, in its discretion, award to any party costs in the form of reimbursement for expenses reasonably incurred and reasonable attorneys' fees resulting from "frivolous conduct," which includes: (1) conduct completely without merit in law, which cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) conduct undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; and (3) the assertion of material factual statements that are false (22 NYCRR 130-1.1[a], [c][3]). The court may also award financial sanctions on the same grounds (22 NYCRR 130-1.1[b]).
>
> In determining whether conduct is frivolous, the court shall consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel" (22 NYCRR 130-1.1[c]).
>
> Here, the husband made a claim in the divorce action for repayment of the $27,000 "loan," and Supreme Court rejected it. He then failed to

challenge that finding on direct appeal. Any argument that Supreme Court did not actually decide the issue of the "loan" because it did not specifically address it is rejected, since the court included the "catch-all" language that any claims not discussed were denied. In any event, the husband could have sought clarification from the court if he felt that the claim related to the "loan" had escaped the court's attention. Indeed, it would have behooved him to do so, as it is well settled that "res judicata bars a subsequent plenary action concerning an issue of marital property which could have been, but was not, raised in the prior matrimonial action" ... . Again, we are required to consider "the circumstances under which the conduct took place" when reviewing a sanctions motion (22 NYCRR 130-1.1[c]). Here, the circumstances are that the husband, an experienced divorce lawyer, ignored a long-standing principle of matrimonial jurisprudence. Thus, his decision to commence an action that he knew, or should have known, was futile from its inception, weighs heavily in favor of a finding that his conduct was intended solely to harass the wife. **Borstein v Henneberry, 2015 NY Slip Op 05390, 1st Dept 6-23-15**

ATTORNEYS/LICENSE TO PRACTICE LAW/IMMIGRATION LAW/UNDOCUMENTED IMMIGRANTS/DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)/JUDICIARY LAW/TENTH AMENDMENT

New York State Can Issue a License to Practice Law to an Undocumented Immigrant Authorized to Be In the United States by the Deferred Action for Childhood Arrivals Policy of the Federal Government

The Second Department, in an extensive, full-fledged opinion (per curiam), dealing with a question of first impression, determined the State of New York could issue a license to practice law to an undocumented immigrant who was qualified for admission to the bar. The court explained the issues before it as follows:

> We are called upon to determine whether an undocumented immigrant, who is authorized to be present in the United States under the auspices of the Deferred Action for Childhood Arrivals policy of the federal government, and who meets the statutory eligibility requirements and the rules of court governing admission to the practice of law in the State of New York, may satisfy the standard of good character and general fitness necessary for admission. We are further called upon to determine whether such an individual is barred from admission to the practice of law by a federal statute, 8 USC § 1621, which generally prohibits the issuance of state professional licenses to undocumented immigrants unless an individual state has enacted legislation affirmatively authorizing the issuance of such licenses. This presents an issue of first impression in New York and, in terms of the applicability of 8 USC § 1621 and its compatibility with the Tenth Amendment of the United States Constitution, an issue of first impression nationwide.
>
> We hold that a narrow reading of 8 USC § 1621(d), so as to require a state legislative enactment to be the sole mechanism by which the State of New York exercises its authority granted in 8 USC § 1621(d) to opt out of the restrictions on the issuance of licenses imposed by 8 USC § 1621(a), unconstitutionally infringes on the sovereign authority of the state to divide power among its three coequal branches of government. Further, we hold, in light of this state's allocation of authority to the judiciary to regulate the granting of professional licenses to practice law (see Judiciary Law § 53[1]), that the judiciary may exercise its authority as the state sovereign to opt out of the restrictions imposed by section 1621(a) to the limited extent that those restrictions apply to the admission of attorneys to the practice of law in the State of New York. Accordingly, we answer the first question in the affirmative and the second question in the negative. **Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York., 2015 NY Slip Op 04657, 2nd Dept 6-3-15**

BANKING LAW/JOINT BANK ACCOUNTS/RIGHT OF SURVIVORSHIP/CONVENIENCE ACCOUNTS/TRUSTS AND ESTATES

Presumption, Pursuant to Banking Law 675, that a Joint Bank Account Created a Joint Tenancy with Right of Survivorship Is Not Triggered Unless the Signature Card for the Account Indicates a Right of Survivorship Was Intended

The Third Department determined petitioner, whose name was on a joint bank account with decedent and another, was not entitled to one-half of the proceeds in the account upon decedent's death. The court explained that the presumption (Banking Law 675) that a joint bank account creates a joint tenancy with right of survivorship is triggered only when the signature card for the account indicates the parties intended the right of survivorship to apply. Here the signature card made no mention of the right of survivorship:

Banking Law § 675 (a) provides, in relevant part, that, "[w]hen a deposit of cash . . . has been made . . . in the name of [the] depositor . . . and another person and in form to be paid or delivered to either, or the survivor of them, such deposit . . . and any additions thereto made, by either of such persons, . . . shall become the property of such persons as joint tenants and the same, together with all additions and accruals thereon, . . . may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them." Further, Banking Law § 675 (b) provides that "[t]he making of such deposit . . . in such form shall, in the absence of fraud or undue influence, be prima facie evidence, in any action or proceeding to which the . . . surviving depositor. . . . is a party, of the intention of both depositors . . . to create a joint tenancy and to vest title to such deposit . . ., and additions and accruals thereon, in such survivor." Thus, "[w]here an account has been formed in compliance with the statute, it is presumed, absent a showing of fraud or undue influence, that the depositors intended to create a joint tenancy with rights of survivorship" ... . That said, the statutory presumption embodied in Banking Law § 675 (b) will not be triggered unless the signature card for the account in question specifically references rights of survivorship ... . Assuming the statutory presumption has been invoked, the burden then shifts to the party challenging the survivorship rights "to establish — by clear and convincing evidence — fraud, undue influence, lack of capacity or, as [respondent] asserts here, that the account[] [was] only opened as a matter of convenience and [was] never intended to be [a] joint account[]" ... .

Here, the signature card for the Citizens money market account contains no survivorship language. Accordingly, under prevailing case law, petitioner simply is not entitled to the presumption afforded by Banking Law § 675 (b) ... . **Matter of Farrar, 2015 NY Slip Op 04902, 3rd Dept 6-11-15**

BANKING LAW/JOINT BANK ACCOUNT/JOINT TENANCY WITH RIGHT OF SURVIVORSHIP/TRUSTS AND ESTATES

No Survivorship Language in Joint Bank Account Documents/Evidence the Joint Account Was Created as a Matter of Convenience/Summary Judgment Should Not Have Been Granted Awarding Plaintiff Half the Funds in the Account Upon the Death of the Other Person Named on the Account

The Fourth Department noted that Supreme Court erred in concluding a joint bank account was a joint tenancy with right of survivorship and granting the aspect of plaintiff's motion for summary judgment seeking half the funds in the account upon the death of the other party named on the account. There was no survivorship language in the account documents, and there was evidence tending to rebut any statutory presumption of a joint tenancy (i.e., evidence the account was created as a matter of convenience):

> Contrary to the court's determination, we conclude that the statutory presumption of joint tenancy set forth in Banking Law § 675 does not apply to the joint account inasmuch as "the account documents do not contain the necessary survivorship language" ... .
>
> We note in any event that the statutory presumption may be rebutted "by providing direct proof that no joint tenancy was intended or substantial circumstantial proof that the joint account[s] had been opened for convenience only" ... . Even assuming, arguendo, that the statutory presumption of joint tenancy applies to the joint accounts, we conclude that defendant submitted evidence tending to rebut the statutory presumption that is sufficient to raise a triable issue of fact whether, "at the time the accounts were created, the accounts were opened as a matter of convenience" ... . In particular, defendant submitted evidence establishing, inter alia, that decedent was the sole depositor of the joint accounts, and that plaintiff never withdrew funds from the joint accounts during decedent's lifetime ... . In addition, defendant submitted evidence establishing that decedent's creation of a joint tenancy with the right of survivorship in the joint accounts "would represent a substantial deviation from [her] previously expressed testamentary plan" ... , **Harrington v Brunson, 2015 NY Slip Op 05309, 4th Dept 6-19-15**

CHAMPERTY/JUDICIARY LAW

Sale of Notes Was Champertous---Seller Subcontracted Out Its Litigation for Political Reasons In Violation of Judiciary Law 489 (1)

The First Department determined plaintiff's purchase of notes was champertous. Champerty "is the purchase of claims with the intent and for the purpose of bringing an action that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up . . . in [an] effort to secure costs". Champerty is prohibited by Judiciary Law 489 (1). Although purchases of claims for more than $500,000 are not subject to the champerty prohibition (Judiciary Law 489 (2)), the First Department held that the $500,000 must actually be paid. Here the price was set

at $1,000,000 but nothing had been paid. The court determined the seller of the notes had subcontracted out its litigation to plaintiff for political purposes:

> The purported sale of the notes is champertous since [the seller] maintained significant rights in the notes and expected the lion's share of any recovery from defendants ... . There is every indication that plaintiff entered into the Purchase Agreement with the intent of pursuing litigation on [the seller's] behalf in exchange for a fee; plaintiff's intent was not to enforce the notes on its own behalf .... Indeed, plaintiff could not enforce all of the rights under the notes, since, as the motion court noted, "No reasonable finder of fact could conclude that [plaintiff] was making a bona fide purchase of securities." On the contrary, "[t]he only reasonable way to understand the [Purchase Agreement] is that [the seller] was subcontracting out its litigation to [plaintiff] for political reasons." Accordingly, the sale of the notes violated Judiciary Law § 489(1). **Justinian Capital SPC v WestLB AG, 2015 NY Slip Op 04381, 1st Dept 5-21-15**

CIVIL CONTEMPT

Requirements for a Finding of Civil Contempt Explained (Not Met Here)

In finding the motion to hold a party in civil contempt was properly denied (no clear and convincing evidence mandate in a subpoena was disobeyed), the Second Department explained the relevant law:

> To find a party in civil contempt pursuant to Judiciary Law § 753, the applicant must demonstrate, by clear and convincing evidence, " (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct'" ... . **Korea Chosun Daily Times, Inc. v Dough Boy Donuts Corp., 2015 NY Slip Op 05161, 2nd Dept 6-17-15**

CIVIL PROCEDURE/AMENDMENT OF PLEADINGS TO CONFORM TO THE PROOF/CONTRACT LAW/NEGLIGENCE

Plaintiffs Should Have Been Allowed to Amend the Pleadings to Conform to the Proof at Trial---No Prejudice to Defendant

The Second Department determined plaintiffs should have been allowed to amend the pleadings to conform to the proof at trial. The complaint alleged breach of contract and negligence re: the installation of foam insulation. The contract called for the installation to conform to the manufacturer's specifications. The negligence cause of action alleged the work was not done in a good and workmanlike manner. Because defendant would not have been prejudiced, Supreme Court should have allowed plaintiffs to amend the breach of contract cause of action to allege the work was not done in a good and workmanlike manner. Plaintiffs' motion pursuant to CPLR 4404(b) for judgment in their favor on the breach of contract cause of action should have been granted. The negligence cause of action, which essentially duplicated the breach of contract cause of action, should have been dismissed. With respect the post-trial motion to amend the pleadings, the Second Department wrote:

> ... [T]he Supreme Court improvidently exercised its discretion in denying that branch of the plaintiffs' motion which was for leave to amend the pleadings to conform to the evidence adduced at trial. "Whether to permit a party to amend a pleading is generally a matter of discretion for the trial court and, on review, the Appellate Division" ... . Absent prejudice, courts are free, pursuant to CPLR 3025(c), to permit the amendment of pleadings, even after trial ... . Leave shall be freely given upon such terms as may be just (see CPLR 3025[b]). "This favorable treatment applies even if the amendment substantially alters the theory of recovery" ... .
>
> Here, the proposed amendment to the breach of contract cause of action does not alter the theory of recovery. The complaint alleged that the defendant failed to perform the work in a good and workmanlike manner, albeit in the context of the cause of action alleging negligence. Furthermore, the defendant, who has the burden of establishing prejudice ..., failed to assert that it would be prejudiced by permitting the plaintiffs to amend the complaint to conform to the evidence adduced at trial that the work was not performed in a good and workmanlike manner ... . **Mack-Cali Realty, L.P. v Everfoam Insulation Sys., Inc., 2015 NY Slip Op 04615, 2nd Dept 6-3-15**

PRACTICE POINT

In the absence of prejudice, amendment of the pleadings to conform to the proof at trial should be freely allowed.

CIVIL PROCEDURE/CHANGE OF VENUE/IMPARTIAL TRIAL

Change of Venue to Avoid Appearance of Impropriety Properly Granted--Plaintiff Was a Long-Time Senior Employee of Supreme Court in the County Where the Action Was Brought

The plaintiff was employed by Supreme Court Queens County. For that reason, the Second Department determined Supreme Court properly granted the motion to change the venue from Queens County to Nassau County to avoid the appearance of impropriety:

> "To obtain a change of venue pursuant to CPLR 510(2), a 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" ... . A motion to change venue pursuant to CPLR 510(2) is addressed to the sound discretion of the trial court and its determination should not be disturbed absent an improvident exercise of discretion ... . Under the circumstances of this case, including the evidence demonstrating that the plaintiff has been employed at the Supreme Court, Queens County, since 2001, first as a court officer, and more recently as a senior court clerk, the Supreme Court providently granted the motions for a change of the venue of the action from Queens County to Nassau County, in order to avoid any appearance of impropriety ... . **Rutherford v Patel, 2015 NY Slip Op 05170, 2nd Dept 6-17-15**

CIVIL PROCEDURE/COLLATERAL ESTOPPEL/MORTGAGES/FORECLOSURE

Denial of Plaintiff's Motion to Intervene in a Foreclosure Action Did Not Prohibit, Under the Doctrine of Collateral Estoppel, the Plaintiff's Action to Be Declared the Owner of the Subject Property/A Person With an Interest in Real Property Who Is Not Joined in a Foreclosure Action Is Unaffected by the Judgment of Foreclosure

The Second Department, reversing Supreme Court, determined that plaintiff's (Jamison's) action to declare her the owner of property subject to foreclosure should not have been dismissed under the doctrine of collateral estoppel. Plaintiff's ownership of the property had not been determined in the foreclosure action in which she unsuccessfully sought to intervene. In addition, a person with an interest in real property who is not joined in a foreclosure action remains unaffected by the judgment of foreclosure:

> The doctrine of collateral estoppel bars relitigation of an issue which has been necessarily decided in a prior action and is determinative of the issues disputed in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling ... . The party seeking the benefit of the doctrine of collateral estoppel must establish that the identical issue was necessarily decided in the prior action, and is determinative in the present action ... . Once the party invoking the doctrine discharges his or her burden in that regard, the party to be estopped bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination ... .
>
> Here, the bank failed to establish that the issue of whether Jamison has an interest in the subject property had already been decided, since the order it relied upon expressly provided that no determination had made by the court with respect to the issue of whether or not Jamison was a necessary or indispensable party, and Jamison's motion to intervene as of right in the foreclosure action was denied without explanation. In any event, where a person with an interest in real property is not joined as a party to an action to foreclose a mortgage on that property, that person's rights are left unaffected by the judgment of foreclosure and sale, and the foreclosure sale may be considered void as to the omitted person ... . Accordingly, Jamison's interest, if any, in the subject property was neither litigated nor determined in the foreclosure action, and the order denying her motion to intervene as of right in the foreclosure action was not an adjudication of her rights on the merits. **Jamison v Aquai, 2015 NY Slip Op 04097, 2nd Dept 5-13-15**

CIVIL PROCEDURE/CONVERSION OF MOTION TO DISMISS TO MOTION FOR SUMMARY JUDGMENT

Although It Was Proper to Consider the Motion to Dismiss Made After Issue Was Joined a Motion for Summary Judgment, Supreme Court Should Not Have Determined the Motion Without Giving Notice to the Parties So the Parties Could Lay Bare Their Proof

The Second Department determined Supreme Court should not have converted the motion to dismiss to a

motion for summary judgment without notice to the parties. Because the motion to dismiss was made after issue was joined, it should be treated as a motion for summary judgment. However, because none of the exceptions to the notice requirement applied, Supreme Court should not have determined the motion without giving the parties the opportunity to submit additional evidence. The matter was remitted for that purpose:

> Since the [defendants'] motion was made after issue was joined, the Supreme Court correctly determined that it should be treated as a motion for summary judgment pursuant to CPLR 3212 ... . However, the Supreme Court "was required to give adequate notice to the parties' that the motion was being converted into one for summary judgment" ..., unless one of the recognized exceptions to the notice requirement was applicable ... . Here, no such notice was given, and none of the recognized exceptions to the notice requirement is applicable ... . Neither the [defendants] nor the plaintiff made a specific request for summary judgment, nor did they "indicate that the case involved a purely legal question rather than any issues of fact" ... . Further, the parties' evidentiary submissions were not so extensive as to "make it unequivocally clear' that they were laying bare their proof' and deliberately charting a summary judgment course'" ... . Accordingly, the Supreme Court erred by, in effect, converting the [defendants'] motion pursuant to CPLR 3211(a)(3) to dismiss the complaint into one for summary judgment, and should not have searched the record and awarded summary judgment to the plaintiff ... . **JP Morgan Chase Bank, N.A. v Johnson, 2015 NY Slip Op 05159, 2nd Dept 6-17-15**

CIVIL PROCEDURE/DEFAULT JUDGMENT, MOTION TO ENTER

Unopposed Motions to Enter a Default Judgment Properly Denied---Insufficient Proof of Facts Constituting the Claim

In finding the denial of plaintiff's unopposed motions to enter a default judgment was proper, the Second Department explained the documentary requirements: "A party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215... . Thus, a plaintiff moving for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to appear or answer... . ... The plaintiff failed to submit an affidavit of the facts constituting the claim (see CPLR 3215[f]). While a verified complaint may be used as the affidavit of the facts constituting the claim (see CPLR 3215[f]), it must contain evidentiary facts from one with personal knowledge ... . [A] pleading verified by an attorney pursuant to CPLR 3020(d)(3) is insufficient to establish its merits..." [internal quotations omitted]. **DLJ Mtge. Capital, Inc. v United Gen. Tit. Ins. Co., 2015 NY Slip Op 04087, 2nd Dept 5-13-15**

CIVIL PROCEDURE/DEFAULT JUDGMENT, MOTION TO VACATE

Inadequate Excuse for Delay In Answering Complaint---Motion to Vacate Default Judgment Should Have Been Denied

The Second Department determined Supreme Court should not have granted the bank's (BAC's) motion to vacate a default judgment in a foreclosure action. The bank's excuse (clerical error) was conclusory and belied by a pattern of neglect:

> "To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense" ... . "Whether a proffered excuse is reasonable is a sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" ... .
>
> Here, BAC's proffered excuse, that its default in appearing and answering the complaint was due to a clerical error, was unsubstantiated, conclusory, and inadequately explained, and, therefore, did not constitute a reasonable excuse for the default ... . Moreover, the record demonstrates that the alleged mistake was not an isolated error, but part of a pattern of "repeated neglect" ... . In that regard, BAC failed to present a reasonable excuse for its further delay, after being apprised of its default, in cross-moving to vacate its default. **Wells Fargo Bank, N.A. v Krauss, 2015 NY Slip Op 04123, 2nd Dept 5-13-15**

CIVIL PROCEDURE/DISCOVERY/PHYSICIAN-PATIENT PRIVILEGE/MEDICAL MALPRACTICE

Circumstances Warranted Overcoming Physician-Patient Privilege---Substantive Explanation of the Privilege and Its Application (Including When a Court May Decline to Enforce It)

In a medical malpractice case, the plaintiff sought logs from the defendant-hospital which described the surgical procedures done by defendant surgeon during the times of plaintiff's surgeries. The plaintiff sought to demonstrate the surgeon was doing too many procedures in too short a time to have properly performed them. Although the hospital produced the logs, the information describing each procedure was redacted. Plaintiff's motion to compel was denied by Supreme Court, which held the information about surgeries on non-party patients was privileged. The Second Department reversed. Although the information was deemed privileged by the Second Department, the information could properly be discovered because it was "material and necessary" to the plaintiffs' case and the privacy of the non-party patients could be protected by redaction. The facts presented a situation where the court could properly decline to enforce the privilege. The Second Department provided a substantive explanation of the physician-patient privilege and its application:

> ... CPLR 4504(a) ... provides that "[u]nless the patient waives the privilege, a person authorized to practice medicine . . . shall not be allowed to disclose any information which he [or she] acquired in attending a patient in a professional capacity, and which was necessary to enable him [or her] to act in that capacity" (CPLR 4504[a]...).
>
> The enactment of the statutory physician-patient privilege "was based on the belief that fear of embarrassment or disgrace flowing from disclosure of communications made to a physician would deter people from seeking medical help and securing adequate diagnosis and treatment" ... . "The privilege applies not only to information communicated orally by the patient, but also to information obtained from observation of the patient's appearance and symptoms" .... "Moreover, the form in which the information is sought to be introduced is irrelevant, as the privilege operates whether the information is contained in a patient's medical files or is sought to be introduced at trial in the form of expert testimony" ... .
>
> "That which the privilege seeks to protect, however, and thereby foster, are confidential communications, not the mere facts and incidents of a person's medical history" ... . The statute "is not intended to prohibit a person from testifying to such ordinary incidents and facts as are plain to the observation of any one without expert or professional knowledge" ... . Accordingly, although the privilege protects a patient from the disclosure of a communication made to a doctor, "a witness may not refuse to answer questions regarding matters of fact . . . merely because those topics relate to events that required medical care or advice from a physician" ... .
>
> Furthermore, "where the application of a privilege will not serve to further the legitimate purposes for which it was created, there is little reason to permit its invocation" ... . Accordingly, "courts may properly decline to enforce the physician-patient privilege where its invocation does not serve its policy objectives" ... .
>
> However, even where redaction of identifying information will ensure that the policy objectives of CPLR 4504(a) are not subverted, disclosure of otherwise privileged information should not be permitted where it is not "material and necessary in the prosecution or defense of [the] action" (CPLR 3101[a][1]...). Here, although the listing of each surgical procedure ... was privileged under CPLR 4504(a) ..., the plaintiff established that the subject information is indeed "material and necessary" (CPLR 3101[a]) in the prosecution of the action, and that the circumstances warrant overcoming the privilege ... .**Cole v Panos, 2015 NY Slip Op 04269, 2nd Dept 5-20-15**

CIVIL PROCEDURE/DISCOVERY/PROTECTIVE ORDER/PRIVILEGE RE: MATERIAL PREPARED IN ANTICIPATION OF LITIGATION

Conclusory Affidavit Insufficient to Meet Burden of Demonstrating Documents Were Privileged Because the Documents Were Prepared Solely In Anticipation of Litigation---Motion for a Protective Order Limiting Discovery Properly Denied

The Second Department determined the appellants were not entitled to a protective order precluding discovery of documents pursuant to CPLR 3103. The appellants argued the documents were privileged because they were prepared in anticipation of litigation. However, the conclusory attorney affidavit offered in support of the protective order did not meet the appellants' burden to demonstrate the specific documents sought were "prepared solely in anticipation of litigation or trial...":

> CPLR 3101(a) mandates "full disclosure of all matter material and necessary in the prosecution

or defense of an action." Unlimited disclosure is not mandated, however, and a court may issue a protective order pursuant to CPLR 3103 denying, limiting, conditioning or regulating the use of any disclosure device "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103[a]...). "The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court and, absent an improvident exercise of that discretion, its determination will not be disturbed" ... .

In support of that branch of their motion which was pursuant to CPLR 3103 for a protective order preventing the disclosure of certain witness statements and certain investigation and inspection reports, the appellants contended that such evidence was privileged as it was prepared in anticipation of litigation (see CPLR 3101[d][2]). "The burden of proving that a statement is privileged as material prepared solely in anticipation of litigation or trial is on the party opposing discovery" ... . Such burden is met "by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation" ... .

Here, the appellants failed to meet their burden of establishing that the requested material was prepared solely in anticipation of litigation and, therefore, is protected from disclosure by the qualified immunity privilege of CPLR 3101(d)(2). An attorney's affirmation containing conclusory assertions that requested materials are conditionally immune from disclosure pursuant to CPLR 3101(d)(2) as material prepared in anticipation of litigation, without more, is insufficient to sustain a party's burden of demonstrating that the materials were prepared exclusively for litigation ... . **Ligoure v City of New York, 2015 NY Slip Op 04456, 2nd Dept 5-27-15**

PRACTICE POINT

The burden of proving documents are immune from discovery (pursuant to CPLR 3103) because they were prepared in anticipation of litigation is met by "by identifying the particular material with respect to which the privilege is asserted and establishing with specificity that the material was prepared exclusively in anticipation of litigation" ... . A "conclusory" attorney-affidavit does not meet that burden.

CIVIL PROCEDURE/INTERVENE, MOTION FOR LEAVE TO

Criteria for Intervention Described

In finding the motion for leave to intervene was properly denied, the Second Department explained the criteria:

> Upon a timely motion, a person is permitted to intervene in an action as of right when, among other things, "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment" (CPLR 1012[a][2]...). In addition, the court, in its discretion, may permit a person to intervene, inter alia, "when the person's claim or defense and the main action have a common question of law or fact" (CPLR 1013...). " However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance [and that] intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings'" ... . **Trent v Jackson, 2015 NY Slip Op 05467, 2nd Dept 6-24-15**

CIVIL PROCEDURE/JOINDER OF LEGAL AND EQUITABLE CLAIMS/WAIVER OF RIGHT TO DEMAND JURY TRIAL/APPEALS/APPENDIX METHOD

Deliberate Joinder of Claims for Legal and Equitable Relief Arising from the Same Transaction Constitutes a Waiver of the Right to Demand a Jury Trial

The Second Department noted that the deliberate joinder of claims for legal and equitable relief arising from the same transaction constitutes a waiver of the right to demand a jury trial. In addition, the court dismissed the aspect of the appeal for which the relevant portions of the record were omitted from the appendix. With respect to the contents of the appendix submitted on appeal, the Second Department wrote:

> " An appellant who perfects an appeal by using the appendix method must file an appendix that contains all the relevant portions of the record in order to enable the court to render an informed decision on the merits of the appeal'" ... . "The appendix shall contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent" (22 NYCRR 670.10-b[c][1]; see CPLR 5528[a][5]). Here, the

plaintiff omitted material excerpts from the transcripts of trial testimony and critical exhibits she relies on in seeking review of the dismissal of her disability discrimination cause of action. These omissions inhibit this Court's ability to render an informed decision on the merits of the appeal ... . Accordingly, the appeal from so much of the judgment as is in favor of the defendants and against the plaintiff, in effect, dismissing the second cause of action must be dismissed. **Zutrau v ICE Sys., Inc., 2015 NY Slip Op 04479, 2nd Dept 5-1715**

PRACTICE POINT

Deliberate Joinder of claims for legal and equitable relief arising from the same transaction waives the right to demand a jury trial

CIVIL PROCEDURE/JUDICIAL ESTOPPEL

Doctrine of Judicial Estoppel Precluded Plaintiff from Taking a Position Contrary to the Position Plaintiff Took In Two Prior Successful Actions

The Third Department determined the position taken by plaintiff in prior successful actions, i.e., that defendant was the owner of certain lots, precluded plaintiff, under the doctrine of judicial estoppel, from taking the position defendant was not the owner of those lots in the instant proceeding:

> Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, "if a party assumes a position in one legal proceeding and prevails in maintaining that position, that party will not be permitted to assume a contrary position in another proceeding simply because the party's interests have changed" ... . "The doctrine rests upon the principle that a litigant should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise" .... . **Green Harbour Homeowners Assn., Inc. v Ermiger, 2015 NY Slip Op 03899, 3rd Dept 5-7-15**

CIVIL PROCEDURE/MORTGAGE FORECLOSURE/GOOD FAITH NEGOTIATION RE: LOAN MODIFICATION/CONTRACT CLAUSE

Supreme Court Should Not Have Determined the Mortgage Company Did Not Negotiate a Loan Modification in Good Faith Without a Hearing, and Could Not, Pursuant to the Contract Clause, Order the Mortgage Company to Enter a Loan Modification Agreement

After defendant, Ms Hepburn, failed to answer the summons and complaint in a mortgage foreclosure action, the plaintiff mortgage company moved for an order of reference (the appointment of a referee to compute the amount due). Supreme Court denied the motion and, sua sponte, determined the mortgage company had not negotiated a loan modification in good faith (CPLR 3408), and directed the mortgage company to offer a loan modification within sixty days. The Second Department determined Supreme Court should have granted the motion for an order of reference (which was not opposed), should not have made a finding the mortgage company failed to negotiate a loan modification in good faith without conducting a hearing, and could not, pursuant to the Contract Clause, order the mortgage company to enter a loan modification agreement:

> The Supreme Court should not have, sua sponte, determined that the plaintiff failed to negotiate in good faith as required by CPLR 3408, and directed it, within sixty days, to offer a loan modification to Ms. Hepburn allowing her to assume the subject mortgage. "It is well-settled that an action to foreclose a mortgage is equitable in nature and triggers the equitable powers of the court" ... . "Once equity is invoked, the court's power is as broad as equity and justice require" ... . A court "may impose a sanction sua sponte, but the party to be sanctioned must be afforded a reasonable opportunity to be heard" ... .
>
> Here, the only matter before the Supreme Court was the plaintiff's motion for an order of reference. Without an evidentiary hearing or notice to the parties, the Supreme Court sua sponte determined that the plaintiff had not acted in good faith in its negotiations with Ms. Hepburn at settlement conferences, which were held over a 16-month period, and thereupon denied the plaintiff's motion. Such procedure did not afford the plaintiff an opportunity to oppose the Supreme Court's finding that it had not met it obligation to negotiate in good faith as required by CPLR 3408 or to oppose the imposition of sanctions ... . Moreover, even if sanctions for failure to negotiate in good faith were appropriate in this matter, the

Supreme Court erred in directing the plaintiff to, in effect, enter into a contract with Ms. Hepburn ... . Such a sanction violates the Contract Clause of the United States Constitution ... . **PHH Mtge. Corp. v Hepburn, 2015 NY Slip Op 03817, 2nd Dept 5-6-15**

CIVIL PROCEDURE/MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

"Conclusory" Affidavit Submitted In Support of Motion to Dismiss for Failure to State a Cause of Action Did Not Demonstrate the Allegation Defendants Were Directly Liable for Negligent Maintenance of a Taxi Cab Was "Not a Fact At All"---Analytical Criteria Explained

The Second Department determined plaintiff's complaint should not have been dismissed in its entirety because the documentary evidence submitted in support of the motion to dismiss for failure to state a cause of action (CPLR 3211(a)(7)) did not demonstrate the facts alleged (which could support defendants' direct liability for negligent maintenance of a taxi cab) "were not facts at all." Plaintiff was injured when his motorcycle struck a tire which had come off defendants' taxi cab. Although the information in the affidavit submitted by a defendant was sufficient to warrant the dismissal of causes of action which relied on piercing the corporate veil, the information did not demonstrate defendants could not be directly liable for negligent maintenance of the cab. The related causes of action should not have been dismissed. The Second Department explained the analytical criteria to be applied when documentary evidence is submitted in support of a motion to dismiss for failure to state a cause of action:

> "In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" ... . Where evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, "the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" ... .
>
> Here, [defendant's] affidavit falls short of establishing, conclusively, that [plaintiff] has no cause of action. The affidavit completely fails to address [plaintiff's] allegation that the subject taxi was not "roadworthy." The affidavit, while offering conclusory statements, did not supply competent evidence as to which of the various defendants, if any, might have had a duty to maintain, or might in fact have maintained, the offending taxi prior to the accident. Indeed, [defendant's] conclusory statements are completely unsupported with evidence or specific factual references ... and, hence, are of no probative force ... . **Rathje v Tomitz, 2015 NY Slip Op 04467, 2nd Dept, 5-27-15**

PRACTICE POINT

Documentary Evidence Submitted In Support of a Motion to Dismiss for Failure to State a Cause of Action Must Directly Address the Relevant Facts Alleged in the Complaint and Demonstrate the Alleged Facts Are "Not Facts at All." A "conclusory" affidavit will not be enough.

CIVIL PROCEDURE/PUBLIC BENEFIT CORPORATION/PUBLIC AUTHORITIES LAW/CPLR 205(a)/CONDITION PRECEDENT VS. STATUTE OF LIMITATIONS

The One-Year-and-Ninety-Day Time Limit for Bringing Suit Under the Public Authorities Law Is a Statute of Limitations, Not a Condition Precedent to Suit, and Is Therefore Subject to the Six-Month Extension for Recommencing a Suit Which Was Dismissed Without Prejudice Provided by CPLR 205(a)

The underlying medical malpractice action is against Erie County Medical Center Corporation, a public benefit corporation. Pursuant to Public Authorities Law 3641, a notice of claim must be filed prior to the commencement of the lawsuit. Plaintiff had not filed a notice of claim. The action was dismissed without prejudice, subject to the terms of CPLR 205(a), which allows six months to recommence an action that has not been dismissed on the merits. When the suit was recommenced, the defendant argued that the one-year-and-ninety-day time limit for bringing suit under the Public Authorities Law was not a statute of limitations subject to the CPLR 205(a) six-month extension, rather it was a condition precedent to suit and the (second) complaint must therefore be dismissed as untimely. The Fourth Department determined the one-year-and-ninety-day time limit for suit under the Public Authorities Law was a statute of limitations, not a condition precedent, and the six-month extension provided by CPLR 205(a) applied:

> It is well settled that CPLR 205 (a) does not apply when an act has to be performed within a statutory time requirement and is a condition

precedent to suit (see Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp., 93 NY2d 375, 378-379...). We recognize, by way of example, that the one-year statutory period for commencement of suit against the Port Authority Trans-Hudson Corporation set forth in McKinney's Unconsolidated Laws of NY § 7107 has been held to be a condition precedent to suit not entitled to the tolling benefit of CPLR 205 (a) (see Yonkers Contr. Co., 93 NY2d at 378-379). As emphasized by the Court of Appeals in Yonkers, "Unconsolidated Laws § 7107 unambiguously allows an action against the Port Authority only upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year' " (id., 93 NY2d at 379). Here, Public Authorities Law § 3641 (1) (c) contains no similar express conditional language.

We note that CPLR 205 (a) has been held to apply to proceedings commenced under General Municipal Law § 50-i ..., the language of which is identical to that of Public Authorities Law § 3641 (1) (c) at issue herein. We thus conclude that the express language of section 3641 (1) (c) does not support defendant's contention that the one-year and 90-day period is a condition precedent and not a statute of limitations ... . **Benedetti v Erie County Med. Ctr. Corp., 2015 NY Slip Op 04964, 4th Dept 6-12-15**

CIVIL PROCEDURE/NEGLECT TO PROCEED

Court Should Not Have Dismissed for "Neglect to Proceed"---Criteria Explained

Noting that CPLR 3216 is extremely forgiving and never requires dismissal based on "neglect to proceed," the Second Department determined Supreme Court, under the facts, should not have dismissed the action. A dual showing of a justifiable excuse for the delay and a meritorious cause of action is not strictly necessary to avoid dismissal:

> While generally, the Supreme Court is prohibited from dismissing an action based on neglect to proceed whenever the plaintiff has shown a justifiable excuse for the delay in the prosecution of the action and a potentially meritorious cause of action (see CPLR 3216[e]...) , such a dual showing is not strictly necessary to avoid dismissal of the action ... .
>
> Under the circumstances of this case, including the minimal 4-day delay in filing the note of issue, the fact that the defendants demanded additional discovery subsequent to the court's certification order containing the 90-day demand, the absence of any claim of prejudice, and the lack of evidence of a pattern of persistent neglect and delay in prosecuting the action or of any intent to abandon the action, the Supreme Court improvidently exercised its discretion in declining to excuse the plaintiffs' failure to meet the deadline for filing the note of issue ... . **Rossi v Scheinbach, 2015 NY Slip Op 04110, 2nd Dept 5-13-15**

CIVIL PROCEDURE/PLEADINGS/ADMISSIONS/ EVIDENCE

Admissions in Pleadings, Including the Failure to Deny an Allegation, Are Always In Evidence for All Purposes in a Trial

In a trial stemming from an automobile accident, during deliberations the jury asked if there was any evidence a defendant, Kahn, was the driver of one of the vehicles. The judge responded "no." Ultimately the jury found in favor of the defendant. The Second Department determined the judge's telling the jury there was no evidence the defendant was the driver was reversible error. The defendant's answer to the complaint included admissions re: operation. The court noted that the failure to deny an allegation in a complaint is an admission. Pleadings "are always in evidence for all purposes of the trial of an action:"

> The Supreme Court committed reversible error when it advised the jury that there was no evidence in this case that would answer its question of whether Khan was the driver of the taxicab in which the plaintiff was a passenger. The failure to deny an allegation in a complaint constitutes an admission to the truth of that allegation (see CPLR 3018[a]...). "Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made" ... . Moreover, "admissions . . . in pleadings are always in evidence for all the purposes of the trial of [an] action" ... . In response to the jury's inquiry about whether Khan was the driver, the court should have informed the jury of Khan's and Ali's admissions in their answer concerning their operation and ownership of a certain vehicle which was involved in an accident ... on the same date as the plaintiff's accident and at the same location, so that the jury could draw its own inferences on this question. **DeSouza v Khan, 2015 NY Slip Op 04085, 2nd Dept 5-13-15**

CIVIL PROCEDURE/PLEADINGS/SUMMARY JUDGMENT/SEARCH THE RECORD/TRUSTS AND ESTATES

"Lack of Capacity to Sue" Defense Waived If Not Raised in Pleadings/Court Should Not Have Decided Summary Judgment Motion by Searching the Record and Ruling On Issues Not Raised by Anyone

In the context of a suit alleging conversion stemming from the handling of an estate, the Second Department determined the "lack of capacity to sue" defense had been waived because it was not raised by defendant in his pleadings. The court further determined Surrogate's Court exceeded its powers when it went beyond the issues placed before it plaintiff's summary judgment motion, searched the record and decided the motion in defendant's favor on grounds not raised by anyone:

> [The defendant] waived the defense of lack of capacity by failing to raise such defense in a pre-answer motion to dismiss or in his answer to the amended complaint in the action (see CPLR 3211[e]...).
>
> ... [O]n a motion for summary judgment, the court is limited to the issues or defenses that are the subject of the motion before the court ... . "A motion for summary judgment on one claim or defense does not provide a basis for searching the record and granting summary judgment on an unrelated claim or defense" ... .
>
> The Surrogate's Court improperly searched the record and awarded summary judgment to [defendant] dismissing objections 1(i) and 9. [Plaintiff] moved for summary judgment on these objections solely on the grounds that he established that [defendant] converted funds from the father's estate and failed to account for funds that the estate owed to [plaintiff]. [Defendant] did not cross-move for summary judgment dismissing those objections on the basis of the statute of limitations, nor did he argue it in opposition. In view of the limited scope of [plaintiff's] motion, it was not appropriate to search the record and award summary judgment to [defendant] dismissing these objections upon arguments that were not raised ... . **Matter of Ray C., 2015 NY Slip Op 04134, 2nd Dept 5-13-15**

CIVIL PROCEDURE/PRESUMPTION OF PROPER MAILING AND RECEIPT OF SUMMONS AND COMPLAINT

Defendant's Submissions Did Not Rebut the Presumption of Receipt of the Summons and Complaint Properly Sent by Ordinary Mail

The Second Department determined defendant's claims he was out of the country when the summons and complaint were mailed and never received them were insufficient to overcome the presumption of receipt based upon proper mailing by ordinary mail:

> In support of that branch of his cross motion which was pursuant to CPLR 5015(a)(1), the defendant was required to demonstrate a reasonable excuse for his default in answering the complaint ... . In support of his contention that he had a reasonable excuse, the defendant claimed that he was out of the country ..., and when he returned to the United States there were no summons and complaint or notice of this action in the mail. The defendant's submissions, however, failed to rebut the presumption of receipt based on proof of the proper mailing of the summons and complaint by ordinary mail ... . Therefore, the defendant failed to establish a reasonable excuse for his default in answering the complaint ... .
>
> In support of that branch of his motion which was pursuant to CPLR 317, the defendant was required to demonstrate that he did not personally receive notice of the summons in time to defend and a potentially meritorious defense (see CPLR 317...). The evidence demonstrating that copies of the summons and complaint were mailed to the defendant at the correct residential address created a presumption of proper mailing and of receipt, and the defendant's mere denial of receipt was insufficient to rebut that presumption ... . **Williamson v Marlou Cab Corp., 2015 NY Slip Op 04636, 2nd Dept 6-3-15**

CIVIL PROCEDURE/PRIVILEGE/MEDICAL RECORDS

Even Records Demonstrated to Be Material and Necessary to the Prosecution or Defense of an Action Are Not Discoverable If Privileged and the Privilege Is Not Waived

Even though disclosure of a non-party sibling's medical records was demonstrated to be material and necessary (CPLR 3101(a)(1)), the Second Department determined discovery was precluded because the records are

privileged (CPLR 3101 (b)) and the privilege was not waived:

> Even when the party seeking disclosure has demonstrated that such disclosure is material and necessary in the prosecution or defense of an action (see CPLR 3101[a][1]), discovery may still be precluded where, as here, the requested information is privileged and thus exempted from disclosure pursuant to CPLR 3101(b) ... . "Once the privilege is validly asserted, it must be recognized and the sought-after information may not be disclosed unless it is demonstrated that the privilege has been waived" ... . **Washington v Alpha-K Family Med. Practice, P.C., 2015 NY Slip Op 03831, 2nd Dept 5-6-15**

CIVIL PROCEDURE/RES JUDICATA/COLLATERAL ESTOPPEL

Doctrines of Res Judicata and Collateral Estoppel Precluded Plaintiffs' Action---Doctrines Clearly Described

The Second Department determined plaintiffs' breach of contract action was precluded by the doctrines of res judicata and collateral estoppel because all the relevant issues had been raised and determined in defendant's successful mortgage foreclosure actions. The Second Department offered the following clear descriptions of the res judicata and collateral estoppel doctrines:

> The doctrine of res judicata provides that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" ... . The doctrine of res judicata bars a party from relitigating any claim which could have been or should have been litigated in a prior proceeding ... . Therefore, under res judicata, or claim preclusion, a valid final judgment will bar future actions between the same parties involving the same cause of action ... .
>
> The claims asserted by the plaintiffs in this case concern the parties' rights and obligations under the mortgage agreements between the plaintiffs and the defendant. As such, those claims needed to be—and, in fact, were—raised by the plaintiffs in defending against the foreclosure action, and thus the plaintiffs are barred from relitigating those claims in this action ... . * * *
>
> Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent proceeding or action an issue that was raised in a prior action or proceeding and decided against that party or those in privity ... . For the bar to apply, the issue must have been material to the first action and "essential to the decision rendered therein," and it must be the point that is to be determined in the second action, such that "a different judgment in the second would destroy or impair rights or interests established by the first" ... . In addition, the party against whom preclusion is sought must have had a "full and fair opportunity to contest the matter in the prior action" ... .
>
> In this case, the claims sought to be relitigated are identical to those that were decided against the plaintiffs in the foreclosure action. These claims were material to the action and were essential to the decision rendered. Moreover, the plaintiffs had a full and fair opportunity to contest the prior determination ... . **SSJ Dev. of Sheepshead Bay I, LLC v Amalgamated Bank, 2015 NY Slip Op 03824, 2nd Dept 5-6-15**

CIVIL PROCEDURE/120-DAY TIME LIMIT FOR SUMMARY JUDGMENT MOTIONS/STIPULATIONS

120-Day Time Limit for Bringing a Summary Judgment Motion Properly Extended by Stipulation

The Fourth Department determined the 120-day time limit for making summary judgment motions (after the filing of a note of issue) was properly extended by stipulation. The dissent felt that such a stipulation was invalid because it violated public policy: "While we agree with our dissenting colleague that the court was not required to accept the express stipulation of the parties to extend the 120-day deadline in CPLR 3212, we note that the court in fact did so in advance of the motion ... . Moreover, unlike our dissenting colleague, we do not view the timing requirements applicable to motions for summary judgment as a matter of public policy that may not be affirmatively waived by a party ...". **Bennett v St. John's Home & St. John's Health Care Corp., 2015 NY Slip Op 03952, 4th Dept 5-8-15**

CIVIL PROCEDURE/STATUTE OF LIMITATIONS/CPLR 214-c/TOXIC TORTS/NEGLIGENCE/MUNICIPAL LAW/TOWN LAW

CPLR 214-c, Which Starts the Statute of Limitations Upon Discovery of the Injury, Applies Only to Toxic Torts---The Statute Does Not Apply to an Action Seeking Damages for the Allegedly Negligent Approval (by the Town) of a Defective Septic System

Plaintiffs sought replacement-cost damages for a defective septic system, alleging the town negligently approved the system prior to plaintiffs' purchase of the

property. Although the three-year statute of limitations for negligence had passed, the plaintiffs argued that CPLR 214-c applied. CPLR 214-c applies to latent defects and the statute starts running upon discovery of the injury. The Fourth Department determined CPLR 214-c did not apply, noting that the Court of Appeals has held the statute applies only to injury from "toxic torts:"

> CPLR 214-c (1) provides that "the three-year period within which an action to recover damages for personal injury or injury to property caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier" ... .
>
> Here, plaintiffs do not seek "damages for personal injury or injury to property" (CPLR 214-c [1]); rather, they seek to be compensated for the cost of replacing an allegedly defective septic system. Thus, section 214-c is inapplicable to this action ... . Moreover, the Court of Appeals, in interpreting section 214-c, has made clear that it applies only to toxic torts ..., and plaintiffs' claims have nothing do to with toxic substances. Instead, plaintiffs merely allege that the septic system was defective and that defendants failed to identify the defects during their inspections. We thus conclude that the court properly determined that the causes of action against the moving defendants are time-barred. **Clendenin v Town of Milo, 2015 NY Slip Op 04976, 4th Dept 6-12-15**

CIVIL PROCEDURE/SUMMARY JUDGMENT

Dismissal of a Summary Judgment Motion as "Premature" Requires an Evidentiary Showing that Material Information Is In the Exclusive Possession and Control of the Moving Party

In the course of a decision concerning an easement and land ownership, the Third Department explained the proof requirements for a claim that a summary judgment motion should be dismissed as "premature." The essence of the "premature" argument is that material facts are within the exclusive knowledge and possession of the moving party. The argument, to succeed, must be supported by an evidentiary showing. Here defendant argued that plaintiff failed to respond to certain discovery demands, but did not take the next step and demonstrate how the failure to respond deprived him of material information in plaintiff's exclusive possession:

> ... [T]here was no basis to deny plaintiff's summary judgment motion as premature. "Although a motion for summary judgment may be opposed with the claim that facts essential to justify opposition may exist but that such material facts are within the exclusive knowledge and possession of the moving party, the party opposing the motion must make an evidentiary showing to support that conclusion" ... . Defendant pointed out that plaintiff failed to respond to certain discovery demands, but did not take the essential next step and show that her failure to do so deprived him of material information in her exclusive possession ... . **Bailey v Dimick, 2015 NY Slip Op 04704, 3rd Dept 6-4-15**

CIVIL PROCEDURE/SUMMARY JUDGMENT/EVIDENCE/ADMISSIBILITY OF UNSIGNED DEPOSITION/PARTY ADMISSION IN POLICE REPORT

Unsigned Deposition Transcripts and Party Admission in Police Report Admissible as Evidence in Support of Summary Judgment Motion

In reversing the grant of summary judgment to the defendant in a vehicle accident case, the Second Department noted the unsigned deposition transcripts of both plaintiff and defendant were admissible for purposes of the motion. The court also noted that a party admission included in a police report was admissible, while the hearsay report itself was not:

> "[T]he failure to submit an affidavit by a person with knowledge of the facts is not necessarily fatal to a motion where . . . the moving party submits other proof, such as deposition testimony ... . Here, the defendant's certified deposition transcript, although unsigned, was admissible since it was his own testimony that he was proffering in support of his motion and, in effect, he adopted it as accurate ... . In addition, the transcript of the plaintiff's deposition testimony, which was unsigned, was also admissible for the purpose of the defendant's motion, since the transcript was certified by the reporter and the plaintiff did not challenge its accuracy ... .
>
> With respect to the police accident report submitted by the defendant in support of his motion, it was not certified as a business record and thus constituted inadmissible hearsay (see CPLR 4518[a]...), except for that portion of the report which contained a party admission by the plaintiff that she did not have a recollection of the accident ... . **Gezelter v Pecora, 2015 NY Slip Op 05440, 2nd Dept 6-24-15**

CIVIL PROCEDURE/TORTIOUS INTERFERENCE WITH CONTRACT/CONTRACT LAW/COMPETITIVE BIDDING PROCESS

Motion to Dismiss In Which Documentary Evidence Was Submitted---Court's Role Is to Determine Whether Plaintiff Has a Cause of Action, Not Whether Plaintiff Has Stated a Cause of Action---Although the Complaint Alleged Interference With a Competitive Bidding Process Involving Public Entities, the Case Fit an Exception to the Rule that Competitive Bidding Issues Be Determined in an Article 78 Proceeding---It Was Alleged a Private Party (Defendant) Interfered with the Competitive Bidding Process

Reversing Supreme Court, the Third Department determined plaintiff had adequately pled a cause of action for tortious interference with contract. The plaintiff alleged that defendant subverted a bidding process for the installation of artificial turf at state and local schools. Usually competitive bidding cases are brought in an Article 78 proceeding against the relevant public entity. This case fit an exception to that rule because it was brought against a private party working with the public entities. There was also some question whether the proceeding was a motion to dismiss for failure to state a cause of action or a motion for summary judgment. Because documentary evidence was submitted, the court's role was to determine whether the plaintiff has a cause of action, not whether plaintiff has stated one:

> ...[S]ince the motion (made shortly after serving the answer and before disclosure) argued an absence of any legal viability of the alleged causes of action, Supreme Court did not err in treating the motion as a narrowly framed post-answer CPLR 3211 (a) (7) ground asserted in a summary judgment motion ... . When dismissal is sought for failure to state a cause of action and, as here, plaintiff submits affidavits, "a court may freely consider [those] affidavits . . . and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one'" ... .
>
> Turning to the merits of the motion, "the laws requiring competitive bidding were designed to benefit taxpayers rather than corporate bidders and, thus, should be construed and administered with sole reference to the public interest" ... . Therefore, the remedy for an alleged violation of the competitive bidding statutes typically involves a timely CPLR article 78 proceeding challenging the bidding process ... . However, a narrow exception to the limited remedy may exist where a plaintiff does not seek relief from the public entity, but brings an action against someone working on behalf of the public entity in the competitive bidding process who allegedly engaged in egregious conduct unknown to the public entity aimed at intentionally subverting a fair process ... . Allegations of restricting competition to artificial turf manufactured by A-Turf could be part of a cognizable claim under the narrow exception ... . **Chenango Contr., Inc. v Hughes Assoc., 2015 NY Slip Op 03903, 3rd Dept 5-7-15**

CIVIL PROCEDURE/TRUSTS AND ESTATES

Administrator's Delay In Seeking to Be Substituted for the Decedent In a Lawsuit Justified Dismissal of the Complaint with Prejudice

The Second Department determined the estate's administrator's more than five-year delay in seeking to be substituted for the decedent as plaintiff in a lawsuit (CPLR 1021), together with the administrator's failure to provide an excuse for the delay and demonstrate the action had merit, warranted the dismissal of the complaint with prejudice:

> CPLR 1021 provides, in pertinent part, that if the event requiring the substitution of a party "occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate." CPLR 1021 requires a motion for substitution to be made within a reasonable time ... . The determination of reasonableness requires consideration of several factors, including the diligence of the party seeking substitution, the prejudice to the other parties, and whether the party to be substituted has shown that the action or the defense has potential merit ... .
>
> Here, the administrator's failure to effect the required substitution until more than 6 ½ years after the decedent's death and nearly 5 ½ years after he was appointed administrator of the decedent's estate evinced a lack of diligence on the part of the administrator in prosecuting this action, which had been pending for nearly 8 years at the time the administrator sought substitution ... . The administrator failed to demonstrate a reasonable excuse for the delay in seeking substitution, which he did only after the defendants moved to dismiss the complaint ... . Furthermore, the administrator failed to demonstrate a potentially meritorious cause of action through the submission of admissible evidence, and did not rebut the defendants' allegations of prejudice. Accordingly, the

Supreme Court providently exercised its discretion in granting the defendants' motion pursuant to CPLR 1021 to dismiss the complaint, with prejudice... **Alejandro v North Tarrytown Realty Assoc., 2015 NY Slip Op 04792, 2nd Dept 6-10-15**

CIVIL PROCEDURE/VENUE

Failure to Provide Addresses of Witnesses and the Nature of Their Testimony Justified the Denial of Defendants' Motion to Change Venue

The Second Department determined defendants failed to meet their burden (imposed by CPLR 510 (3)) in support of their motion for a change of venue. Although the defendants alleged the inconvenience of witnesses, they failed to provide the addresses of those witnesses and failed to describe the nature of the witnesses' testimony. "CPLR 510(3) provides that the court may, upon motion, change the place of the trial of an action where 'the convenience of material witnesses and the ends of justice will be promoted by the change' (CPLR 510[3]). The party seeking the change, which is discretionary in nature, must set forth: (1) the names, addresses, and occupations of material witnesses, (2) the facts to which those witnesses will testify at trial, (3) a showing that those witnesses are willing to testify, and (4) a showing that those witnesses will be inconvenienced if the venue of the action is not changed ... . " **Fitzsimons v Brennan, 2015 NY Slip Op 03801, 2nd Dept 5-6-15**

CIVIL PROCEDURE/VENUE/CONSOLIDATED ACTIONS

In Consolidated Actions Started in Different Counties, the County Where the First Action Was Brought is the Proper Venue

The Second Department determined the proper venue for consolidated actions started in different counties is the county where the first action was brought: " '[W]here actions commenced in different counties have been consolidated pursuant to CPLR 602, the venue should be placed in the county where the first action was commenced, unless special circumstances are present which decision is also addressed to the sound discretion of the court'..." . **Fitzsimons v Brennan, 2015 NY Slip Op 03802, 2nd Dept 5-6-15**

CIVIL PROCEDURE/VENUE/CONSOLIDATED ACTIONS

Trial Court Has the Discretion to Determine the Best Venue for Consolidated Actions---Here a County Other than the County Where the First Action Was Brought Was Properly Determined to Be the Most Appropriate Venue

In a medical malpractice case, the Second Department determined Supreme Court properly exercised its discretion re: the venue of these consolidated actions. Although the venue of the initial action (Queens County) should usually serve as the venue of the consolidated actions, here the medical treatment was rendered at a hospital in Nassau County, many individual defendants resided in Nassau County, and the plaintiffs themselves resided in Nassau County at the time each action was commenced---making Nassau County the best venue for the proceedings:

> "When a trial court orders consolidation or joint trials under CPLR 602(a), venue should generally be placed in the county where jurisdiction was invoked in the first action" ... . However, where special circumstances are present, the court, in its discretion, may place venue elsewhere ... .
>
> Here, the claims relate to treatment rendered at St. Francis Hospital, located in Nassau County. Many of the individual defendants resided in Nassau County. All of the individual defendants worked in Nassau County at the time of the alleged malpractice and lack of informed consent. The plaintiffs themselves resided in Nassau County at the time each action was commenced. Under these circumstances, the Supreme Court providently exercised its discretion in granting those branches of the cross motions which were to place the venue of the consolidated action in Nassau County and denying that branch of the plaintiffs' motion which was to place venue in Queens County... . **Castro v Durban, 2015 NY Slip Op 04600, 2nd Dept 6-3-15**

CIVIL RIGHTS/MUNICIPAL LAW/42 USC 1983/POLICE OFFICERS/EXCESSIVE FORCE

Question of Fact Raised Whether Police Officers Used Excessive Force In Violation of Plaintiff's Civil Rights---Criteria Explained

The Second Department determined a question of fact had been raised about whether police officers used excessive force in violation of plaintiff's civil rights. The court explained the relevant law:

"A claim that a law enforcement official used excessive force during the course of an arrest . . . is to be analyzed under the objective reasonableness standard of the Fourth Amendment" ... . The reasonableness of a particular use of force is judged from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" ..., and takes into account "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight" ... . "[A]n officer's decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others" ... . "Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide" ... . "If found to be objectively reasonable, the officer's actions are privileged under the doctrine of qualified immunity" ... . **Williams v City of New York, 2015 NY Slip Op 05470, 2nd Dept 6-24-15**

CONTRACT LAW/ATTORNEY'S FEES

Disagreement About the Meaning of a Term in the Shared-Fee-Agreement Did Not Render the Contract Ambiguous---No Need for Interpretation of the Term by the Court

The First Department, in an extensive decision, over a two-justice partial dissent, determined the shared-fee arrangements among attorneys were unambiguous and must be enforced as written, without reference to extrinsic evidence. The underlying personal injury case eventually settled for $8 million. Along the way, plaintiff's attorney, Menkes, entered into agreements with two attorneys for assistance with the case. Most of the decision addresses the agreement with an attorney, Golomb, concerning mediation and settlement negotiations. If the mediation resulted in a settlement, Golomb was entitled to 12% of the attorney's fees. If further work, beyond the mediation, were required, Golomb was entitled to 40% of the attorney's fees. Menkes argued that, although the mediation session did not result in a settlement, the mediation was a "process" which continued beyond the initial session culminating in a settlement. The majority held that the term "mediation," pursuant to the language of the contract, encompassed only the one session. Once that session ended without a settlement, the 40% shared-fee-arrangement kicked in:

> The issue before us is one of simple contract interpretation. Under well established precedent, agreements are to be generally construed in accord with the parties' intent ... . The best evidence of the parties' intent is "what they say in their writing" ... . "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" ... . This rule is particularly applicable where the parties are sophisticated and are negotiating at arm's length ... . Language in a written agreement is deemed to be clear and unambiguous where it is reasonably susceptible of only one meaning or interpretation ... . Finally, "[e]xtrinsic evidence may not be introduced to create an ambiguity in an otherwise clear document" ... .
>
> Here, as the dissent agrees, the language of the contract is unambiguous. Menkes argues that she interpreted the term "mediation" to constitute an ongoing process that would not be limited to a single session but rather would continue until an impasse or other termination had occurred. However, the assertion by a party to a contract that its terms mean something to him or her "where it is otherwise clear, unequivocal and understandable when read in connection with the whole contract" is not sufficient to make a contract ambiguous so as to require a court to divine its meaning ... . The specific fee language that Menkes now claims supports her position was added to the agreement at her request. She takes the untenable position that she was never advised that the mediation reached an impasse or had been terminated. Yet despite the fact that the agreement went through several revisions, neither party saw fit to add any language to that effect. Both parties to the agreement are attorneys and thus know the importance of precision in the words used ... . These clear terms, under these circumstances, need no interpretation by the court. **Marin v Constitution Realty, LLC, 2015 NY Slip Op 04225, 1st Dept 5-19-15**

CONTRACT LAW/BREACH OF CONTRACT/DAMAGES/LOST PROFITS

Lost Profits Sufficiently Proven in Breach of Contract Action---Criteria Explained

In affirming the judgment, the Second Department explained the criteria for the award of lost profits as damages in a breach of contract action:

> To prevail on a cause of action alleging breach of contract, the plaintiff must demonstrate that it sustained "actual damages as a natural and probable consequence" of the defendant's breach ... . Where the plaintiff seeks to recover damages for lost profits, such profits must also be "within

the contemplation of the parties at the time the contract was entered into" and, even though required to be proven with reasonable certainty, damages "resulting from the loss of future profits are often an approximation" ... . Here, contrary to the defendant's contentions, the evidence and credible testimony adduced at trial demonstrated that the plaintiff incurred actual damages due to the defendant's breach of the agreement ... . The plaintiff's witness testified that he determined the lost profits for the plaintiff by subtracting the expenses from the revenue, which would have been generated [if the contract had not been breached]. The evidence produced by the plaintiff provided a reasonably reliable foundation upon which to calculate the plaintiff's damages ... . **Family Operating Corp. v Young Cab Corp., 2015 NY Slip Op 05437, 2nd Dept 6-24-15**

CONTRACT LAW/BREACH OF CONTRACT/INSTRUMENT FOR MONEY ONLY

Contract and Related Instrument for Money Only Inextricably Intertwined---Summary Judgment On Instrument Precluded by Related Breach of Contract Action

e Second Department noted that, although a breach of a related contract will generally not defeat summary judgment on an instrument for money only, that is not the case where the contract and instrument are inextricably intertwined: "The defendant ... previously commenced an action to recover damages against the plaintiff, alleging that the plaintiff breached an operating agreement ... . That action was inextricably intertwined with the instant action, which was commenced by the plaintiff to recover on a promissory note and personal guaranty. Indeed, the actions have already been joined for trial (see CPLR 602[a]...). Moreover, the promissory note refers to the operating agreement for the purpose of defining certain terms set forth in the note, and the promissory note and personal guaranty are referred to in, and appended as exhibits to, the operating agreement ... ." **Montecalvo v Cat E., LLC, 2015 NY Slip Op 04103, 2nd Dept 5-13-15**

CONTRACT LAW/DOCTRINE OF DEFINITENESS/UNJUST ENRICHMENT

Complaint Sufficiently Alleged a Cause of Action for Unjust Enrichment---an Action Which Only Applies in the Absence of an Express Agreement

The Second Department determined Supreme Court properly granted the motion to dismiss the breach of contract cause of action because, pursuant to the "doctrine of definiteness," the terms of the purported contract were too indefinite and uncertain to be enforceable. However, Supreme Court should not have dismissed the unjust enrichment cause of action. The court noted that unjust enrichment, or quasi contract, only applies in the absence of an express agreement and is really not a contract, but rather an equitable obligation. Here plaintiff alleged that defendant took possession of millions of dollars worth of watches and refused to pay for them. Therefore, the complaint alleged the elements of unjust enrichment---(1) defendant was enriched at (2) plaintiff's expense and (3) it is against equity to allow the defendant to keep what is sought to be recovered:

> The doctrine of definiteness, well established in contract law, "means that a court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to" ... .
>
> "[T]o recover for unjust enrichment, a plaintiff must show that (1) the [defendant] was enriched, (2) at [the plaintiff's] expense, and (3) that it is against equity and good conscience to permit [the defendant] to retain what is sought to be recovered'" ... . Such quasi contract only applies in the absence of an express agreement, and is not really a contract at all, but rather an equitable obligation imposed in order to prevent a party's unjust enrichment ... . Here, the complaint alleges that [defendant] received a benefit when he received luxury watches worth millions of dollars from [plaintiff's] predecessor in interest, "with the understanding and reasonable expectation that [defendant] would pay for those goods," and that [defendant] was "personally enriched by taking the millions of dollars worth of luxury watches, while failing and refusing to pay for said merchandise." Such allegations are sufficient to state a cause of action alleging unjust enrichment ... . **UETA Latinamerica, Inc. v Zafir, 2015 NY Slip Op 04633, 2nd Dept 6-3-15**

CONTRACT LAW/EVIDENCE/PAROL EVIDENCE/EXTRINSIC EVIDENCE/MEETING OF THE MINDS

Parol Evidence Demonstrated What Appeared to Be a Contract Was Not---There Was No Meeting of the Minds Re: the Consideration for the Contract

The Third Department, over a dissent, reversing Supreme Court, determined extrinsic evidence should have been considered on the issue whether a contract was ever formed, i.e., whether there was a "meeting of the minds." Based upon that extrinsic evidence, the breach of contract complaint was dismissed by the Third

Department. The defendant argued that the contract was premised upon the understanding plaintiff would execute a power of attorney, which plaintiff refused to do. The parol evidence, emails, demonstrated that defendant agreed to the terms of the contract in return for the power of attorney executed by the plaintiff. The power of attorney was the consideration for the contract. Therefore, the parol evidence demonstrated no contract was ever formed:

> In order "'[t]o create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms' and consideration" ... . Defendant is not arguing that a valid agreement between the parties included an unstated commitment by plaintiff to execute the power of attorney; instead, she is asserting that she proposed an agreement upon that understanding, but that there was never a meeting of the minds on the issue sufficient to give rise to a valid agreement. Accordingly, she was entitled to use parol evidence "to show that what appears to be a contractual obligation is, in fact, no obligation at all"... . **Libasci v Singares, 2015 NY Slip Op 04357, 3rd Dept 5-21-15**

CONTRACT LAW/IMPLIED CONTRACT FOR COMMUNITY HOMEOWNERS' ASSOCIATIONS/BUSINESS JUDGMENT RULE

Townhouse Residents, Members of a Community Homeowners' Association, Entered an Implied Contract to Pay a Proportionate Share of the Fees for Authorized and Necessary Services in Connection with the Maintenance of the Townhouse Facilities

The Third Department affirmed Supreme Court's ruling that defendants (townhouse residents) had entered an implied contract to pay a proportionate share of the full cost of maintaining the facilities. The defendants had refused to pay membership fees after a dispute with other residents arose. The Third Department, applying the "business judgment rule," determined the fees assessed by the plaintiffs were for authorized and necessary services provided by the plaintiff:

> ... [T]he Court of Appeals has made clear that an implied contract for a community homeowners' association "includes the obligation to pay a proportionate share of the full cost of maintaining . . . facilities and services, not merely the reasonable value of those actually used by any particular resident" ... . We review plaintiff's action in undertaking such expenditures under the business judgment rule, which, in the absence of "claims of fraud, self-dealing, unconscionability, or other misconduct," is limited to an inquiry of "whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the corporation" ... . **Bluff Point Townhouse Owners Assn., Inc. v Kapsokefalos, 2015 NY Slip Op 04905, 3rd Dept 6-11-15**

CONTRACT LAW/INDEMNIFICATION AGREEMENT/GENERAL OBLIGATIONS LAW/LEASE/LANDLORD-TENANT

Indemnification Clause in Lease/Alteration Agreements Unenforceable---No Exception for Lessor's Negligence

The Second Department determined an indemnification clause in lease/alteration agreements was unenforceable because it was not limited to the lessee's acts or omissions and because it did not make exceptions for the lessor's negligence (General Obligations Law 5-321):

> Broad indemnification provisions ... which are not limited to the lessee's acts or omissions, and which fail to make exceptions for the lessor's own negligence, are unenforceable pursuant to General Obligations Law § 5-321 where [the relevant agreements] were not negotiated at arm's length by two sophisticated business entities... . **Nolasco v Soho Plaza Corp., 2015 NY Slip Op 05164, 2nd Dept 6-17-15**

CONTRACT LAW/INSURANCE LAW/FINANCIAL INSTITUTION BOND

Unambiguous Language In a Rider and an Exclusion In a Financial Institution Bond Precluded Coverage of Losses Stemming from the "Madoff" Ponzi Scheme

The First Department reversed Supreme Court and determined a rider and an exclusion of coverage in a financial institution bond applied to the "Madoff" Ponzi scheme. The losses associated with the Ponzi scheme were therefore not covered by the bond. The rider covered loss resulting from dishonest acts of named persons (including Madoff) "solely" with respect to such persons' duties as an "outside investment advisor." Because the losses stemmed from Madoff's hybrid duties as both an "outside investment advisor" and a "securities broker," the rider did not cover the losses. In addition, a specific exclusion from coverage included losses caused by the dishonest acts of a non-employee securities broker (i.e., Madoff). **Jacobson Family Invs.,**

Inc. v National Union Fire Ins. Co. of Pittsburgh, PA, 2015 NY Slip Op 05273, 1st Dept 6-18-15

CONTRACT LAW/NEGLIGENCE/CONTRACTUAL INDEMNIFICATION/CIVIL PROCEDURE/CONDITIONAL JUDGMENT

A Conditional Judgment May Be Rendered On the Issue of Contractual Indemnity---The Party Seeking Contractual Indemnity Must Be Free from Negligence

Plaintiff was injured at a construction site when he fell from a ladder. The construction manager commenced a third-party action against the general contractor seeking contractual indemnification in the event the construction manager is liable to the plaintiff,. The Second Department noted that a " 'court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed' ... . The party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable solely by virtue of statutory or vicarious liability ...". **Arriola v City of New York, 2015 NY Slip Op 04079, 2nd Dept 5-13-15**

CONTRACT LAW/RELEASES/INCAPACITY/MENTAL DISABILTY SUFFICIENT TO TOLL STATUTE OF LIMITATIONS/NEGLIGENCE

Plaintiff Not Competent When Release Was Signed/Statute of Limitations Tolled by Plaintiff's Mental Disability

The Third Department determined Supreme Court properly concluded the release signed by the plaintiff was not enforceable, because the plaintiff was not competent at the time it was signed, and the statute of limitations was tolled by plaintiff's mental disability. Plaintiff suffered a brain injury when he was struck by a car in 1991. A few months later plaintiff signed a release provided by an insurance adjuster in return for $5000. The case languished for years and Supreme Court denied defendant's motion for summary judgment dismissing the case in 2014. The court explained the relevant law:

> With respect to the release signed by plaintiff, "the burden of proving incompetence rests upon the party asserting incapacity to enter into an agreement [and], to prevail, plaintiff was required to establish that [his] 'mind was so affected as to render [him] wholly and absolutely incompetent to comprehend and understand the nature of the transaction'" ... . The incapacity must be shown to exist at the time the pertinent document was executed ... . Regarding the statute of limitations issue, the toll for "insanity" provided by CPLR 208 is narrowly interpreted, the concept of insanity is "equated with unsoundness of mind" ... and encompasses "only those individuals who are unable to protect their legal rights because of an over-all inability to function in society" ... . The mental incapacity must exist at or be caused by the accident and continue during the relevant time ... . **Lynch v Carlozzi, 2015 NY Slip Op 04893, 3rd Dept 6-11-15**

CONTRACT LAW/QUANTUM MERUIT/ACCOUNT STATED

Quantum Meruit and Account Stated Causes of Action Should Have Been Dismissed---Quantum Meruit is Not Available Where a Valid, Enforceable Written Contract Covers the Subject Matter---Account Stated Can Not Be Used to Collect Under a Disputed Contract

The Second Department determined, in a breach of contract action, the quantum meruit and account stated causes of action should have been dismissed. No action for quantum meruit lies when a contract covers the subject matter of the dispute. An "account stated' cause of action can not be used as another means to collect under a disputed contract:

> A party cannot recover under a theory of quantum meruit where a valid and enforceable written contract governs the subject matter involved in the dispute ... . Moreover, "a claim for an account stated may not be utilized simply as another means to attempt to collect under a disputed contract" ... .
>
> Here, the defendant expressly agreed, in the written contract, to pay "as reasonable" for required "extra material and/or labor." Therefore, the plaintiff's remedy with respect to the additional labor and materials is not in quantum meruit or account stated, but to seek recovery in breach of contract pursuant to that provision ... . **Aquatic Pool & Spa Servs., Inc. v WN Weaver St., LLC, 2015 NY Slip Op 05137, 2nd Dept 6-17-15**

CONTRACT LAW/UNSIGNED CONTRACT/INDEMNFICATION

Question of Fact Raised Whether an Indemnification Clause on a Scaffolding Inspection Tag Created an Enforceable (Unsigned) Indemnification Contract

In a case stemming from plaintiff's fall from an allegedly improperly installed scaffold, a question of fact had been raised whether a tag on the scaffolding, which included an indemnification clause, evidenced an enforceable indemnification agreement:

> "[A] contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute—such as the statute of frauds (General Obligations Law § 5-701)—that imposes such a requirement" ... . "[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" ... . "[I]n many instances the issue of whether or when an indemnification agreement came into being in the absence of a signed document will present a question of fact to be resolved by the trier of fact" ... .
>
> Here, in support of their respective motion and cross motion, [the parties] failed to eliminate all triable issues of fact as to whether the scaffold inspection tag ..., which included an indemnification clause, related to the scaffold employed by the injured plaintiff at the time of the accident and, if so, whether these parties' words and deeds demonstrated their intent to be bound by the terms of thereof ... .**Murphy v Eagle Scaffolding, Inc., 2015 NY Slip Op 04823, 2nd Dept 6-10-15**

CORPORATION LAW/DISSOLVED CORPORATIONS

Sole Officer of Dissolved Corporation Personally Liable for Post-Dissolution Debts Attributed to "New Business"

The Third Department determined the sole officer of a corporation dissolved in 1997 was personally liable for the post-dissolution debts incurred for the purchase of fuel. The court explained the relevant law:

> Business Corporation Law § 1005 (a) (1) provides, in relevant part, that, following dissolution, "[t]he corporation shall carry on no business except for the purpose of winding up its affairs." Winding up, in turn, is defined as "the performance of acts directed toward the liquidation of the corporation, including the collection and sale of corporate assets" (...see Business Corporation Law § 1005 [a] [2]...). Notably, a dissolved corporation is precluded from engaging in new business ... and "has no existence, either de jure or de facto, except for a limited de jure existence for the sole purpose of winding up its affairs" ... . As a result, "[a] person who purports to act on behalf of a dissolved corporation is personally responsible for the obligations incurred" ... . **Long Oil Heat, Inc. v Polsinelli, 2015 NY Slip Op 04542, 3rd Dept 5-28-15**

CORPORATION LAW/LIMITED LIABILITY COMPANIES/BUSINESS CORPORATION LAW/SHAREHOLDERS'S DERIVATIVE ACTION/PRESUIT DEMAND

Plaintiff Did Not Adequately Allege a Presuit Demand Would Be Futile

The First Department, noting that the presuit demand required by Business Corporation Law 626(c) applies to Limited Liability Companies, determined that plaintiff failed to adequately allege the presuit demand was excused as futile. The court noted that Business Corporation Law 625(c) does not differentiate between majority and minority shareholders and a corporation's refusal to provide information is not on the list of circumstances where a demand is excused:

> Pursuant to Business Corporation Law § 626(c), a plaintiff shareholder must "set forth in the complaint - with particularity - an attempt to secure the initiation of such action by the board or the reasons for not making such effort" ... . Demand is excused due to futility when a complaint alleges with particularity that: (1) "a majority of the board of directors is interested in the challenged transaction"; or (2) "the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances"; or (3) "the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors" ... . The demand requirement of Business Corporation Law § 626(c) also applies to members of New York limited liability companies ... .
>
> The complaint alleges only that since Sowers owns 80% of the LLC, it would be futile for plaintiff to make a demand upon him to consent to the filing of an action on the LLC's behalf. However, this Court has made clear that Business Corporation Law § 626(c) "does not differentiate between minority and majority shareholders for demand purposes" ... . We note that Sowers'

alleged concealment of financial information does not warrant a finding that demand was futile, since "[a] corporation's refusal to provide information to its shareholders is not on the [] list of circumstances where demand is excused" ... , **Barone v Sowers, 2015 NY Slip Op 04195, 1st Dept, 5-14-15**

COUNTY LAW/MUNICIPAL LAW/CIVIL PROCEDURE/DISCOVERY/NEGLIGENCE

Court Properly Ordered Further Deposition of County Employee and the Deposition of the Commissioner of Public Works Based Upon Plaintiff's Showing the Witness Previously Provided Did Not Have Sufficient Knowledge

The Fourth Department noted that the court did not abuse its discretion in ordering the further deposition of a county employee and the deposition of the Commissioner of Public Works concerning the maintenance of a section of the road where plaintiff's-decedent's car left the road and struck a pole. The employee's prior testimony was incomplete because he could not recall relevant information. And, although the county can determine who should be deposed on its behalf, the court can order the deposition of a specific witness where the plaintiff shows the witness previously produced did not have sufficient knowledge:

> "A trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion" ... . We note with respect to the employee that he admitted at his initial deposition that he could not recall specific details relevant to plaintiffs' theory of the County's liability without reviewing the documents that subsequently were produced by the County. We thus conclude that the court did not abuse its discretion in directing the further deposition of the employee concerning those documents.
>
> We likewise conclude that the court did not abuse its discretion in directing the County to produce the Commissioner for a deposition. "Although a municipality, in the first instance, has the right to determine which of its officers or employees with knowledge of the facts may appear for a deposition, a plaintiff may demand production of additional witnesses when (1) the officers or employees already deposed had insufficient knowledge or were otherwise inadequate, and (2) there is a substantial likelihood that the person sought for deposition possesses information which is material and necessary to the prosecution of the case" ... . Here, the record establishes that the two employees previously produced by the County have at most a general understanding of the reconstruction project contemplated by the County with respect to the section of road where the accident occurred and the reasons that the reconstruction project was abandoned, while the Commissioner has peculiar and specific knowledge about that project and the decision-making process pursuant to which it was abandoned. We therefore conclude that plaintiffs met their burden of demonstrating that the employees previously produced by the County "did not possess sufficient knowledge of the relevant facts or [were] otherwise inadequate" ... . **Black v Athale, 2015 NY Slip Op 05355, 4th Dept 6-19-15**

COURT OF CLAIMS/NOTICE OF CLAIM

Claimant's Motion to File a Late Notice of Claim Properly Denied---Application of Statutory Factors Explained

The Second Department determined claimant's motion for leave to file a late notice of claim was properly denied. Claimant had other remedies available and the claims were deemed to be without merit. The statutory factors (Court of Claims Act 10(6)) to be weighed are: "... whether the delay in filing was excusable; whether the State had notice of essential facts constituting the claim; whether the State had an opportunity to investigate the circumstances underlying the claim; whether the claim appears to be meritorious; whether the State is prejudiced; and whether the claimant has any other available remedy ... . 'No one factor is deemed controlling, nor is the presence or absence of any one factor determinative'...". **Borawski v State of New York, 2015 NY Slip Op 03795, 2nd Dept 5-6-15**

CRIMINAL LAW/BATSON DOCTRINE

Defense Counsel's Main Reason for the Peremptory Challenges To Which the Prosecutor Objected, i.e., the Potential Jurors Had Been Crime-Victims, Was Not Pretextual

The Second Department reversed defendant's conviction because Supreme Court improperly applied the Batson doctrine and denied defense counsel's peremptory challenges to two jurors. The prosecutor raised a "reverse-Batson" objection to defense peremptory challenges alleging the defense was excluding "Asian persons." Defense counsel offered race-neutral reasons for the peremptory challenges, the principal reason being that the potential jurors had been crime victims. Supreme Court found the proffered race-

neutral reasons were pretextual. The Second Department determined they were not:

> "In Batson, the United States Supreme Court formulated a three-step test to assess whether peremptory challenges have been used to exclude potential jurors on the basis of race, gender, or other protected categories. In step one, the moving party must make a prima facie case of purposeful discrimination by showing that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason. If the moving party makes a prima facie showing, the inquiry proceeds to step two, and the burden shifts to the adversary to provide a facially neutral explanation for the challenge. If the nonmoving party offers facially neutral reasons supporting the challenge, the inference of discrimination is overcome. Once facially neutral reasons are provided, the inquiry proceeds to step three, and the burden shifts back to the moving party to prove purposeful discrimination, and the trial court must determine whether the proffered reasons are pretextual" ... . A trial court's step-three determination that the facially race-neutral reasons for a nonmoving party's peremptory challenges to particular jurors were pretextual is entitled to great deference on appeal and will not be disturbed where such determination is supported by the record ... . * * *
>
> The record does not support the trial court's step-three finding of fact as to the subject prospective juror, to wit, that other prospective jurors who were crime victims and who indicated that the incident would not affect them had nevertheless been seated. "[A]ssurances from a challenged prospective juror that he or she could assess the evidence in a fair manner even though he or she was a crime victim are irrelevant to the determination of whether the basis of a peremptory challenge is pretextual" ... . Nonetheless, the record indicates that defense counsel treated such jurors consistently by exercising a peremptory challenge for another prospective juror who was not Asian but was a crime victim who provided assurance that nothing in her experience would affect her as a juror. In addition, although defense counsel did not exercise peremptory challenges for K.A.M. and G.A., defense counsel sufficiently distinguished the experiences of those jurors from that of the subject prospective juror, who had been robbed at gunpoint ... . Consequently, the record supports a finding that defense counsel had legitimate, nonpretextual reasons for challenging prospective jurors based on their crime victim status ... .**People v Grant, 2015 NY Slip Op 04505, 2nd Dept 5-17-15**

CRIMINAL LAW/BATSON (REVERSE-BATSON) CHALLENGE/RESPONSE TO JURY NOTE

Reverse-Batson Challenge to the Peremptory Challenge of a White Woman by Defense Counsel Properly Sustained/Judge's Failure to Inform and Seek the Input of the Parties Re: a Jury Note Was a Mode of Proceedings Error Requiring Reversal

The Second Department determined the trial judge properly sustained the prosecutor's "reverse-Batson" challenge to a peremptory challenge to a white woman by defense counsel. Defense counsel's proffered reason, that the juror had her head down and would be a "wall flower" following others on the jury, was deemed pretextual. The proffered reason was entirely subjective and was not based upon the voir dire. Reversal of the conviction was warranted, however, because the trial judge did not inform and seek the input of the parties in response to a jury. Preservation of the error was not required because the record did not reflect that defense counsel was made aware of the contents of the note prior to the judge's answering it in the jury's presence:

> "Although not entirely insulated from review, the determination of whether an explanation [of the exercise of a peremptory challenge to a a juror in response to a reverse-Batson challenge by the prosecutor] is merely pretextual is generally a matter for the Trial Judge, whose findings are entitled to great deference" ... . This is particularly true where, as here, the reason for challenging a prospective juror is based upon certain nonverbal responses and reactions of the prospective juror, which the trial court had the opportunity to observe ... . However, "[a]lthough a proffered race- [or gender-] neutral explanation for the exclusion of a potential juror need not rise to the level required to challenge a venireperson for cause,' . . . the burden cannot be met by merely claiming good faith and denying discriminatory purpose" ... . Here, the reason proffered by defense counsel for exercising the peremptory challenge against the subject prospective juror was that, during voir dire, "[s]he had her head down the entire time and was kind of looking down through this process," from which counsel concluded that she was "going to be a wall flower[ ] and just kind[ ] of go with the flow." This explanation was purely intuitive and based on counsel's subjective impression rather than upon facts adduced at voir dire ... . To accept the defendant's bare assertion, unsupported by any factual basis, that the prospective juror was neutral and would not be a strong juror for the defense would be, in effect, to accept no reason at all ... . There is nothing in the record to support defense counsel's purported conclusion that this

prospective juror—a 68-year-old sales associate who had previously sat on a jury, did not know anyone in law enforcement, and, unlike many of the prospective jurors, had not been the victim of a crime—would be a weak juror for the defense. * * *

... [T]he jury advised: "We have one juror that feels she cannot make a decision based on the evidence presented to us." Instead of marking the note as an exhibit and reading it aloud on the record to the parties prior to calling in the jury, the court read the note on the record for the first time in front of the jurors, and then immediately responded by issuing a truncated Allen charge ..., encouraging continuing deliberations. This jury note "called for a substantive response that required careful crafting after hearing argument from both the People and the defense" ... . Yet there is no indication that the court provided notice to defense counsel and the prosecutor of the contents of the note or "a full opportunity to suggest appropriate responses" ... . "[B]y depriving the defendant of meaningful notice of the communication [and] a meaningful opportunity to participate in the formulation of the court's response," the court failed to fulfill its "core responsibility" under CPL 310.30, thereby committing an error affecting "the mode of the proceedings" ... . Such an error "need not be preserved, and prejudice manifestly results" ... . Thus, despite defense counsel's failure to object to the Supreme Court's handling of the jury's notes, reversal is required ... .

The People are correct that a timely objection to an alleged O'Rama error may be required where defense counsel had "knowledge of the substance of the court's intended response" ... . However, while the record shows that a discussion was held off the record at the sidebar immediately before the Supreme Court directed the court officer to "bring them in," it is not evident from the record that defense counsel had knowledge of the contents of the note or how the court would respond to the note. Rather, as far as the record reveals, defense counsel first learned of the court's response at the same time the jury heard it ... . Where a trial transcript does not show compliance with O'Rama's procedure as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to ... . **People v Brown, 2015 NY Slip Op 04860, 2nd Dept 6-10-15**

CRIMINAL LAW/CONCURRENT INCLUSORY COUNTS

Concurrent Inclusory Counts Dismissed Despite Lack of Preservation

The Fourth Department determined the lesser inclusory counts of vehicular manslaughter in the first degree must be dismissed, despite lack of preservation:

> ... [C]ounts four, five and seven must be dismissed as lesser inclusory counts of count three, vehicular manslaughter in the first degree. Initially, we note that defendant's failure to preserve the issue for our review is of no moment because preservation is not required ... . With respect to the merits, "concurrent counts are inclusory when the offense charged in one is greater than that charged in the other and when the latter is a lesser offense included within the greater" ... . Thus, where, as here, "it is impossible to commit a particular crime without concomitantly committing, by the same conduct, []other offense[s] of lesser grade or degree, the latter [are], with respect to the former, . . . lesser included offense[s]" ... . Because it is impossible to commit the crime of vehicular manslaughter in the first degree under Penal Law § 125.13 (4), without concomitantly committing the crime of vehicular manslaughter in the second degree under Penal Law § 125.12, or without concomitantly committing the crime of, inter alia, driving while ability impaired by drugs under Vehicle and Traffic Law § 1192 (4), the latter two crimes are inclusory concurrent counts of the former crime. We therefore modify the judgment by dismissing the three counts of the indictment charging the latter two crimes.**People v Bank, 2015 NY Slip Op 04954, 4th Dept 6-12-15**

CRIMINAL LAW/CONSENT TO SEARCH

Where One Resident Consents to a Search and Another Resident Does Not Consent, the Search Can Not Be Executed---However, the Refusal to Consent Is Only Operative As Long As the Objecting Resident Is Physically Present

The Third Department explained that where one resident consents to a search of the premises, but another resident does not consent, the search can not be conducted. However, a resident's refusal to consent is operative for only as long as the resident is present at the premises. Here the objecting resident left the premises and the police properly executed the search with the consent of the remaining resident:

> Even in the absence of a warrant, police may lawfully search a residence where an inhabitant

with apparent authority to consent to the search freely and voluntarily does so ... . However, where one resident consents to a search and another refuses, "[the] warrantless search of [the] shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him [or her] on the basis of consent given to the police by another resident" ... . Notably, however, the objecting resident's refusal operates to counteract the other resident's consent only so long as the objecting resident is physically present on the premises ... . **People v Grillo, 2015 NY Slip Op 03880, 3rd Dept 5-7-15**

Persons Entering the Hall of Justice, In Which Signs Are Posted Warning that Those Entering the Premises Are Subject to Being Searched, Impliedly Consent to a Full Search, Including the Opening of Objects Found in the Search

The Fourth Department determined the defendant impliedly consented to a search of his person after entering the Hall of Justice. Signs in the Hall of Justice warned that those who enter the building were subject to search. The defendant's argument that consent extended to no more than a frisk was rejected. The court found the defendant consented to a full search of his person and the opening of a foil packet found on his person:

> Here, defendant was warned before walking through the magnetometers that he could be subject not just to a pat frisk, but to a search. Given a reasonable person's knowledge of the increased security measures in government buildings in the past decade and the notifications posted for entrants into the Hall of Justice, we conclude that a reasonable person would have understood that the impending search could involve more than a pat frisk if the initial magnetometer scans indicated the presence of metal on his or her person ... . We therefore further conclude that the deputies' search of defendant's person did not exceed the scope of defendant's implied consent.
>
> Defendant's contention that the opening of the foil package, once it was removed from his person, was a separate, improper search incident to an arrest is unpreserved for our review because defendant failed to raise that contention in his omnibus motion or before the suppression court ... . In any event, that contention has no merit. As defendant correctly concedes, he was not under arrest when he was taken to the adjacent room. Moreover, inasmuch as defendant impliedly consented to a search of his person and belongings before entering the Hall of Justice, and did not revoke said consent before the deputies opened the foil package, we conclude that the deputies' opening of the package to check if it contained a small weapon, such as a razor blade, was not improper ... . **People v White, 2015 NY Slip Op 03963, 4th Dept 5-8-15**

CRIMINAL LAW/EVIDENCE

Records of Pedigree Information Which Was Linked to the Defendant and Was Supplied by the Person Who Purchased a Prepaid Cell Phone Properly Admitted as Circumstantial Evidence Defendant Purchased the Phone

The First Department determined "[a]uthenticated records showing that the person who purchased a particular prepaid cell phone, which was linked to the crime, supplied pedigree information linked to defendant were properly admitted as circumstantial evidence of defendant's identity as the purchaser of the phone. In the context of the case, the pedigree information did not constitute assertions of fact, but circumstantial evidence that the declarant was, in all likelihood, defendant ... . Rather than being factual, the pedigree information was analogous to a fingerprint left on a document, tending to show the true identity of its author ... . Although the purchaser of the phone was not under a business duty to provide the pedigree information, that requirement of the business records exception to the hearsay rule did not apply, because the initial declaration was independently admissible ... . The possibility that the phone could have been purchased by an unknown person who had somehow acquired defendant's pedigree information goes to weight, not admissibility." **People v Patterson, 2015 NY Slip Op 03788, 1st Dept 5-5-15**

CRIMINAL LAW/EVIDENCE/HEARSAY/DECLARATION AGAINST PENAL INTEREST

Hearsay Statement Did Not Meet the "Reliability" Requirement for Admissibility as a Statement Against Penal Interest

The First Department determined defendant's friend's alleged hearsay statement that he, not defendant, assaulted the victim was properly precluded. The statement did not meet the "reliability" requirement for admissibility as a statement against penal interest (an exception to the hearsay rule):

> This hearsay evidence did not satisfy the reliability requirement for admissibility under the exception for declarations against penal interest ..., or under a due process theory ... . Defendant's friend told defense counsel that he neither committed the assault nor made the alleged

statements, the statements were contradicted by trial witnesses who testified that the friend was nearby but did not participate in the assault, the statements were allegedly made to persons closely aligned with defendant, and recorded phone calls raised suspicion that defendant had made efforts to manufacture exculpatory evidence. All these factors undermined any reliability this hearsay evidence may have had ... . **People v Jones, 2015 NY Slip Op 04781, 1st Dept 6-9-15**

CRIMINAL LAW/FORFEITURE/APPEALS

Stipulation of Forfeiture of a Sum of Money Was Part of the Judgment of Conviction and Therefore Was Reviewable on Appeal from the Judgment of Conviction

The First Department, over a dissent, determined a stipulation of forfeiture of a sum of money entered by the defendant was part of the judgment of conviction, and was therefore reviewable on appeal. The dissent argued that appeal should have been dismissed because the forfeiture was not part of the judgment of conviction and was therefore not reviewable. The forfeiture was ultimately affirmed on the merits:

> At the outset, we reject the People's contention, adopted by the dissent, that this appeal is not properly before us because the forfeiture was not part of the judgment of conviction. Pursuant to Penal Law § 60.30, a court has the authority to order a forfeiture of property, and any order exercising that authority "may be included as part of the judgment of conviction." In People v Detres-Perez (127 AD3d 535 [1st Dept 2015]), relying on Penal Law § 60.30, this Court recently found that a forfeiture agreement was part of the judgment of conviction and thus reviewable on the appeal from the judgment. Likewise here, the court's so-ordering of the stipulation at the time of sentencing rendered it part of the judgment of conviction and reviewable on this appeal as of right (see CPL 450.10). Contrary to the dissent's position, we do not conclude that Penal Law § 60.30 authorizes the inclusion of forfeiture as part of a defendant's sentence. Rather, that provision allows a court to order forfeiture as a separate component of the judgment of conviction... . ... Finally, the omission of the forfeiture order from the sentence and commitment sheet does not render the order unreviewable since a forfeiture, although not a component of a criminal sentence, can nevertheless be part of the judgment of conviction ... . **People v Burgos, 2015 NY Slip Op 05600, 1st Dept 6-30-15**

CRIMINAL LAW/GROSSLY UNQUALIFIED JUROR/DISHCHARGE OF JUROR FOR CAUSE BASED UPON A NEWLY DISCOVERED GROUND

Sworn Juror Who Was From the Same Neighborhood as Defendant Stated His Fear of Drug Dealers Would Prevent Him from Reaching an Impartial Verdict---the Juror Was Properly Discharged as "Grossly Unqualified" and "For Cause" Based Upon a Newly Discovered Ground

The First Department determined a sworn juror was properly discharged as "grossly unqualified," as well as "for cause." The juror lived in the neighborhood where the crime occurred and where defendant and his accomplices lived. The juror told the court that his fear of drug dealers in his neighborhood would prevent him from reaching an impartial verdict. The juror had not mentioned his fear before he was sworn:

> The juror's fear provided grounds for the court to dismiss him as "grossly unqualified to serve" pursuant to CPL 270.35(1), even if the court did not cite the statutory phrasing, because it was clear that the juror could not remain impartial. Additionally, since the juror had not mentioned that he feared for his safety when questioned by the court and the parties before being sworn, he was properly discharged for cause, on a newly discovered ground, pursuant to CPL 270.15(4). **People v Ward, 2015 NY Slip Op 04928, 1st Dept 6-11-15**

CRIMINAL LAW/GUILTY PLEA BASED UPON INACCURATE INFORMATION/APPEALS/EXCEPTION TO PRESERVATION REQUIREMENT

Incorrect Information About Sentencing Provided to the Defendant by the Court and Counsel Warranted Vacating the Plea In the Absence of Preservation

The Fourth Department concluded that wrong information provided to the defendant about sentencing required vacation of the plea, in the absence of preservation by a motion to withdraw the plea. The defendant was wrongly told by the court and counsel that his sentences on the instant offense and an unrelated offense would necessarily run consecutively. Because there was no way to expect defendant to know the information was incorrect, the error need not be preserved by a motion to withdraw the plea. Because the plea was based upon complete confusion by all concerned, the plea was vacated:

We agree with defendant, however, that his plea should be vacated on the ground that it was not voluntarily, knowingly or intelligently entered based on the mistaken understanding of the legally required sentence shared by County Court and counsel. Although defendant failed to preserve his contention for our review ..., we conclude that the narrow exception to the preservation requirement applies ... . Here, it is clear from the face of the record that the prosecutor incorrectly stated that the sentence on the instant conviction must run consecutively to the sentence imposed on an unrelated conviction, when in fact that was not the case because the instant offense occurred prior to the unrelated conviction (see generally Penal Law § 70.25). It is equally clear that this error was not corrected by defense counsel or the trial court. Thus, preservation was not required "[i]nasmuch as defendant—due to the inaccurate advice of his counsel and the trial court—did not know during the plea . . . proceedings" that consecutive sentences were not required by law ... . " [D]efendant [could] hardly be expected to move to withdraw his plea on a ground of which he ha[d] no knowledge' " ... . Even assuming, arguendo, that the narrow exception to the preservation requirement is inapplicable, we would nevertheless exercise our power to address defendant's contention as a matter of discretion in the interest of justice (see CPL 470.15 [3] [c]).

On the merits, we conclude that defendant's plea should be vacated because "[i]t is impossible to have confidence, on a record like this, that defendant had a clear understanding of what he was doing when he entered his plea," based on the prosecutor's erroneous statement that [*2]consecutive sentences were required and the failure of the court or defense counsel to correct that error. We "cannot countenance a conviction that seems to be based on complete confusion by all concerned" ... . **People v Brooks, 2015 NY Slip Op 03969, 4th Dept 5-8-15**

CRIMINAL LAW/INDICTMENT RENDERED DUPLICITOUS/ERRONEOUS JURY CHARGE, PROSECUTION HELD TO PROOF REQUIRED BY/PROSECUTORIAL MISCONDUCT

Counts Rendered Duplicitous by Trial Testimony/Prosecution Held to Erroneous Jury Charge to Which No Objection Was Made/Prosecutorial Misconduct Mandated a New Trial

The Second Department determined: (1) many counts of the indictment were rendered duplicitous because the complainant in this sex-offense case testified to more than one offense within the time-periods encompassed by indictment counts; (2) the prosecution must be held to the erroneous jury charge to which no objection was made (stating proof complainant was less than 14 was required when the statute says less than 15); (3) the prosecution did not prove complainant was less than 14---relevant counts dismissed; and (4) prosecutorial misconduct during summation (prosecutor acted as an unsworn witness, invited the jury to speculate, shifted the burden of proof, and made inflammatory remarks) mandated a new trial on the remaining counts:

> Each count of an indictment may charge one offense only" (CPL 200.30[1]). A count in an indictment is void as duplicitous when that "single count charges more than one offense" ... . Where, as here, the crime charged " is completed by a discrete act, and where a count in the indictment is based on the repeated occurrence of that act over a course of time, the count includes more than a single offense and is duplicitous'" ... . " Even if a count is valid on its face, it is nonetheless duplicitous where the evidence presented . . . at trial makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict'" ... . * * *
>
> ... [S]ince the People did not object to the erroneous jury charge, they were "bound to satisfy the heavier burden" ... of proving, for counts 1 through 40, that the defendant engaged in sexual intercourse with a person less than 14 years old. Since the evidence demonstrated that the complainant was 14 years old during the time periods encompassed by counts 17 through 40 of the indictment, the People failed to satisfy this burden as to those counts. * * *
>
> "[S]ummation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his [or her] command" ... . Rather, "[t]here are certain well-defined limits" (id. at 109). Among other things, "[the prosecutor] must stay within the four corners of the evidence' and avoid irrelevant and inflammatory comments which have a tendency to prejudice the jury against the accused" ... . A prosecutor would be well-advised not to test these limits, both so as to stay within his or her proper truth-seeking role ... and so as to avoid the waste of time and expense that occurs when a new trial must be conducted solely on the basis of summation misconduct. Here, the prosecutor surpassed the "well-defined limits" ... .
>
> The prosecutor acted as an unsworn witness when, in response to defense counsel's

summation comments regarding the lack of corroborative medical evidence and the failure to call certain witnesses, the prosecutor told the jury that the uncalled witnesses had "nothing to offer" and that the medical records the prosecution failed to offer into evidence were "either irrelevant or cumulative" ... . The prosecutor also improperly invited the jury to speculate as to certain matters, despite advance warning by the trial court not to engage in that line of comment ... . Further, the prosecutor shifted the burden of proof by telling the jury, and repeatedly returning to this theme, that it had not "heard" any "compelling reason" for the complainant to lie, and by suggesting that the jury would have to convict the defendant if it did not "buy" the defendant's explanation of certain evidence ... . The prosecutor further improperly suggested that the jury would have to conclude that the complainant was "evil" in order to acquit the defendant ... . The prosecutor repeatedly vouched for the complainant, while denigrating the defense and expressing his personal opinion as to the defendant's lack of credibility ... . Finally, the prosecutor made a number of inflammatory references to the defendant using the complainant as his "personal sex toy" ... . **People v Singh, 2015 NY Slip Op 04157, 2nd Dept 5-13-15**

CRIMINAL LAW/INEFFECTIVE ASSISTANCE OF COUNSEL/FAILURE TO INVESTIGATE POTENTIAL DEFENSE/ATTORNEYS

Defense Counsel's Failure to Pursue a Minimal Investigation (i.e., Failure to Access Defendant's Psychiatric Records and Failure to Have the Defendant Examined by an Independent Psychiatrist) Constituted Ineffective Assistance of Counsel---Conviction Reversed

The Second Department determined defendant's motion to vacate his conviction should have been granted. Defendant suffered from mental illness and had been hospitalized for psychiatric disorders. The trial court had granted defense counsel permission to access to defendant's psychiatric records and had granted authorization for the appointment of an independent psychiatrist to evaluate defendant. Defense counsel did not seek the psychiatric records, nor the evaluation by the independent psychiatrist. The Second Department, after an in-depth explanation of the criteria, held that defendant was deprived of effective assistance of counsel. The court noted that the ground at issue here, defense counsel's failure to pursue minimal investigation, required reversal without a showing that the result of the trial would have been different had the investigation been conducted:

A criminal defendant is guaranteed the effective assistance of counsel under both the federal and the state constitutions (see US Const Amend VI; NY Const, art I, § 6). Generally, to prevail on a claim of ineffective assistance of counsel under the United States Constitution, a defendant must show, first, "that counsel's representation fell below an objective standard of reasonableness" ..., and, second, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" ... .

Under the New York Constitution, a defendant must show that he was not afforded "meaningful representation" ... , which also entails a two-pronged test, "with the first prong identical to its federal counterpart" ..., and the second being a "prejudice component [which] focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case'" ... and, thus, is "somewhat more favorable to defendants" ... . A reviewing court must examine whether "the evidence, the law, and the circumstances of [the] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" ... .
Under both state and federal law, a defendant's right to the effective assistance of counsel includes assistance by an attorney who has conducted a reasonable investigation into the relevant facts and law to determine whether matters of defense can be developed ... .

Generally, in order to make out a claim of ineffective assistance under the New York Constitution, a defendant is required to make some showing of prejudice, albeit not necessarily the "but for" prejudice required under federal law ... . However, prejudice is not an "indispensable element in assessing meaningful representation" ... . The Court of Appeals has indicated that counsel's failure to pursue the minimal investigation appropriate with respect to an issue central to the defense itself "seriously compromises [the] defendant's right to a fair trial," regardless of whether the information would have altered the uninformed strategy counsel employed, or otherwise helped the defense ... .

Here, the People's case hinged almost entirely on their ability to prove the defendant's state of mind, and trial counsel undisputedly failed to take the minimal steps of obtaining the defendant's psychiatric records and having him evaluated by an expert, which were necessary to make an informed decision as to whether or not to present a psychiatric defense. Under the circumstances of this case, the People's argument that, even with

the benefit of the evidence trial counsel should have obtained, there is no reasonable chance that a mental disease or defect or EED defense would have been successful, or that the outcome of the trial would otherwise have been different, misconstrues the central issue in this case. The issue is not whether trial counsel's choice to have certain documents excluded from the record constitutes a legitimate trial strategy, but whether the failure to secure and review crucial documents, that would have undeniably provided valuable information to assist counsel in developing a strategy during the pretrial investigation phase of a criminal case, constitutes meaningful representation as a matter of law ... . Trial counsel's "total failure" in this regard deprived the defendant of meaningful representation ... . **People v Graham,2015 NY Slip Op 04862, 2nd Dept 6-10-15**

CRIMINAL LAW/INEVITABLE DISCOVERY DOCTRINE/APPEALS

Seizure of Evidence from the Pocket of the Defendant After a Pat-Down Search on the Street Not Justified Under the "Inevitable Discovery" Exception to the Warrant Requirement---the Doctrine Does Not Apply to "the Very Evidence Obtained in the Illegal Search"---A Justification for the Search and Seizure Not Relied Upon by the People Below Can Not Be Raised on Appeal

The Second Department determined defendant's motion to suppress jewelry taken from his pocket after pat-down search on the street should have been granted. At the suppression hearing, the People did not argue that the officer who stopped the defendant had probable cause to arrest the defendant at the time of the pat-down search. Therefore, the Second Department noted, that argument could not be raised by the People on appeal. At the suppression hearing, the People argued that the jewelry was admissible under the "inevitable discovery" exception to the warrant requirement. However, the "inevitable discovery" exception does not apply to "the very evidence obtained in the illegal search:"

> At the suppression hearing, the People expressly disclaimed reliance on the theory that the search of the defendant and the seizure of the jewelry from his pants pocket was justified because the police had probable cause to arrest the defendant at the moment he was stopped, and the hearing court did not address that theory. Thus, the People may not assert this theory on appeal ... . Instead, the People argued that the jewelry inevitably would have been discovered, and the Supreme Court relied on that theory in denying that branch of the defendant's motion which was to suppress the jewelry. The court properly determined that the record does not support a finding that the police officer legitimately believed that the jewelry might be some kind of weapon ... . However, as the People now correctly concede, the court erred in its determination that the jewelry inevitably would have been discovered through normal police procedures, as the inevitable discovery doctrine does not apply to primary evidence, that is, "the very evidence obtained in the illegal search," such as the jewelry at issue here ... . Accordingly, that branch of the defendant's motion which was to suppress the jewelry should have been granted. **People v Henagin, 2015 NY Slip Op 04864, 2nd Dept 6-10-15**

CRIMINAL LAW/JUSTIFICATION DEFENSE/INITIAL AGGRESSOR JURY INSTRUCTION

Court Should Not Have Instructed the Jury on the Initial Aggressor Exception to the Justification Defense---No Evidence to Support the Exception

The First Department, over a dissent, determined the trial court should not have instructed the jury that the justification defense would not apply if the jury determined defendant was the initial aggressor. The victim was swinging a mop handle, while the defendant used a gun. The majority held that there were no facts in the record from which it could be inferred the defendant was the initial aggressor: "In charging the jury on the justification defense, the court erred when, over defendant's objection, it included the initial aggressor exception to the defense embodied in Penal Law § 35.15(1)(b). This concept, that defendant would not have been justified in using deadly physical force if he was the initial aggressor, was completely inapplicable to the facts of the case. Although the jury could have reasonably determined that defendant's use of deadly force was unjustified (where defendant used a gun against the deceased, who wielded a mop handle), it could not have reasonably found that defendant was the initial aggressor because the evidence does not support such a conclusion. There was no evidence that defendant was the first person in the fatal encounter to use or threaten the imminent use of deadly force, or any kind of force, for that matter. On the contrary, the evidence tended to indicate either that it was the deceased who first used force, by swinging a mop handle at defendant, or that defendant and the deceased used or threatened force simultaneously." **People v Valentin, 2015 NY Slip Op 03914, 1st Dept 5-7-15**

CRIMINAL LAW/JUSTIFICATION DEFENSE/JURY INSTRUCTIONS/AMBIGUOUS VERDICT/INTEREST OF JUSTICE APPELLATE JURISDICTION/APPEALS

Failure to Make Clear in the Jury Instructions that the Acquittal on the Top Count Based Upon the Justification Defense Required Acquittal on the Lesser Counts As Well Rendered the Verdict "Ambiguous"---New Trial Ordered in the Interest of Justice

The First Department, in a full-fledged opinion by Justice Tom, exercising the court's "interest of justice" jurisdiction, determined defendant was entitled to a new trial because the jury instructions did not make clear that, if the jury found the defendant's actions justified (self-defense), acquittal on all counts was mandatory. The defendant was charged with attempted murder, attempted assault in the first degree, and assault second degree stemming from a stabbing. There was evidence defendant may have acted in self-defense. Therefore the jury was given the justification-defense instruction. The jury found the defendant not guilty of attempted murder, but guilty of the lesser two counts. If the not guilty verdict was based on the justification defense, then the defendant should have been acquitted of all charges. The jury instructions did not make the effect of finding the defendant's acts justified clear. Because it could not be discerned whether the jury acquitted the defendant of attempted murder based on the justification defense, the verdict was ambiguous and a new trial was required, notwithstanding that the error in the jury instructions was not preserved:

> On this record, review of the issue in the interest of justice is warranted because it is impossible to discern whether acquittal of the top count of attempted murder in the second degree was based on the jurors' finding of justification so as to mandate acquittal on the two lesser counts. While lack of justification was included as an element of each crime, the verdict sheet and the court's accompanying explanation created confusion, because they indicated among other things that the jurors "must consider" count three irrespective of their disposition of higher counts and they failed to explicitly convey that a finding of justification on the top count precluded further deliberation. While the trial court did follow the CJI justification instruction in its charge, it also included as an element of each offense "[t]hat the defendant was not justified," which may have led the jurors to conclude that deliberation on each crime required reconsideration of the justification defense, even if they had already acquitted the defendant of the top count of attempted murder in the second degree based on justification. **People v Velez, 2015 NY Slip Op 05619, 1st Dept 6-30-15**

CRIMINAL LAW/JURIES/WAIVER OF 12-PERSON JURY

Defendant's Waiver of 12-Person Jury Upheld

The First Department determined defendant had validly waived his right to be tried in front of a 12-person jury. During defendant's trial, after the court had been closed for several days due to Hurricane Sandy, one of the jurors informed the court he was leaving town. The defendant, against the advice of his lawyer, was insistent that he wanted the trial to continue with 11 jurors:

> The court noted on the record that the excused juror had informed the court that he had a flight scheduled for that day, and that the court had called the juror that morning but could not reach him. Defense counsel objected to the court's discharge of the juror without first consulting with counsel. Counsel informed the court that, against her advice, defendant wanted deliberations to continue with the remaining 11 jurors. Defense counsel stated that she had told defendant "a number of times that I do not think we should go forward with 11," but defendant was "extremely insistent," was "tired of this process," and did "not want to retry the case." The court confirmed with defendant on the record that he wanted to continue with 11 jurors, and defendant executed a written waiver of a 12-person jury. Defense counsel also signed the written waiver.
>
> Although the court should have given defense counsel an opportunity to be heard before it excused the juror (see CPL 270.35[2][b]), defendant entered a knowing, voluntary, and intelligent waiver of his right to a 12-person jury ... . Defense counsel stated that she had discussed with defendant the possibility of a retrial, and that defendant rejected that option ... . The court questioned defendant on the record and confirmed that he had discussed his decision with counsel, and that he understood but rejected counsel's advice. As defense counsel stated, defendant was insistent that deliberations continue with an 11-person jury. Defendant "must accept the decision he knowingly, voluntarily and intelligently made" ... . **People v Perry, 2015 NY Slip Op 05394, 1st Dept 6-23-15**

CRIMINAL LAW/MANSLAUGHTER/"PERSON" DEFINED

23-Week-old Child Who Was Born Alive and Lived for 2 1/2 Hours After Removal from Life-Support Was a "Person" Within the Meaning of the Manslaughter Statute

The Fourth Department determined the 23-week-old child delivered by cesarean section was a "person" within the meaning of the manslaughter statute. The child's mother was severely injured in a head-on collision with defendant's vehicle and the child was delivered to save the mother's life. The child was taken off life-support because of the high risk of cognitive and neurological deficits and died 21/2 hours later. The court, in essence, determined the child was a "person" because she was born alive.

> The Penal Law provides that a defendant "is guilty of manslaughter in the second degree when . . . [he or she] recklessly causes the death of another person" (§ 125.15 [1]). Furthermore, " [p]erson,' when referring to the victim of a homicide, means a human being who has been born and is alive" (§ 125.05 [1]), and the Penal Law defines homicide as "conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks" (§ 125.00).
>
> Defendant first contends that the evidence is not legally sufficient because, pursuant to the above statutory scheme, a child who is less than 24 weeks of gestational age is not a person. That contention is without merit. Penal Law § 125.00 uses the disjunctive "or" in defining who may be the victim of a homicide, and it is a well-settled rule of statutory interpretation that "[u]se of the conjunction or' in a statute usually indicates that the language is to be construed in an alternative sense"... . Therefore, a victim who is born alive may be a person for the purposes of a homicide pursuant to section 125.00, regardless of whether he or she is less than 24 weeks of gestational age. **People v Hardy, 2015 NY Slip Op 03961, 4th Dept 5-8-15**

CRIMINAL LAW/MIRANDA WARNINGS/SUPPRESSION OF STATEMENT

"Preamble" Read to Defendant Before the Miranda Warnings Neutralized the Effect of the Warnings---Defendant's Statement Should Have Been Suppressed

The Second Department determined defendant's suppression motion should have been granted because the "preamble" read to him before he waived his right to remain silent neutralized the effect of the Miranda warnings. "Before the defendant was read his Miranda rights, the detective investigator said to him (1) "if you agree to speak with us, you may, if you wish, explain what you did and what occurred at that date, time, and place," (2) "[i]f . . . you have an alibi . . . and you want to tell us where you were, we will ask that you please give us as much information as you can, including the names of any people you were with," and (3) "[i]f you agree to speak to us and your version of the events of that day differs from what we have heard, you may, if you so choose, tell us your story." Thus, a clear implication was conveyed to the defendant that he ought to speak to the detective investigator and the assistant district attorney present at the interview in order to set forth his version of events so that they could be investigated. As such, the preamble here ... rendered the subsequent Miranda warnings inadequate and ineffective in advising the defendant of his rights ...". **People v Rivera, 2015 NY Slip Op 04517, 2nd Dept 5-27-15**

CRIMINAL LAW/MOLINEUX EVIDENCE (EVIDENCE OF PRIOR UNCHARGED OFFENSES)/MOTIVE/INTENT/ BACKGROUND INFORMATION

Evidence of Prior Uncharged Offenses Involving the Same Behavior and Against the Same Victim as Alleged in the Charged Offense Deemed Admissible to Prove Motive, Intent and to Provide Necessary Background Information About the Nature of the Relationship Between the Victim and Defendant

The Fourth Department determined evidence of prior uncharged sexual abuse of the victim, which included actions attributed to the defendant in the charged offense (abuse when the victim was unconscious from alcohol intoxication), was properly admitted. The court found the uncharged crime evidence was admissible to prove intent and motive, and to provide background information about the nature of the relationship between the victim and defendant:

> We reject defendant's contention ... that the court erred in admitting evidence of defendant's prior

uncharged sexual abuse of the victim which, according to the victim's testimony, also occurred while she was unconscious from alcohol intoxication. "The general rule is that evidence of . . . uncharged crimes may not be offered to show defendant's bad character or his propensity towards crime but may be admitted only if the acts help establish some element of the crime under consideration or are relevant because of some recognized exception to the general rule" ... . Here, we conclude that the evidence of uncharged crimes was admissible to establish intent and motive under the first two exceptions specifically identified in Molineux's illustrative and nonexhaustive list ... . Specifically, the disputed evidence was relevant to the issue whether defendant intended to commit the instant crime for the purpose of sexual gratification (see Penal Law §§ 130.00 [3]; 130.65 [2]), and to establish defendant's motive in providing a large quantity of alcohol to the victim. Consequently, "the evidence in this case was not propensity evidence, but was probative of [defendant's] motive and intent to [sexually] assault his victim" ... . Moreover, the evidence was also admissible under a more recently recognized Molineux exception, i.e., to "provide[] necessary background information on the nature of the relationship" between defendant and the victim ... and thus, we conclude that the court did not abuse its discretion in allowing the People to present the evidence at issue ... . **People v Leonard, 2015 NY Slip Op 05314. 4th Dept 6-19-15**

CRIMINAL LAW/MOTION TO VACATE CONVICTION/BRADY VIOLATION/UNQUALIFIED JUROR

Defendant's Motion to Vacate His Conviction, Supported by Evidence that (1) the People May Have Violated Their "Brady" Obligation to Inform the Defense of a Plea Deal Made In Return for Testimony and (2) a Juror May Have Had a Mental Disability, Should Not Have Been Denied Without a Hearing

The Fourth Department determined defendant had made sufficient evidentiary showings that (1) the People may have failed to inform the defense of a plea bargain made with the codefendant in return for testimony against the defendant, and (2) a juror may have been unqualified due to a mental disability. Therefore defendant's motion to vacate his conviction should not have been denied without a hearing;

Defendant moved to vacate the judgment on two grounds, neither of which may be decided without a hearing. First, he contended that the People violated their Brady obligation because they failed to disclose that they made a specific plea agreement with the codefendant at the start of the proceedings, contingent upon the codefendant testifying against defendant. Defendant contended that the People effectuated that agreement by, among other things, obtaining an indictment charging the codefendant with a lower level crime than the class B violent felony that was lodged against defendant, to avoid the plea bargaining restrictions in CPL 220.10 (5) (d) (ii), and by agreeing that the codefendant could withdraw his plea to the lower level felony and plead guilty to a misdemeanor if he cooperated against defendant. Defendant submitted evidence in support of his contentions, including transcripts of the prosecutor's statements in the codefendant's case regarding the agreement, and those transcripts also established that the prosecutor had discussed the agreement with the victim before it was implemented. * * *

The second ground advanced by defendant in support of his CPL article 440 motion was that a juror lacked the capacity to serve on the jury, and that the juror had misrepresented his employment status in response to questioning by the court. Defendant submitted some evidence establishing that the prospective juror may be developmentally disabled and that he may have misrepresented his prior and current employment, but defendant's investigator was unable to obtain more information without judicial subpoenas that the court declined to provide. Inasmuch as defendant submitted evidence that called into question "whether this particular juror should have been entrusted with the responsibilities of fact finding [because the juror] did not understand the lawyers or the judge" ..., the court further erred in denying the motion on the ground that the issue could be decided on direct appeal. **People v Bailey, 2015 NY Slip Op 04987, 4th Dept 6-12-15**

CRIMINAL LAW/MOTION TO VACATE CONVICTION/EVIDENCE/HEARSAY/ DECLARATION AGAINST PENAL INTEREST

Motion to Vacate Conviction Should Not Have Been Granted---Hearsay Statement Exonerating Defendant Did Not Meet the Criteria for a Statement Against Penal Interest and Should Not Have Been Admitted---The Underlying Evidence Was Not Newly Discovered Because Defendant Was Aware of It at the Time of Trial--Defendant Did Not Provide the Evidence at Trial Because He Feared Retaliation by Gang Members

The Fourth Department determined defendant's motion to vacate his conviction should not have been

granted. The hearsay statement made by Jackson which exonerated defendant did not meet the criteria for a statement against penal interest and should not have been admitted in evidence. The evidence involved was not newly discovered. Defendant did not provide the evidence at trial out of fear of retaliation by gang members:

> ... [T]he court erred in admitting Jackson's statement in evidence at the hearing, and, in any event, the statement would not be admissible at trial. This is vital because " [i]mplicit in th[e] ground for vacating a judgment of conviction is that the newly discovered evidence be admissible' " ... . Here, the court admitted the statement at the hearing as a declaration against penal interest, but it is well settled that "[f]or a statement against penal interest to be admissible the interest compromised must be such as to all but rule out' motive to falsify, [and] the declarant must be conscious of the consequences of his statement at the time it is made . . . Those assurances of probative value, which might in a proper case substitute for cross-examination, were not present in this case" ... . Although a less stringent standard applies where, as here, the declaration is offered by defendant to exonerate himself rather than by the People, to inculpate him... , none of the requirements was met here. To the contrary, the statement of the gang member was provided only after he was assured that he would not be prosecuted for any information that he provided, thus removing any indicia of reliability regarding that information... . ...
>
> Even assuming, arguendo, that Jackson's statement was properly admitted at the hearing, and further assuming, arguendo, that the information he provided is material, noncumulative, and does not merely impeach or contradict the record evidence, we conclude that the information was known to defendant at the time of the trial ... . We cannot agree with the court that it was in effect "newly discovered" based on defendant's fear of physical harm to himself and his family. "A defendant who chooses to withhold evidence should not be given a new trial on the basis of the evidence thus withheld' " ... . Therefore, the evidence does not satisfy the requirement that it was "discovered since the entry of a judgment based upon a verdict of guilty after trial" ... . **People v Backus, 2015 NY Slip Op 05330, 4th Dept 6-19-15**

CRIMINAL LAW/MOTION TO VACATE CONVICTION/NEWLY DISCOVERED EVIDENCE/DECLARATION AGAINST PENAL INTEREST/SPOUSAL PRIVILEGE

New Evidence Demonstrated the Declarant, Not the Defendant, Committed the Murders of Which Defendant Was Convicted---Motion to Vacate Defendant's Convictions Properly Granted

The Fourth Department affirmed County Court's vacation of defendant's murder convictions, after a hearing, based upon newly discovered evidence. Although the "declarant" did not testify, witnesses testified declarant admitted killing the two persons defendant had been convicted of murdering. There was considerable evidence supporting the reliability of the declarant's statements. The court noted that the declarant's statements were admissible under an exception to the hearsay rule as "statements against penal interest" and it was reasonable to assume the declarant was "unavailable" (a requirement for admissibility) because he would assert his right to remain silent if called as a witness. The court further noted that the testimony of declarant's ex-wife was not protected by spousal privilege. Declarant's threat to kill his wife if she reported the murders to the police removed the "communications from the protection of privilege:"

> Contrary to the People's contention, County Court properly determined, following a hearing, that defendant proved by a preponderance of the evidence that "[n]ew evidence has been discovered since the entry of [the] judgment . . . , which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10 [1] [g]; see CPL 440.40 [6]). **People v Pierre, 2015 NY Slip Op 04985, 4th Dept 6-12-15**

CRIMINAL LAW/MUNICIPAL LAW/MUNICIPAL ORDINANCES/VOID FOR VAGUENESS

Ordinance Prohibiting "Unnecessary Noise" Is Not Unconstitutionally Vague

The defendant was stopped by the police for a violation of a city ordinance prohibiting "unnecessary noise" (a loud car stereo). The defendant argued that the stop, which resulted in drug charges, was not justified by probable cause because the "unnecessary noise" ordinance is "unconstitutionally vague." The Fourth Department determined the ordinance was not

unconstitutionally vague because it is tailored to the context of what can be heard more than 50 feet from a vehicle on a public highway and is sufficiently definite to put defendant on notice his conduct was forbidden:

> Municipal ordinances "enjoy an exceedingly strong presumption of constitutionality' " ..., and such legislative enactments "are to be construed so as to avoid constitutional issues if such a construction is fairly possible"... . "The void-for-vagueness doctrine embodies a rough idea of fairness' " ..., and "an impermissibly vague ordinance is a violation of the due process of law" ... . In addressing such a challenge, courts first "must determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his [or her] contemplated conduct is forbidden by the statute" ... . "Second, the court must determine whether the enactment provides officials with clear standards for enforcement"
>
> * * * ... [T]he City Ordinance is not unconstitutionally vague because the section under which defendant was convicted was tailored to a specific context—the creation of "unnecessary noise" beyond 50 feet of a motor vehicle on a public highway (City Ordinance § 40-16 [b]). In our view, "[w]hat is usual noise in the operation of a car [radio or other sound production device] has become common knowledge . . . and any ordinary motorist should have no difficulty in ascertaining" whether the noise in question violates the applicable standard ... . Based on the foregoing, we conclude that the ordinance in question was "sufficiently definite" to put defendant on notice that his conduct was forbidden, and that it provided the police "with clear standards for enforcement" ... . **People v Stephens, 2015 NY Slip Op 03991, 4th Dept 5-8-15**

CRIMINAL LAW/PLEA ALLOCUTION/VOLUNTARINESS OF PLEA/WAIVER OF APPEAL/APPEALS

Defendant Would Not Admit to the Commission of Certain Elements of the Offense to Which He Pled Guilty---Vacation of Plea as Involuntary Was Required, Despite Lack of Preservation and a Waiver of Appeal

The Third Department determined defendant's guilty plea must be vacated, despite a failure to preserve the error and a waiver of appeal. During the plea allocution, defendant denied elements of the offense to which he was pleading guilty (strangulation in the second degree). Defendant denied that the victim experienced a loss of consciousness or any injury, and denied he had the intent to impede the breathing of the victim. The guilty plea, therefore, was not knowing, intelligent and voluntary (constituting an exception to the "preservation of error" requirement):

> Although defendant's challenge to the voluntariness of his plea survives his uncontested waiver of the right to appeal ..., it is unpreserved for our review in the absence of an appropriate postallocution motion ... . Upon reviewing the record, however, we are persuaded that the narrow exception to the preservation requirement has been triggered here, as defendant made numerous statements during the course of the plea colloquy that negated essential elements of the crime, thereby calling into question the voluntariness of his plea ... . * * *
>
> Simply put, defendant's responses to the questions posed during the plea colloquy negated more than one element of the charged crime, thereby casting doubt upon his guilt. Inasmuch as further inquiry by County Court neither resolved that doubt nor otherwise established that the resulting plea was knowing, intelligent and voluntary ... , it should not have been accepted by the court and must now be vacated ... . **People v Mcmillan, 2015 NY Slip Op 04680, 3rd Dept 6-4-15**

CRIMINAL LAW/REASONABLE SUSPICION OF CRIMINAL ACTIVITY/FLIGHT/PURSUIT

The Totality of Circumstances Provided the Police Officer with Reasonable Suspicion of Criminal Activity and Thereby Justified Pursuit of the Defendant

The Second Department determined defendant's motion to suppress a gun thrown away during a foot pursuit by a police officer was properly denied. Unusual activity in and around a car (a "Malibu") in a high crime area gave the police an objective, credible reason to approach the car. Under the totality of the circumstances, when defendant began walking away, the police officer (Detective Tait), having a reasonable suspicion of criminal activity, properly pursued the defendant:

> "Police pursuit of an individual significantly impede[s] the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed" ... . "Flight, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit" ... . Here, Detective Talt had reasonable suspicion of criminal activity based on the defendant's flight,

combined with the unusual activity of the occupants of the Malibu, Detective Talt's knowledge that that specific location was a high-crime area, and his knowledge that contraband could be hidden under a car hood. Accordingly, the court properly declined to suppress the gun. **People v Jennings, 2015 NY Slip Op 05497, 2nd Dept 6-24-15**

CRIMINAL LAW/RESTITUTION

Failure to Pronounce the Amount of Restitution at Sentencing Survives Waiver of Appeal and Requires Vacation of the Sentences and Remittal

The Second Department noted that county court's failure to pronounce the amount of restitution at sentencing survived waiver of appeal and required vacation of the sentences and remittal for that purpose:

> Since the County Court failed to pronounce the sentences of restitution in open court, the sentences must be vacated and the matter remitted to the County Court, Orange County, for resentencing in accordance with CPL 380.20 ... . **People v Guadalupe, 2015 NY Slip Op 05206, 2nd Dept 6-17-15**

CRIMINAL LAW/REVOCATION OF PROBATION/EVIDENCE

Evidence Seized In Violation of Probationer's Constitutional Rights Should Not Have Been Used as the Basis for a Probation Revocation

The Fourth Department determined evidence which was suppressed because it was unconstitutionally seized could not be used to support a revocation of probation, noting that a probationer loses some privacy and Fourth Amendment rights, but not all of both:

> The Court of Appeals has "recognized . . . that a probationer loses some privacy expectations and some part of the protections of the Fourth Amendment, but not all of both" ..., and "that a person on parole, although legally in custody and subject to supervision, is nevertheless constitutionally entitled to protection against unreasonable searches and seizures. A person on probation, subject to similar restraints (see CPL 410.50, subds. 1, 2)[,] should be similarly protected" ... . Furthermore, with respect to evidence that was illegally seized from a person under a revocable disposition, "the Court of Appeals has applied the New York constitution to suppress such evidence at a parole revocation hearing . . . , and it would seem to follow a fortiori that such evidence would not be admissible at a probation violation hearing, which is even closer to a criminal action than a parole violation hearing" ... . Here, the court concluded that the stop and search of defendant and his home were violative of defendant's rights under the Constitutions of New York and the United States. Consequently, the court erred in relying upon the evidence seized as a result of those improper searches to conclude that defendant violated a condition of his probation... . **People v Robinson, 2015 NY Slip Op 03967, 4th Dept 5-8-15**

CRIMINAL LAW/RIGHT TO COUNSEL

Defendant's Indelible Right to Counsel Did Not Attach When the Attorney for Defendant's Husband's Estate Communicated with the Police---The Attorney Was Unaware that Defendant Was a Suspect In Her Husband's Death at the Time of the Communication

The Fourth Department determined a communication with the police by the attorney who represented the estate of defendant's husband did not trigger the attachment of her indelible right to counsel (rendering a subsequent statement inadmissible). The defendant was convicted of murdering her husband. At the time the probate attorney communicated with the police, he identified himself as the estate's attorney and was not aware defendant was a suspect in her husband's death:

> The evidence established that defendant was the personal representative of the estate ..., and that the attorney's representation of her was only with respect to her role as personal representative of the estate. The attorney testified that at no time did he know that defendant was a suspect in decedent's death, which he believed to have been a suicide; that he identified himself as the attorney for decedent's estate in his communications with the police; and that he would not have given defendant advice related to a criminal investigation because to do so would be a conflict of interest with his role as the attorney for the estate. It is well established that, although "an attorney-client relationship formed in one criminal matter may sometimes bar questioning in another matter in the absence of counsel . . . , a relationship formed in a civil matter is not entitled to the same deference" ... . **People v Castor, 2015 NY Slip Op 03648, 4th Dept 5-1-15**

CRIMINAL LAW/RIGHT TO COUNSEL/ATTORNEY TOOK POSITION ADVERSE TO CLIENT

Attorney's Telling the Court There Was No Reason Sentencing Should Not Go Forward in the Face of Defendant's Pro Se Motion to Withdraw His Guilty Plea Adversely Affected Defendant's Right to Counsel

The Second Department ordered that a hearing be held on defendant's motion to withdraw his guilty plea and that another lawyer be assigned. When defendant made his pro se motion to withdraw his plea, his attorney told the court there was no reason sentencing should not go forward. The attorney's taking a position adverse to the defendant's adversely affected the defendant's right to counsel:

> The defendant's right to counsel was adversely affected when his attorney took a position adverse to his ... . The County Court should have assigned a different attorney to represent the defendant before it determined the defendant's motion to withdraw his plea of guilty ... . Accordingly, the matter must be remitted to the County Court, Westchester County, for a hearing on the defendant's motion to withdraw his plea of guilty, for which the defendant shall be appointed new counsel, and for a new determination of the motion thereafter. **People v King, 2015 NY Slip Op 05209, 2nd Dept 6-17-15**

CRIMINAL LAW/SENTENCING/RESENTENCING/POST RELEASE SUPERVISION (PRS)

Resentencing Required---Sentencing Court Unaware It Had Discretion Re: Length of the Postrelease Supervision Period

The Second Department sent the matter back for resentencing because the judge was unaware he/she had the discretion as to the length of the postrelease period:

> ... [R]esentencing is required because the record supports the defendant's contention that the Supreme Court was unaware that it had discretion as to the length of the period of PRS. Specifically, the court stated that the law required it to impose a period of PRS of 5 years. In fact, the court had the authority to impose a period of PRS of between 2½ years and 5 years (Penal Law § 70.45[2][f]). **People v Battee, 2015 NY Slip Op 05491, 2nd Dept 6-24-15**

CRIMINAL LAW/SENTENCING/MATERIALLY UNTRUE ASSUMPTIONS OR MISINFORMATION RELIED UPON IN SENTENCING

Sentence Vacated---Sentencing Judge Relied on Materially Untrue Assumptions and Misinformation About Defendant's Criminal History

Although the error was not preserved, the Fourth Department, in the interest of justice, determined defendant's sentence should be vacated. At sentencing, the judge made statements alleging past criminal acts by the defendant which were unsupported by the record:

> ... [W]e conclude that the court erred in sentencing defendant on the basis of "materially untrue assumptions or misinformation" ... . Here, the court characterized defendant as having been involved in "more than 40 residential burglaries" and "all the tens of burglaries," but those statements are unsupported by the record and therefore constitute improper speculation... . **People v Mcknight, 2015 NY Slip Op 04961, 4th Dept 6-12-1**

CRIMINAL LAW/SEX OFFENDER REGISTRATION ACT (SORA)/CORRECTION LAW

Court Not Required to Obtain a New Risk Assessment Instrument After People Filed a Petition for an Upward Modification Based Upon a New Offense Committed In Violation of Defendant's Probation

Re: the People's petition for upward modification, the Second Department determined County Court was not required to obtain a new Risk Assessment Instrument (RAI) after the defendant committed a "new" sex crime in violation of his probation. The petition for upward modification was properly sent to the Board of Examiners of Sex Offenders (Board) and the Board properly responded by letter:

> Correction Law § 168-o specifies that, upon the receipt of such a petition, "the court shall forward a copy of the petition to the board and request an updated recommendation pertaining to the sex offender" (Correction Law § 168-o[4]). The County Court followed this procedure and received an "updated recommendation" from the Board, in the form of a letter. The RAI, an "objective assessment instrument" created by the Board to assess an offender's "presumptive risk level" ...

was designed to assist the courts in reaching an initial SORA determination. Indeed, if a new RAI was completed upon the filing of the People's petition, it would be almost identical to the initial RAI, in which 10 out of the 15 risk factors addressed the subject sex offense and crimes committed prior to that offense ... . Thus, the County Court was not required to obtain a new RAI from the Board in considering the People's petition for an upward modification pursuant to Correction Law § 168-o(3). **People v Williams, 2015 NY Slip Op 04108, 2nd Dept 5-13-15**

Conviction In a Military Tribunal of "Assault with Intent to Commit Rape" Was Not a "Sex Offense" Under New York Law---However, the Conviction Could Be Considered Under the "Prior Criminal History" Risk Assessment Category

The Second Department determined that conviction of "assault with intent to commit rape" in a military tribunal should not have been as a "prior sex crime" to determine defendant's risk level. The offense did not qualify as a "sex offense" under New York law and did not include all the elements of any New York sex offense. The conviction, however, could be considered as "a prior criminal history" in the risk assessment:

> ...[T]he military offense of which the defendant was convicted did not qualify as a "sex offense," as defined in Correction Law § 168-a(2)(d)(ii) ... . Furthermore, contrary to the People's contention, the defendant's military offense does not "include[ ] all of the essential elements" (Correction Law § 168-a[2][d][i]) of attempted rape in the first degree under New York law, and thus does not qualify as a "sex offense" on that basis.
>
> Although the defendant's prior military offense of assault with intent to commit rape [*2]does not qualify as a sex offense, it does evidence a prior criminal history, **People v Lancaster, 2015 NY Slip Op 04106, 2nd Dept 5-13-15**

CRIMINAL LAW/SEX OFFENDER REGISTRATION ACT (SORA)/JUVENILE DELINQUENCY ADJUDICATIONS/UPWARD DEPARTURE

Juvenile Delinquency Adjudication Should Not Have Been Considered in SORA Risk Assessment---Criteria for an Upward Departure Explained

The Second Department determined defendant's juvenile delinquency adjudication should not have been considered in determining the defendant's risk level. The court explained the proper procedure for considering an upward departure: ... "[T]he County Court upwardly departed without following the required three analytical steps of determining, first, whether an aggravating factor exists as a matter of law, second, whether the People have adduced clear and convincing evidence of the facts in support of that aggravating factor, and third, whether, in the court's discretion, the totality of the circumstances warrant the upward departure to avoid an under-assessment of the defendant's dangerousness and risk of sexual recidivism ...". **People v Ruland, 2015 NY Slip Op 04464, 2nd Dept 5-27-15**

CRIMINAL LAW/SEX OFFENDER REGISTRATION ACT (SORA)/RES JUDICATA

Despite the Fact that Defendant Entered Guilty Pleas in Two Counties, Only One SORA Disposition for the "Current Offenses" (Which Included the Offenses from Both Counties) Can Be Held

The Defendant was convicted (by guilty pleas) of sex offenses committed in two counties. The two district attorney offices coordinated the defendant's sentences to run concurrently. Prior to defendant's release a SORA hearing was held in one of the two counties, taking into account all of the offenses to which defendant pled guilty. When defendant was notified the second county had scheduled a SORA hearing he filed a motion to dismiss the second proceeding, arguing it was unauthorized by SORA and barred by the doctrine of res judicata. The Second Department agreed and dismissed the second proceeding. The decision includes a substantive discussion of statutory interpretation and the purposes and application of the Sex Offender Registration Act:

> ...[T]he defendant pleaded guilty to charges contained in accusatory instruments filed in two different counties, two in Queens County and one in Richmond County. Nonetheless,... all of those offenses constituted "Current Offenses" for the purpose of determining the defendant's risk level pursuant to SORA and, indeed, were considered as such by the Board of Examiners of Sex Offenders and the Supreme Court, Richmond County, in conducting their SORA assessment.
>
> The only reasonable interpretation of the statute and Guidelines, and the one that most effectuates SORA's purpose, is that only one SORA "disposition" may be made per "Current Offense," or group of "Current Offenses." Once a court has rendered "an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based" and submitted such order to the Division (Correction

Law § 168-d[3]), the Division has all the information it needs to create a file for the defendant and add it to the registry (see Correction Law § 168-b[1]). In this case, once the Division received the SORA order from Richmond County, it had the information it needed to serve SORA's goal of "protect[ing] the public from" this particular sex offender ... . **People v Cook, 2015 NY Slip Op 04295, 2nd Dept 5-20-15**

CRIMINAL LAW/SEX OFFENDER REGISTRATION ACT (SORA)/UPWARD DEPARTURE

Upward Departure Proper In Light of Felony Conviction Not Considered in the Risk Assessment--Criteria for Upward Departure Explained In Some Detail

The Second Department determined County Court properly departed (upward) from the presumptive risk level based upon a felony conviction which pre-dated the sexual offenses considered in the risk assessment. The Second Department explained in some detail the criteria for an upward departure:

> A court is permitted to depart from the presumptive risk level if "special circumstances" warrant departure (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). An upward departure is permitted only if the court concludes "that there exists an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (id. at 4...). In determining whether an upward departure is permissible and, if permissible, appropriate, a SORA court must engage in a multi-step inquiry. First, the court must determine whether the People have articulated, as a matter of law, a legitimate aggravating factor. Next, the court must determine whether the People have established, by clear and convincing evidence, the facts supporting the existence of that aggravating factor in the case before it. Upon the People's satisfaction of these two requirements, an upward departure becomes discretionary. If, upon examining all of circumstances relevant to the offender's risk of reoffense and danger to the community, the court concludes that the presumptive risk level would result in an underassessment of the risk or danger of reoffense, it may upwardly depart ... . **People v Williams, 2015 NY Slip Op 04465, 2nd Dept 5-27-15**

CRIMINAL LAW/SHOW-UP IDENTIFICATION

Police Officer's Draping Defendant's Striped Shirt Over Defendant's Chest During a Show-Up Identification Was Tantamount to Pointing Out the Defendant as the Perpetrator---Victim Had Told the Police the Perpetrator Was Wearing a Striped Shirt

The Second Department, over a dissent, determined the show-up identification procedure was unduly suggestive, requiring suppression of the identification testimony and a new trial. The defendant did not match the description of a person who had just robbed the victim at knife-point. However, the victim said the robber was wearing a brown and white striped shirt. When a police officer spotted the defendant, he was shirtless but was carrying a red and white striped shirt. The victim was driven to where the defendant was being held, but she was only able to identify the defendant as the robber after an officer draped the striped shirt over his chest:

> Here, the active police involvement in the identification process—the police officers' draping of the shirt over the defendant's chest immediately after the complainant had hesitated in identifying the shirtless defendant as the perpetrator and before she did identify him—renders this showup identification procedure unduly suggestive ... . The actions taken by the police officers suggested to the complainant that the defendant was the perpetrator. Although the complainant saw the shirtless defendant, she did not identify him as the perpetrator until after the police held the striped shirt up against him. This action by the police is akin to the police having pointed out the defendant as the perpetrator ... . **People v James, 2015 NY Slip Op 03864, 2nd Dept 5-6-15**

CRIMINAL LAW/SHOW-UP IDENTIFICATION

Cumulative Effect of Several "Suggestive" Factors Rendered the Show-Up Identification Inadmissible

The First Department, in a full-fledged opinion by Justice Gische, over a dissent, determined the show-up identification of the defendants was unduly suggestive and should have been suppressed. While none of the "suggestive" factors alone would have been sufficient to invalidate the identification, the cumulative effect of all the factors rendered the identification inadmissible. The defendants were handcuffed and standing together in a well-lit garage, surrounded by police officers. The driver of the police car carrying the complainant, who had been

assaulted an hour before by "three or four black teens," shown the car's headlights and "takedown" lights on the defendants. The defendants, none of whom were "teens," and one of whom was light-skinned, were covered in soot. The complainant looked at the defendants through the police car's mesh divider and windshield. In addition to noting there were no "exigent circumstances" mandating the show-up procedure, the court described the factors which cumulatively rendered the show-up inadmissible at trial as follows:

> Here, the three suspects were standing side by side after the complainant had described her attack by multiple attackers. Defendants were flanked by as many as eight officers and, apart from the complainant, they were the only civilians present. Defendants were visibly restrained. This was obvious, not only from the fact that their hands were behind their backs, but also from the fact that defendant Santiago, who had visible physical injuries to his face indicative of a recent scuffle, was being physically restrained by one of the officers as the complainant made her identification. Defendants were covered in soot, such that it affected their appearance, particularly as to skin color. Previously, the complainant had described her assailants' "black" skin color as a prominent identifying feature, along with their ages. As the complainant was driven from the precinct to the location of the showup identification, she was told that she would be looking at people, and that she should tell the officers if she had seen them before. When defendants were shown to the complainant, they were illuminated by the patrol car's headlights and takedown flood lights, even though the garage lighting itself was good.
>
> We recognize that some of these factors, either alone or even in combination do not necessarily make a showup identification unduly suggestive. A showup identification may be acceptable, even where a defendant is handcuffed and guarded by police officers when shown to the complainant ... . Nor is the fact that remarks are made to a complainant before being taken to a lineup itself a basis for a prohibited showup identification ... . This is because a person of ordinary intelligence would realize that the police are showing them someone suspected of having committed a crime ... . Even shining lights on a suspect is not by itself unduly suggestive ... . It is the cumulative effect of what otherwise might be individually permissible that makes this particular showup identification unduly suggestive. The showup was clearly beyond the high water mark set forth by the Court of Appeals... . **People v Cruz, 2015 NY Slip Op 04597, 1st Dept 6-2-15**

CRIMINAL LAW/STANDING TO CONTEST SEARCH

Court's Erroneous Ruling that Defendant Did Not Have Standing to Contest a Search Was Followed by Defendant's Entering a Guilty Plea---Because Defendant May Not Have Pled Guilty Had the Suppression Motion Been Held and Suppression Granted, the Matter Was Remitted for a Suppression Hearing (After Defendant Had Completed His Sentence)

The Fourth Department determined Supreme Court erroneously ruled defendant did not have standing to contest a search. After that ruling the defendant pled guilty and has since completed his sentence. Because the suppression hearing should have been held, and because the defendant may not have pled guilty had suppression been granted, the matter was remitted for a suppression hearing. **People v Kendrick, 2015 NY Slip Op 03979, 4th Dept 5-8-15**

CRIMINAL LAW/SUPERIOR COURT INFORMATION

Superior Court Information Was Jurisdictionally Defective---The Offenses Were Not the Same As, or Lesser Included Offenses of, Those In the Felony Complaint

The Third Department determined defendant's plea to a superior court information (SCI) could not stand because the crimes in the information were not the same as, or lesser included offenses of, those in the felony complaint:

> ... [T]he SCI was jurisdictionally defective in this case. The crimes charged in the SCI, to which defendant pleaded guilty, were required to be the same or lesser included offenses of those listed in the felony complaint ... . However, the only crimes listed in the felony complaint were the class E felony of possessing a sexual performance by a child and two class A misdemeanors. The SCI, on the other hand, charged defendant with the class C felony of use of a child in a sexual performance and the class B felony of course of sexual conduct against a child in the first degree. Clearly, the latter crimes were not lesser included offenses of the former. Accordingly, due to this jurisdictional defect, we are constrained to conclude that the guilty plea must be vacated and the matter remitted to County Court for further proceedings. **People v O'Neill, 2015 NY Slip Op 05517, 3rd Dept 6-24-15**

CRIMINAL LAW/SUPPRESSION OF STATEMENT

Insufficient Break Between "Unwarned" Statement and Statement Made Subsequently After the Miranda Warnings Were Given---Entire Statement Should Have Been Suppressed

The Fourth Department determined there was an insufficient break (10 minutes) between an "unwarned" inculpatory statement made by the defendant and a subsequent statement made after the Miranda warnings were given. The entire statement should have been suppressed:

> "When, as part of a continuous chain of events, a defendant is subjected to custodial interrogation without Miranda warnings, any statements made in response as well as any additional statements made after the warnings are administered and questioning resumes must be suppressed" ... . Where, however, "there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning," his or her statements in response to renewed questioning after he or she has received Miranda warnings and waived his or her constitutional rights may be admitted ... . Here, the initial questioning by the second officer, although brief, produced an inculpatory statement directly related to the instant crime... , and the second interrogation, which produced another inculpatory statement, occurred less than 10 minutes later and in the same location ... . Moreover, contrary to the People's contention, the record does not establish that "a reasonable suspect in defendant's position would have perceived a marked change in the tenor of his engagement with [the] police" ... . We thus conclude that "it cannot be said that there was such a definite, pronounced break' in the interrogation that defendant was returned to the position of one who was not under the influence of the initial improper questioning" ... . **People v Walker, 2015 NY Slip Op 05313, 4th Dept 6-19-15**

CRIMINAL LAW/TEMPORARY DETENTION

Placing Defendant in the Back of a Patrol Car Did Not Constitute De Facto Arrest

In affirming the conviction, the Fourth Department noted that placing the defendant in the back seat of a patrol car did not, under the circumstances, amount to a de facto arrest. Rather "the temporary detention of defendant was proper as 'part of a continuum of permissible police intrusions in response to escalating evidence of criminal activity' ;"

> We conclude that "the police action fell short of the level of intrusion upon defendant's liberty and privacy that constitutes an arrest" ... . Here, the brief investigative detention of defendant by the police was "justified by reasonable suspicion that a crime [had] been, [was] being or [was] about to be committed" ..., i.e., "that quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" ... . Indeed, after the man with defendant displayed the contents of the duffel bag, the officer had reasonable suspicion that defendant and the other man had committed a crime. The established circumstances at that point were that the officer had received a report that suspicious individuals carrying bags had gone behind a residence in an area where burglaries targeting copper pipe had previously occurred; the officer observed two men matching the description coming down a driveway carrying bags; the two men admitted that they were walking around looking for copper plumbing; and the contents of the duffel bag revealed their actual possession of numerous copper pipes of various sizes with no indication of other scrap metals. Under these circumstances, we conclude that the temporary detention of defendant was proper as "part of a continuum of permissible police intrusions in response to escalating evidence of criminal activity" ... . Here, "the police diligently pursued a minimally intrusive means of investigation likely to confirm or dispel suspicion quickly, during which time it was necessary to detain the defendant" ... , and "a less intrusive means of fulfilling the police investigation was not readily apparent" ... . **People v Howard, 2015 NY Slip Op 05350, 4th Dept 6-19-15**

CRIMINAL LAW/"VIOLENT FELONY OVERRIDE"/AUTHORITY OF SENTENCING COURT

Court Could Not Promise a "Violent Felony Override" Allowing Defendant to Participate in Programs While Incarcerated---Only the DOCCS Can Determine Defendant's Eligibility---Conviction by Guilty Plea Reversed

The Second Department determined the sentencing court had no authority to promise the defendant, as part of the plea bargain, a "violent felony override" which

would allow the defendant to participate in a variety of programs while incarcerated. Where a defendant is statutorily qualified (as defendant was) it is up to the Department of Corrections and Community Supervision (DOCCS) to determine a defendant's eligibility for the programs. Therefore, defendant's guilty plea was reversed because it was based in part on misinformation (not knowing and voluntary):

> ... [A] "violent felony override" is "an imprecise and potentially confusing term that is sometimes used to describe a document referred to in 7 NYCRR 1900.4(c)(1)(iii) that permits the Department of Corrections and Community Supervision (hereinafter DOCCS) to ascertain whether an inmate has met one of the threshold requirements to be eligible for a temporary release program despite conviction of a specified violent felony offense" (id.; see Correction Law § 851[2]; Executive Order [Spitzer] No. 9 [9 NYCRR 6.9]; Executive Order [A. Cuomo] No. 2 [9 NYCRR 8.2]; 7 NYCRR 1900.4[c][1][ii], [iii]; [2]). "Certain subdivisions of the specified violent felony offenses will not disqualify an inmate from eligibility for temporary release. The document provided for in 7 NYCRR 1900.4(c)(1)(iii) need only set forth the exact offense, including the section, and subdivision if any, of the crimes of which the inmate was convicted. When the document indicates that the inmate was convicted of a subdivision of one of the enumerated violent felony offenses that does not automatically disqualify the inmate from eligibility for temporary release, the inmate may use it to establish that he has met one of the threshold requirements for eligibility" ... . The document itself does not qualify an inmate for eligibility for temporary release ... "It is for DOCCS, and not the court or the district attorney, to determine whether conviction under a particular section and subdivision disqualifies an inmate from eligibility" (id.; see generally 7 NYCRR 1900.4). The issuance of the document specified in 7 NYCRR 1900.4(c)(1)(iii) is not discretionary, and a defendant is entitled to have the exact statutory provisions under which he or she was convicted specified in the sentence and commitment ... .
>
> As part of the plea agreement, the County Court promised the defendant that it would sign a "violent felony override," which would make the defendant eligible for several programs in prison. Since the document specified in 7 NYCRR 1900.4(c)(1)(iii) does not, by itself, qualify an inmate for eligibility for temporary release, and eligibility for temporary release programs are determined by DOCCS, the court exceeded its authority by promising the defendant something that it had no authority to promise in exchange for the defendant's plea of guilty. Under these circumstances, the defendant's plea of guilty was not knowing, voluntary, and intelligent... . **People v Ballato, 2015 NY Slip Op 04140, 2nd Dept 5-13-15**

CRIMINAL LAW//WEIGHT OF THE EVIDENCE/EVIDENCE/DNA/APPEALS

Medical Examiner's Testimony Did Not Rule Out the Possibility that Someone Other than the Defendant Contributed DNA to a Mixture from At Least Three Persons---Conviction Reversed as Against the Weight of the Evidence

The First Department, over a dissent, determined that defendant's conviction of criminal possession of a weapon was against the weight of the evidence. The medical examiner testified there was a mixture of DNA from at least three persons found on the weapon and defendant "could" have been a contributor to that mixture. "In other words, the medical examiner could not rule out the reasonable possibility that another unrelated individual could match the DNA profile." The court explained its role in a "weight of the evidence," as opposed to a "legal insufficiency," analysis:

> On this appeal, defendant does not ask us to reverse his convictions of criminal possession of a weapon in the second and third degrees on the ground that the trial evidence was legally insufficient to support such convictions. Instead, defendant argues that his convictions should be reversed because the jury's verdict was against the weight of the evidence. An appellate court weighing the evidence "must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony'" ... . "If based on all the credible evidence a different finding would not have been unreasonable" and if the "trier of fact has failed to give the evidence the weight it should be accorded, the appellate court may set aside the verdict" ... . When an appellate court performs weight of the evidence review, it sits, in effect, as a "thirteenth juror" ... .
>
> We agree with defendant that the verdict was against the weight of the evidence ... . The evidence failed to connect defendant with a pistol that had been discarded during a shooting incident. **People v Graham, 2015 NY Slip Op 04401, 1st Dept 5-26-15**

PRACTICE POINT

If the evidence supporting a conviction has sufficient flaws, be sure to ask for a "weight of the evidence" review of the evidence on appeal. Note

the subtle difference between whether a verdict is supported by legally sufficient evidence (an issue which must be preserved by specific motions to dismiss) and whether a verdict is against the weight of the evidence, which need not be preserved by a motion. Here the defendant successfully argued the DNA evidence presented by the medical examiner did not have sufficient weight to support the conviction. [Editor's note: I find this distinction difficult to understand and articulate in the context of this decision. In the usual case a "weight of the evidence" analysis looks at the credibility of (conflicting) witness testimony. If a witness provides sufficient evidence to make out a prima facie case, a motion to dismiss for legal insufficiency will fail. However, if the credibility of witness' testimony is sufficiently suspect, a "weight of the evidence" review may result in reversal.]

DEFAMATION

Statements at Issue Were Statements of Opinion Directly Linked to the Plaintiff's Writings--- Defamation Complaint Properly Dismissed

The Second Department determined the defamation action against a newspaper was properly dismissed. The newspaper article referred to writings by the plaintiff which were described as racist. The article questioned whether plaintiff, who allegedly held "white supremacist" views, should be the principal of a school with minority students. The court determined the relevant statements in the article were statements of opinion which were linked directly to quotations from plaintiff's writings. Therefore the statements constituted nonactionable opinion:

> "Since falsity is a necessary element of a defamation cause of action and only facts' are capable of being proven false, it follows that only statements alleging facts can properly be the subject of a defamation action'" ... . In distinguishing between facts and opinion, the factors the court must consider are (1) whether the specific language has a precise meaning that is readily understood, (2) whether the statements are capable of being proven true or false, and (3) whether the context in which the statement appears signals to readers that the statement is likely to be opinion, not fact ... . "The dispositive inquiry . . . is whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff" ... .
>
> In this case, the context of the complained-of statements was such that a reasonable reader would have concluded that he or she was reading opinions, and not facts, about the plaintiff. Moreover, in all instances, the Daily News defendants made the statements with express reference to the written materials authored by the plaintiff, including quotations from the books. Thus, the statements of opinion are nonactionable on the additional basis that there was full disclosure of the facts supporting the opinions ... . **Silverman v Daily News, L.P., 2015 NY Slip Op 05463, 2nd Dept 6-24-15**

DEFAMATION/ATTORNEYS/LITIGATION PRIVILEGE

Absolute Privilege Attaches to Statement Made by a Nonparticipant in the Litigation Which Is Republished by an Attorney In the Course of the Litigation

The Third Department determined an action based upon the republication of an allegedly defamatory statement (made by a nonparticipant in the litigation) by an assistant attorney general in the course of a medical malpractice case was precluded by the absolute privilege afforded attorneys in matters related to litigation:

> Statements made by parties and their counsel in the context of a legal action or proceeding are protected by an absolute privilege so long as, "by any view or under any circumstances, they are pertinent to the litigation" ... . Allowing such statements or writings to form the basis of an action for defamation "would be an impediment to justice, because it would hamper the search for truth and prevent making inquiries with that freedom and boldness which the welfare of society requires" ... . A liberal standard guides the inquiry of what is pertinent ... , and encompasses "any statement that may possibly or plausibly be relevant or pertinent, with the barest rationality" ... . Moreover, the burden rests with claimant "to conclusively, and as a matter of law, establish the impertinency and the irrelevance of the statement" ... .
>
> Here, claimant asserts that the memorandum was prepared by a nonparticipant to the litigation which removes it from the protection of the absolute privilege; however, this contention ignores that claimant's action is grounded in the republication of the alleged defamatory statement by the AAG, whose statements are afforded the protection ... . It is evident that the AAG turned over the memorandum after the malpractice litigation had been commenced in federal court ... and, further, the statements in the memorandum were clearly pertinent to the malpractice litigation, as they concerned allegations that were relevant to the treatment of the inmate ... . **McPhillips v**

State of New York, 2015 NY Slip Op 05242, 3rd Dept 6-18-15

DEFAMATION/DAMAGES/OSTRACISM AND REJECTION/EDUCATION-SCHOOL LAW/NAME-CLEARING HEARING

The Absence of Proof Defendants Disclosed Slanderous Statements Included in Letters to Plaintiff Precluded a "Name-Clearing" Hearing/The Jury Should Not Have Been Allowed to Consider "Ostracism and Rejection" Damages Absent Proof Defendants Were Responsible for Republication of the Slanderous Remarks by Third Persons

In a lawsuit stemming from allegedly slanderous remarks made by defendants in connection with plaintiff's termination from employment by the defendant school district, the Third Department determined plaintiff's petition for a name-clearing hearing should have been dismissed, because there was no evidence defendants disclosed the relevant letters to anyone, and the jury should not have been allowed to consider rumor-related "ostracism and rejection" damages, because there was no evidence defendants were responsible for the alleged repetition of the slander by third persons. A new trial on damages was ordered:

> Proof of "ostracism and rejection" to establish damages for defamation is only admissible if the proof is "'the direct and well-connected result'" of a defamatory statement at issue ... . Further, even when a defendant's slanderous statement is connected by proof to that statement's republication, "'one who utters a slander . . . is not responsible for its voluntary and unjustifiable repetition, without his [or her] authority or request, by others over whom he [or she] has no control and who thereby make themselves liable to the person injured'" ... . This is because "each person who repeats the defamatory statement is responsible for the resulting damages" ... .
>
> Plaintiff's proof regarding rumors and ostracism fail these tests. Plaintiff and her witnesses offered no proof that directly connected [defendants'] slanderous statements to the ostracism that plaintiff allegedly suffered ... . Further, even assuming that the content of the rumors allegedly spread by community members allowed for a reasonable inference that said community members were aware of [defendants'] slanderous statements, proof of republication was nonetheless improper given the absence of evidence that defendants had any knowledge of or played any role in such republication ... . Compounding the effect of the error, Supreme Court did not instruct the jury that plaintiff had the burden of proving that the ostracism harms that plaintiff allegedly suffered were actually connected to [defendants'] statements, despite defendants' request that it do so. **Wilcox v Newark Val. Cent. School Dist., 2015 NY Slip Op 04890, 3rd Dept 6-11-15**

DEFAMATION/STATEMENTS REPORTED IN A NEWSPAPER ARTICLE

Prima Facie Case of Defamation Made Out in the Complaint

The Fourth Department determined the complaint made out a prima facie case of defamation. The statements were included in a newspaper article and were attributed to defendant. The court succinctly explained the applicable law:

> "The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se"..., and we conclude that the complaint sufficiently alleges those elements and, thus, states a viable cause of action. We further conclude, contrary to defendant's contention, that the "particular words complained of" were sufficiently set forth in the complaint as required by CPLR 3016 (a) and, in any event, plaintiff attached to the complaint the full Niagara Falls Reporter article containing the alleged defamatory statements ... . Defendant contends that, because he did not participate in the drafting of the Niagara Falls Reporter article, he cannot be held liable for defamation and, thus, the court properly granted his cross motion. That contention is without merit. It is well established that "[a]nyone giving a statement to a representative of a newspaper authorizing or intending its publication is responsible for any damage caused by the publication" ... . **Accadia Site Contr., Inc. v Skurka, 2015 NY Slip Op 04958, 4th Dept 6-12-15**

DISCIPLINARY HEARINGS (INMATES)

Failure to Interview Witnesses Justified Annulment of the Determination

The Third Department determined the failure of the employee assistant to interview the witnesses identified by the petitioner and the hearing officer's direction that witnesses not be interviewed required annulment of the determination:

We agree with petitioner that he was deprived of meaningful employee assistance. The record establishes that when petitioner complained of inadequate assistance, the hearing was adjourned to provide petitioner with additional employee assistance. Upon reconvening, petitioner again complained that, although the employee assistant interviewed the four witnesses he requested, the employee assistant failed to speak with the other 15 identified inmates involved in the incident. In response, the Hearing Officer stated that he, in fact, had instructed the employee assistant not to speak with those 15 inmates as the information petitioner was seeking was irrelevant to the determination. Under these circumstances, the employee assistant should have interviewed the inmates involved and reported back to petitioner with the results in order to assist petitioner in preparing an adequate defense ... . Moreover, under these circumstances, we find that the Hearing Officer improperly interfered with and deprived petitioner of his right to employee assistance by directing the assistant not to contact 15 inmates involved in the incident on the basis that he considered the information requested to be irrelevant. Accordingly, the determination must be annulled. **Matter of Williams v Fischer, 2015 NY Slip Op 03901, 3rd Dept 5-7-15**

DISCIPLINARY HEARINGS (INMATES)

Confinement in Special Housing Unit Was Harsh and Excessive Punishment---No Showing Petitioner Was a Threat to Institutional Safety

The Third Department determined petitioner posed no threat to institutional safety and, therefore, his confinement in a special housing unit constituted harsh and excessive punishment:

> ... [B]ecause neither the charges of which he is guilty nor the evidence presented at the hearing establishes that petitioner's conduct was a threat to institutional safety and security, we find that the imposition of confinement in the special housing unit is harsh and excessive ... .**Matter of Kim v Annucci, 2015 NY Slip Op 04178, 3rd Dept 5-14-15**

DISCIPLINARY HEARINGS (INMATES)/EVIDENCE

Failure to Take Steps to Verify and Corroborate the Information from a Confidential Source Required Annulment and Expungement of the Misbehavior Determination

The Third Department determined the absence of information corroborating the confidential-source allegations which were the basis for the misbehavior report, coupled with the hearing officer's failure to interview either the source or the sergeant who obtained the confidential information, required annulment and expungement of the misbehavior determination:

> ... [C]onfidential information may provide substantial evidence supporting a prison disciplinary determination as long as it is sufficiently detailed and probative that the Hearing Officer may make an independent assessment of the reliability of the information ... . Petitioner contends that the Hearing Officer failed to independently assess the reliability of the confidential information considered here. Based upon our review of the record, we must agree. The misbehavior report was the primary evidence supporting the disciplinary determination, as the sergeant who prepared it did not testify at the hearing. The sergeant based the report upon confidential memoranda that she prepared after obtaining incriminating information directly from the confidential source. The memoranda, however, do not contain additional information or corroborating details to facilitate verification of the source's reliability ... . Moreover, the Hearing Officer did not personally interview either the source or the sergeant who obtained the information. In view of this, we agree with petitioner that the necessary independent assessment of the confidential information was lacking and that the determination must be annulled and all references thereto expunged from petitioner's institutional record ... . **Matter of Cooper v Annucci, 2015 NY Slip Op 05548, 3rd Dept 6-25-15**

EDUCATION-SCHOOL LAW/EDUCATION LAW/ADMINISTRATIVE LAW/STATUTE OF LIMITATIONS

The Three-Year Statute of Limitations in the Education Law Need Not Be Raised as a Defense---Here the Charges Against a Teacher Were Time-Barred---The Department of Education (DOE) Did Not Demonstrate the Charges Were Criminal (to Which the Three-Year Statute Would Not Have Applied)

The First Department determined the third set of charges brought against petitioner-teacher, alleging the teacher improperly obtained his daughter's admission to NYC Department of Education (DOE) schools for which she was not zoned, was time-barred. Although the three-year statute of limitations in the Education Law would not apply had the allegations constituted a crime, the hearing officer did not find the teacher's conduct to be criminal. The court determined that the first two set of charges against the teacher did not justify termination (the penalty imposed) and remitted the matter for a lesser punishment. The court noted that the statute of limitations in the Education Law need not be raised as a defense:

> Supreme Court did not exceed its authority in finding that the third set of charges against petitioner was time-barred. Education Law § 3020-a(1) requires that disciplinary charges against a teacher be brought within three years from the date of the alleged misconduct, unless the alleged misconduct constituted a crime when committed. Petitioner was not required to raise the statutory time limitation set forth in Education Law § 3020-a(1) as a defense in the disciplinary proceeding. Where, as here, "a statute creates a right unknown at common law, and also establishes a time period within which the right may be asserted, the time limit is . . . a condition attached to the right as distinguished from a [s]tatute of [l]imitations which must be asserted by way of defense" ... . Accordingly, DOE had the burden of establishing that it met the time requirement set forth in Education Law § 3020-a(1) or that the crime exception to the time requirement applied ... . DOE failed to meet its burden. **Matter of Suker v New York City Board/ Dept. of Educ., 2015 NY Slip Op 04940, 1st Dept 6-11-15**

EDUCATION-SCHOOL LAW/INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)/STATUTORY INTERPRETATION/PRIVATE RIGHT OF ACTION BY LOCAL EDUCATONAL AGENCIES (LEA'S)

Individuals with Disabilities Education Act (IDEA) Does Not Confer a Private Right of Action Upon Local School Districts to Challenge IDEA-Related Rulings by the State Education Department (SED)

The Third Department, in a full-fledged opinion by Justice Peters, determined the Individuals with Disabilities Education Act (IDEA) did not give local educational agencies (LEA's) (here a local school district) a private right of action to challenge a ruling by the State Education Department (SED) . Here the SED found that the LEA's dispute resolution practices violated state laws and regulations promulgated in accordance with the IDEA and ordered corrective measures. The LEA then challenged the SED's rulings in an Article 78 action. The Third Department noted that the IDEA does not expressly confer a right of private action on LEA's in this context and therefore whether such a right exists depends upon congressional intent. Because the IDEA confers a private right of action upon a specialized class, i.e., "any party aggrieved" by IDEA-related administrative proceedings which involve due process afforded a particular child, it follows that Congress did not intend to confer such a right upon LEA's:

> ... Congress created procedural safeguards to ensure that students with disabilities receive a free appropriate public education and, in doing so, expressly granted a private right of action to "any party aggrieved" by an SEA's administrative findings or decision resolving a due process complaint challenging "any matter relating to the identification, evaluation or educational placement of [a particular] child, or the provision of a free appropriate public education to such child" (20 USC § 1415 [b] [6] [A]; [f], [g], [i] [2] [A]; see also Education Law § 4404; 8 NYCRR 200.5 [i], [j], [k], [l])[FN2]. Since the IDEA includes an express right of action in favor of a specific class of persons, it is logical to assume that, had Congress intended to bestow upon LEAs a right of action to challenge an SEA's regulatory and enforcement actions, it would have expressly done so ... .
>
> Further evidence of a lack of Congressional intent can be found in the hierarchal regulatory and enforcement structure created by the IDEA, which requires the federal Secretary of Education to monitor the states' implementation of IDEA mandates and imposes upon the states corresponding regulatory and enforcement

responsibilities over LEAs (see 20 USC § 1412 [a] [11]; § 1416 [a] [3]; 34 CFR 300.600, 300.603). The delegation of regulatory and enforcement power to the Secretary of Education and the states, but not to LEAs, suggests that Congress specifically intended to deny LEAs a right of action to challenge an SEA's compliance with the IDEA ... . Moreover, it would be inconsistent for Congress to implicitly create this right of action, as doing so would divest the Secretary of Education and the states of their regulatory and enforcement authority and would transfer that power to the Judiciary ... . **Matter of East Ramapo Cent. Sch. Dist. v King, 2015 NY Slip Op 04703, 3rd Dept 6-4-15**

EDUCATION-SCHOOL LAW/TEACHERS/TENURE BY ESTOPPEL/PROBATIONARY PERIOD, CALCULATION OF/MATERNITY LEAVE

Teacher Entitled to Tenure by Estoppel---Proper Way to Calculate Probationary Period Which Included Unpaid Maternity Leave Explained

The Second Department determined a teacher was entitled to tenure by estoppel. The number of days the teacher was on unpaid, approved maternity leave was excluded from the probationary period. Properly calculated (the proper method was explained), the teacher worked beyond the three-year probationary period and was therefore entitled to tenure by estoppel:

> Tenure by estoppel results "when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term" ... . A teacher who has acquired tenure by estoppel, but is nonetheless improperly terminated, is entitled to reinstatement, retroactive to the last date of employment, back pay, and all accrued benefits ... .
>
> Where a teacher is granted a period of unpaid maternity leave during her three-year probationary period, that period of leave may properly be excluded from computation of a teacher's three-year probationary period ... . Contrary to the appellants' contention in this proceeding, such an extension of a teacher's probationary period is to be performed utilizing a workday-to-calendar day methodology. That is, for each workday missed as a result of a teacher's unpaid leave, the three-year probationary period is to be extended by the corresponding number of calendar days ... . Such a methodology is consistent with both Education Law § 3012(3), which provides that "no period in any school year for which there is no required service and/or for which no compensation is provided shall in any event constitute a break or suspension of probationary period or continuity of tenure rights," and the purpose of the three-year probationary period in affording a school district an opportunity to evaluate an individual's performance as a teacher prior to granting tenure ... .
>
> Applying the foregoing principles to this proceeding, we conclude that the petitioner worked past her extended probationary period end date. Accordingly, the Supreme Court properly determined that she acquired tenure by estoppel, and that she is entitled to reinstatement to her position, with tenure and back pay from the date her employment was terminated, i.e., January 21, 2011. **Matter of Brown v Board of Educ. of Mahopac Cent. Sch. Dist., 2015 NY Slip Op 05471, 2nd Dept 6-24-15**

ELECTION LAW/COUNTY LAW/TOWN LAW/RESIDENCE OF VOTERS

Seasonal Residents Properly Deemed "Residents" of a Town for Election Purposes

The Third Department, in a full-fledged opinion by Justice Peters, determined that seasonal residents of a condominium were properly deemed "residents" of the town where the condominium is located for voting purposes under the Election Law. The court noted that, under the Election Law, a voter may have two residences and choose one of them for election purposes. The Election Law requires only that the voter have legitimate, significant and continuing attachments to the residence and there be no "aura of sham:"

> The [County Election] Board's determination upholding the voter registrations at issue constituted presumptive evidence of the ... voters' residence for voting purposes; thus, petitioner was saddled with the weighty burden of proffering sufficient evidence to overcome that presumption (see Election Law § 5-104 [2]...). The Election Law defines "residence" as "that place where a person maintains a fixed, permanent and principal home and to which he [or she], wherever temporarily located, always intends to return" (Election Law § 1-104 [22]...). As the courts of this state have repeatedly explained, the Election Law "does not preclude a person from having two residences and choosing one for election purposes provided he or she has 'legitimate, significant and continuing attachments' to that

residence" ... . "The crucial [factor in the] determination [of] whether a particular residence complies with the requirements of the Election Law is that the individual must manifest an intent, coupled with physical presence 'without any aura of sham'" ... . **Matter of Maas v Gaebel, 2015 NY Slip Op 04353, 3rd Dept 5-21-15**

EMPLOYMENT DISCRIMINATION/EMPLOYMENT LAW/EXECUTIVE LAW/42 USC 1981, 1983

Elements of Actions for (1) Discrimination in Employment and (2) Retaliation for Opposition to Discriminatory Practices Succinctly Described

In determining the employer's (State of New York's) motion for summary judgment was properly granted, the Second Department succinctly explained the elements of an action for discrimination in employment and an action for retaliation for an employee's opposition to discriminatory practices:

> A plaintiff alleging discrimination in employment has the initial burden to establish a prima facie case of discrimination ... . To meet this burden, the plaintiff must show that (1) he or she is a member of a protected class; (2) he or she was qualified to hold the position; (3) he or she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination ... . The burden then shifts to the employer "to rebut the presumption of discrimination by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision" ... . To succeed on the claim, "the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason" ... .
>
> To prevail on a motion for summary judgment in a discriminatory employment action, a defendant must demonstrate either the plaintiff's failure to establish every element of intentional discrimination, or, having offered legitimate, nondiscriminatory reasons for their challenged actions, the absence of a material issue of fact as to whether their explanations were pretextual ... .
> * * *
>
> It is unlawful to retaliate against an employee for opposing discriminatory practices ... . In order to make out a claim for retaliation, a plaintiff must show that (1) he or she has engaged in protected activity; (2) his or her employer was aware of such activity; (3) he or she suffered an adverse employment action based upon the protected activity; and (4) there is a causal connection between the protected activity and the adverse action ... . **Cotterell v State of New York, 2015 NY Slip Op 04601, 2nd Dept 6-3-15**

EMPLOYMENT LAW/EXECUTIVE LAW/CIVIL SERVICE LAW/EMPLOYMENT DISCRIMINATION/DISABILTY DISCRIMINATION/ACCOMMODATION

Question of Fact Whether Employer Considered Accommodation for Plaintiff's Injury---Summary Judgment to Employer Should Not Have Been Granted

Plaintiff's employment with the Department of Correctional Services (DOCS) was terminated (after plaintiff injured her hand) on the ground that plaintiff had failed to demonstrate she was medically fit to return to work and had failed to provide a date by which she would return to full duty. The plaintiff challenged her proposed termination and sought reinstatement before the effective date of termination. The Second Department determined Supreme Court should not have granted summary judgment to the employer (DOCS). A question of fact had been raised about whether DOCS met its duty to consider accommodation for plaintiff's injury:

> An employer normally cannot obtain summary judgment on a disability discrimination claim pursuant to Executive Law § 296 "unless the record demonstrates that there is no triable issue of fact as to whether the employer duly considered the requested accommodation," and the employer cannot present such a record "if the employer has not engaged in interactions with the employee revealing at least some deliberation upon the viability of the employee's request" ... .
>
> "The employer has a duty to move forward to consider accommodation once the need for accommodation is known or requested" (9 NYCRR 466.11[j][4]). Viewing the evidence in the light most favorable to the nonmoving party ... , we find that the plaintiff's responses to the notice of proposed termination could reasonably have been understood as a request for accommodation, which DOCS rejected by terminating the plaintiff's employment based on her inability to return to work within the one year permitted under Civil Service Law § 71.

Therefore, we conclude that the defendants failed to establish, prima facie, that they engaged in a good faith interactive process that assessed the needs of the plaintiff and the reasonableness of her requested accommodation ... . **Cohen v State of New York, 2015 NY Slip Op 05147, 2nd Dept 6-17-15**

EMPLOYMENT LAW/EXECUTIVE LAW/EMPLOYMENT DISCRIMINATION/EDUCATION-SCHOOL LAW/ADMINISTRATIVE LAW

Supreme Court Properly Annulled New York Division of Human Rights' Determination there Was No Probable Cause to Believe the School District Discriminated against Petitioner When It Refused to Hire Her Because of Her Anticipated Absence (Due to Pregnancy)

The Fourth Department affirmed Supreme Court's annulment of the New York Division of Human Rights' (SDHR's) finding, without a hearing, there was no probable cause to believe the school district discriminated against the petitioner. Petitioner was not hired because of her anticipated absence due to pregnancy. The school district's stated reason for not hiring petitioner was that she was going to be unavailable to counsel students and there was concern about the resulting lack of continuity of counseling services for the students. However, the petitioner's unavailability was due to her pregnancy and discrimination could therefore be inferred:

> "Where, as here, a determination of no probable cause is rendered [by SDHR] without holding a public hearing pursuant to Executive Law § 297 (4) (a), the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis' " ... . "Probable cause exists only when, after giving full credence to the complainant's version of the events, there is some evidence of unlawful discrimination" ... . "There must be a factual basis in the evidence sufficient to warrant a cautious [person] to believe that discrimination had been practiced" ... . The complainant's factual showing must be accepted as true on a probable cause determination ... . While our standard of review is highly deferential to the agency's determination ..., we agree with the court that SDHR's determination "was not rationally based upon the evidence presented" ... .
>
> Executive Law § 296 prohibits an employer from refusing to hire or employ an individual based on, inter alia, the individual's sex. In opposition to the petition, the District argued that it decided not to rehire petitioner because of her unavailability and its concern for continuity of counseling services for its students. Petitioner was unavailable to work, however, because of her pregnancy, and we conclude that discrimination could be inferred from the record before us ... . The District relies on Roslyn Union Free Sch. Dist. v State Div. of Human Rights (72 AD2d 808) in support of its argument that it did not discriminate against petitioner. To the extent that Roslyn holds that a decision not to hire an individual because the individual is pregnant is not a form of discrimination (see id. at 809-810), we decline to follow it. **Matter of Mambretti v New York State Div. of Human Rights, 2015 NY Slip Op 05384, 4th Dept 6-19-15**

EMPLOYMENT LAW/EXECUTIVE LAW/EMPLOYMENT DISCRIMINATION/HOSTILE WORK ENVIRONMENT/RETALIATION FOR OPPOSING DISCRIMINATORY CONDUCT

"Hostile Work Environment" (Allegedly Offensive Sex-Related Remarks) and "Retaliation for Opposition to Discriminatory Practices" Causes of Action Explained

The Second Department determined defendant-employer was entitled to summary judgment on plaintiff-employee's "hostile work environment" cause of action (allegedly offensive sex-related remarks) but was not entitled to summary judgment on plaintiff-employee's "retaliation for opposing discriminatory conduct" cause of action. Defendant was able to demonstrate the allegedly offensive remarks were isolated incidents which did not permeate the work environment. But a question of fact was raised about the "retaliation" cause of action. Plaintiff was terminated one day after the employer received a letter about the alleged discrimination from plaintiff's attorney. The Second Department explained the elements of "hostile work environment" and "retaliation for opposing discriminatory conduct" causes of action:

> A hostile work environment exists where the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" ... . Various factors, such as frequency and severity of the discrimination, whether the allegedly discriminatory actions were threatening or humiliating or a "mere offensive utterance," and whether the alleged actions "unreasonably interfere[ ] with an employee's work" are to be considered in determining whether a hostile work environment exists ... .

> The allegedly abusive conduct must not only have altered the conditions of employment of the employee, who subjectively viewed the actions as abusive, but the actions must have created an "objectively hostile or abusive environment—one that a reasonable person would find to be so" ... . * * *
>
> Under the New York State Human Rights Law, it is unlawful to retaliate against an employee for opposing discriminatory practices (see Executive Law § 296[7]...). In order to make out a cause of action for retaliation, "[a] plaintiff must show that (1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" ... . "To establish its entitlement to summary judgment in a retaliation case, a defendant must demonstrate that the plaintiff cannot make out a prima facie claim of retaliation or, having offered legitimate, nonretaliatory reasons for the challenged actions, that there exists no triable issue of fact as to whether the defendant's explanations were pretextual" ... . **La Marca-Pagano v Dr. Steven Phillips, P.C., 2015 NY Slip Op 05162, 2nd Dept 6-17-15**

ENVIRONMENTAL LAW/CITY ENVIRONMENTAL QUALITY REVIEW (CEQR)/FINAL ENVIRONMENTAL IMPACT STATEMENT (FEIS)/MUNICIPAL LAW

City Was Not Required to Consider the Petitioners' Preferred Scenario for Development---City Was Required Only to Consider the "No Action" Alternative

The First Department determined the city (NYC) took the requisite "hard look" at a development project and provided a "reasoned elaboration" of the basis for its approval of the project. The court noted that, although the City Environmental Quality Review (CEQR) requires that the Final Environmental Impact Statement (FEIS) include an analysis of a "No Action" alternative (an analysis based on the assumption the project will not be constructed), the CEQR does not require the FEIS to consider the petitioners' preferred alternative development scenario. **Matter of Residents for Reasonable Dev. v City of New York, 2015 NY Slip Op 04560, 1st Dept 5-28-15**

ENVIRONMENTAL LAW/EMINENT DOMAIN PROCEDURE LAW (EDPL)/STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA)/MUNICIPAL LAW/TOWN LAW

Town Board Should Not Have Considered the Environmental Impact of Only One Small Part of a Revitalization Project, as Opposed to the Entire Revitalization Project, without Explaining the Reasons for Limiting Its Review In Accordance with the Requirements of the State Environmental Quality Review Act

The Second Department determined the town board did not complete the required review under the State Environmental Quality Review Act (SEQRA) in connection with an Eminent Domain Procedure Law (EDPL) 207 proceeding to condemn certain land for drainage and storm water management improvements (drainage plan). Even though the drainage plan is part of a much larger revitalization plan, the town board considered only the drainage plan in its SEQRA review, a limited review which can be done only if certain SEQRA requirements are met. The matter was remitted to the town board for compliance with the relevant provisions of SEQRA:

> ...[U]nder SEQRA, the Town Board was obligated to consider the environmental concerns raised by the entire project (see 6 NYCRR 617.3[g][1]...). If, at this stage, the larger project is merely speculative or hypothetical, then the Town's separate consideration of the drainage plan would not constitute impermissible segmentation ... . However, the respondents are not claiming that the larger project is speculative or hypothetical. Moreover, to the extent that the Town Board concluded that segmenting the environmental review of the drainage plan from that of the larger revitalization project was warranted under the circumstances presented here, it was required under the SEQRA regulations to "clearly state in its determination of significance . . . the supporting reasons[,]" "demonstrate that such review is clearly no less protective of the environment[,]" and to identify and discuss "[r]elated actions . . . to the fullest extent possible" (6 NYCRR 617.3[g][1]). The Town Board failed to do so. Since the Town Board failed to properly comply with SEQRA, the determination and findings must be rejected, and the matter remitted to the Town Board to undertake an appropriate review ... . **Matter of J. Owens Bldg. Co., Inc. v Town of Clarkstown, 2015 NY Slip Op 04487, 2nd Dept 5-27-15**

ENVIRONMENTAL LAW/NAVIGATION LAW

Dry-Cleaning Chemical, PERC, Is Not "Petroleum" Within the Meaning of the Navigation Law--- Plaintiff's Suit for Clean-Up of PERC Under the Navigation Law Properly Dismissed

The Third Department determined the Navigation Law did not confer upon plaintiff a private right of action to sue for clean-up of PERC, a chemical used in dry cleaning. Plaintiff is the owner of a shopping plaza and sued the estate of the owner a of dry cleaning business that was located in the plaza after PERC was found in the soil. The Navigation Law provides a private right of action to sue for the clean-up of "petroleum." Although PERC is derived from petroleum, the court held PERC does not constitute petroleum within the meaning of the Navigation Law:

> Essentially, plaintiff argues that this finding that PERC is petroleum derived is sufficient to support imposition of liability under the Navigation Law. This would constitute a novel expansion of the law; plaintiff does not cite to, nor can we find, any case in which PERC has been deemed to constitute petroleum under the Navigation Law. At least two other courts have come to the opposite conclusion, finding that PERC does not constitute petroleum under the Navigation Law ... . As defendant argues, the vast and diverse range of products and substances derived from petroleum — many of which pose none of the same dangers as petroleum itself — would make a per se rule imposing liability for the discharge of any petroleum-derived substance unworkable. Accordingly, we find no error in Supreme Court's determination that PERC is not petroleum as defined under Navigation Law article 12 ... . **Fairview Plaza, Inc. v Estate of Peter J. Rigos, 2015 NY Slip Op 04901, 3rd Dept 6-11-15**

FALSE ARREST/FALSE IMPRISONMENT

Re: False Arrest and False Imprisonment--- Allegations Sufficient to Survive Motion to Dismiss for Failure to State a Cause Action

The Fourth Department determined plaintiff's causes of action for false arrest and false imprisonment properly survived a motion to dismiss for failure to state a cause of action: "

> Although liability for false arrest and false imprisonment generally will not be imposed where a civilian complainant merely furnishes information to law enforcement authorities rather than taking " an active role in the [arrest] of the plaintiff, such as giving advice and encouragement or importuning the authorities to act' . . . with the intent that [the] plaintiff be confined" ..., we conclude that the complaint and plaintiff's submissions in opposition to defendant's motion here sufficiently allege that defendant's employees made false statements to investigators with the intent of having plaintiff be arrested and confined ... . **Harrison v Samaritan Med. Ctr., 2015 NY Slip Op 03971, 4th Dept 5-8-15**

FAMILY LAW/CIVIL CONTEMPT/MUNICIPAL LAW/COUNTY LAW

County Department of Human Services Was Entitled to a Hearing On Whether It Should Be Held In Contempt for Failing to Place a Person In Need of Supervision In Foster Care

The Fourth Department determined the County Department of Human Services should not have been held in contempt without a hearing for failing to return the respondent (a person in need of supervision) to foster care. The Department had raised a defense, i.e., the Department had tried but was unable to place the respondent, and was therefore entitled to a hearing. **Matter of Andrew B., 2015 NY Slip Op 03999, 4th Dept 5-8-15**

FAMILY LAW/CONTRACT LAW/PRENUPTIAL AGREEMENT MANIFESTLY UNFAIR

Terms and Circumstances of the Signing of the Prenuptial Agreement Rendered it Manifestly Unfair

The Second Department determined the terms and the circumstances surrounding the signing of a prenuptial agreement supported the order setting the agreement aside:

> In general, New York has a "strong public policy favoring individuals ordering and deciding their own interests through contractual agreements" ... . "However, this right is not and has never been without limitation" ... . "An agreement between spouses or prospective spouses should be closely scrutinized, and may be set aside upon a showing that it is unconscionable, or the result of fraud, or where it is shown to be manifestly unfair to one spouse because of overreaching on the part of the other spouse" ... . Here, the plaintiff established her prima facie entitlement to judgment as a matter of law by demonstrating that the terms of the prenuptial

agreement were manifestly unfair given the nature and magnitude of the rights she waived and in light of the vast disparity in the parties' net worth ... . The circumstances surrounding the signing of the agreement support a finding that the unfairness of the agreement was the product of the defendant's overreaching, including that the agreement was presented to the plaintiff two days before the wedding as "take-it or leave-it" when she had already moved in with her children to the marital home. In opposition, the defendant failed to raise a triable issue of fact ... . **Smith v Smith, 2015 NY Slip Op 05171, 2nd Dept 6-17-15**

FAMILY LAW/CUSTODY/EXPRESSED WISHES OF CHILD

Court Properly Awarded Sole Custody to Mother, Despite Expressed Wishes of Adolescent Child

The Fourth Department, over a two-justice dissent, determined Family Court properly awarded custody to mother, despite the wishes of the adolescent child. The dissenters argued that great weight should have been given to the expressed wishes of the child. **Sheridan v Sheridan, 2015 NY Slip Op 05301, 4th Dept 6-19-15**

FAMILY LAW/CUSTODY BY NONPARENT

Family Court Should Not Have Denied Nonparent's Petition for Custody of a Child, and Awarded Custody to the Father and Mother, in the Absence of an Evidentiary Hearing

The Third Department determined there were questions of fact whether non-parent petitioner could show extraordinary circumstances warranting the award of custody of a child petitioner cared for for years. Family Court had awarded custody to the father and mother without a hearing:

> Under settled law, "a parent has a claim of custody of his or her child, superior to that of all others, in the absence of surrender, abandonment, persistent neglect, unfitness, disruption of custody over an extended period of time or other extraordinary circumstances" ... , and the nonparent bears the "heavy burden of establishing extraordinary circumstances to overcome the [parent's] superior right to custody" ... . "The pertinent factors to be considered in determining whether extraordinary circumstances exist include the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the . . . parent allowed such custody to continue without trying to assume the primary parental role" ..., as well as "the child's psychological bonding and attachments, the prior disruption of the parent['s] custody, separation from siblings and potential harm to the child" and other relevant factors ... . A "consent order, standing alone, does not constitute a judicial finding [or an admission] of . . . extraordinary circumstances" ... . However, we have stressed that, "with few exceptions, an evidentiary hearing is necessary to determine whether extraordinary circumstances exist" ... . **Matter of Liz WW. v Shakeria XX., 2015 NY Slip Op 03888, 3rd Dept 5-7-15**

FAMILY LAW/CUSTODY PROCEEDING BY NONPARENT/STANDING

Non-Parent Petitioner, the "Nongestational" Spouse In a Same-Sex Marriage, Did Not Have Standing to Seek Custody

Family Court properly dismissed a nonparent's action for custody for lack of standing. [Apparently (not spelled out) petitioner is the spouse of the biological parent of the child in a same-sex marriage.] ... "[P]etitioner, who is neither an adoptive parent nor a biological parent of the subject child, failed to allege the existence of extraordinary circumstances that would establish her standing to seek custody". Petitioner did not show "the parent has relinquished [his/her] right due to surrender, abandonment, persistent neglect, unfitness, or other extraordinary circumstances" ... . In addition, petitioner, as the nongestational spouse in a same-sex marriage, could not establish she was a "parent" within the meaning of Family Court Act 417 and Domestic Relations Law 24. The statutes refer to a biological relationship, not legal status. **Matter of Paczkowski v Paczkowski, 2015 NY Slip Op 04325, 2nd Dept 5-20-15**

FAMILY LAW/DOMESTIC RELATIONS LAW/DIVORCE/EQUITABLE DISTRIBUTION/TRUSTS AND ESTATES

Divorce and Right to Equitable Distribution Did Not Abate Upon Husband's Death

The Second Department determined the divorce action and the right to equitable distribution did not abate upon the husband's death. The final adjudication of divorce had been made before the husband's death and death did not abate a vested right to equitable distribution:

> Contrary to the contention of the executor of the husband's estate, the actions did not abate upon

the death of the husband. The Supreme Court had made the final adjudication of divorce before the husband's death, but had not performed the " mere ministerial act of entering the final judgment'" ... . Moreover, a cause of action for equitable distribution does not abate upon the death of a spouse ... . " Consequently, if a party dies in possession of a vested right to equitable distribution, and that right has been asserted during the party's lifetime in an action in a court of this State, that right survives the party's death and may be asserted by the estate'" ... . **Charasz v Rozenblum, 2015 NY Slip Op 03798, 2nd Dept 5-6-15**

FAMILY LAW/FAMILY COURT ACT/EVIDENCE/HEARSAY

Child's Out-of-Court Statements Not Sufficiently Corroborated for Admission Into Evidence

The Second Department determined Family Court properly refused to admit evidence of the child's out-of-court statements in an abuse and neglect proceeding because the statements were not corroborated:

> A child's prior out-of-court statements may provide the basis for a finding of abuse or neglect, provided that these hearsay statements are corroborated so as to ensure their reliability ... . Any other evidence tending to support the reliability of the child's previous statements shall be sufficient corroboration (see Family Ct Act § 1046[a][vi]...). There is a threshold of reliability that the evidence must meet ... . The Family Court has considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated ... . Here, the Family Court did not improvidently exercise its discretion in determining that the statements of the subject child Anthony W. were insufficient to corroborate the statements of the subject child Sally W. as to the alleged sexual abuse perpetrated upon her. **Matter of Gerald W. (Anne R.), 2015 NY Slip Op 05198, 2nd Dept 6-17-15**

FAMILY LAW/FAMILY COURT ACT/JUVENILE DELINQUECY

Untimely Initial Appearance Does Not Mandate Dismissal as Long as the Right to a Speedy Fact-Finding Hearing Is Not Violated

The Third Department determined the failure to conduct an initial appearance within ten days of the filing of the juvenile delinquency petition (charging the equivalent of assault and criminal possession of a weapon) did not require dismissal of the petition. The court attempted to conduct the initial appearance within ten days but respondent failed to appear and no timeliness objection was raised when the initial appearance was conducted five days later. The Third Department explained that the ten-day requirement is flexible, but the requirement that a fact-finding hearing be conducted within 60 days of the initial appearance is mandatory:

> Respondent first contends that dismissal of the June 2013 petition is required because Family Court failed to conduct a timely initial appearance. Because he was not detained, Family Ct Act § 320.2 (1) required that the initial appearance occur "as soon as practicable and, absent good cause shown, within [10] days after" the filing of the petition. The initial appearance, "like the arraignment of an adult charged with a crime, is the process by which the court obtains jurisdiction over the minor, determines if detention is warranted, and sets the dates for further proceedings" (... see Family Ct Act § 320.4). Dismissal is appropriate where a respondent is deprived of his or her right to a speedy fact-finding hearing, a hearing that must occur "not more than [60] days after the conclusion of the initial appearance" if he or she is not confined (Family Ct Act § 340.1 [2]; see Family Ct Act §§ 310.2, 332.1 [8]). A "similar protected status" is not afforded to the initial appearance itself, although "dismissal without prejudice may be an appropriate remedy" if it is not held in a timely manner ... . To put it succinctly, dismissal is not mandated in the wake of an untimely initial appearance so long as respondent's right to a speedy fact-finding hearing is not violated ... . **Matter of Daniel B., 2015 NY Slip Op 04698, 3rd Dept 6-4-15**

FAMILY LAW/NEGLECT/CORPORAL PUNISHMENT/DOMESTIC VIOLENCE

Single Act of Excessive Corporal Punishment Justified Neglect and Derivative Neglect Findings/Single Act of Domestic Violence Did Not Justify Neglect and Derivative Neglect Findings---No Proof the Three-Month-Old Child Was Aware of the Domestic-Violence Incident

The Second Department determined a single act of excessive corporal punishment (slamming to the floor and choking) justified a finding of neglect and derivative neglect. However a single act of domestic violence did not justify the same findings because there was no proof the three-month-old child was aware of the domestic violence.

> [Re: corporal punishment, the court wrote:] "While parents have the right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare, the use of excessive corporal punishment constitutes neglect ... . A single incident of excessive corporal punishment may suffice to sustain a finding of neglect..." .
>
> [Re: witnessing domestic violence, the court wrote]: "While domestic violence may be a permissible basis upon which to make a finding of neglect, [n]ot every child exposed to domestic violence is at risk of impairment'" ... . Here, although there was testimony that the father engaged in an act of domestic violence against the mother while [the child], then three months old, was somewhere in the room, there is no evidence that the child saw, or was aware of, what happened, or that his emotional condition was impaired or placed in imminent danger of impairment by it ...". **Matter of Dalia G. (Frank B.), 2015 NY Slip Op 04127, 2nd Dept 5-13-15**

FAMILY LAW/NEGLECT/ABUSE/EVIDENCE/WEIGHT OF THE EVIDENCE/EXPERT TESTIMONY

Although a Prima Facie Case of Abuse and Neglect Was Made Out, Father's Expert Provided Persuasive Evidence the Child's Injuries Were Not the Result of Abuse---The Abuse and Neglect Findings Were Not, Therefore, Supported by a Preponderance of the Evidence

The Third Department, in a full-fledged opinion by Justice McCarthy, reversed Family Court's finding that father abused and neglected his infant daughter (Nora). The trial was essentially a "battle of experts" [Patno was the Department of Social Service's expert; Scheller was father's expert]. The Third Department determined the Department of Social Services had made out a prima facie case of abuse and neglect (expert testimony that Nora's physical condition was caused by shaking) but, under a weight of the evidence analysis, father's expert provided the best explanation for Nora's injuries---an explanation which did not implicate father. The court noted that father did not exhibit any characteristics associated with an abusive parent and father's expert's "testimony, which was consistent with conclusions of Nora's treating physicians and her medical records in crucial respects, offered a reasonable and persuasive account of how Nora's symptoms — and lack thereof — better supported his ... diagnosis:"

> .... [T]he uncontested evidence showed that Nora did not suffer external trauma ..., broken bones or neck injuries ..., and she had a one-sided retinal hemorrhage ... . Further, the father, a professional pediatric nurse, exhibited none of the characteristics thought to be diagnostically predictive of a perpetrator of abusive head trauma ..., and he consistently denied that he mishandled Nora ... . The single characteristic that Nora was fussy — while perhaps almost always present in victims of abusive head trauma — fails to meaningfully support Patno's diagnosis over Scheller's diagnosis, given the vast number of fussy infants who are never physically abused. Further, while Patno testified that abusive head trauma from shaking often results in a triad of symptoms that include subdural hematoma, retinal hemorrhaging and brain swelling ..., the medical evidence uniformly established that Nora did not suffer from brain swelling. Additionally, Scheller and Adamo — petitioner's witness — were substantially in agreement that Nora's single-sided retinal hemorrhaging could be the specific result of the subdural hematoma, rather than a direct result of any potential trauma. Patno failed to offer any explanation regarding the merits of such a theory or even an opinion as to whether she believed that such one-sided retinal hemorrhaging was the direct result of shaking ... . Accordingly, given Patno's lack of specificity regarding the one-sided retinal hemorrhage, it is unclear whether she believed that evidence of a fussy infant who had suffered a subdural hematoma was, by itself, sufficient to diagnose abusive head trauma. **Matter of Natalie AA. (Kyle AA.), 2015 NY Slip Op 04889, 3rd Dept 6-11-15**

FAMILY LAW/PATERNITY/ABANDONMENT

There Must Be a Determination of Paternity Before Making an Abandonment Finding

The Second Department, in a full-fledged opinion by Justice Dillon, determined Family Court should have granted appellant's request for DNA testing before finding that appellant had abandoned the child (thereby freeing the child for adoption). Appellant did not know whether he was the father of the child and there was no evidence of his paternity. Appellant feared the abandonment finding would negatively affect his relationship with his four children. The Second Department held the abandonment finding could not be made unless appellant is the father, so whether appellant is the father must be determined first:

> We are asked to address whether a Family Court may render a determination that a putative father has abandoned a child so as to free the child for adoption, if there is not first a threshold finding

that the putative father is, in fact, the father of the child. For the reasons set forth below, we conclude that where paternity is not ascertained in fact or by law, the Family Court may not conclusorily find that a respondent is not a "consent father," or that his consent, while otherwise required, has been forfeited by reason of his abandonment of the child. **Matter of Heaven A. A. (Tyrone W.--Stephanie A.), 2015 NY Slip Op 03833, 2nd Dept 5-6-15**

FAMILY LAW/PATERNITY/EQUITABLE ESTOPPEL

Best Interests of Child Justified Denial of Petition to Vacate Acknowledgment of Paternity (Equitable Estoppel)

The Second Department determined Family Court properly denied the petition to vacate an acknowledgment of paternity. Petitioner demonstrated his signing of the acknowledgment was based upon a mistake of fact. Although petitioner was not the child's biological father, the best interests of the child, with whom petitioner had lived from birth for six years, mandated denial of the petition. The court explained the relevant law:

> A party seeking to challenge an acknowledgment of paternity more than 60 days after its execution must prove that it was signed by reason of fraud, duress, or material mistake of fact (see Family Ct Act § 516-a[b][ii]). If the petitioner meets this burden, the court is required to conduct a further inquiry to determine whether the petitioner should be estopped, in accordance with the child's best interests, from challenging paternity ... . * * *
>
> The Family Court providently exercised its discretion in concluding that the petitioner should be equitably estopped from denying paternity. The purpose of equitable estoppel "is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" ... . Thus, "a man who has held himself out to be the father of a child, so that a parent-child relationship developed between the two, may be estopped from denying paternity" ... . "The doctrine in this way protects the status interests of a child in an already recognized and operative parent-child relationship" ... . The paramount concern in such cases "has been and continues to be the best interests of the child" ... .
>
> Here, the hearing evidence demonstrated that the petitioner lived with the child from the time of her birth in March 2005, until 2011. After the parties separated in 2011, the petitioner continued to visit with the child approximately one to two times per week. According to the petitioner, the child is free to visit with him whenever she wants. Although the child knows that the petitioner is not her biological father, she does not refer to or think of anyone else as her father. The child has a strong relationship with the petitioner and wants to spend more time with him and his son, whom she regards as her brother. Accordingly, the evidence established that, up to the time of the hearing, there had been a recognized and operative parent-child relationship between the petitioner and the child in existence all of the child's life ... . **Matter of Luis Hugo O. v Paola O., 2015 NY Slip Op 05195, 2nd Dept 6-17-15**

FAMILY LAW/PETITION TO RELOCATE/APPEALS

Mother's Petition to Relocate Should Not Have Been Denied---Analytical Criteria Described

The Second Department determined Family Court should not have denied mother's petition to relocate. The analytical criteria were described as: "When reviewing a custodial parent's request for permission to relocate, the court's primary focus must be on the best interests of the child ... . Although each custodial parent's request for relocation must be decided on its own merits, the factors to be considered include, but are not limited to, each parent's reasons for seeking or opposing the move, the quality of the relationships between the children and each parent, the impact of the move on the quantity and quality of the children's future contact with the noncustodial parent, the degree to which the lives of the custodial parent and the children may be enhanced economically, emotionally, and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and the children through suitable visitation arrangements ... . In relocation proceedings, this [the appellate court's] authority is as broad as that of the hearing court, and a relocation determination will not be permitted to stand unless it is supported by a sound and substantial basis in the record ...". [internal quotation marks omitted] **Matter of DeCillis v DeCillis, 2015 NY Slip Op 04126, 2nd Dept 5-13-15**

FAMILY LAW/REVIVAL OF UNEMANCIPATED STATUS

Child's Unemancipated Status Was Revived Entitling Father to Child Support

The Fourth Department determined the child's moving in with father after becoming emancipated by leaving mother's residence revived his unemancipated status, thereby entitling father to child support. The child left mother to avoid her rules, including rules prohibiting the use of drugs. After living with friends for a while, the child sought treatment for drug addiction. It was thereafter the child moved in with father:

> "[T]he case law makes clear that a child's unemancipated status may be revived provided there has been a sufficient change in circumstances to warrant the corresponding change in status" ... . "Permitting reversion to unemancipated status is consistent with the statutory principle that parents are responsible for the support of their dependent children until the children attain the age of 21" ... . Generally, a return to the parents' custody and control has been deemed sufficient to revive a child's unemancipated status ... . Although most of the cases concerning a revival of a child's unemancipated status involve a child's return to the home that he or she abandoned versus the home of the noncustodial parent ..., we conclude that the return to the noncustodial parent's supervision and control does not preclude a revival of unemancipated status inasmuch as it has generally been held that "the move from one parent's home to the other parent's home does not constitute emancipation as th[e] child is neither self-supporting nor free from parental control" ... . In this case, the child did not immediately move in with the father after flouting the mother's rules ... . Rather, he engaged in treatment for his addiction and then resumed living under the supervision and control of a parent while attending school. **Baker v Baker, 2015 NY Slip Op 05045, 4th Dept 6-12-15**

FAMILY LAW/SOCIAL SERVICES LAW/OFFICE OF CHILDREN AND FAMILY SERVICES (OCFS)/CHILD PROTECTIVE SERVICES (CPS)/STATEWIDE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT (SCR)/FAMILY ASSESSMENT RESPONSE (FAR)/EXPUNCTION (EXPUNGEMENT) OF RECORDS

Family Assessment Response (FAR) Reports Are Not Subject to Expunction (Expungement) Prior to the Expiration of the 10-Year Statutory Period

The Second Department determined the Office of Children and Family Services (OCFS) did not have the authority to expunge a Family Assessment Response (FAR) report prior to the end of the 10-year statutory period. The decision includes an in-depth analysis of the early expunction (expungement) of reports pursuant to Social Services Law 422(5)(c) and why such early expunction (expungement) is not authorized for Family Assessment Response (FAR) reports pursuant to Social Services Law 427-a:

> ... Social Services Law § 427-a is not "silent" on the matter of expunction of FAR reports and records. Rather, it expressly requires that FAR reports and records be maintained for 10 years after the initial report is made (see Social Services Law § 427-a[4][c][i]; [5][c]). Thus, as OCFS correctly determined, pursuant to Social Services Law § 427-a, FAR reports and records are only subject to expunction 10 years after the initial report is made to the SCR, and not before.
>
> ...[T]he existence of an early expunction provision in Social Services Law § 422 supports ... this interpretation. In this respect, the failure of the Legislature to include an early expunction provision in Social Services Law § 427-a, when it had, prior to the enactment of Social Services Law § 427-a, included such a provision in a statute within the same statutory scheme, "should be construed as indicating that the exclusion was intentional" ... .
>
> ...[T]he interpretation of Social Services Law § 427-a as not incorporating the early expunction process set forth in Social Services Law § 422(5)(c) does not conflict with the legislative intent of section 427-a. As explained in the relevant legislative history, "[t]raditionally, CPS is required to respond to reports of child abuse and maltreatment with a standard investigation that is narrowly focused on determining whether a specific incident of abuse actually occurred and if the child is at risk" ... . "The focus of the CPS

system on investigation of abuse and maltreatment has created an environment that, for many families, casts suspicion over any offer of services or service referrals" (id.). Implementation of a differential response, in the form of a FAR track, "permits a social service district to conduct an assessment of the family's needs and strengths rather than investigate the validity of the allegations in a child abuse and maltreatment report" ... . "The expectation of FAR is that families will be more likely to seek necessary help when a less adversarial, less threatening, approach is taken" ... . **Matter of Corrigan v New York State Off. of Children & Family Servs., 2015 NY Slip Op 05473, 2nd Dept 6-24-15**

FORECLOSURE/BONA FIDE ENCUMBRANCER

Nothing in the Documentation Submitted to the Lender Raised Any Questions About the Applicant's Authority, as the Sole Member, to Enter the Mortgage on Behalf of Defendant Limited Liability Company---Therefore the Affirmative Defense Alleging the Mortgage Was Invalid Because there Were Undisclosed Members of the Limited Liability Company Was Properly Dismissed

In an action to foreclose a mortgage, the Second Department determined the defendants' affirmative defense claiming the mortgage was invalid was properly dismissed. The defendants alleged the member of defendant limited liability company who applied for the mortgage, Botticelli, did not have the authority to enter the mortgage on behalf of the limited liability company because he was not the sole member. However, there was nothing in the documents submitted to the lender by Botticelli which raised questions about the existence of undisclosed members. Therefore the mortgagee was not under any obligation to make inquiries to ensure Botticelli had the proper authority and the mortgagee was a bona fide encumbrancer:

> The operating agreement of the defendant Jericho Plaza, LLC (hereinafter the LLC), which was formed to build and sell new homes, provided that Silvia Cerrone held a 50% interest, that her son-in-law Giuliano Botticelli held a 25% interest, and that his father, Anthony Botticelli, held a 25% interest in the LLC. The LLC obtained a $600,000 loan, secured by a mortgage on the only property it owned. At the closing, Giuliano Botticelli presented documents indicating that he was the sole member of the LLC, and was authorized to execute the mortgage on its behalf. Thereafter, the plaintiffs commenced this foreclosure action against the LLC and others. Silvia Cerrone successfully moved to intervene. The LLC and Silvia Cerrone (hereinafter together the defendants) moved for summary judgment dismissing the complaint insofar as asserted against them, contending that the mortgage was invalid by reason of Cerrone's undisclosed interest in the LLC, and the plaintiffs cross-moved for summary judgment dismissing the defendants' affirmative defenses which were based upon the alleged invalidity of the mortgage.
>
> A mortgagee is not a bona fide encumbrancer where, despite being aware of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue, it fails to make such inquiries ... . However, mortgagees "do not have a duty of care to ascertain the validity of the documentation presented by an individual who claims to have the authority to act on behalf of a borrower corporation or entity" ... .
>
> Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law dismissing the defendants' affirmative defenses which were based upon the alleged invalidity of the mortgage, by submitting evidence demonstrating that Giuliano Botticelli submitted documents at the closing which indicated that he was the sole member of the LLC, and had the authority to enter into the mortgage on its behalf. Moreover, the plaintiffs established, prima facie, that the circumstances presented would not lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue. **334 Corp. v Jericho Plaza, LLC,2015 NY Slip Op 03827, 2nd Dept 5-6-15**

FORECLOSURE/STANDING

Bank Did Not Demonstrate It Had Possession of the Note Prior to Commencing Foreclosure Action---Bank Did Not Have Standing to Bring the Action

The Second Department determined plaintiff-bank did not demonstrate it had possession of the note at the time the action was commenced, and therefore the bank did not have standing to bring the foreclosure action:

> In a mortgage foreclosure action, where, as here, the plaintiff's standing to commence the action is placed in issue by a defendant, "the plaintiff must prove its standing in order to be entitled to relief" ... . "[A] plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" ... . "Either a written assignment of the underlying note or the physical delivery of the note prior to the

commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" ... .

Here, the plaintiff failed to establish, prima facie, that it had standing to commence this action. The relevant affidavits the plaintiff submitted contained conclusory statements regarding the plaintiff's possession of the note, without any factual details of a physical delivery and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing the action ... . The copy of the note the plaintiff submitted in support of its motion included an indorsement to the plaintiff but, because the indorsement was undated, it is not clear whether the indorsement was effectuated prior to the commencement of this action ... . Although the written assignment of the mortgage that the plaintiff submitted was dated and recorded prior to the date this action was commenced, that assignment only transferred the mortgage. The plaintiff failed to show that the note also was assigned at that time ... . **Flagstar Bank, FSB v Anderson, 2015 NY Slip Op 04606, 2nd Dept 6-3-15**

Similar issue and result in **Bank of Am., N.A. v Kyle, 2015 NY Slip Op 04705, 3rd Dept 6-4-15**

FORECLOSURE/STANDING/POSSESSION OF NOTE OR ASSIGNMENT OF NOTE

Either Possession of the Note or an Assignment of the Note Confers Standing

The Second Department explained that standing to bring a foreclosure action is demonstrated either by possession of the note or an assignment of the note on the date the action is commenced:

> In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced ... . Either a written assignment of the underlying note or the physical delivery of the note to the plaintiff, prior to the commencement of the action, is sufficient to transfer the obligation ... . **Emigrant Bank v Larizza, 2015 NY Slip Op 05151, 2nd Dept 6-17-15**

FORECLOSURE/STANDING/WAIVER OF DEFENSE

"Lack of Standing" Defense to Foreclosure Action Is Waived If Not Raised in the Answer or a Pre-Answer Motion to Dismiss

The Second Department determined plaintiff was entitled to summary judgment on its foreclosure action, noting that any defense based upon plaintiff's alleged lack of standing was waived because it was not raised in the answer or in a pre-answer motion to dismiss the complaint:

> "A party's alleged lack of standing to commence [an] action is a defense that is waived if not raised in an answer or in a pre-answer motion to dismiss the complaint" ... . "Where, as here, the defendants in a mortgage foreclosure action waive the issue of standing by failing to assert the defense in an answer or pre-answer motion to dismiss the complaint (see CPLR 3211[e]), the plaintiff need not establish its standing in order to demonstrate its prima facie entitlement to judgment as a matter of law" ... . In this case, the plaintiff established, prima facie, its entitlement to judgment as a matter of law for the unpaid principal balance of the note ... . In this regard, the plaintiff presented the subject mortgage, the unpaid note, evidence of [defendant's] default, and evidence demonstrating that the unpaid principal balance remaining on the note totaled $434,382.89 ... . In opposition, [defendant] failed to raise a triable issue of fact ... . **JP Morgan Chase Bank, N.A. v Butler, 2015 NY Slip Op 04812, 2nd Dept 6-10-15**

FORECLOSURE SALE

Criteria for Setting Aside a Foreclosure Sale Explained---Not Met Here

In finding the motion to vacate a foreclosure sale was properly denied, the Second Department explained the circumstances in which a foreclosure sale will be set aside: "In the exercise of its equitable powers, a court has the discretion to set aside a foreclosure sale where there is evidence of fraud, collusion, mistake, or misconduct" ... . "Absent such conduct, the mere inadequacy of price is an insufficient reason to set aside a sale unless the price is so inadequate as to shock the court's conscience"... . **Chiao v Poon, 2015 NY Slip Op 04268, 2nd Dept 5-20-15**

FORECLOSURE SALE/EQUITABLE POWER TO SET ASIDE A FORECLOSURE SALE AS AN INSTRUMENT OF INJUSTICE

Court's Equitable Power to Set Aside a Foreclosure Sale as "An Instrument of Injustice" Explained and Applied

The Fourth Department, over a dissent, exercised its equitable power to set aside a foreclosure sale which, it determined, had been made an "instrument of injustice." The facts of the case, which include an extensive appellate history, defy adequate summarization here. The court explained its equitable power to set aside the foreclosure sale:

> It is well settled that, even after a judicial sale to a good faith purchaser, "[a] court may exercise its inherent equitable power over a sale made pursuant to its judgment or decree to ensure that it is not made the instrument of injustice . . . Although this power should be exercised sparingly and with great caution, a court of equity may set aside its own judicial sale upon grounds otherwise insufficient to confer an absolute legal right to a resale in order to relieve [a party] of oppressive or unfair conduct" ... . Generally, such discretion, "which is separate and distinct from any statutory authority" ..., is exercised where fraud, mistake, exploitive overreaching, misconduct, irregularity or collusion "casts suspicion on the fairness of the sale" ... . It may also be exercised where "the price is so inadequate as to shock the court's conscience" ... or where the judicial sale has been "made the instrument of injustice" ... .
>
> While we agree with defendants that there has been no showing of fraud, mistake, exploitive overreaching, misconduct, irregularity or collusion, and the price is not so inadequate as to shock the conscience, we agree with plaintiff that, under the circumstances of this case, the judicial sale has been made the instrument of injustice. **Altshuler Shaham Provident Funds, Ltd. v GML Tower LLC, 2015 NY Slip Op 04952, 4th Dept 6-12-15**

FRAUD/AGENCY/APPARENT AUTHORITY/JUSTIFIABLE RELIANCE/EMPLOYMENT LAW

Defendant's Employee Had "Apparent Authority" to Act on Behalf of Defendant Insurance Agency---Plaintiff Justifiably Relied on the Apparent Authority When It Purchased a Fake Policy from Defendant's Employee--Plaintiff Entitled to Partial Summary Judgment on the Fraud Cause of Action

The Fourth Department, over a two-justice dissent, determined plaintiff was entitled to summary judgment on its fraud cause of action against defendant insurance agency. An employee of the insurance agency issued a fake workers' compensation policy to the plaintiff. The Fourth Department found that the actions of the insurance agency provided the employee with "apparent authority" to issue the policy and the plaintiff justifiably relied on that apparent authority. The relevant law was succinctly explained:

> "In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by [the maker], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" ... . It is undisputed that the insurance policy purportedly issued by AIG was false, and thus plaintiff established that a false representation was made that was known to be false by defendant's employee. Defendant contends, however, that the justifiable reliance element was not met because it cannot be liable for the acts of its employee, and plaintiff's reliance on the alleged "apparent authority" of defendant's employee was not reasonable.
>
> It is axiomatic that "[t]he mere creation of an agency for some purpose does not automatically invest the agent with apparent authority' to bind the principle without limitation . . . An agent's power to bind his [or her] principal is coextensive with the principal's grant of authority" ... . "Essential to the creation of apparent authority are words or conduct of the principal, communicated to the third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his [or her] own acts imbue himself [or herself] with apparent authority. Rather, the existence of "apparent authority" depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal — not the agent' . . . Morever, a third party with whom the agent deals

may rely on an appearance of authority only to the extent that such reliance is reasonable" ... . Here, plaintiff contacted defendant seeking workers' compensation coverage, and defendant assigned its employee who specialized in plaintiff's type of business to assist plaintiff. We therefore conclude that plaintiff established that it reasonably relied upon the authority of defendant's employee to act for defendant. **Regency Oaks Corp. v Norman-Spencer McKernan, Inc., 2015 NY Slip Op 04959, 4th Dept 6-12-15**

FREEDOM OF INFORMATION LAW (FOIL)/EDUCATION-SCHOOL LAW/PUBLIC OFFICERS LAW

Supreme Court Used the Wrong Standards When It Denied Petitioner's Request for Documents Relating to Complaints Alleging the Improper Use of School Property by an Employee of the Department of Education (the Employee Gave a Speech on School Property Which May Have Violated the Chancellor's Regulations re: the Use of School Property for Political Purposes)---Correct Analytical Criteria Explained and Applied

The First Department determined Supreme Court used the wrong criteria when it denied petitioner's request for documents relating to the investigation of complaints about the use of school buildings for political purposes. The complaints concerned a speech given by an employee of the Department of Education (DOE) which criticized the positions on education policy taken by unnamed mayoral candidates. The speech was put up on the DOE website. Petitioner alleged the speech violated specified Chancellor's Regulations re: the conduct of school employees with respect political campaigns and elections. Supreme Court erroneously held that petitioner must show that the denial of the request for documents was "arbitrary and capricious," "an abuse of discretion," "irrational," or "unlawful." The proper analysis is whether the determination "was affected by an error of law" and places the burden on the respondent to show the request falls within one of the statutory exceptions to disclosure. The First Department reversed Supreme Court, applied the correct analytical criteria and found that any relevant privacy interests did not outweigh the public interest in disclosure:

> The appropriate standard of review is whether the determination "was affected by an error of law" (CPLR 7803[3]...). Moreover, the burden is on respondents to establish "that the material requested falls squarely within the ambit of one of the[] statutory exemptions" from disclosure ... . Under the circumstances of this case, the application of an improper legal standard is reversible error since it resulted in substantial prejudice to petitioner ... .
>
> Respondents failed to establish that disclosure of the materials at issue would "constitute an unwarranted invasion of personal privacy under the provisions of [§ 89(2)]" (Public Officers Law § 87[2][b]). They do not claim that any personal privacy category enumerated in § 89(2) is applicable. Therefore, we must determine whether any invasion of personal privacy would be unwarranted "by balancing the privacy interests at stake against the public interest in disclosure of the information" ... . The speech at issue excoriated unspecified candidates in the 2013 mayoral election who had taken certain positions on education policy. Notwithstanding that the speech did not name any individual candidate or political party, the complaints to [the school district] raised serious questions about the propriety of the speech and its publication on DOE's website. We find that there is a "significant public interest" in the requested materials, which may shed light on whether this matter was adequately investigated ... . Respondents failed to establish that the claimed privacy interests outweigh this public interest ... . They assert that the materials contain personally identifying information such as home addresses, dates of birth, and Social Security numbers. However, that information can be redacted and does not provide a basis for withholding entire documents ... .
> . **Matter of Thomas v Condon, 2015 NY Slip Op 04237, 1st Dept 5-19-15**

FREEDOM OF INFORMATION LAW (FOIL)/PUBLIC OFFICERS LAW

Documents Relevant to a Civil Investigation by the Department of Taxation and Finance Were Not Protected from FOIL Disclosure by a Statute which Specifically Relates to Criminal Investigations

The Third Department affirmed Supreme Court's determination that documents which were pertinent to a civil, as opposed to a criminal, investigation, were not shielded from disclosure by Public Officers Law 87(2)(e)(iv). The petitioners were notified they were subject to an "interrogation" by the Department of Taxation and Finance about job-related expense deductions. Under a FOIL request, the petitioners sought documents which included "interrogation" questions. Because Public Officers Law 87(2)(e)(iv) protects such documents from disclosure only if they are part of a criminal investigation, Supreme Court properly held the documents should be disclosed:

"Under FOIL, agency records are presumptively available for public inspection, without regard to the need or purpose of the applicant, unless the requested documents fall within one of the exemptions set forth in Public Officers Law § 87 (2)" ... . In this regard, "[e]xemptions are narrowly construed, with the agency that seeks to prevent disclosure bearing the burden of demonstrating that the requested material falls squarely within an exemption by articulating a particularized and specific justification for denying access" ... .

Here, in denying access to the 68 pages of proposed interrogation questions, respondents relied exclusively upon Public Officers Law § 87 (2) (e) (iv), which exempts from disclosure "records or portions thereof that . . . reveal criminal investigative techniques or procedures, except routine techniques and procedures." The statute — on its face — references criminal investigative techniques or procedures, and prevailing case law suggests that this exemption applies only to a FOIL request that, at the very least, has its genesis in an underlying criminal investigation or prosecution ... . **Matter of Aurigemma v New York State Dept. of Taxation & Fin., 2015 NY Slip Op 04356, 3rd Dept 5-21-15**

FREEDOM OF INFORMATION LAW (FOIL)/CIVIL RIGHTS LAW/PUBLIC OFFICERS LAW

Documents Which Reveal the Identity of Sex Offense Victims Are Categorically Excluded from Disclosure Under the Civil Rights Law and Public Officers Law (Even If the Identifying Information Can Be Redacted)

The Third Department determined petitioner's request for evidence held by the district attorney's office was properly denied. The requested evidence consisted of chat logs and the contents of computers which identified the victims of sex offenses. The court noted that, even if the identification could be reacted, the documents are categorically excluded from disclosure under the Civil Rights Law and Public Officers Law. **Matter of MacKenzie v Seiden, 2015 NY Slip Op 04537, 3rd Dept 5-28-15**

FREEDOM OF INFORMATION LAW (FOIL)/PUBLIC OFFICERS LAW

Request for Mugshots and Identifying Information Re: Arrestees for Posting on Petitioner's Website Denied---Posting of Such Information Would Constitute an Unwarranted Invasion of Privacy

Petitioner sought mugshots and other identifying information re: arrestees from the NYC Department of Corrections (DOC) for posting on his website. Petitioner charged a fee for removing a photo from the site. DOC denied the request. Supreme Court denied the Article 78 petition seeking reversal of the DOC's denial. The Second Department determined DOC did not meet its burden of demonstrating the applicability of any of the statutory exemptions from disclosure in the Public Officers Law (DOC's assertions were "conclusory"), but went on to determine release of the photos and information would constitute an unwarranted invasion of privacy and may endanger the life or safety of the arrestees:

The agency's burden of demonstrating that the material requested falls within a statutory exemption "requires the [agency] to articulate a "particularized and specific justification for denying access"'" ... . " Conclusory assertions that certain records fall within a statutory exemption are not sufficient; evidentiary support is needed'" ... .

Pursuant to Public Officers Law § 87(2)(b), an agency "may deny access to records" where disclosure "would constitute an unwarranted invasion of personal privacy under the provisions of [Public Officers Law § 89(2)(b)]." "[W]here none of the [exemptions under Public Officers Law § 89(2)(b) are] applicable, a court must decide whether any invasion of privacy . . . is "unwarranted" by balancing the privacy interests at stake against the public interest in disclosure of the information'" ... .

Here, the DOC proffered only conclusory assertions that denial of the requested records "would result in economic or personal hardship to the subject party," which was insufficient to demonstrate the applicability of Public Officers Law § 89(2)(b)(iv) ... . The DOC also failed to establish that any individuals received an express or implied promise of confidentiality from it, as required to demonstrate the applicability of Public Officers Law § 89(2)(b)(v) ... .

In view of the DOC's failure to demonstrate the applicability of any exemptions under Public Officers Law § 89(2)(b), this Court must determine whether disclosure would constitute an

"unwarranted invasion of personal privacy" by " balancing the privacy interests at stake against the public interest in disclosure of the information'" ... . Here, the petitioner has not set forth any direct public interest in disclosure of the records at issue, which were sought for the sole purpose of posting personal information and photographs of individuals currently or formerly in the custody of the DOC on a website that collects payment in exchange for removing the photographs. On the other hand, the record reflects that the privacy interests of numerous individuals are implicated, including those individuals who were ultimately acquitted of any criminal charges and adolescents between the ages of 16 and 18 who are presently or were in the custody of the DOC. Consequently, under the particular circumstances of this case, a balancing of the privacy interests at stake against any public interest in disclosure necessitates a determination that disclosure of the records at issue would constitute an "unwarranted invasion of personal privacy" (Public Officers Law § 87[2][b]...). **Matter of Prall v New York City Dept. of Corrections, 2015 NY Slip Op 04653, 2nd Dept 6-3-15**

GENERAL BUSINESS LAW/CONTRACT LAW/DECEPTIVE ADVERTISING

Online Promotion Which Offered a Coupon to Persons Who Provided His or Her Email Address Did Not Constitute an "Offer" Which Could Be "Accepted" to Create a Contract/In Light of the Disclaimers the Promotion Was Not "Deceptive" and Plaintiff Suffered No "Actual Injury" within the Meaning of the General Business Law

Plaintiff brought a putative class action alleging an act of deception in an online business promotion. Defendants "offered to provide to visitors to their website who entered their email address a $1 coupon toward the purchase of their products and further promotional materials." The complaint alleged the members of the class provided their email addresses but never received a coupon. The Second Department determined the complaint, which alleged breach of contract and a violation of General Business Law 349, was properly dismissed. Because the website indicated the supply of coupons was limited, there was no clearcut "offer" which could form a contract upon acceptance. The online promotion constituted only an "invitation for offers." Because of the disclaimers, the promotion was not "deceptive" within the meaning of General Business Law 349. Nor did the plaintiff suffer any "actual injury" within the meaning of General Business Law 349:

> ...[T]he defendants made a prima facie showing that the online promotion did not constitute an offer. Rather, it constituted only an invitation for offers, in light of the fact that the promotion expressly stated that the supply of coupons was "limited." In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's contention, extrinsic evidence was not admissible to interpret the promotional materials under the circumstances herein ... . The record thus showed as a matter of law that the promotion did not create the power of acceptance for consumers and, consequently, no unilateral contract was formed... . * * *
>
> [Re: General Business Law 349], in addition to showing that the conduct was consumer oriented, "[a] prima facie case requires . . . a showing that [the] defendant is engaging in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof" ... . "Whether a representation or an omission, the test is whether the allegedly deceptive practice is likely to mislead a reasonable consumer acting reasonably under the circumstances'" ... . A plaintiff must also show that he or she suffered an actual injury, as a result of the deceptive act or practice... . ...
>
> ...[T]he defendants ... showed ... that the plaintiff did not suffer any "actual injury," for purposes of the General Business Law § 349 cause of action. To recover damages under General Business Law § 349, a plaintiff need not prove intent to defraud or justifiable reliance ... . The plaintiff may not "set[ ] forth deception as both act and injury" ... . Here, the record showed as a matter of law that the plaintiff suffered no actual injury, apart from the alleged deceptive act itself ... . **Amalfitano v NBTY, Inc., 2015 NY Slip Op 04077, 2nd Dept 5-13-15**

HUMAN RIGHTS LAW (NEW YORK)/EMPLOYMENT DISCRIMINATION/EMPLOYMENT LAW

Plaintiff's Age-Discrimination Lawsuit Properly Survived Summary Judgment

The First Department, over an extensive dissent, determined defendant's motion for summary judgment in an age-discrimination suit was properly denied. Plaintiff alleged she was terminated because of her age and was able to raise a question of fact about whether the reasons for termination proffered by the defendant were pretextual. The core of plaintiff's allegations were remarks made by the person who replaced plaintiff as executive director of defendant-club---remarks noting plaintiff looked "tired" and perhaps needed to "rest" or

questions whether plaintiff was "up for" meetings or whether a meeting might be "too much for" her:

> ...[W]e find that when plaintiff's testimony is credited for purposes of this motion, these remarks directly reflect age-based discriminatory bias ..., and raise an inference of age-related bias sufficient to make out plaintiff's prima facie case of employment discrimination ... . In concluding that no inference of discriminatory motive can be drawn from this evidence, the dissent fails to abide by the precept that "all of the evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor" ... .
>
> Plaintiff has ... met her burden of showing pretext by "respond[ing] with some evidence that at least one of the reasons proffered by defendant is false, misleading, or incomplete" ... . **Rollins v Fencers Club, Inc., 2015 NY Slip Op 03769, 1st Dept 5-7-15**

INSURANCE LAW

Late Notice of the Accident by the Insured (in Violation of the "Prompt Notice Condition), Coupled with the Injured Plaintiff's Failure to Make Reasonable Efforts to Identify and Notify the Insurer, Relieved the Insurer of Any Obligation to Defend or Indemnify the Insured

Plaintiff was injured while skiing at a ski resort (Nevele's). The Third Department determined Nevele failed to give timely notice of the accident/injury to its insurer, Lexington. Nevele did not inform Lexington for ten months. The policy included a "prompt notice condition." The court noted that, because the injured party can also notify the insurer of an accident, late notice will be excused if the injured party is unable to identify the insurer after making reasonable efforts. Here the plaintiffs sent a letter to Nevele asking Nevele to notify its insurer, but did nothing further to learn the identity of or notify the insurer. Plaintiffs' efforts were not sufficient to excuse the late notice:

> Because an injured party is allowed by law to provide notice to an insurance company (see Insurance Law § 3420 [a] [3]), he or she is also generally held to any prompt notice condition precedent of a policy ... . However, such an injured party can overcome an insurance company's failure to receive timely notice — which would otherwise vitiate coverage — by a demonstration that he or she did not know the insurer's identity despite his or her reasonably diligent efforts to obtain such information ... .
>
> As proof of their reasonably diligent efforts, plaintiffs submitted two letters that they had sent to Nevele with an attached questionnaire. The letters provided notice of the contemplated personal injury action, requested that Nevele complete the questionnaire and requested that Nevele either kindly refer the letter to Nevele's insurance company or inform plaintiffs if Nevele was not insured. The attached questionnaire requested insurance carrier information. However, despite the fact that [plaintiff's] accident did not involve any automobile, that questionnaire only specifically requested insurance information regarding Nevele's automobile insurer. Nevele responded to the second correspondence, but it did not respond to the question relating to insurance coverage. The record is devoid of evidence that plaintiffs took any further efforts to ascertain Lexington's identity.
>
> * * * Given the combination of plaintiffs' initial failure to specifically ask for the relevant insurance information, their failure to ask for such information after Nevele's communication and their failure to promptly follow up in any other manner, plaintiffs failed to raise a triable issue of fact as to their reasonable efforts to ascertain Lexington's identity ... . **Kleinberg v Nevele Hotel, LLC, 2015 NY Slip Op 03891, 3rd Dept 5-7-15**

INSURANCE LAW/ASSAULT AND BATTERY EXCLUSION OF COVERAGE

"Assault and Battery" Exclusion from Coverage Applied Even Though Plaintiff Was Not the Intended Target of the Assault

The plaintiff was struck by a bar stool in a fight at the insured bar. Plaintiff was not involved in the fight and the assailant apparently did not intend to strike her. The Second Department determined the "assault and battery" exclusion in the bar's policy applied and the insurer (North Sea) was not obligated to defend and indemnify the insured bar. The fact that the plaintiff was not the intended target of the assault did not preclude the application of the exclusion:

> "The duty to defend is triggered whenever the allegations of a complaint, liberally construed, suggest a reasonable possibility of coverage, or the insurer has actual knowledge of facts establishing a reasonable possibility of coverage" ... . "[A]n insurance carrier can be relieved of its duty to defend if it establishes, as a matter of law, that there is no possible factual or legal basis on which it might eventually be obligated to

indemnify its insured under any policy provision" ... . "An insurer may also disclaim coverage on the basis of a policy exclusion by demonstrating that the allegations of the complaint cast that pleading solely and entirely within the exclusion" ... . "An exclusion for assault and/or battery applies if no cause of action would exist but for' the assault and/or battery" ... .

Here, North Sea demonstrated its prima facie entitlement to judgment as a matter of law by establishing that the assault and battery exclusion is applicable to the claims asserted by the plaintiff against the pub defendants in the underlying action ... . The claims asserted by the plaintiff in the underlying action arise out of the assault and, thus, fall within the exclusion under the subject policy ... .

In opposition, the plaintiff failed to raise a triable issue of fact as to the exclusion's applicability ... . Contrary to the plaintiff's contention, the fact that the bar stool made physical contact with her and not the intended target does not negate the conclusion that the act was done with the intention to commit an assault or a battery ... . **Parler v North Sea Ins. Co., 2015 NY Slip Op 05166, 2nd Dept 6-17-15**

INSURANCE LAW/BREACH OF FIDUCIARY DUTY

Failure to Allege a "Special Relationship" Between Insurance Broker and Client Required Dismissal of the "Breach of Fiduciary Duty" Cause of Action

In determining defendants' motion to dismiss the "breach of fiduciary duty" cause of action was properly granted, the Second Department explained that an insurance broker can be liable to a client for breach of a fiduciary duty only when a "special relationship" over and above the ordinary broker-client relationship exists. Here the plaintiffs failed to allege the existence of a "special relationship." The court explained the relevant law:

> The common-law rule is that "an insurance broker acting as an agent of its customer has a duty of reasonable care to the customer to obtain [specifically] requested coverage within a reasonable time after the request, or to inform the customer of the agent's inability to do so, [but] the agent owes no continuing duty to advise, guide or direct the customer insured to obtain additional coverage" ... . However "[w]here a special relationship develops between the broker and client, [the] broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage" ... . The Court of Appeals has identified three "exceptional situations" which may give rise to such a special relationship: " (1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on'" ... . **Waters Edge @ Jude Thaddeus Landing, Inc. v B & G Group, Inc., 2015 NY Slip Op 04634, 2nd Dept 6-3-15**

INSURANCE LAW/CONTRACT LAW/AMBIGUITY RESOLVED AGAINST INSURER

Ambiguity Should Have Been Resolved Against the Insurer

Reversing Supreme Court, the Second Department determined the ambiguity in the supplemental underinsured motorist (SUM) endorsement about whether a snowmobile was a covered "motor vehicle" should have been resolved against the insurer. "We find that the policy, when read as a whole, is ambiguous as to whether the term "motor vehicle" in the SUM endorsement refers to the snowmobile, the only vehicle covered by the policy. Contrary to State Farm's contention and the Supreme Court's determination, this ambiguity must be resolved 'against the insurer and in favor of coverage' ... , without reference to the definition of 'motor vehicle' set forth in the Vehicle and Traffic Law." **Matter of State Farm Mut. Auto. Ins. Co. v Jones, 2015 NY Slip Op 04493, 2nd Dept 5-27-15**

INSURANCE LAW/CONTRACT LAW/BANKRUPTCY

"Bankruptcy" Exclusion in a Political Risk Insurance Policy Applied---Insurer Not Obligated to Cover Loss Occasioned by Bankruptcy Proceedings in Mexico

The First Department, in a full-fledged opinion by Justice Gonzalez, determined that the "bankruptcy" exclusion in a Political Risk Insurance Policy applied to court proceedings in Mexico and the insurer was therefore entitled to disclaim coverage for the related loss to plaintiff. The core issue was the meaning of "bankruptcy." The plaintiff argued the term referred to a final adjudication of bankruptcy. But the court held the definition was much broader, and included the ongoing court proceedings in Mexico. The fact that the plaintiff and defendant disagreed about the definition of

"bankruptcy" did not render the policy-contract ambiguous. Applying the plaintiff's narrow definition would have rendered other provisions of the policy-contract superfluous:

> We agree with defendant that plaintiff's definition of bankruptcy (a final judgment of reorganization or liquidation) is overly narrow. Bankruptcy is generally understood to include being under the judicial protection of a bankruptcy court - or, according to dictionary definition - "a statutory procedure by which a (usu[ally] insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation. . . for the benefit of creditors" (Black's Law Dictionary 175 [10th ed 2014]; see Compact Oxford English Dictionary 934-935 [2d ed 1999][same]).
>
> Plaintiff contends that since the parties have conflicting interpretations of the term "bankruptcy," the policy must be ambiguous on this point, and points out that settled principles of interpretation of insurance contracts require resolution of any ambiguity in favor of the insured ... . However, "provisions in a contract are not ambiguous merely because the parties interpret them differently" ... . Here, common understanding supports interpreting the term bankruptcy as the court proceeding in which the debtor is afforded judicial protection while it reorganizes or liquidates.
>
> Further, settled law requires that the terms of a contract be read in context ... . Plaintiff's definition of bankruptcy, i.e. the state of having been declared bankrupt, would render the accompanying alternatives in Section 4.12 of the policy (insolvency and financial default) superfluous. The redundancy can be eliminated only by accepting defendant's definition, an interpretation that gives meaning to every "sentence, clause, and word of [the] contract of insurance" ... . **CT Inv. Mgt. Co., LLC v Chartis Specialty Ins. Co., 2015 NY Slip Op 04051, 1st Dept 5-12-15**

INSURANCE LAW/INTENTIONAL CONDUCT

Whether the Insurer Is Obligated to Indemnify the Driver Turns on Whether the Driver Acted Intentionally When His Vehicle Struck the Rear of Decedent's Vehicle----There Was a Question of Fact Whether the Incident Was an Accident or the Result of Intentional Conduct

The Fourth Department determined there was a question of fact whether the striking of decedent's car from behind was intentional or accidental. If the rear driver acted intentionally, his insurer had no duty to indemnify the rear driver. The court explained the terms "accidental" and "intentional" in this context:

> "In deciding whether a loss is the result of an accident, it must be determined, from the point of view of the insured, whether the loss was unexpected, unusual and unforeseen" ... . We must look to the allegations of the complaint in the underlying action, but may also consider extrinsic facts ... .
>
> Insurable " [a]ccidental results can flow from intentional acts' " ... . On the other hand, "when the damages alleged in the [underlying] complaint are the intended result which flows directly and immediately from [the insured's] intentional act, . . . there is no accident, and therefore, no coverage" ... . "[M]ore than a causal connection between the intentional act and the resultant harm is required to prove that the harm was intended" ... . The exclusion for an intentional injury, however, will apply where the injuries are " inherent in the nature' of the wrongful act"... . **Kemper Independence Ins. Co. v Ellis, 2015 NY Slip Op 04011, 4th Dept 5-8-15**

INSURANCE LAW/LEGAL MALPRACTICE/EXCLUSION FOR CLAIMS ARISING OUT OF BUSINESS OWNED BY ATTORNEY/RESERVATION OF RIGHTS TO DISCLAIM COVERAGE BY INSURER

The Insurer Properly Reserved Its Rights to Disclaim Coverage When It Agreed to Defend a Legal Malpractice Action

The insurer agreed to defend an attorney in a legal malpractice action, but reserved its rights to disclaim coverage based upon the exclusion in the policy for actions arising from the conduct of a business owned by the attorney (as opposed to the law practice). The First Department rejected the argument that the insurer's reservation of rights violated the policy:

> The issuance of a reservation of rights allows the insurer the flexibility of fulfilling its obligation to provide its insured with a defense, while continuing to investigate the claim further. In fact, an insurance company's failure to reserve the right to disclaim coverage may later result in the insurer being equitably estopped from doing so ... . Thus, although plaintiffs are correct that the counterclaims, broadly construed, triggered defendants' duty to provide them with a defense, defendants did not breach that duty by agreeing to do so, but with a reservation of rights to, among other things, later recoup their defense costs upon a determination of non-coverage ... . **Law**

Offs. of Zachary R. Greenhill P.C. v Liberty Ins. Underwriters, Inc., 2015 NY Slip Op 04382, 1st Dept 5-21-15

INSURANCE LAW/NO-FAULT

Person Injured After Being Thrown from a Motorcycle Is an "Occupant" of the Motorcycle Within the Meaning of the Insurance Law and Is Therefore Not Eligible for First-Party No-Fault Benefits

The Fourth Department, in a full-fledged opinion by Justice Sconiers, determined a person injured after being thrown from a motorcycle was an "occupant" of the motorcycle within the meaning of the Insurance Law and therefore ineligible for first-party no-fault benefits:

> Previously, motorcycle operators and passengers injured in motor vehicle accidents were generally entitled to first-party benefits under the no-fault law. Former section 672 (1) (a) of the Insurance Law provided that those entitled to first-party benefits under the no-fault scheme encompassed "persons, other than occupants of another motor vehicle." That category included motorcyclists on a par with pedestrians ... . The statute was amended in 1977 to exclude occupants of motorcycles from such benefits (see L 1977, ch 892, § 9), thereby terminating the treatment of motorcycle occupants "as pedestrians rather than motorists [who] enjoy the benefits of no-fault at no cost" ... . The successor of the amended statute, Insurance Law § 5103 (a) (1), currently provides that, under a policy of insurance issued on an automobile, first-party benefits are available to "[p]ersons, other than occupants of another motor vehicle or a motorcycle" ... . The exclusions in the Kemper and Farm and Family insurance policies of "any person while occupying a motorcycle" are consistent with Insurance Law § 5103 (a) (1) and the regulations promulgated thereunder (see 11 NYCRR 65-1.1 [d]). **Boyson v Kwasowsky, 2015 NY Slip Op 03964, 4th Dept 5-8-15**

INSURANCE LAW/PERMISSION TO SETTLE WITH TORTFEASOR

Insured Was Entitled to Settle with Tortfeasor 30 Days After Insured's Notification of His Insurer of the Settlement Offer---Although Insurer Sent a Letter Responding to the Notification, It Was Sent to the Wrong Address and the Insured Never Received It

In determining the insurer's (GEICO's) motion to stay arbitration should have been denied, the Second Department explained the procedure where the insured has been offered a settlement by the tortfeasor for the full amount of the tortfeasor's policy and permission to settle is sought from the insured's carrier (GEICO here). The insured timely notified and requested permission to settle from GEICO, but GEICO sent its response to the wrong address and the insured never received it. After the passage of 30 days, the insured accepted the settlement and served a demand for arbitration on GEICO re: the supplemental uninsured/underinsured motorist (SUM) benefits under the GEICO policy:

> As a general rule, an insured who settles with a tortfeasor in violation of a policy condition requiring his or her insurer's consent to settle, thereby prejudicing the insurer's subrogation rights, is precluded from asserting a claim for SUM benefits under the policy ... . However, the language set forth in 11 NYCRR 60-2.3(f), which must be included in all motor vehicle liability insurance policies in which SUM coverage has been purchased, creates an exception to this rule in situations where the insured advises the insurer of an offer to settle for the full amount of the tortfeasor's policy, which obligates the insurer either to consent to the settlement or to advance the settlement amount to the insured and assume the prosecution of the tort action within 30 days ... . In the event that the insurer does not timely respond in accordance with this condition, the insured may settle with the tortfeasor without the insurer's consent, and without forfeiting his or her rights to SUM benefits (see 11 NYCRR 60-2.3[f]...).
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> Here, the burden was on GEICO to come forward with sufficient facts to establish justification for a stay of arbitration ... . GEICO's submission of its letter requesting additional documentation regarding the settlement, which was addressed to the wrong law firm at an address different from that of the law firm which had initially notified GEICO of the settlement offer, failed to sustain this burden. **Matter of Government Empls. Ins. Co. v Arciello, 2015 NY Slip Op 05477, 2nd Dept 6-24-15**

INSURANCE LAW/PRIVILEGE (ATTORNEY-CLIENT)/CIVIL PROCEDURE/DISCOVERY

Reports by Attorneys Which Relate to an Insurer's Decision to Accept or Reject a Claim Are Discoverable---Reports by Attorneys Made After the Claim Is Rejected Are Not Discoverable

The Fourth Department determined the records generated by attorneys which related to an insurer's decision whether to accept or reject a claim were discoverable as records made in the regular course of

business---even if the records relate in part to potential litigation. Records generated by attorneys after the claim was denied are privileged and not discoverable:

> "It is well settled that [t]he payment or rejection of claims is a part of the regular business of an insurance company. Consequently, reports which aid it in the process of deciding which of the two indicated actions to pursue are made in the regular course of its business' " ... . "Reports prepared by . . . attorneys before the decision is made to pay or reject a claim are thus not privileged and are discoverable . . . , even when those reports are mixed/multi-purpose' reports, motivated in part by the potential for litigation with the insured" ... . Here, the documents submitted to the court for in camera review constitute multi-purpose reports motivated in part by the potential for litigation with plaintiff, but also prepared in the regular course of defendant's business in deciding whether to pay or reject plaintiff's claim, and thus plaintiff is entitled to disclosure of those documents. **Lalka v Aca Ins. Co., 2015 NY Slip Op 03995, 4th Dept 5-8-15**

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS/MUNICIPAL LAW

Public Policy Bars a Cause of Action Against Government Officials (in their Official Capacities) for Intentional Infliction of Emotional Distress

The Second Department noted that an intentional infliction of emotional distress cause of action cannot be brought against a governmental entity. Since the respondents were sued only in their official capacities, the cause of action was properly dismissed:

> "[P]ublic policy bars claims sounding in intentional infliction of emotional distress against a governmental entity" ... . Here, the individual respondents were only sued in their official capacities. Therefore, the petitioner could not and did not state a cause of action against them for intentional infliction of emotional distress. **Matter of Gottlieb v City of New York, 2015 NY Slip Op 04645, 2nd Dept 6-3-15**

JURY TRIAL, RIGHT TO/ACCOUNTING/ACCOUNT STATED/EQUITABLE RELIEF

Equitable Relief Sought for the Purpose of Determining a Money Judgment---Plaintiffs Entitled to Jury Trial

In an action involving former partners, plaintiffs sought an accounting, a declaration of defendant's share in the business, and money judgments for breach of contract and unjust enrichment. The Third Department determined Supreme Court properly held plaintiffs are entitled to a jury trial. The inquiry is whether the primary character of the case is legal or equitable. Here the primary character was the seeking of a monetary judgment:

> ... [W]e agree with Supreme Court that plaintiffs are entitled to a jury trial. In determining whether a party is entitled to a jury trial, "the relevant inquiry 'is not whether an equitable counterclaim exists but whether, when viewed in its entirety, the primary character of the case is legal or equitable'" ... . Here, plaintiffs seek equitable relief — an accounting of defendant's share of Medical Arts and an account stated between the parties — only for the purpose of determining the money judgment against defendant. **Staunton v Brooks, 2015 NY Slip Op 05248, 3rd Dept 6-18-15**

LABOR LAW

Lateral Shift of Heavy Equipment, Which Pinned Plaintiff Against a Column, Not Gravity-Related---Not Covered Under Labor Law 240 (1)

The First Department determined Supreme Court should have dismissed plaintiff's Labor Law 240 (1) cause of action because plaintiff's injury was not caused by a falling object. Plaintiff was moving an 8000 pound piece of equipment across a flat platform when the equipment shifted laterally and pinned plaintiff against a column. Because the accident did not flow from the application of the force of gravity, it was not covered under Labor Law 240 (1):

> Plaintiff and his coworkers were moving a piece of an 8,000-pound piece of equipment across a flat platform. The ultimate goal was to place the equipment onto the forks of a forklift. Plaintiff testified that because two wheels broke off, the workers were pushing and pulling the equipment when it pinned him against a column on the side of the platform. Plaintiff testified that they did not lift the equipment into the air, and that it did not fall. Nor did he know what caused the equipment to shift laterally towards his side. Plaintiff's

testimony established that the piece of equipment that pinned him to the column was not a "falling object" and that he was not a "falling worker," and the accident did not otherwise flow from the application of the force of gravity. Thus, he was not covered by Labor Law § 240(1) under the current case law ... . **Martinez v 342 Prop. LLC, 2015 NY Slip Op 03770, 1st Dept 5-5-15**

Violation of an Industrial Code Provision Does Not Conclusively Establish Negligence in a Labor Law 241 (6) Action

The Fourth Department noted that the fact that an Industrial Code provision was violated does not establish negligence sufficient to support partial summary judgment: "Despite our conclusion that defendants violated 12 NYCRR 23-9.5 (c), we reject plaintiff's contention that he is entitled to partial summary judgment on the issue of defendants' liability with respect to the Labor Law § 241 (6) claim. A violation of an Industrial Code provision 'does not establish negligence as a matter of law but is merely some evidence to be considered on the question of a defendant's negligence'...". Whether there was a violation of 12 NYCRR 23-9.5 (c) turned on whether plaintiff was a member of an "excavation crew." If he was not, then his proximity to the equipment which injured him violated the provision. If he was a member of an "excavation crew," the provision was not violated. The majority determined plaintiff was not a member of a "crew" because he was the only person there. The two dissenting judges disagreed and argued plaintiff was a member of an "excavation crew" within the meaning of the provision. **Vanderwall v 1255 Portland Ave. LLC, 2015 NY Slip Op 03959, 4th Dept 5-8-15**

Inability to Remember Fall and Absence of Witnesses Did Not Preclude Summary Judgment on Labor Law 240(1) Cause of Action

The First Department determined the plaintiff's inability to remember his fall from a scaffold and the absence of witnesses did not preclude summary judgment in his favor for the Labor Law 240(1) cause of action:

> Plaintiff established his entitlement to judgment as a matter of law on the issue of liability in this action where he sustained injuries when, while performing asbestos removal work in a building owned by defendant, he fell from a baker's scaffold. Plaintiff's testimony that he was standing on the scaffold working, and then woke up on the ground with the scaffold tipped over near him, established a prima facie violation of the statute and that such violation proximately caused his injuries ... . That plaintiff could not remember how he fell does not bar summary judgment ... . Nor does the fact that he was the only witness raise an issue as to his credibility where, as here, his proof was not inconsistent or contradictory as to how the accident occurred, or with any other evidence ... . **Strojek v 33 E. 70th St. Corp., 2015 NY Slip Op 04203, 1st Dept 5-14-15**

To Be Entitled to Summary Judgment on a Labor Law 200 Cause of Action, the Defendant Must Demonstrate the Defendant (1) Did Not Control the Plaintiff's Work and (2) Did Not Create or Have Constructive Knowledge of the Dangerous Condition

The Second Department determined summary judgment should not have been granted to defendant homeowners in this Labor Law 200 action. It was alleged the homeowners created a dangerous condition by placing an unsecured tarp in the area where plaintiff placed his ladder. Plaintiff was injured when he fell from the ladder. The Second Department explained that the defendants, to be entitled to summary judgment, were required to demonstrate (1) they did not "have authority to supervise or control the methods or materials of the injured plaintiff's work" and (2) they did not create the dangerous condition that caused the accident or have actual or constructive notice of the dangerous condition. Here the defendants failed to demonstrate they did not create the dangerous condition:

> Where a plaintiff's injures are alleged to have been caused by defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both of the foregoing liability standards ... . A defendant moving for summary judgment in such a case may prevail "only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard" ... . **Pacheco v Smith, 2015 NY Slip Op 04293, 2nd Dept 5-20-15**

A Three-and-a-Half-Foot Fall from a Railing to a Raised Platform Was Covered by Labor Law 240(1)--Elements of Labor Law 240(1), 200 and 246(1) Causes of Action Explained---Failure to State (in the Pleadings) the Particular Industrial Code Provision Alleged to Have Been Violated Was Not Fatal to the Labor Law 246(1) Cause of Action---Belated Identification of the Code Provision Did Not Prejudice Defendant

The Second Department determined plaintiff's Labor Law 240(1) cause of action should not have been dismissed. Plaintiff climbed up scaffolding to access a platform and, as he attempted to climb over the three-and-a-half-foot platform railing, plaintiff fell to the platform and was injured. Plaintiff was not instructed to access the platform any other way, so plaintiff's failure to use a ladder located 25 to 30 feet away could not be considered the sole proximate cause of the accident. In addition, the Second Department noted that the Labor Law 241(6) cause of action should not have been dismissed. Plaintiff's failure to state the particular provision of the Industrial Code alleged to have been violated in the complaint or bill of particulars was not fatal to the cause of action. The belated identification of the relevant code provision involved no new factual allegations and no new theories of liability. The Second Department also held the Labor Law 200 cause of action should not have been dismissed, explaining the elements. With respect to the Labor Law 240(1) cause of action, the court wrote:

> Labor Law § 240(1) imposes absolute liability on owners, contractors, and their agents when their "failure to provide proper protection to workers employed on a construction site proximately causes injury to a worker" ... . However, liability may "be imposed under the statute only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential'" ... .
>
> Contrary to the contention of the defendants and Newtron, Labor Law § 240(1) applies to the facts of this case, even though the plaintiff fell only from the railing to the platform ... . The plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability on his cause of action alleging a violation of Labor Law § 240(1) by submitting evidence demonstrating that the defendants failed to provide him with an adequate safety device, and that such failure was a proximate cause of his injuries ... .
>
> In opposition, the defendants failed to raise a triable issue of fact as to whether the plaintiff's actions in using the scaffolding and climbing over the railing, rather than using a permanent ladder that was approximately 25 to 30 feet from the scaffolding ladder, to access the permanent platform was the sole proximate cause of his injuries. A plaintiff's negligence is the sole proximate cause of his or her injuries "when the safety devices that plaintiff alleges were absent were readily available at the work site, albeit not in the immediate vicinity of the accident, and plaintiff knew he [or she] was expected to use them but for no good reason chose not to do so, causing an accident" ... . Here, there is no evidence that anyone instructed the plaintiff that he was "expected to" use the permanent ladder rather than the scaffolding ... . **Doto v Astoria Energy II, LLC, 2015 NY Slip Op 04605, 2nd Dept 6-3-15**

Injury Caused by an Unsecured Scaffolding Component Which Fell Approximately Two-Feet, Striking Plaintiff, Was Not the Type of Elevation-Related Risk Which Is Covered by Labor Law 240 (1)

Plaintiff was injured when a component of scaffolding fell about two-feet and struck him. The Third Department determined the incident was not the result of a circumstance covered by Labor Law 240 (1) (the absence of statutorily-required safety equipment), even though the incident was "gravity-related." However, the Labor Law 246 (1) cause of action, alleging a violation of a provision of the Industrial Code, and the Labor Law 200 cause of action against the general contractor which supervised and controlled the work, should not have been dismissed. With respect ot the Labor Law 240 (1) cause of action, the court explained:

> Labor Law § 240 (1) "imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" ... . The statute is intended to provide "extraordinary protections [applicable] only to a narrow class of dangers. More specifically, [the statute] relates only to special hazards presenting elevation-related risks" ... . Accordingly, "section 240 (1) does not automatically apply simply because an object fell and injured a worker; '[a] plaintiff must show that the object fell . . . because of the absence or inadequacy of a safety device of the kind enumerated in the statute'" ... . Where, as here, an injury is caused by a falling object, liability "depends on whether the injured worker's task creates an elevation-related risk of the kind that the safety devices listed in section 240 (1) protect against" ... . An elevation-related risk arises only where there is a "physically significant elevation differential" ... . In order to determine whether a height differential is physically significant, we must consider "the weight of the object and the amount of force it was capable of

generating, even over the course of a relatively short descent" ... . Without a significant elevation differential, Labor Law § 240 (1) does not apply, even if the injury is caused by the application of gravity on an object ... .

Here, "tak[ing] into account the practical differences between the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by [the statute]," as we must ..., we find that plaintiff's injury, caused by the tipping frame or scaffold component (see 12 NYCRR 23-1.4), did not fall within the scope of Labor Law § 240 (1). Our conclusion remains even if we accept it to be true that the frame was part of a scaffold that was in the process of being assembled or dismantled ... . The record indicates that, at most, the crossbar of the frame, which was upright but not connected to any other component or supporting any planking, was two feet above plaintiff's head. In our view, the facts do not present a physically significant height differential and, while plaintiff was exposed to a general workplace hazard, he was not exposed to an elevation-related risk within the ambit of Labor Law § 240 (1) ... . As such, this cause of action should be dismissed. **Christiansen v Bonacio Constr., Inc., 2015 NY Slip Op 04700, 3rd Dept 6-4-15**

Industrial Code Provision Which Prohibits Allowing an Employee to Use an "Elevated Working Surface Which Is In a Slippery Condition" Does Not Apply to Snow Removal/The Injury---a Slip and Fall While Shoveling Snow---Was Caused by "An Integral Part of the Work"

Plaintiff was directed to remove snow from the work site and slipped and fell in the process. The Third Department affirmed the dismissal of plaintiff's Labor Law 241(6) cause of action because the cited industrial code provision (12 NYCRR 23-1.7 (d)) did not apply to the work plaintiff was assigned. The industrial code prohibited allowing an employee to use an "elevated working surface which is in a slippery condition." However, where the injury is caused by "an integral part of the work" being performed (here, removal of the slippery condition) that industrial code provision does not apply:

> ... [P]laintiff cites 12 NYCRR 23-1.7 (d), which prohibits an employer from allowing an employee to use an "elevated working surface which is in a slippery condition." However, when the injury is caused by "an integral part of the work" being performed, 12 NYCRR 23.1-7 does not apply ... . In other words, liability does not attach when the injury is caused by the "'very condition [a plaintiff] was charged with removing'" ... . Here, plaintiff was injured due to the condition that he was specifically charged with removing ... , **Barros v Bette & Cring, LLC, 2015 NY Slip Op 04910, 3rd Dept 6-11-15**

Plaintiff Entitled to Summary Judgment on Labor Law 240 (1) Cause of Action---Plaintiff Was Standing on an A-Frame Ladder When It Swayed and Tipped Over

The Second Department determined plaintiff, Casasola, was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff was standing on an unsecured A-frame ladder when it swayed and tipped over. The incident occurred when Casasola was working on property owned by the State of New York. The court noted that, to be liable, the property owner need not have exercised any control over the work. All the plaintiff must show is the violation of a statute proximately caused his injury:

> Labor Law § 240(1) provides that "[a]ll contractors and owners and their agents . . . shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to [construction workers employed on the premises]" ... . The purpose of this statute, commonly referred to as the "scaffold law," is to protect workers "by placing ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor, instead of on workers, who are scarcely in a position to protect themselves from accident" ... . **Casasola v State of New York, 2015 NY Slip Op 04798, 2nd Dept 6-10-15**

Plaintiff Who Fell From Scaffolding Which Did Not Have Safety Rails Entitled to Summary Judgment on His Labor Law 240(1) Cause of Action

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon his fall from scaffolding which did not have safety rails. The relevant law was succinctly explained:

> Labor Law § 240(1) imposes a nondelegable duty upon owners, lessees that control the work performed, and general contractors to provide safety devices necessary to protect workers from risks inherent in elevated work sites ... . "To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the

violation was a proximate cause of the accident" ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold which lacked safety rails on the sides and that he was not provided with a safety device to prevent him from falling ... . **Vasquez-Roldan v Two Little Red Hens, Ltd., 2015 NY Slip Op 04842, 2nd Dept 6-10-15**

Defendant-Homeowner's Providing Plaintiff With a Ladder With Allegedly Worn Rubber Feet Raised a Question of Fact About Defendant's Liability for the Ladder's Slipping and Plaintiff's Fall---Cause of Accident Can Be Proven by Circumstantial Evidence

The Second Department determined Supreme Court should not have granted summary judgment to the defendant homeowner. Plaintiff was using defendant's ladder when the ladder slipped and plaintiff fell. Plaintiff alleged the rubber feet on the ladder were totally destroyed. That allegation created a question of fact whether defendant provided dangerous or defective equipment to the plaintiff which caused plaintiff's injury. In response to defendant's argument that plaintiff could not explain the cause of the accident without resort to speculation, the court noted that the cause of an accident can be proven by circumstantial evidence (here the condition of the feet of the ladder and fact that the feet slipped):

> "[W]hen a defendant property owner lends allegedly dangerous or defective equipment to a worker that causes injury during its use, the defendant moving for summary judgment must establish that it neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" ... . While lack of constructive notice can generally be established by evidence demonstrating when the area or condition was last inspected relative to the time of the accident ..., the absence of rubber shoes on a ladder is a "visible and apparent defect," evidence of which may be sufficient to raise a triable issue of fact on the issue of constructive notice ... . Here, the defendants satisfied their prima facie burden with evidence that the ladder had been inspected prior to the accident. The defendant Billis Arniotis (hereinafter Billis) testified that, since purchasing the ladder 20 years before the accident, he had used it once per week and had inspected its rubber feet each time. Billis last inspected the ladder one or two weeks before the accident and did not observe any wear at that time. However, the plaintiff testified that he inspected the ladder after the accident and found that its rubber feet were "totally eaten up, worn," and "destroyed." This conflicting evidence, coupled with Billis's testimony that the ladder had not been used between the time of the accident and the plaintiff's inspection, raised a triable issue of fact.
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> Contrary to the defendants' contention, they failed to make a prima facie showing that the plaintiff cannot identify the cause of his fall without engaging in speculation. A plaintiff's inability to testify exactly as to how an accident occurred does not require dismissal where negligence and causation can be established with circumstantial evidence ... . Here, Billis's testimony establishes that he was present at the time of the accident and that he watched the ladder slide down while the plaintiff was on it. Evidence that the ladder's rubber feet were worn down also is sufficient to permit the inference that this defective condition caused the slippage ... . **Patrikis v Arniotis, 2015 NY Slip Op 05167, 2nd Dept 6-17-15**

Defendant Entitled to Summary Judgment--Activity (Routine Cleaning) Not Covered by Labor Law 240 (1)---Re: Labor Law 200 and Common Law Negligence: Equipment Provided by Defendant Not Defective; Defendant Did Not Have Authority to Control Plaintiff's Work

The Second Department determined Supreme Court properly dismissed an action by plaintiff-janitor who fell from an A-frame ladder while cleaning the basketball backboard in a school gymnasium. The Labor Law 240 (1) cause of action was properly dismissed because cleaning the backboard was routine maintenance, not covered by Labor Law 240 (1). The Labor Law 200 and common law negligence causes of action were properly dismissed because the defendant school demonstrated the ladder was not defective and it did not have the authority to control the manner in which plaintiff did his work:

> ... [T]he injured plaintiff's work did not constitute "cleaning" within the meaning of Labor Law § 240(1). The defendant established that the injured plaintiff was performing routine maintenance of the basketball backboards, done regularly throughout the course of the basketball season, that did not require any specialized equipment, and was unrelated to any ongoing construction or renovation of the school. As such, it was not a covered activity under Labor Law § 240(1) ... .
>
> Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work ... . "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have authority to exercise supervision and control over the work'" ... . Where a plaintiff's injuries arise not

from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be liable under Labor Law § 200 if it " either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition'" ... . When an accident is alleged to involve defects in both the premises and the equipment used at the work site, a defendant moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards ... . A defendant moving for summary judgment in such a case may prevail "only when the evidence exonerates it as a matter of law for all potential concurrent causes of the plaintiff's accident and injury, and when no triable issue of fact is raised in opposition as to either relevant liability standard" ... .

To the extent that the plaintiffs allege that the accident was caused by a defect in the ladder, which was owned and provided by the defendant, a premises condition is at issue ... . However, the defendant established, prima facie, that the ladder was not in a defective condition and that, in any event, it did not create or have actual or constructive notice of any defect in the ladder ... .

To the extent that the plaintiffs allege that the accident was caused by the manner in which the work was performed, the defendant established, prima facie, that it did not have the authority to supervise or control the means and methods of the injured plaintiff's work ... .**Torres v St. Francis Coll., 2015 NY Slip Op 05466, 2nd Dept 6-24-15**

PRACTICE POINT

This case illustrates an important recurring issue---the sufficiency of papers in support of a defendant's motion for summary judgment. In bringing the motion, a defendant must think like a plaintiff. The defendant must consider all the possible theories under which it/he/she might be held liable, and address all of them affirmatively in the motion papers. What the plaintiff brings up it the answering papers has no relevance to the initial determination of the sufficiency of the movant's papers. Here there were two possible theories under which the defendant could be liable pursuant to Labor Law 200. The motion addressed both of them and succeeded. If only one or the other had been addressed, the motion would have failed.

LABOR LAW/CIVIL PROCEDURE

Injury While Lowering a Heavy Tank Entitled Plaintiff to Summary Judgment on His Labor Law 240 (1) Claim---Party's Cross Motion Should Not Have Been Denied for Failure to Attach Pleadings---the Pleadings Had Been Provided to the Court by Other Parties

The First Department determined plaintiff was properly awarded summary judgment on his Labor Law 240 (1) claim. A rope attached to a heavy tank being lowered down some stairs by plaintiff severed one finger and a portion of another ("grave injury"). The court found that the incident was gravity-related, plaintiff was not provided with adequate safety devices, and plaintiff's actions were not the sole proximate cause of his injury. The court noted that another party's cross-motion for summary judgment should not have been denied on the ground the pleadings were not attached to the motion papers. The pleadings had been provided to the court by other parties. **Serowik v Leardon Boiler Works Inc., 2015 NY Slip Op 04773, 1st Dept 6-9-15**

LABOR LAW/TREE REMOVAL

Injury During Tree-Removal Not Covered by Labor Law Even though the Tree-Removal Was a Prerequisite to the Removal of a Fence---Work on the Fence Had Not Begun at the Time of the Injury

Plaintiff was injured during the cutting and removal of trees along a property line which included a fence. Although the fence was to be removed, the fence-removal project had not been started at the time of the accident. A fence is a "structure" within the meaning of the Labor Law, so injury while removing a fence would be covered. But because tree-related work is not covered by the Labor Law, and because the fence removal was not underway at the time of the injury, defendants' motion for summary judgment was properly granted:

> Labor Law § 240 (1) affords protection to workers engaged in the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Under settled case law, a tree does not qualify as a building or structure ..., and — generally speaking — neither tree removal ... constitutes one of the enumerated statutory activities. Although plaintiff correctly notes that a fence qualifies as a structure within the meaning of Labor Law § 240 (1) ... and, further, that the statutory protections extend to duties that are ancillary to the enumerated activities set forth therein ..., the fact remains that Labor Law § 240 (1) "afford[s] no protection to a plaintiff [who is] injured before any activity listed in the statute [is] under way" ... . **Cicchetti v Tower Windsor**

Terrace, LLC, 2015 NY Slip Op 04375, 3rd Dept 5-21-15

LABOR LAW/SUBCONTRACTORS/LABOR LAW 200/LABOR LAW 241 (6)

Subcontractor Who Is Not Vicariously Liable for the Acts or Omissions of Its Subcontractors Under Labor Law 200 May Be Vicariously Liable for those Acts or Omissions Under Labor Law 241 (6)

The First Department explained that, under Labor Law 200 (a codification of common law negligence), a subcontractor, as the statutory agent of the owner and general contractor, stands in the shoes of the owner and general contractor. Niether the owner, general contractor nor their statutory agent may be held liable under Labor Law 200 in the absence of evidence the owner, general contractor or their statutory agent actually created the dangerous condition or had actual or constructive notice of the dangerous condition. Here there was no evidence the defendant subcontractor created or was aware of a dangerous condition allegedly created by its subcontractors. A subcontractor who did not create and/or has no notice of the dangerous condition, however, can be vicariously liable for the acts and omissions of its subcontractors, as a statutory agent, under Labor Law 241 (6):

> As a subcontractor and, therefore, the statutory agent of the owner and general contractor, [defendant] stands in the shoes of the owner and general contractor, neither of which may be held liable under common-law negligence or Labor Law § 200 (a codification of common-law negligence) for injuries arising from a dangerous condition in the absence of evidence that such party actually created the dangerous condition or had actual or constructive notice of it ... . Uncontroverted evidence establishes, as a matter of law, that [defendant] sub-subcontracted all of its work ... and furnished no workers in its own employ to perform work. Rather, [defendant's] presence at the site was limited to one-hour visits by its president once a week or every other week. Since there is no evidence that [defendant] itself created the condition in question or had actual or constructive of it, it cannot be held liable for injuries arising from that condition under common-law negligence or Labor Law § 200, neither of which makes an owner, a general contractor or their statutory agent vicariously liable for the negligence of a downstream subcontractor ... .
>
> However, given that [defendant's] subcontract with [the owner] delegated to it the authority to supervise all drywall work, and given plaintiff's allegation that the presence of the pipe segment on the floor was caused by employees of [defendant's] spackling sub-subcontractor ... , [defendant] is subject to liability under Labor Law § 241(6) as a statutory agent ... . **DeMaria v RBNB 20 Owner, LLC, 2015 NY Slip Op 05599, 1st Dept 6-30-15**

LABOR LAW/WHISTLEBLOWER STATUTE/CIVIL PROCEDURE

"Whistleblower Statute" Cause of Action Should Have Survived the Motion to Dismiss---No Need to Cite Particular Statute, Rule or Regulation Alleged to Have Been Violated by the Employer in the Complaint

The Second Department determined plaintiff's Labor Law 740 cause of action should have survived a motion to dismiss for failure to state a cause of action. "A cause of action based upon Labor Law § 740, commonly known as the 'whistleblower statute,' is available to an employee who 'discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety'...". The court noted that, to survive dismissal, the particular law, rule or regulation which was purportedly violated need not be specified in the complaint:

> Here, the amended complaint alleged, inter alia, that the plaintiff's employment with the corporate defendants was terminated after he complained to the individual defendants and the human resources department about certain activities and practices which the corporate defendants engaged in or tolerated. It further alleged that such conduct violated various laws or rules or regulations, and threatened public safety. Notably, "for pleading purposes, the complaint need not specify the actual law, rule or regulation violated, although it must identify the particular activities, policies or practices in which the employer allegedly engaged, so that the complaint provides the employer with notice of the alleged complained-of conduct" ... . **Ulysse v AAR Aircraft Component Servs., 2015 NY Slip Op 04474, 2nd Dept 5-27-15**

LANDLORD-TENANT/RENT-STABILIZED APARTMENT/NONRENEWAL NOTICE/ACCEPTANCE OF UNSOLICITED RENT PAYMENTS AFTER NONRENEWAL NOTICE TO TENANT

Acceptance of Unsolicited Rent After Expiration of a Lease and After the Requisite Nonrenewal Notice Does not Waive the Intention Not to Renew or Vitiate the Notice

The Second Department, in a full-fledged opinion by Justice Cohen, determined the acceptance of unsolicited rent payments after the lease for a rent-stabilized apartment had expired, and after the tenant had received the requisite nonrenewal notice, did not constitute a waiver of the intention not to renew:

> ... [W]e are asked to determine whether a landlord's acceptance of unsolicited rent in the "window period" between the expiration date of a lease and the commencement of a holdover proceeding nullifies a landlord's previous service of a notice of intention not to renew the lease. We conclude that the acceptance of unsolicited rent in these circumstances does not, by itself, demonstrate an intentional waiver of a previously served notice of intention not to renew the lease and, thus, does not vitiate that notice. **Matter of Georgetown Unsold Shares, LLC v Ledet, 2015 NY Slip Op 05185, 2nd Dept 6-17-15**

MEDICAID/STANDING TO SEEK REIMBURSEMENT OF MEDICAID EXPENSES

Prior Owner of a Nursing Home Did Not Have Standing to Seek Payments from Medicaid for the Period During His Ownership---Only the Current Owner/Operator of the Nursing Home Had Standing

The Third Department determined petitioner, the former owner of a nursing home, did not have standing to seek payments from Medicaid for the period before petitioner sold the nursing home. Only the current operator of the nursing home has standing to seek Medicaid payments. The court noted that petitioner had protected his interest in the payments by contract with the new owner of the nursing home:

> Standing requires a party to demonstrate both an injury-in-fact and an injury falling "within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted" ... . Petitioner has clearly demonstrated an injury-in-fact particularly since it initiated the rate appeal while it was still the owner/operator ... . The more difficult question is whether petitioner meets the zone of interests component as a former owner/operator. Our review shows that the governing statute and regulations contemplate the payment of Medicaid reimbursement to the current provider of medical services or the current operator of a nursing home facility. Specifically, Social Services Law § 367-a (1) (a) mandates that all payments "shall be made to the person, institution, state department or agency or municipality supplying such medical assistance" and expressly prohibits the assignment of a reimbursement claim to a third party. This legislation was designed to "relieve DOH from the potential liability and increased administrative burdens involved in such assignments" (Legislative Mem, 1971 McKinney's Session Laws of NY at 2419-2420...). Correspondingly, nursing home facilities qualify for Medicaid payments provided that they possess a valid operating certificate issued by the Commissioner (see Public Health Law § 2801 [2], [3], [4] [b]; 10 NYCRR 86-2.1 [a]). An operating certificate "shall only be used by the established operator for the designated site or operation" (10 NYCRR 401.2 [b]). When, as here, the owner/operator sells a facility to a party who intends to continue operating the facility, it may transfer the operating certificate to the new operator only upon approval of the Public Health Council (see 10 NYCRR 401.3 [c]). Read together, these provisions establish that it is the current operator of a nursing home facility — i.e., the holder of a valid operating certificate — that is entitled to receive Medicaid payments and, thus, is the protected party within the statutory zone of interest. **Matter of Park Manor Rehabilitation & Health Care Ctr., LLC v Shah, 2015 NY Slip Op 04909, 3rd Dept 6-11-15**

MENTAL HYGIENE LAW/CRIMINAL PROCEDURE LAW/CRIMINAL LAW/SEALING OF CLINICAL RECORD/BLANKET SEALING OF RECORD/INSANITY AQUITTEES

Insanity Acquittee Not Entitled to Blanket Sealing of Record of a Recommitment Proceeding But Is Entitled to Sealing of His Clinical Record

The Third Department determined respondent, who is subject to Criminal Procedure Law 330.20 based on his acquittal of criminal charges by reason of mental disease or defect, was not entitled to a blanket sealing of the record of a recommitment proceeding pursuant to Mental Hygiene Law 9.31 (F), but was entitled to the sealing of

his clinical record pursuant to Mental Hygiene Law 33.13:

> Here, respondent was subject to CPL 330.20 based upon his acquittal of criminal charges by reason of mental disease or defect. A lack of responsibility for criminal conduct by reason of mental disease or defect is an affirmative defense that a defendant must raise and prove by a preponderance of the evidence (see Penal Law §§ 25.00 [2]; 40.15). By avoiding criminal penalties and becoming subject to CPL 330.20, "this places insanity acquittees in a significantly different posture than involuntarily committed civil patients" ..., and "rational differences between procedures for commitment and release applicable to defendants found not responsible and persons involuntarily committed under the Mental Hygiene Law are justifiable" ... . In light of this distinction, we agree with Supreme Court that the blanket sealing of the record that is specifically applicable to the involuntarily admission of civil patients under Mental Hygiene Law § 9.31 (f) is not applicable to respondent ... .
>
> We reach a different conclusion, however, regarding defendant's clinical record. Pursuant to Mental Hygiene Law § 33.13, a clinical record for each patient or client shall be kept containing "information on all matters relating to the admission, legal status, care, and treatment of the patient or client and shall include all pertinent documents relating to the patient or client" (Mental Hygiene Law § 33.13 [a]) and "such information about patients or clients . . . shall not be a public record," subject to certain exceptions (Mental Hygiene Law § 33.13 [c]). Although Supreme Court ruled that respondent's clinical treatment records, related hospital records and unrelated medical records must be sealed, it is unclear if other information intended to be included in his clinical record under Mental Hygiene Law § 33.13 (a) would be made public. In our view, respondent is entitled to the full protection of Mental Hygiene Law § 33.13, and all information contained in his clinical record, as defined in Mental Hygiene Law § 33.13 (a), shall not be made public, subject to the statutory exceptions (see Mental Hygiene Law § 33.13 [c]). **Matter of John Z. (John Z.), 2015 NY Slip Op 04361, 3rd Dept 5-21-15**

MORTGAGES/NOTES/DEBTOR-CREDITOR/STATUTE OF LIMITATIONS

Note Which Was Extended and Consolidated with Other Debts Was Not Extinguished by the Consolidation, Extension and Modification Agreement (CEMA)---the Agreement, Therefore, Did Not Commence the Running of the Statute of Limitations for an Action on the Note

The Third Department, reversing Supreme Court, determined a Consolidation, Extension and Modification Agreement (CEMA) did not extinguish a note which was extended and consolidated under the agreement. Therefore the statute of limitations for action on the note did not commence running when the agreement was entered:

> We agree with plaintiff that the plain language of the CEMA does not support Supreme Court's conclusion that the CEMA extinguished the 1992 note and thereby recommenced the running of the statute of limitations. "It is well established that a subsequent note does not discharge the original indebtedness secured unless there is an express agreement between the parties" ... . Defendant points to no express agreement and cites no authority supporting its claim that the CEMA operated to extinguish the 1992 note. Rather, the record makes clear that defendant still owed approximately $169,000 on the 1992 note at the time that the CEMA was executed. That debt was consolidated with two other debts into a new note and the mortgage liens were "coordinated, consolidated, combined and extended" to form a single lien. "Where, as here, balances of first mortgage loans are increased with second mortgage loans and CEMAs are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist" ... . **Bechard v Monty's Bay Recreation, Inc., 2015 NY Slip Op 04711, 3rd Dept 6-4-15**

MUNICIPAL LAW/CIVIL SERVICE LAW/FIREFIGHTERS/INVOLUNTARY LEAVE/DIABETES/UNFIT FOR ACTIVE SERVICE AS A FIREFIGHTER

Failure to Strictly Comply With Notice Requirement in the Civil Service Law Rendered the Involuntary Leave Imposed Upon the Petitioner-Firefighter a Nullity---Petitioner Entitled to Back Pay for Leave Period---Petitioner Properly Deemed Unfit for Active Duty Due to His Inability to Manage Diabetic Symptoms

The Fourth Department determined a firefighter was properly deemed unfit for active duty as a firefighter because of his inability to manage diabetic symptoms. During the course of the decision, the Fourth Department held that the city's failure to strictly comply with the notice requirements of the Civil Service Law rendered the involuntary leave imposed on petitioner a nullity (entitling him to back pay for the leave period):

> We conclude that the procedural protections contained in Civil Service Law § 72 (1) apply to proceedings brought pursuant Civil Service Law § 72 (5) based on the language in subdivision (1) that the provisions of notice and hearing therein apply to employees "placed on leave of absence pursuant to this section" (emphasis added), "which includes Civil Service Law § 72 (5)" ... . These procedures are necessary "to afford tenured civil servant employees . . . procedural protections prior to involuntary separation from service" ... . "Because of the significant due process implications of the statute, strict compliance with its procedures is required" ... . Here, it is undisputed that respondents did not strictly comply with the procedures pursuant to section 72 for placing petitioner on immediate involuntary leave inasmuch as it was not until April 2012 that petitioner was provided with "[w]ritten notice of the facts providing the basis for the judgment of the appointing authority that [petitioner was] not fit to perform the duties of" his position (§ 72 [1]). Although the parties had engaged in negotiations during the period before respondents provided petitioner with written notice, respondents concede that at no time did petitioner waive his rights under section 72 ... . Additionally, petitioner did not receive the final notice of determination within 75 days from the receipt of his request for review (see § 72 [1]). The absence of strict compliance with these procedural requirements renders petitioner's alleged leave a nullity prior to September 30, 2013, when Linnertz issued his final determination after reviewing the Hearing Officer's decision ... , and petitioner is entitled to back pay and the restoration of benefits from August 26, 2011 until September 30, 2013.**Matter of Williams v Troiano, 2015 NY Slip Op 05318, 4th Dept 6-19-15**

MUNICIPAL LAW/COUNTY LAW/NASSAU COUNTY CHARTER/MUNICIPAL CONTRACTS/CONTRACT LAW

Lease and Lease Amendment Invalid Even Though Approved by County Legislature---County Charter Required that All Contracts with the County Be Executed by the County Executive---The County Executive Signed the Lease But Not the Lease Amendment (Which Was Integral to the Agreement)---Lease Required All Modifications to Be In Writing, So Signing the Lease Amendment Was Not a "Purely Ministerial Act"---A Municipal Contract Which Does Not Comply with Statutory Requirements or Local Law Is Invalid and Unenforceable

The Second Department determined that a lease and a lease amendment were invalid and unenforceable, even though the documents had been approved by the Nassau County Legislature. The Nassau County Charter required that any contract entered into by the county be executed by the County Executive. The County Executive signed the lease, but not the lease amendment (which was integral to the final agreement). Execution of the lease amendment was not a "purely ministerial act" because the lease required that any modifications be in writing:

> " A municipal contract which does not comply with statutory requirements or local law is invalid and unenforceable'" ... . Here, the County demonstrated its prima facie entitlement to judgment as a matter of law by establishing that the lease amendment, which was integral to the final agreement between the parties, was not executed by the County Executive or his authorized designee, as required by Nassau County Charter § 2206. Contrary to the defendant's contention, the execution of the lease amendment by the County Executive or his designee was not a purely ministerial act in light of the express language in the lease requiring any modifications thereto to be in writing ... . Further, the express terms of the proposed lease provided that it could not be modified "except by a writing subscribed by both parties" (emphasis added), and the lease amendment expressly contemplated that it would be effective when "last executed by the parties." Since the lease amendment was integral to the final agreement between the parties, and the proposed lease and lease amendment together constituted the entirety of the parties' understanding of their obligations, the County established, prima facie,

that the County Executive's determination not to execute the lease amendment rendered the proposed lease unenforceable because there was no meeting of the minds between the parties ... . **County of Nassau v Grand Baldwin Assoc., L.P., 2015 NY Slip Op 04445, 2nd Dept 5-27-15**

MUNICIPAL LAW/EMPLOYMENT LAW/GENERAL MUNICIPAL LAW 207-c/POLICE OFFICERS/DISABILITY PAYMENTS/LIGHT-DUTY ASSIGNMENT

Police Officer Who Refused a Light-Duty Assignment Was Not Entitled to Disability Benefits Pursuant to General Municipal Law 207-c

The Second Department determined a police officer was not entitled to refuse a light duty assignment during the period his entitlement to disability benefits pursuant to General Municipal Law 207-c was being determined:

> A disabled officer receiving General Municipal Law § 207-c benefits is entitled to a due process hearing before those benefits may be terminated when the officer submits medical evidence contesting the finding of a municipality's appointed physician that the officer is fit for duty ... . Once such evidence has been submitted, an "order to report for duty may not be enforced, or benefits terminated, pending resolution of an administrative hearing, which itself is subject to review under CPLR article 78" ... . However, where the municipality's physician is of the opinion that the officer is able "to perform specified types of light police duty," payment of the full amount of salary or wages may be discontinued should the officer refuse to perform such light police duty if same "is available and offered to [the officer]" and enables him or her "to continue to be entitled to his [or her] regular salary or wages" (General Municipal Law § 207-c[3]...). If an officer who refuses to return to light duty fails to provide medical proof that he or she is unable to do so, the municipality may discontinue disability payments without a hearing ... . **Matter of Garvey v Sullivan, 2015 NY Slip Op 05476, 2nd Dept 6-24-15**

MUNICIPAL LAW/EQUITABLE ESTOPPEL/FORECLOSURE

Promise Made or Advice Given by a Municipal Employee Does Not Give Rise to Equitable Estoppel

The Second Department noted that the doctrine of equitable estoppel is applied only rarely against municipalities. Here plaintiff alleged the four-month statute of limitations for redemption (re: a foreclosure action) passed because of a municipal employee's promise to hold papers submitted in support of an attempt at redemption. The court held that a promise made or advice given by a governmental employee will not give rise to equitable estoppel: "... [E]quitable estoppel is applied against a municipality performing governmental functions only in the rarest of cases ..., and "erroneous advice by a governmental employee will not give rise to an exception to the general rule"... . **Wilson v Neighborhood Restore Hous., 2015 NY Slip Op 05176, 2nd Dept 6-17-15**

MUNICIPAL LAW/GENERAL MUNICIPAL LAW/BIDDING FOR MUNICIPAL CONTRACTS/ADMINISTRATIVE LAW

There Was a Rational Bases for Fire District Board of Commissioners' Rejection of Petitioner's Bid to Supply a Radio Dispatch System---Court Cannot Substitute Its Own Judgment for the Board's

The Second Department determined the respondent board (fire district commissioners) had a rational basis for rejecting petitioner's bid for a radio dispatch system. As long as a rational basis for an administrative decision exists it must be upheld. A court may not substitute its own judgment:

> General Municipal Law § 103(1) provides that, in awarding any contract in excess of $35,000, public entities must award the contract to "the lowest responsible bidder." "The central purposes of New York's competitive bidding statutes are the (1) protection of the public fisc by obtaining the best work at the lowest possible price; and (2) prevention of favoritism, improvidence, fraud and corruption in the awarding of public contracts'"... . Nevertheless, it is a municipality's right to determine whether a bid meets its specifications, and that determination is entitled to deference if it is supported by "any rational basis" ... . Thus, " a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion'" ... . It is the petitioner's burden to demonstrate that a bid has been wrongly awarded ... .

Here, the board identified three reasons for rejecting the petitioner's bid: (1) the petitioner did not demonstrate that it had a service location within 20 miles of the fire district; (2) the petitioner offered to supply equipment which differed from the bid specifications; and (3) over the life of the contract, the monthly maintenance costs would render the petitioner's bid more expensive than Eastern's. Although the petitioner disagrees with the board's conclusions as to each of these points, any one of them would provide a rational basis for the rejection of the petitioner's bid. **Matter of Hello Alert, Inc. v East Moriches Fire Dist., 2015 NY Slip Op 05189, 2nd Dept 6-17-15**

MUNICIPAL LAW/NOTICE OF CLAIM/MOLD CLAIMS/NEW YORK CITY HOUSING AUTHORITY (NYCHA)

Late Notice of Claim Should Not Have Been Deemed Timely (Sua Sponte, Nunc Pro Tunc)---the 90 Days Started Running When Plaintiff's Asthma Symptoms Worsened, Not When a Doctor Connected the Symptoms to Mold in the Apartment---the Plaintiff Did Not Make a Motion for Permission to File a Late Notice of Claim

The First Department determined Supreme Court should not have, sua sponte (in the absence of a motion by the plaintiff), deemed plaintiff's late notice of claim timely filed nunc pro tunc. The claim alleged mold resulting from a leak in plaintiff's New York City Housing Authority (NYCHA) apartment exacerbated plaintiff's asthma. The First Department found that the cause of action accrued when plaintiff's symptoms worsened, no later than February, 2011, not when a connection between the mold and plaintiff's symptoms was suggested by a doctor in March 2011:

> [Plaintiff] was required to file a notice of claim within 90 days after "the date of [her] discovery of the injury" or the date on which "through the exercise of reasonable diligence the injury should have been discovered" (CPLR 214-c[3]; see General Municipal Law § 50-e[1][a]...). NYCHA established that plaintiff's claim accrued no later than February 2011, by relying on plaintiff's testimony that her asthma symptoms worsened, resulting in more frequent attacks and hospital visits, starting in September or December of 2010, or January or February of 2011, when she was prescribed additional medications, as reflected in her hospital records. Thus, the notice of claim, filed over 90 days later in June 2011, without leave of court, was late and without effect ... .
>
> Plaintiff argues that her claim did not accrue until March 2011, when a doctor noted a connection between her symptoms and the mold in her apartment. However, a "cause of action for damages resulting from exposure to toxic substances accrues when the plaintiff begins to suffer the manifestations and symptoms of his or her physical condition, i.e.[,] when the injury is apparent, not when the specific cause of the injury is identified" ... .
>
> The court lacked authority to deem the late notice of claim timely filed nunc pro tunc, since plaintiff never moved for such relief and the statutory time limitation for bringing the claim had already expired when NYCHA moved for summary judgment ... . **Vincent v New York City Hous. Auth., 2015 NY Slip Op 04767, 1st Dept 6-9-15**

MUNICIPAL LAW/POLICE POWERS/DEMOLITION OF BUILDING

Demolition of Building Without Notice or Opportunity to Be Heard Was a Proper Exercise of City's Police Powers

The Second Department determined summary judgment dismissing the complaint against the city, based upon the city's demolishing a building without notice or the opportunity to be heard, was properly granted:

> "In the exercise of its police powers [a] municipality may demolish a building without providing notice and an opportunity to be heard if there are exigent circumstances which require immediate demolition of the building to protect the public from imminent danger" ... . "[W]here there is competent evidence allowing the official to reasonably believe that an emergency does in fact exist, or that affording pre-deprivation process would be otherwise impractical, the discretionary invocation of an emergency procedure results in a constitutional violation only where such invocation is arbitrary or amounts to an abuse of discretion" ... . Here, the defendant City of New York made a prima facie showing that its decision to cause the demolition of the subject building was not arbitrary or an abuse of discretion ... . In opposition, the plaintiffs failed to raise a triable issue of fact. **Iavarone v City of New York, 2015 NY Slip Op 04811, 2nd Dept 6-10-15**

MUNICIPAL LAW/TOWN LAW/CIVIL SERVICE LAW/EMPLOYMENT LAW/ABOLISHMENT OF POSITION

Petitioner's Position Properly Abolished by Enactment of Town Budget

The Second Department determined that the town did not act in bad faith when it abolished petitioner's position through the enactment of the town budget. The court explained the applicable law:

> A public employer may abolish civil service positions to "promote efficiency and economy," provided that the employer acts in good faith ... . Where a public employer has abolished a position, an employee challenging that determination has the burden of proving that the employer engaged in a bad faith effort to circumvent the Civil Service Law ... . "Bad faith may be demonstrated by evidence that a newly hired person performed substantially the same duties as the discharged employee" ... . "[W]hen there exists a triable issue of fact with regard to bad faith, a full hearing must be held" ... .
>
> Here, contrary to the petitioner's contention, adoption of a municipal budget may properly serve, under certain circumstances, to abolish an employee's position ... . **Matter of Grant v Town of Lewisboro, 2015 NY Slip Op 05187, 2nd Dept 6-17-14**

MUNICIPAL LAW/TOWN LAW/PRIOR PUBLIC USE DOCTRINE

Installing, Pursuant to a Resolution, a Temporary Barrier to Address Traffic and Speeding Problems Did Not Violate the "Prior Public Use" Doctrine

The Second Department determined the town's passing of a resolution installing a temporary barrier on a street to address complaints about traffic and speeding was proper. Installing the barrier did not violate the "prior public use" doctrine because the barrier did not interfere with a prior public use:

> The prior public use doctrine limits "the general grant of the power of eminent domain extended in Town Law § 64(2)" by prohibiting towns from "acquir[ing] rights in property already devoted to another public use where the acquisition will interfere with or destroy the prior public use" ... . The subject breakaway barrier that the Town installed on Samuel Road did not interfere with or destroy the prior public use of Samuel Road. Accordingly, the prior public use doctrine is inapplicable, and does not prohibit the Town from installing the barrier ... . **Matter of County of Rockland v Town of Clarkstown, 2015 NY Slip Op 04314 2nd Dept 5-20-15**

NEGLIGENCE/ASSAULTS, DUTY TO PROTECT AGAINST

Question of Fact Whether Movie Theater Breached Its Duty to Protect Patrons from Assault

The Second Department determined defendant movie theater's motion for summary judgment was properly denied. Plaintiffs were assaulted at the theater. Depositions revealed there had been four or five similar incidents at the theater and one of the plaintiffs screamed for help throughout the 15-to-20-minute assault:

> A property owner must act in a reasonable manner to prevent harm to those on its premises, which includes a duty to control the conduct of persons on its premises when it has the opportunity to control such conduct, and is reasonably aware of the need to do so ... . However, "the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults" ... . **Solomon v National Amusements, Inc., 2015 NY Slip Op 04306, 2nd Dept 5-20-15**

Question of Fact Whether Property Owners Owed a Duty to Protect Plaintiff from an Assault During a Fair on the Premises

The Second Department determined there was a question of fact whether the defendants, who held a fair on their premises, were liable to plaintiff who was attacked by two teenage boys during the fair. There was evidence a security guard had been notified that a fight was about to break out and did nothing:

> "While landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such persons and is reasonably aware of the need for such control" ... . Thus, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults ... .
>
> Here, the church defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence which demonstrated that the infant plaintiff's injuries resulted from an

unexpected and unforeseeable assault ... . However, in opposition, the plaintiffs raised a triable issue of fact as to whether the assault of the infant plaintiff was unexpected and unforeseeable. The plaintiffs presented a transcript of the deposition testimony of the infant plaintiff's girlfriend, who explained that, approximately 30 minutes before the subject incident, she spoke to a security guard at the fair and advised him that there was a "confrontation" and that it was "getting worse." **Bisignano v Raabe, 2015 NY Slip Op 04081, 2nd Dept 5-13-15**

Bar Patron Was Beaten to Death by Other Patrons---Defendants (Bar and Premises Owners) Were Unable to Demonstrate the Attack Was Not Foreseeable and their Negligence Was Not the Proximate Cause of the Attack---Defendants' Summary Judgment Motion Properly Denied

The Second Department determined there were questions of fact whether a bar patron could have been protected from harm. "The plaintiff's decedent was assaulted by other patrons of a lounge on premises leased by the defendant Bartini's Pierre, Inc., also known as Station Bar Corp., doing business as Bartini's Lounge, and owned by the defendant Reiner & Keiser Associates (hereinafter together the appellants)." The appellants were not able to demonstrate prima facie that the attack was not foreseeable, that the attack could not have been prevented, that the appellants' negligence was not the proximate cause of the attack, or that reasonable security measures to guard against criminal acts by third persons were taken:

> "Although a property owner must act in a reasonable manner to prevent harm to those on its premises, an owner's duty to control the conduct of persons on its premises arises only when it has the opportunity to control such conduct, and is reasonably aware of the need for such control. Thus, the owner of a public establishment has no duty to protect patrons against unforeseeable and unexpected assaults" ... .
>
> Here, the appellants failed to demonstrate their prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against them. In support of their motion, the appellants submitted the deposition testimony of a witness to the incident, who testified that, shortly before the incident, he noticed the decedent being restrained by a security guard, but was not aware of the events which led the security guard to restrain the decedent. The witness testified that the security guard then proceeded to escort the decedent out of the premises, during the course of which the decedent was severely beaten by other patrons, resulting in his death. This evidence failed to demonstrate, prima facie, that the attack upon the decedent was not foreseeable, that the appellants lacked the opportunity to prevent the attack, or that any negligence on the appellants' part was not a proximate cause of the incident ... . The appellants also failed to demonstrate, prima facie, that they took reasonable security measures against foreseeable criminal acts of third parties ... . **Walfall v Bartini's Pierre, Inc., 2015 NY Slip Op 03830, 2nd Dept 5-6-15**

Doctor Who Allegedly Wrongfully Prescribed Narcotics for a Drug Addict Who Shot Plaintiff's Decedent in an Attempt to Steal Narcotics from a Pharmacy Did Not Owe a Duty of Care to Plaintiff's Decedent

The Second Department determined the duty to protect persons from the criminal acts of others did not extend to plaintiff's decedent. Plaintiff sued a doctor who operated a pain management clinic, alleging that the doctor operated a "pill mill" and wrongfully provided drugs to a drug addict, The drug addict shot plaintiff's decedent during a robbery of a drug store in an attempt to steal narcotics. The court noted that there are situations in which a defendant exercises sufficient control to prevent harm to others. Here, however, in the absence of such control, the doctor owed no duty of care to plaintiff's decedent:

> "The question of whether a defendant owes a duty of care to another person is a question of law for the courts" ... .
>
> Generally, "[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm" ... . Further, "there is no duty to control the conduct of third persons to prevent them from causing injury to others,' even where, as a practical matter, the defendant could have exercised such control" ... .
>
> ... Courts have imposed a duty of care "where there exist special circumstances in which there is sufficient authority and ability to control the conduct of third persons" that courts have identified a duty to exercise such control ... . Thus, courts have imposed a duty to control the conduct of others "where there is a special relationship: a relationship between [the] defendant and [the] third person whose actions expose [the] plaintiff to harm such as would require [the] defendant to protect the plaintiff from the conduct of others" ... .
>
> The Supreme Court erred in denying [the doctor's] motion to dismiss the complaint insofar

as asserted against him for failure to state a cause of action. [The doctor] did not owe a duty to the decedent or to the general public because no special circumstances existed. The decedent was a stranger to [the shooter] and a member of the general public, not a member of "a determinate and identified class" ... . **Malone v County of Suffolk, 2015 NY Slip Op 03811, 2nd Dept 5-6-15**

NEGLIGENCE/ASSUMPTION OF THE RISK

Spectator Watching People Sledding Assumed the Risk of Being Struck

The Fourth Department determined plaintiff assumed the risk of injury when she stood at the bottom of a hill to watch people sledding down the hill. The court noted that in a suit against participants in a sport, a spectator is held to have assumed the risks inherent in the activity, including the risk of being struck:

> To establish the defense, "a defendant must show that [the] plaintiff was aware of the defective or dangerous condition and the resultant risk, although it is not necessary to demonstrate that [the] plaintiff foresaw the exact manner in which his [or her] injury occurred" ... . [I]n a suit against participants in [an applicable activity], a spectator generally will be held to have assumed the risks inherent in the [activity], including the specific risk of being struck' " ... . For instance, it has been held that a spectator at a baseball game assumes the risk of being struck by a foul ball ... .
>
> Here, we similarly conclude that, by standing on the side of the hill while watching other people sledding, plaintiff assumed the risk of being struck by a sled. **Savage v Brown, 2015 NY Slip Op 03638, 4th Dept, 5-1-15**

NEGLIGENCE/ASSUMPTION OF RISK/AIRPORTS/PILOTS

Pilot Assumed the Risk of a Take-Off from a Wet, Grass Field

The Fourth Department determined plaintiff-pilot's complaint should have been dismissed because the pilot, injured attempting to take off from a grass field, assumed the risk associated with a take-off from a wet field. The airport is a designated venue for the recreational activity of private aviation. Therefore the recreational use of the airport was a qualifying activity under the doctrine of primary assumption of the risk. The pilot was aware of the wet conditions prior to his attempt to take off:

> We agree with defendant that its airport is a designated venue for the recreational activity of private aviation and that plaintiff's use thereof was in furtherance of his pursuit of that activity ... . We thus conclude, as defendant contends, that plaintiff's recreational use of defendant's airport was a qualifying activity under the doctrine of primary assumption of the risk ... . Primary assumption of the risk applies when a consenting participant in a qualified activity "is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks" ... . "If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" ... . "[A]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff" ... . The primary assumption of the risk doctrine also encompasses risks involving less than optimal conditions... . "It is not necessary to the application of assumption of [the] risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" ... .
>
> Here, the undisputed facts establish that plaintiff, an experienced pilot, was well aware of the risk inherent in taking off from a soft, wet grass runway with the type of landing gear with which his aircraft was equipped. Plaintiff's awareness of the risk was amply established by his admitted preflight concern about the condition of the grass runway, and by his personal inspection thereof generated in part by his encounter with wet and muddy conditions while towing his aircraft to the runway by motor vehicle. **Bouck v Skaneateles Aerodrome, LLC, 2015 NY Slip Op 05300, 4th Dept 6-19-15**

NEGLIGENCE/BUILDING MANAGER/INHERENTLY DANGEROUS CONDITION/LIABILITY IN TORT ARISING FROM CONTRACT/CONTRACT LAW

Question of Fact Whether a Building Manager Owed a Duty to Plaintiff---Plaintiff, a Sidewalk Pedestrian, Was Struck by Window-Washing Equipment---The Window Washing Service Was an Independent Contractor Hired by the Building Manager---Question of Fact Raised Whether a Duty to the Plaintiff Ran from the Building Manager Because of the Inherently Dangerous Work the Independent Contractor Was Hired to Do and Because of the Nature of the Contract Between the Building Manager and the Building Owner---The Court Noted that the Property Owners Were Not Liable Because Ownership and Control of the Building on the Property Had Been Transferred (to the Building Owner)

The Second Department determined there was a question of fact whether a building manager (Milford) who hired a window washing service (Red Cap) could be liable for injury to a pedestrian (plaintiff) struck by a piece of window-washing equipment which fell. Although Red Cap was an independent contractor, plaintiff raised a question of fact about whether Milford owed a nondelegable duty to plaintiff because the work it hired Red Cap to do was inherently dangerous (in the absence of warning signs and pedestrian barriers) and whether the building management services contract between Milford and the building-owner (S & P) was sufficiently comprehensive and exclusive to create a duty running to plaintiff. The court noted that the property owners were not liable because ownership and control of the building (on the property) had been transferred (to the building-owner):

> Milford established its prima facie entitlement to judgment as a matter of law by submitting proof that Red Cap was an independent contractor and, thus, it could not be held liable for Red Cap's negligent acts ..., and that, as S & P's contractual managing agent, it owed no duty to the plaintiff ... . However, in opposition, the plaintiff raised triable issues of fact as to whether Milford owed a nondelegable duty to the plaintiff because it knew or had reason to know that the work it hired Red Cap to perform was inherently dangerous to pedestrians in the absence of warning signs or barriers on the sidewalk below the window-washing apparatus ..., and whether the property management services agreement with S & P was sufficiently comprehensive and exclusive so as support a duty running to the plaintiff ... . **Baek v Red Cap Servs., Ltd., 2015 NY Slip Op 04794, 2nd Dept 6-10-15**

NEGLIGENCE/CIVIL PROCEDURE/DISCOVERY/ PSYCHOLOGICAL TESTING

Motion to Compel Plaintiff to Submit to a Psychological Test Should Have Been Granted---Plaintiff Placed Her Mental Condition In Issue and Did Not Demonstrate the Test Was Invasive or Harmful

Reversing Supreme Court, the Second Department determined the defendants' motion to compel plaintiff to submit to the administration of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) should have been granted. Plaintiff amended the bill of particulars to allege she suffered from post-traumatic stress disorder (stemming from the underlying car accident). Plaintiff placed her mental condition in issue, and there was no showing the MMPI-2 would be invasive or harmful:

> Where the mental or physical condition of a party is in controversy, the party may be required to submit to a medical examination ... . However, a plaintiff who places his or her physical or mental condition in controversy will not be required to undergo an examination or objective testing procedure which is invasive, painful, or presents the possibility of danger to life or health ... .
>
> Here, it is undisputed that the plaintiff's mental condition was put into controversy by her service of the bill of particulars denominated a second supplemental bill of particulars, in which she alleged that she has post-traumatic stress disorder that was caused by the accident. In support of their motion, the defendants established, through the affidavit of a psychologist, that the MMPI-2 is a conventionally accepted noninvasive test utilized for the assessment of a diagnosis of post-traumatic stress disorder.
>
> In opposition, the plaintiff failed to establish that subjecting herself to the MMPI-2 would be invasive or harmful to her health ... . **Peculic v Sawicki, 2015 NY Slip Op 05168, 2nd Dept 6-17-15**

NEGLIGENCE/CIVIL PROCEDURE/NOTICE TO ADMIT/ADMISSIONS/WITHDRAWAL OF ADMISSIONS/EMPLOYMENT LAW/RESPONDEAT SUPERIOR/SCOPE OF EMPLOYMENT

A Request for an Admission Which Goes to the Heart of the Litigation Is Improper---Defendant Should Have Been Allowed to Withdraw Its Admission that Its Employee Was Acting Within the Scope of His Employment When a Vehicle Accident Occurred

The Second Department determined Supreme Court should have allowed defendant to withdraw admissions made in response to a notice to admit. Plaintiff was involved in an accident with a vehicle driven by an employee of defendant, Islip Pizza. In response to a notice to admit, the defendant stated that the employee was acting in the scope of his employment at the time of the collision. Because defendant's liability, under the doctrine of respondeat superior, depended entirely on whether the employee was acting within the scope of his employment, the admission went to the heart of the matters at issue. A request for an admission which deals with an ultimate conclusion is improper (CPLR 3123 (a)). Defendant should have been allowed to withdraw it (CPLR 3123 (b)):

> Under CPLR 3123(a), a party may serve upon another party a written request that it admit, among other things, "the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry" (CPLR 3123[a]). The legislative policy underlying CPLR 3123(a) is to promote efficiency in the litigation process by "eliminat[ing] from the issues in litigation matters which will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial. A notice to admit which goes to the heart of the matters at issue is improper" ... . Furthermore, under CPLR 3123(b), a court may at any time permit a party to amend or withdraw any admission "on such terms as may be just" (CPLR 3123[b]...). **Altman v Kelly, 2015 NY Slip Op 04076, 2nd Dept 5-13-15**

NEGLIGENCE/CONSTRUCTIVE NOTICE

The Fact that Plaintiff's Testimony Was the Only Evidence of the Defect Which Caused Her to Fall (a Hole in a Worn Rubber Mat) Did Not Render the Evidence Insufficient to Support the Plaintiff's Verdict

The First Department, over a dissent, determined the trial evidence was sufficient to support the jury's conclusion the defendant hospital had constructive notice of a worn rubber mat. The jury could reason that the wearing of the mat, resulting in a hole, occurred over a period of time and should have been noticed by the defendant. The fact that plaintiff's testimony was the only evidence of the claimed defect did not render the evidence insufficient. The motion to set aside the verdict was properly denied and the verdict was not against the weight of the evidence:

> Plaintiff testified that as she entered the playground with her five-year-old grandson, her foot became caught in a hole in the rubber mat, and she fell forward, her right elbow striking the ground. Plaintiff described the hole as being caused by "worn out" rubber. * * *
>
> To set aside a jury verdict as unsupported by sufficient evidence, the movant must demonstrate that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial" ... . The standard for setting aside a verdict as against the weight of the evidence is "whether the evidence so preponderate[d] in favor of the [movant] that [the verdict] could not have been reached on any fair interpretation of the evidence" ... .
>
> The liability verdict was based on legally sufficient evidence of defendant's constructive notice of a dangerous condition on its premises and was not against the weight of the evidence ... .
>
> Plaintiff's testimony that she was caused to fall when her foot became ensnared in a "worn out" section of the rubber mat was sufficient to support a finding of liability ... . The fact that plaintiff's testimony provided the lone evidence of the claimed defect is not a basis to conclude that there was insufficient evidence of a hazardous defect to impose liability on the premises owner ... .
>
> The dissent's contention that there was insufficient evidence to support the inference that the worn out area was visible or apparent by

reasonable inspection cannot withstand scrutiny. A "worn out" section by definition occurs over the passage of time. As the trial court noted "the very description of a worn out area pre-supposes a slow process, and can support a jury inference [*3]that the defect should have been discovered." The jury having reasonably credited plaintiff's direct observations and testimony over that of the defense witnesses, it is not for us to second-guess the verdict. **Cruz v Bronx Lebanon Hosp. Ctr., 2015 NY Slip Op 05601, 1st Dept 6-30-15**

NEGLIGENCE/CONTRACT, LIABILITY IN TORT ARISING FROM/CONTRACT LAW

Management Agreement Did Not Give Rise to Tort Liability for Slip and Fall

In determining the management agreement with a hospital did not give rise to tort liability for a slip and fall on the hospital premises, the Second Department explained the relevant law:

> "Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party" ... . However, there are three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a hazardous condition; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely ... . "As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars" ... .
>
> Here, the plaintiffs alleged that Sodexo [the building manager] maintained and controlled the premises. Sodexo established its prima facie entitlement to judgment as a matter of law by submitting evidence establishing that the plaintiffs were not parties to the management agreement and thus, it owed the injured plaintiff no duty of care ...; that the management agreement was not so comprehensive and exclusive as to displace the Hospital's duty to maintain the premises safely ...; and that it did not create the allegedly hazardous condition ... . In opposition, the plaintiffs failed to raise a triable issue of fact. **Sperling v Wyckoff Hgts. Hosp., 2015 NY Slip Op 04840, 2nd Dept 6-10-15**

NEGLIGENCE/CORPORATION LAW/CIVIL PROCEDURE

Corporate Officer May Be Personally Liable for Torts Committed in the Performance of Corporate Duties/Criteria for Determining a Motion to Dismiss for Failure to State a Cause of Action (Where Documentary Evidence Is Submitted) Explained

The Second Department determined defendant's motion to dismiss for failure to state a cause of action was properly denied. Plaintiff alleged he tripped and fell over a hole left when a for sale sign was removed. The defendant moved to dismiss alleging the property was owned by the corporation of which defendant was the sole shareholder. The Second Department noted that an officer of a corporation may be personally liable for torts committed in the performance of corporate duties. The court explained its role in determining a motion to dismiss for failure to state a cause of action where documentary evidence is submitted: "When a defendant submits evidence in support of a motion to dismiss pursuant to CPLR 3211(a)(7), and the motion has not been converted into one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one ... . "[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, . . . dismissal should not eventuate... '. [quotations omitted] **Orlando v New York Homes By J & J Corp., 2015 NY Slip Op 04104, 2nd Dept 5-13-15**

NEGLIGENCE/DAMAGES/PUNITIVE DAMAGES/DRIVING WHILE INTOXICATED/"WANTON AND RECKLESS" CONDUCT

The Amount of Alcohol Consumed by Defendant and the Extent of His Intoxication at the Time of the Vehicle-Accident Evinced "Wanton and Reckless" Conduct Which Supported a Punitive-Damages Award

The Second Department determined the award of punitive damages by the jury was supported by clear and convincing evidence. Defendant was intoxicated at the time of the vehicle accident. The fact that defendant was driving while intoxicated would not, standing alone, warrant punitive damages. However, other factors, including defendant's high blood-alcohol level and his "incoherence" at the time of the accident evinced the requisite "wanton and reckless" conduct:

> Whereas compensatory damages are intended to assure that the victim receives "fair and just compensation commensurate with the injury

sustained," punitive damages are meant to "punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future" ... . Evidence that a defendant was driving while intoxicated is insufficient, standing alone, to justify the imposition of punitive damages ... . However, driving while intoxicated may support an award for punitive damages where there is additional evidence that the defendant engaged in "wanton and reckless" conduct evincing heedlessness and an utter disregard for the safety of others ... . **Chiara v Dernago, 2015 NY Slip Op 04444, 2nd Dept 5-27-15**

PRACTICE POINT

Ask for punitive damages where it can be argued that a defendant's behavior rises to the level of "wanton and reckless" conduct and punitive damages will serve the broader "societal" purpose of deterring others from indulging in the conduct attributed to the defendant.

NEGLIGENCE/DUTY OF CARE

Liability for a Defective or Dangerous Condition on Real Property Must Be Predicated Upon Ownership, Occupancy, Control, or Special Use of the Property---Here Defendant Demonstrated None of Those Factors Applied

The Second Department, finding that defendant's motion for summary judgment in a slip and fall case was properly granted, noted that in order for a defendant to be liable for a dangerous or defective condition on real property the liability must be predicated "upon ownership, occupancy, control, or special use of that property ...". Here no such factors were demonstrated (defendant denied the allegation that it acted as the property manager). **Reynolds v Avon Grove Props., 2015 NY Slip Op 05169, 2nd Dept 6-17-15**

NEGLIGENCE/DUTY OF CARE/COMMON CARRIER/BUSES

Bus Company's Duty of Care Did Not Include Keeping Steps to the Bus Dry and Free of Snow During a Snow Storm

Reversing Supreme Court, the Second Department determined the defendant bus company could not be held liable for a slip and fall on wet steps on a bus during a snow storm:

> "[A] common carrier is subject to the same duty of care as any other potential tortfeasor—reasonable care under all of the circumstances of the particular case" ... . Here, contrary to the Supreme Court's determination, the defendant demonstrated its prima facie entitlement to judgment as a matter of law by showing that it did not breach any duty to the plaintiff under the circumstances that existed at the time of the accident ... . Given the inclement weather conditions when the accident occurred, "it would be unreasonable to expect the [defendant] to constantly clean the steps of the subject bus" ... . **Batista v MTA Bus Co., 2015 NY Slip Op 05430, 2nd Dept 6-24-15**

NEGLIGENCE/DUTY OF CARE/SCOPE OF DUTY/FORESEEABILITY

Defendant Sky-Diving Instructor's Duty of Care (Re: Training) Did Not Extend to the Unforeseeable Conduct Which Resulted In the Plane Crash

Plaintiff was injured in a plane crash which occurred as the pilot was attempting to pull a skydiver back into the plane. The hatch door opened unexpectedly on take-off and a skydiver, against the pilot's instructions, stood up and attempted to pull the door closed. Plaintiff had completed a one-hour skydiving course offered by defendant prior to the flight. Plaintiff alleged that defendant breached his duty to provide proper training for the pilot, instructors and other skydivers. The court determined defendant owed no duty of care to the plaintiff with respect to the unforeseeable conduct which occurred on the plane:

> "The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors" ... . In making such a determination, "the courts look to whether the relationship of the parties is such as to give rise to a duty of care . . . , whether the plaintiff was within the zone of foreseeable harm . . . and whether the accident was within the reasonably foreseeable risks" ... . "[T]he law draws a line between remote possibilities and those that are reasonably foreseeable because [n]o person can be expected to guard against harm from events which are . . . so unlikely to occur that the risk . . . would commonly be disregarded' " ... .
>
> We conclude that defendant established as a matter of law that the plane crash at issue was not a reasonably foreseeable consequence of defendant's alleged failure to provide adequate training. Although the risk may now readily be perceived with the benefit of hindsight, we

conclude that the plane crash due to the hatch door opening and the response of the pro-rated skydiver was not "within the class of foreseeable hazards" associated with defendant's alleged failure to provide proper training ... . We thus conclude that defendant had "no cognizable legal duty to protect [plaintiff] against the injury-producing occurrence" .... . **Tiede v Frontier Skydivers, Inc., 2015 NY Slip Op 05311, 4th Dept 6-19-15**

NEGLIGENCE/EMERGENCY DOCTRINE

Transit Authority Not Liable Under the Emergency Doctrine As a Matter of Law

The Second Department determined the defendant New York City Transit Authority was not liable to the plaintiff as a matter of law under the emergency doctrine. Plaintiff was a passenger in the Transit Authority's vehicle when defendant Franco allegedly backed out of a driveway at a high rate of speed (to get over a snow bank) into the path of the Transit Authority's vehicle. "The common-law emergency doctrine 'recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency' ... . 'Although the existence of an emergency and the reasonableness of the response to it generally present questions of fact, those issues may in appropriate circumstances be determined as a matter of law"...". **Majid v New York City Tr. Auth., 2015 NY Slip Op 03809, 2nd Dept 5-6-15**

NEGLIGENCE/EMERGENCY DOCTRINE/NEGLIGENT ENTRUSTMENT/GRAVES AMENDMENT/LESSOR'S LIABILITY

Tractor-Trailer Veered Into Oncoming Lane Striking Bus/Emergency Doctrine Required Dismissal of Complaint Against Bus Company and Driver as a Matter of Law/Lessor of Trailer Protected Against Vicarious Liability by Graves Amendment/Negligent Entrustment Cause of Action Against Lessor of Trailer Dismissed as a Matter of Law (No Special Knowledge Use of Trailer by Lessee Would Render It Unreasonably Dangerous)

A tractor trailer suddenly veered into oncoming traffic and struck a bus owned by one of the defendants, Schoolman. The Second Department determined the emergency doctrine precluded, as a matter of law, the suit against the bus company and the driver of the bus (Zimmardi). The court also determined the company which leased the trailer, EMH, was protected from vicarious liability by the Graves Amendment, and was not liable, as a matter of law, under a negligent entrustment theory. The leasing company had no special knowledge of a use of the trailer by the lessee that would render the use of the trailer unreasonably dangerous:

> Here, Schoolman established its prima facie entitlement to judgment as a matter of law dismissing the complaints ... by demonstrating that its driver, Zimmardi, was faced with an emergency situation not of his own making when the truck suddenly veered into his lane of traffic, and that he acted reasonably in the context of that emergency ... . * * *
>
> EMH established its prima facie entitlement to judgment as a matter of law in connection with the vicarious liability causes of action by demonstrating, prima facie, that the Graves Amendment (49 USC § 30106) applied to shield it from liability for the plaintiffs' injuries by virtue of its status as a commercial lessor of motor vehicles that was free from negligence in maintaining the subject vehicle (see Castillo v Amjack Leasing Corp., 84 AD3d 1297, 1297-1298; Graham v Dunkley, 50 AD3d 55, 57-58). Further, EMH established its prima facie entitlement to judgment as a matter of law dismissing the negligent entrustment causes of action insofar as asserted against it by demonstrating that it did not possess special knowledge concerning a characteristic or condition ... that rendered the use of the leased vehicle ... unreasonably dangerous ... . **Pacelli v Intruck Leasing Corp, 2015 NY Slip Op 04292, 2nd Dept 5-20-15**

NEGLIGENCE/FORESEEABILITY

Question of Fact Whether It Was Foreseeable Children Would "Ride" an Unsecured Gate Resulting in Injury

The Fourth Department determined there was a question of fact whether it was foreseeable that children would swing on an unsecured gate to a cemetery (open to the public). The seven-year-old plaintiff was injured while "riding the gate." Although there is nothing inherently dangerous about an unsecured gate, knowledge that children played in the cemetery raised a question of fact whether injury to a child was foreseeable:

"It is beyond dispute that landowners . . . have a duty to maintain their properties in [a] reasonably safe condition" ... . "Consistent with that duty, the degree of care to be exercised must take into account the known propensity' of children to roam and climb and play' " ... . Indeed, "New York State courts have recognized the special propensities of children and the prevailing social policy of protecting them from harm' . . . and have not deprived them of a right to compensation for injuries caused by the negligence of third parties . . . solely on account of their misuse of an instrument found on the defendant's premises" ... . "What accidents are reasonably foreseeable, and what preventive measures should reasonably be taken, are ordinarily questions of fact" ... .

* * * "[A]t least once it is known that children commonly play around . . . an artificial structure [such as the gate], their well-known propensities . . . to climb about and play' . . . create a duty of care on the part of a landowner to prevent foreseeable risks of harm that might arise out of those activities" ... .

Given that, "as a matter of law, [riding' a gate] is not such an extraordinary' form of play as to break the causal connection between the dangerous condition . . . and plaintiff's injuries," we conclude that there is a triable issue of fact whether "[i]t was a natural and foreseeable consequence of defendant's failure to effectively secure the [gate] against access that young children would play [on it]," thereby resulting in injury ... . **Charles v Village of Mohawk, 2015 NY Slip Op 03975, 4th Dept 5-8-15**

Question of Fact Whether It Was Foreseeable that Overbooking a Theater Could Cause Crowd-Related Injury (Plaintiff Alleged Injury in a "Stampede")

The First Department determined there was a question of fact whether it was foreseeable that overbooking a movie theater would result in crowd-related problems. Here plaintiff alleged she was injured in a "stampede" which occurred when she and the group she was with were told to turn around and go back downstairs:

> ... [T]he motion court properly concluded that defendants did not establish entitlement to judgment as a matter of law. It is well settled that landowners and permittees owe those "on their property a duty of reasonable care under the circumstances to maintain their property in a safe condition," and "to minimize foreseeable dangers on their property" ... . Under the circumstances presented, involving the deliberate overbooking of a theater for a free film screening, defendants were required to show that they took adequate crowd control measures to address the foreseeable risks to those attending in order to meet their prima facie burden of demonstrating entitlement to summary judgment ... . Here, defendants knew that the screening was deliberately overbooked, and it was, therefore, foreseeable that overcrowding could be a problem ... . Deposition testimony from both plaintiff and Regal's manager demonstrated that the staircase on which plaintiff fell was crowded, and that the crowd had formed a "stampede" after being redirected downstairs to find available seats in the crowded theater. Since defendants failed to present evidence that adequate crowd control measures were in place, the motions for summary judgment were properly denied. **Sachar v Columbia Pictures Indus., Inc., 2015 NY Slip Op 04717, 1st Dept 6-4-15**

NEGLIGENCE/GENERAL BUSINESS LAW 349/CONTRACT LAW/TORTIOUS INTERFERENCE WITH CONTRACT

Elements of Negligence, General Business Law 349 and Tortious Interference with Contract Causes of Action Succinctly Described

The Second Department determined that Supreme Court properly dismissed (for failure to state a cause of action) the negligence cause of action, should not have dismissed the General Business Law 349 cause of action, and properly denied the motion to dismiss the tortious interference with contract cause of action. The court succinctly described the elements of the three causes of action (facts not described in the decision):

> To prevail on a negligence cause of action, a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages. "Absent a duty of care, there is no breach, and without breach there can be no liability" ... . * * *
>
> To state a cause of action under General Business Law § 349, the complaint must allege that " a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice'" ... . * * *
>
> The elements of a cause of action to recover damages for tortious interference with contract are the existence of a valid contract between it and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of the third party's breach of that contract without justification, and damages ...

. **MVB Collision, Inc. v Allstate Ins. Co., 2015 NY Slip Op 05453, 2nd Dept 6-24-15**

NEGLIGENCE/LEAD PAINT/LANDLORD-TENANT

Landlord Failed to Eliminate Triable Issues of Fact Concerning Whether He Had Constructive Notice of the Presence of Lead Paint

In the context of a summary judgment motion, the Fourth Department determined the landlord did not meet his burden of demonstrating he did not have constructive notice of the presence of lead paint:

> Where, as here, there is no evidence that the landlord had actual notice of the existence of a hazardous lead paint condition, plaintiff may establish that defendant had constructive notice of such condition by demonstrating that the landlord "(1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (Chapman v Silber, 97 NY2d 9, 15). Defendant conceded that he was aware that a young child lived in the subject premises, and we conclude that he failed to meet his burden on the four remaining Chapman factors... . **Wood v Giordano, 2015 NY Slip Op 03984, 4th Dept 5-8-15**

NEGLIGENCE/LEGAL MALPRACTICE/ATTORNEYS/CIVIL PROCEDURE/CPLR 3211 MOTIONS TO DISMISS/PLEADINGS/DAMAGES

Criteria for Motion to Dismiss for Failure to State a Cause of Action (Where Documentary Evidence Submitted) Explained---Criteria for Motion to Dismiss Based on Documentary Evidence Explained---Pleading Requirements for Legal Malpractice Explained

In finding the legal malpractice complaint properly survived motions to dismiss, the Second Department explained the criteria for a motion to dismiss for failure to state a cause of action where documentary evidence is submitted (question is whether plaintiff has a cause of action, not whether one has been stated, affidavits considered to remedy defects in complaint), the criteria for a motion to dismiss founded on documentary evidence (documents must utterly refute allegations in complaint), the elements of legal malpractice, and the adequacy of damages allegations in a legal malpractice complaint (cannot be conclusory or speculative but plaintiff not obligated to show it actually sustained damages) :

> On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (see CPLR 3026...). Where a party offers evidentiary proof on a motion pursuant to CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" ... . " [A] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint'" ... .
>
> A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law... .
>
> To state a cause of action to recover damages for legal malpractice, a plaintiff must allege (1) that the attorney failed to exercise the care, skill, and diligence commonly possessed and exercised by a member of the legal profession, and (2) that such negligence was a proximate cause of the actual damages sustained ... . A plaintiff must plead "actual[,] ascertainable damages" resulting from the attorney's negligence ... . Conclusory or speculative allegations of damages are insufficient... . However, "[a] plaintiff is not obligated to show, on a motion to dismiss, that it actually sustained damages. It need only plead allegations from which damages attributable to the defendant's malpractice might be reasonably inferred" ... . **Randazzo v Nelson, 2015 NY Slip Op 04299, 2nd Dept 5-20-15**

NEGLIGENCE/LEGAL MALPRACTICE/ATTORNEYS/CRIMINAL LAW

To Succeed In a Legal Malpractice Action Stemming from Representation in a Criminal Matter, the Plaintiff Must Have a Colorable Claim of Actual Innocence---Elements of Legal Malpractice in this Context Explained

The Second Department determined defendant-attorney's motion for summary judgment dismissing the legal malpractice complaint should have been

granted. Plaintiff, when represented by defendant-attorney, was convicted of sex offenses. The conviction was overturned on "ineffective assistance of counsel" grounds. Plaintiff was acquitted upon retrial. In the legal malpractice action, the plaintiff was unable to prove the element of causation. Defendant-attorney demonstrated plaintiff's conviction was not due solely to defendant-attorney's conduct, but was based in part on plaintiff's "guilt," in that her children provided graphic testimony alleging sexual abuse. To succeed in a legal malpractice action stemming from a criminal matter, the plaintiff must at least have a colorable claim of actual innocence. In addition, the nonpecuniary damages sought by the plaintiff (psychological injury due to her incarceration) are not recoverable in a legal malpractice action. The Second Department explained the elements of legal malpractice in this context (stemming from representation in a criminal case):

> To recover damages for legal malpractice, a plaintiff must establish that the defendant attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages ... . Even where a plaintiff establishes that his or her attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by members of the legal profession, the plaintiff must still demonstrate causation ... . "To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence" ... . In the civil context, this Court has held that a plaintiff in a legal malpractice action "need prove only that the defendant-attorney's negligence was a proximate cause of damages" ... . However, in a legal malpractice action such as this one, arising from representation in a criminal matter, the "plaintiff must have at least a colorable claim of actual innocence" ..., and the plaintiff ultimately bears the unique burden to plead and prove that his or her "conviction was due to the attorney's actions alone and not due to some consequence of his [or her] guilt" ... . " To succeed on a motion for summary judgment, the defendant in a legal malpractice action must present evidence in admissible form establishing that the plaintiff is unable to prove at least one of these essential elements'" ... . **Dawson v Schoenberg, 2015 NY Slip Op 04603, 2nd Dept 6-3-15**

NEGLIGENCE/LEGAL MALPRACTICE/TRUSTS AND ESTATES/ATTORNEYS

Absence of Privity Between Beneficiary of an Estate and the Attorneys Who Represented the Estate in Medical Malpractice and Wrongful Death Actions Precluded Legal Malpractice Action by Beneficiary

The Third Department determined the plaintiff-beneficiary of an estate represented by defendants-attorneys in medical malpractice and wrongful death actions could not bring a legal malpractice action against the attorneys (based upon the medical malpractice and wrongful death actions) because no attorney-client relationship existed. Absent fraud or collusion, the absence of privity between the beneficiary and the attorneys precluded the legal malpractice action:

> There is no question that a legal malpractice claim requires — in the first instance — "the existence of an attorney-client relationship" ... . Plaintiff does not contend, and the record does not otherwise reflect, that he had a contractual relationship with defendants. Rather, plaintiff argues that because defendants represented [plaintiff's mother] in her capacity as the administrator of decedent's estate in both the medical malpractice and wrongful death actions and plaintiff, in turn, is a beneficiary of decedent's estate, it necessarily follows that defendants were duty bound to represent plaintiff's best interests in the context of those two actions. The flaw in plaintiff's argument on this point is that "[i]n New York, a third party, without privity, cannot maintain a claim against an attorney in professional negligence, absent fraud, collusion, malicious acts or other special circumstances" ... . Although a limited exception has been carved out with respect to an action brought by the personal representative of an estate, "strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances" ... . **Sutch v Sutch-Lenz, 2015 NY Slip Op 04692, 3rd Dept 6-4-15**

NEGLIGENCE/HIGHWAY CONDITIONS/BLOWING SNOW/STORM IN PROGRESS RULE/QUALIFIED IMMUNITY

Question of Fact Whether State Exercised Due Diligence In Addressing Recurrent Blowing-Snow Problem on Highway

The Third Department, reversing the Court of Claims, determined questions of fact had been raised about

whether the state had taken adequate measures to address a recurrent "blowing snow" condition in the vicinity of plaintiff's-decedent's highway accident. The court rejected defendant's argument that the "storm in progress" rule should be applied to blowing snow on a roadway. Rather the inquiry is whether the defendant exercised reasonable diligence in maintaining the roadway under the prevailing circumstances. There was evidence that the area in question was the site of several accidents and that installation of a snow fence may have prevented the problem. The state was unable to demonstrate it had undertaken a relevant study and was therefore unable to invoke qualified immunity:

> ... [I]t is a matter of established law that "[t]he pertinent inquiry is whether [defendant] exercised reasonable diligence in maintaining [the roadway] under the prevailing circumstances" ... . Applying this analysis, ongoing adverse conditions do not excuse defendant from its duty to remediate dangerous conditions, but are relevant to the inquiry as to whether it exercised reasonable diligence in doing so ... . * * *
>
> Defendant may be held liable in negligence where it "failed to diligently remedy [a] dangerous condition[] once it was provided with actual or constructive notice or [where] it did not correct or warn of a recurrent dangerous condition of which it had notice" ... . "Once [defendant] is made aware of a dangerous traffic condition it must undertake reasonable study thereof with an eye toward alleviating the danger" ... . * * *
>
> ... [A]n issue of fact exists with respect to whether defendant's actions in seeking to remedy the recurring hazard of windblown snow by relying solely on plowing were reasonable. * * *
>
> ... [D]efendant failed to show that it was entitled to summary judgment on the basis of qualified immunity. When defendant undertakes a "stud[y] [of] a dangerous condition and determines as part of a reasonable plan of governmental services that certain steps need not be taken, that decision may not form the basis of liability" ... . Although defendant contends that its decision not to utilize a snow fence or other measures intended to mitigate the hazard of windblown snow resulted from a "reasoned plan or study," the record is inadequate to demonstrate, as a matter of law, that such a study was undertaken ... . **Frechette v State of New York, 2015 NY Slip Op 05538, 3rd Dept 6-25-15**

NEGLIGENCE/INDEPENDENT CONTRACTORS/LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR/NEGLIGENT HIRING OF INDEPENDENT CONTRACTOR/EMPLOYMENT LAW

Criteria for Liability for Acts of Independent Contractor and for Negligent Hiring of an Independent Contractor Explained (Criteria Not Met Here)

Plaintiff, who was working for the roofing contractor on a building damaged by fire, was asked by a salvager to help move a refrigerator. Plaintiff agreed and was injured while moving the refrigerator down some stairs. The salvager was allowed to go through the building and pick out the items the salvager wanted (which included the refrigerator). Plaintiff sued the building owner (E & M). In finding the plaintiff did not have a cause of action against E & M, the First Department explained the relevant law with respect to liability for the acts of an independent contractor (the salvager) and negligent hiring of an independent contractor:

> E & M established that even if it hired the salvager as an independent contractor, there is no basis to impose liability on it. "As a general rule, a principal is not liable for the acts of an independent contractor because, unlike the master-servant relationship, principals cannot control the manner in which independent contractors perform their work" ... . Although "liability will attach where the employer is negligent in selecting, instructing or supervising the contractor, where the contractor is employed to do work that is inherently dangerous or where the employer bears a specific nondelegable duty'" ..., these exceptions are inapplicable... . * * *
>
> Plaintiff's contention that issues of fact exist as to whether E & M or its principal were negligent in selecting the salvager, i.e. whether they failed to exercise reasonable care in ascertaining whether he was qualified to move a refrigerator down a flight of stairs, is also unavailing. "[A]n employer has the right to rely on the supposed qualifications and good character of the contractor, and is not bound to anticipate misconduct on the contractor's part...." ... . Thus, an employer "is not liable on the ground of his having employed an incompetent or otherwise unsuitable contractor unless it also appears that the employer either knew, or in the exercise of reasonable care might have ascertained, that the contractor was not properly qualified to undertake the work" ... . "Cases finding employers liable for negligent hiring have done so only in very specific

circumstances" ... not present here. There is no competent proof that E & M knew or should have known of any propensity on the part of the salvager or his helper to engage in the conduct that allegedly caused the accident ... . Furthermore, plaintiff has not shown that E & M had any reason to question the qualifications of the salvager, who E & M knew had been used by its plumber on a prior occasion, to move a refrigerator ... . Moreover, there was no reason for E & M to suspect that the salvager would enlist an employee of the roofing contractor to assist him. **Nelson v E&M 2710 Clarendon LLC, 2015 NY Slip Op 05391, 1st Dept 6-23-15**

NEGLIGENCE/MEDICAL MALPRACTICE/ASSAULT AND BATTERY/INFORMED CONSENT/CIVIL PROCEDURE/MOTION TO DISMISS ACCOMPANIED BY EVIDENTIARY SUBMISSIONS

Signed Consent Form Precluded Cause of Action for Assault and Battery (Re: a Hysterectomy)---Defendant Demonstrated the Allegation Plaintiff Did Not Consent to the Hysterectomy Was "Not a Fact At All"--Question of Fact Raised Re: the "Lack of Informed Consent" Cause of Action

The Second Department, over a partial concurrence/dissent, determined defendant was entitled to dismissal of the assault and battery cause of action, which was based on the allegation a hysterectomy was performed without plaintiff's consent. The evidence however demonstrated plaintiff signed a consent form, and thereby demonstrated that the "without consent" factual allegation was "not a fact at all." Plaintiff did, however raise a question of fact concerning the "lack of informed consent" cause of action. The court explained the elements of assault and battery in this context, the elements of a "lack of informed consent" cause of action, as well as how to handle a motion to dismiss for failure to state a cause of action which is accompanied by evidentiary submissions:

> "When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one . . . [The motion] must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" ... .
>
> "To plead a cause of action to recover damages for assault, a plaintiff must allege intentional physical conduct placing the plaintiff in imminent apprehension of harmful contact'" ... . "To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature" ... . Here, the evidence in the record upon which the Supreme Court relied established that "a material fact as claimed by the plaintiff" was "not a fact at all" ... . Notwithstanding the plaintiff's allegations and testimony that she never gave permission for the performance of a hysterectomy, the signed consent form clearly authorized such a procedure, and she admitted that she signed the consent form. Therefore, dismissal of the assault and battery cause of action was proper ... .
>
> "To succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment (see Public Health Law § 2805-d [1], [3])...). Here the plaintiff's deposition testimony indicates that she was not fully advised of the risks, benefits, and alternatives to the procedure or treatment, including the fact that one of the risks was a total hysterectomy and/or perforation of the bowel, nor was it established as a matter of law that if the plaintiff received full disclosure, she still would have consented to the procedure. Since the defendants' submissions included the plaintiff's deposition testimony, they failed to establish, prima facie, that there were no triable issues of fact with respect to the cause of action alleging lack of informed consent ... . Accordingly, the Supreme Court should have denied that branch of the defendants' motion which was for summary judgment dismissing the cause of action alleging lack of informed consent. **Thaw v North Shore Univ. Hosp., 2015 NY Slip Op 05173, 2nd D**

NEGLIGENCE/MEDICAL MALPRACTICE/DUTY OF ON-CALL PHYSICIAN WHO DID NOT TREAT PLAINTIFF/IMPLIED PHYSICIAN-PATIENT RELATIONSHIP/MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION/SUMMARY JUDGMENT

Allegations Supported the Existence of an "Implied Physician-Patient Relationship" Giving Rise to a Duty Owed to Plaintiff by the On-Call Surgeon---The On-Call Surgeon Was Notified of Plaintiff's Facial Lacerations But Told Hospital Personnel (by Phone) His Services Were Not Required to Treat the Plaintiff---Plaintiff Alleged Suturing by a Physician's Assistant Resulted in Excess Pain and Scarring

Plaintiff alleged that the defendant on-call plastic surgeon should have treated infant plaintiff whose facial lacerations were sutured by a physician's assistant (resulting in excess pain and scarring). The defendant on-call plastic surgeon, after being notified of plaintiff's condition by phone, informed hospital personnel his services were not needed to treat the plaintiff. The surgeon brought a motion to dismiss for failure to state a cause of action, and a motion for summary judgment, on the ground that he did not treat the plaintiff and, therefore, there existed no physician-patient relationship giving rise to a duty on his part. The Second Department, after explaining the criteria for both types of motions, determined the motions were properly denied. Although the surgeon did not treat the plaintiff, a question was raised whether an "implied physician-patient relationship" existed by virtue of the surgeon's communication with hospital personnel indicating his services were not needed for the plaintiff's wounds:

> "In considering a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" ... . " A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7)'" ... . "If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one'" ... . In a case where a defendant has submitted evidentiary material in support of a motion to dismiss pursuant to CPLR 3211(a)(7), the motion must be denied " unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it'" ... .

Summary judgment, in contrast to a motion to dismiss, is designed to expedite civil cases by eliminating claims which can properly be resolved as a matter of law ... . It is a drastic remedy which "should only be employed when there is no doubt as to the absence of triable issues" ... . On a motion for summary judgment, the party seeking judgment as a matter of law has the burden of tendering evidentiary proof in a form admissible at trial to show the absence of triable issues of fact ... . The failure to eliminate all material issues of fact results in the denial of the motion, regardless of the sufficiency of the opposing papers ... .

In support of his motion, the defendant argued that no physician-patient relationship existed that gave rise to any duty, as he did not examine or treat the infant plaintiff and did not dispense any medical advice on which anyone relied. Certainly, for there to be a cause of action sounding in medical malpractice, a physician-patient relationship must exist that gives rise to a duty of care ..., and the absence of such a relationship precludes the cause of action ... .

The physician-patient relationship is typically created when "professional services of a physician are rendered to and accepted by another person for the purposes of medical or surgical treatment" ... . However, the law also recognizes circumstances where the existence of a physician-patient relationship is implied by circumstances. "An implied physician-patient relationship can arise when a physician gives advice to a patient, even if the advice is communicated through another health care professional" ... .

The Supreme Court properly denied the defendant's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint insofar as asserted against him for failure to state a cause of action or, in the alternative, for summary judgment dismissing the complaint insofar as asserted against him. The defendant, in his role as the on-call plastic surgeon for Southside Hospital, allegedly made a medical determination over the phone that the infant plaintiff's facial laceration was not an emergency requiring his expertise as a board-certified plastic surgeon. The defendant's determination allegedly resulted in the suturing of the wound, without sedation, by a physician's assistant, beyond the time frame that was medically advisable and which resulted in scarring. **Pizzo-Juliano v Southside Hosp., 2015 NY Slip Op 04626, 2nd Dept 6-5-3-15**

NEGLIGENCE/MEDICAL MALPRACTICE/FORESEEABILITY/SUICIDE/ INTERVENING ACT/SUPERSEDING CAUSE

Patient's Suicide Was Not a Foreseeable Consequence of Doctor's Alleged Failure to Properly Diagnose and Treat Patient's Abdominal Pain

The Third Department affirmed summary judgment granted to defendant doctor (Skezas). Plaintiff alleged the doctor failed to properly diagnose and/or treat plaintiff's decedent's abdominal pain. Decedent was told by the doctor he may have cancer, which, if not treated, could be fatal within 6 to 12 months. The doctor set up an appointment for plaintiff's decedent with a specialist. Before seeing the specialist, plaintiff's decedent committed suicide. The Third Department determined plaintiff's decedent's suicide was not a foreseeable consequence of the actions ascribed to the doctor:

> "An intervening act will be deemed a superseding cause and will serve to relieve [a] defendant of liability when the act is of such an extraordinary nature or so attenuates [the] defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant" ... . Applying this rule to a person's intentional act of taking his or her own life, negligent conduct can only support liability for another person's suicide under certain circumstances and where suicide is a foreseeable consequence of such conduct ... . Here, Skezas did not practice psychiatry, decedent was not confined to Skezas' care and Skezas did not advise decedent to commit suicide. The possibility that decedent would choose to take his own life in the absence of any actual terminal cancer diagnosis and rather than taking advantage of the second medical opinion — regarding a diagnosis and/or pain management — from the specialist that Skezas had secured for decedent is not a foreseeable consequence of the alleged negligent acts ... . **Stein v Kendal At Ithaca, 2015 NY Slip Op 05246, 3rd Dept 6-18-15**

NEGLIGENCE/MUNICIPAL LAW/GENERAL MUNICIPAL LAW/LABOR LAW/FIREFIGHTERS/GOVERNMENTAL IMMUNITY

Question of Fact Whether Failure to Provide Personal Ropes to Firefighters Gave Rise to a Claim Under General Municipal Law 205-a and Labor Law 27-a

The First Department, recalling and vacating its decision and order dated March 3, 2015, determined the defendants' motion for summary judgment dismissing the plaintiff-firefighter's action based upon General Municipal Law 205-a and Labor Law 27-a was properly denied. The action alleged the city failed to provide firefighters with personal ropes and, as a result, firefighters were forced to jump from windows without ropes (resulting in injury and death). Labor Law 27-a requires employers to provide a place of employment free from recognized hazards. A question of fact was raised whether the failure to issue personal ropes resulted from the city's discretionary decision-making, and therefore is not subject to government-function immunity:

> The motion court properly declined to dismiss the portion of plaintiffs' General Municipal Law (GML) § 205-a claims predicated on an alleged violation of Labor Law § 27-a(3)(a)(1). The City unavailingly contends that Labor Law § 27-a(3)(a)(1) cannot provide a valid predicate for any General Municipal Law § 205-a claim. However, the statute, known as the Public Employee Safety and Health Act (PESHA), which imposes a general duty on an employer to provide employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protection to the lives, safety or health of its employees" (Labor Law § 27-a[3][a][1]), is sufficient since it is "a requirement found in a well-developed body of law and regulation that imposes clear duties" ... .
>
> Moreover, the City failed to "show that it did not negligently violate any relevant government provision or that, if it did, the violation did not directly or indirectly cause plaintiff's injuries" ... . There is evidence, including testimony and an investigative report, that the failure to issue personal ropes to the firefighters contributed to the injuries and deaths suffered when the firefighters jumped from windows using either no safety devices or a single rope that had been independently purchased by one of the firefighters. The City is also not entitled to

dismissal of these claims pursuant to governmental function immunity, since the evidence concerning the removal of existing personal ropes in 2000, and the failure to provide new ropes in the period of more than four years from then until the fire giving rise to these claims, raises issues of fact concerning whether the absence of ropes "actually resulted from discretionary decision-making — i.e., the exercise of reasoned judgment which could typically produce different acceptable results" ... . **Stolowski v 234 E. 178th St. LLC, 2015 NY Slip Op 05099, 1st Dept 6-16-15**

NEGLIGENCE/MUNICIPAL LAW/GENERAL MUNICIPAL LAW/NOTICE OF CLAIM/SAVINGS CLAUSE/CIVIL PROCEDURE/MOTION TO RENEW

Notice of Claim Timely Served by an Unauthorized Method Deemed Valid/Motion to Renew Based Upon Information Known at the Time of the Original Motion Properly Heard in Exercise of Discretion

The First Department determined the savings provision of General Municipal Law 50-e applied and a notice of claim which was timely served by an unauthorized method was valid. The court noted that a motion court can exercise its discretion to hear a motion to renew which relies on information known but not raised at the time the original motion was made:

> Although the motion was based on information that was available to plaintiff earlier, "courts have discretion to consider such evidence in the interest of justice" ... .
>
> Defendant moved for summary judgment on the ground that plaintiff's notice of claim was not served within the 90-day period set forth in General Municipal Law § 50-e, and plaintiff had not timely moved for an extension of time to serve. Plaintiff contended that she qualified under either or both prongs of the "savings provision" under General Municipal Law § 50-e(3)(c), which provides that "[i]f the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant. . .be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received."
>
> Moreover, "[t]he purpose of a notice of claim is to allow the municipal defendant to make a prompt investigation of the facts and preserve the relevant evidence. The applicable statute should be applies flexibly so as to balance two countervailing interests: on the hand, protecting municipal defendants from stale or frivolous claims, and on the other hand, ensuring that a meritorious case is not dismissed for a ministerial error. General Municipal Law § 50-e was not meant as a sword to cut down honest claims, but merely as a shield to protect municipalities against spurious ones" ... .
>
> Here, the record shows that plaintiff served a notice of claim on defendant on December 8, 2011 via regular mail, which did not comply with the requirement that service be completed in person or via registered or certified mail. However, defendant subsequently demanded that plaintiff appear for examinations pursuant to General Municipal Law § 50-h with regard to her claim. Under such circumstances, plaintiff's service of the notice of claim is valid under the first prong of General Municipal Law § 50-e(3)(c). **Person v New York City Hous. Auth., 2015 NY Slip Op 05417, 1st Dept 6-23-15**

NEGLIGENCE/MUNICIPAL LAW/COUNTY LAW/HIGHWAY LAW

Question of Fact Whether County Had Constructive Notice of Pothole Which Injured Bicyclist

The Second Department determined a question of fact had been raised about whether the county had constructive notice of a pothole. Plaintiff was injured when his bicycle struck the pothole. Although the county did not have written notice of the defect, the Highway Law (section 139[2]) provides that a county may be liable for a defective highway condition if the county has constructive notice of it. Plaintiff's expert opined the pothole had existed for four months prior to the accident:

> Notwithstanding the existence of a prior written notice statute, a County may be liable for an accident caused by a defective highway condition where the County has constructive notice of the condition (see Highway Law § 139[2]...). Here, the County submitted the deposition testimony of a County employee who stated that he inspected the roadway where the fall is alleged to have occurred every Monday through Friday until the week before the accident, and did not observe any potholes. This was sufficient to establish, prima facie, that the County lacked constructive notice of the alleged defect ... . However, in

opposition to the County's motion, the plaintiff submitted the affidavit of an expert who inspected the subject roadway and opined that the defect was in existence for at least four months prior to the accident. This affidavit was sufficient to raise a triable issue of fact as to whether the County had constructive notice of the alleged defect by virtue of the fact that it existed for so long a period that it should have been discovered and remedied in the exercise of reasonable care and diligence ... . **Rauschenbach v County of Nassau, 2015 NY Slip Op 03818, 2nd Dept 5-6-15**

NEGLIGENCE/MUNICIPAL LAW/CREATION OF A DANGEROUS CONDITION

In Order for a Municipality to Be Liable for the Creation of a Dangerous Condition, the Dangerous Condition Must Result *Immediately* from the Negligent Act---Here the Allegation the Dangerous Condition Developed Over a Period of Years Was Not Sufficient

The Second Department noted that the "prior written notice" requirement (as a prerequisite for municipal liability for a dangerous condition) is independent of any actual or constructive notice of a defect. Although there is an exception to the "prior written notice" requirement where the municipality created the defect through an affirmative act of negligence, that act of negligence must *immediately* result in the existence of a dangerous condition. It is not sufficient to allege that the defect developed over a period of years (here allegedly stemming from work done in 2008):

> "A municipality that has adopted a prior written notice law' cannot be held liable for a defect within the scope of the law absent the requisite written notice" ... . A defendant's actual or constructive notice of the allegedly defective condition does not satisfy the prior written notice requirement ... . Further, although an exception to the prior written notice requirement exists where the municipality created the defect through an affirmative act of negligence ..., that exception "[is] limited to work by the [municipality] that immediately results in the existence of a dangerous condition"... . **DeVita v Town of Brookhaven, 2015 NY Slip Op 04086, 2nd Dept 5-13-15**

NEGLIGENCE/MUNICIPAL LAW/EDUCATION-SCHOOL LAW/NOTICE OF CLAIM/LATE NOTICE OF CLAIM

A Police Report of a Vehicle Accident Involving Respondent's Employee Was Not Sufficient to Alert Respondent to the Facts Underlying Petitioner's Claim---Petition to File Late Notice of Claim Properly Denied

The Second Department determined the petition to file a late notice of claim was properly denied because there was no showing the respondent school district was aware of the facts underlying the claim, there was no showing the school district was not prejudiced by the two-month delay, and there was no showing of an adequate excuse for the delay. The petitioner argued that a police report describing a vehicle accident provided notice of the facts to the school district. But the report indicated only that respondent's employee was involved in the accident, which was not sufficient to establish respondent's knowledge of the facts of plaintiff's claim:

> For a police accident report to serve as sufficient notice to the public corporation, the public corporation must have been "able to readily infer from that report that a potentially actionable wrong had been committed by the [employee of] the public corporation" ... . A report which describes the circumstances of the accident without making a connection between the petitioner's injuries and negligent conduct on the part of the public corporation will not be sufficient to constitute actual notice of the essential facts constituting the claim ... . The petitioners' contention that the respondent had actual knowledge of their claim solely on the basis of the allegation that its employee was directly involved in the accident, without more, such as a report or record demonstrating that the respondent acquired actual knowledge of the essential facts constituting the claim, is without merit ... . **Matter of Thill v North Shore Cent. School Dist., 2015 NY Slip Op 04332, 2nd Dept 5-20-15**

NEGLIGENCE/MUNICIPAL LAW/GOVERNMENTAL IMMUNITY/COUNTY LAW

Construction at County Airport Was a Governmental Function---County is Therefore "Immune" from a Suit Alleging the Construction Caused a Highway White-Out Condition Which Resulted in Plaintiff's-Decedent's Death in a Collision

Plaintiffs alleged that construction by the defendant-county caused snow to blow across the highway leading to the "white-out" which resulted in plaintiff's decedent's death in a collision. The Fourth Department determined the county was immune from suit because the relevant construction was a governmental, not proprietary function, and the county did not owe a special duty to the plaintiffs:

> ... "[I]f the [municipal defendant] acted in a proprietary role, i.e., when its activities essentially substitute for or supplement traditionally private enterprises . . . , ordinary rules of negligence apply. If, however, the [defendant] acted in a governmental capacity, i.e., when its acts are undertaken for the protection and safety of the public pursuant to general police powers . . . , the court must undertake a separate inquiry to determine whether the [defendant] owes a special duty to the injured party. In the event that the plaintiff fails to prove such a duty, the [defendant] is insulated from liability" ... . A municipal defendant can therefore establish entitlement to judgment as a matter of law by showing that its allegedly negligent acts were undertaken in a governmental rather than a proprietary capacity, and that it did not owe the plaintiff a special duty.
>
> We conclude that defendants established on their motion that the construction of the tunnels and retaining wall was undertaken in a governmental capacity ... , inasmuch as the construction was the result of defendants' discretionary decision-making after defendants consulted with experts to determine how to make improvements to the Airport property in compliance with, inter alia, safety regulations of the Federal Aviation Administration ... . We further conclude that plaintiffs failed to raise a triable issue of fact whether defendants owed a special duty to plaintiffs or were acting in a proprietary capacity ... . **Klepanchuk v County of Monroe, 2015 NY Slip Op 05323, 4th Dept 6-19-15**

NEGLIGENCE/MUNICIPAL LAW/GOVERNMENTAL IMMUNITY/GOVERNMENT FUNCTION/911 RESPONSE/SNOW STORM/CLEARING STREETS

Causes of Action Against City Alleging Negligence In Responding to a 911 Call and In Preparing for and Responding to a Snow Storm Which Blocked Roads Should Have Been Dismissed---Only Governmental Functions Were Involved and there Was No Special Relationship between the City and Plaintiffs' Decedent

The Second Department determined the complaint against the city should have been dismissed under the doctrine of governmental immunity. Plaintiffs alleged the city was negligent in responding to a 911 call for an ambulance and was negligent in preparing for and responding to a snow storm (which blocked roads). Because the relevant acts or omissions related to government functions, and because no special relationship existed between the city and plaintiffs' decedent, the city was immune from suit. The Second Department provided a good explanation of the relevant law:

> As a general rule, "a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection, fire protection or ambulance services" ... . When a negligence cause of action is asserted against a municipality, and the municipality's conduct is proprietary in nature, the municipality is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties ... . If it is determined that a municipality was exercising a governmental function, the municipality may not be held liable unless it owed a special duty to the injured party ... . "A special duty' is a duty to exercise reasonable care toward the plaintiff,' and is born of a special relationship between the plaintiff and the governmental entity'" ... . Insofar as relevant here, to establish a special relationship against a municipality which was exercising a governmental function, a plaintiff must show: "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" ... . * * *
>
> A municipal emergency response system is a classic governmental, rather than proprietary, function ... . Contrary to the plaintiffs' contentions,

the complaint fails to allege any facts tending to show knowledge by the defendants that inaction would lead to harm, or that there was any justifiable reliance on any promise made by the defendants. Accordingly, the complaint fails to state facts from which it could be found that there was a special relationship between the decedent and the defendants and, therefore, the complaint does not state a viable cause of action against the defendants based upon their alleged negligence in responding to the 911 call ... .

Furthermore, the Supreme Court improperly denied that branch of the defendants' motion which was to dismiss the cause of action alleging that the defendants failed to prepare for, and respond to, the snowstorm. A municipality is obligated to maintain the streets and highways within its jurisdiction in a reasonably safe condition for travel ... . A municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers ... . Under the circumstances presented here, the defendants' snow removal operation on the public streets was a traditionally governmental function, rather than a proprietary function ... . Moreover, the plaintiffs failed to sufficiently allege in their complaint the existence of a special relationship between the decedent and the defendants as to the defendants' snow removal function ... . **Cockburn v City of New York, 2015 NY Slip Op 05146, 2nd Dept 6-17-15**

NEGLIGENCE/MUNICIPAL LAW/TOWN LAW/WRITTEN NOTICE OF SIDEWALK DEFECT

The Town's Actual or Constructive Notice of a Sidewalk Defect Does Not Obviate the Written Notice Requirement

The Second Department determined summary judgment was properly awarded to the town (re: an allegedly defective sidewalk where plaintiff fell) because the "written notice manually transcribed by the complainant" requirement was not met. The fact that there existed writings and email generated by the town concerning the defect, and the fact that the town may have had constructive or actual notice of the defect, did not obviate the written notice requirement:

> "A municipality that has enacted a prior written notice statute may not be subjected to liability for injuries caused by a defective condition in a sidewalk unless it either has received written notice of the defect or an exception to the written notice requirement applies" ... . " The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property'" ... . The affirmative negligence exception is limited to work done by a municipality that immediately results in the existence of a dangerous condition ... . Here, the Town has adopted a prior written notice law stating that written notices must be "manually subscribed by the complainant" and submitted to the Town Superintendent of Highways or the Town Clerk (Code of the Town of North Hempstead § 26-1). **Wolin v Town of N. Hempstead, 2015 NY Slip Op 04846,, 2nd Dept 6-9-15**

NEGLIGENCE/NEGLIGENCE PER SE/VEHICLE AND TRAFFIC LAW/DAMAGES/PROPERTY DAMAGE/DEMOLITION COSTS

Only an "Unexcused" Violation of a Provision of the Vehicle and Traffic Law Constitutes Negligence Per Se---Damages May Include Cost of Demolition of a Building Which Has Been Deemed a Safety Hazard

In the course of a decision finding questions of fact precluded summary judgment, the Fourth Department explained the doctrine of negligence per se as it relates to a violation of the Vehicle and Traffic Law, and the recoverable damages when property damage requires demolition of a building which was rendered a safety hazard. The defendant-driver here struck plaintiff's building which was then destroyed by fire. The cost of demolition, which the town had ordered because the building was a safety hazard, exceeded the fair market value of the building prior to the accident. The court noted that the demolition costs could be recoverable damages. The court further noted that only the "unexcused" violation of the Vehicle and Traffic Law constitutes negligence per se. Therefore the defendant's guilty plea to a Vehicle and Traffic Law violation could be excused by the jury if the jury determined the driver acted to avoid an object in the road. In that situation, the violation would only constitute "some evidence" of negligence:

> It is well settled that "the fact that [the] driver entered a plea of guilty to a Vehicle and Traffic Law offense is only some evidence of negligence and does not establish his negligence per se" ... . Rather, it is the "unexcused violation of the Vehicle and Traffic Law [that] constitutes negligence per se" ... . If a trier of fact accepts as true the position that the driver swerved to avoid an object in the road, the jury may excuse the driver's alleged negligence, in which case

defendant would not have any vicarious liability for the accident ... . * * *

It is well settled that the standard for assessing damages to property is the lesser of replacement cost or diminution in market value ... . Here, it is undisputed that the cost of the required demolition exceeds the fair market value of the property before the accident. Defendant contends that plaintiffs' damages are limited to the market value of the property before the accident, with no consideration of demolition costs, inasmuch as the full market value of the property before the accident is less than the repair or replacement cost. We agree with plaintiffs, however, that demolition costs are recoverable where the property to be demolished constitutes a "safety hazard beyond repair" ... . There are also situations in which a property may be deemed to have a negative market value, i.e., where the cost to remediate the property exceeds the market value of the property ... . **Shaw v Rosha Enters., Inc., 2015 NY Slip Op 05305, 4th Dept 6-19-15**

NEGLIGENCE/NEGLIGENCE PER SE/VEHICLE AND TRAFFIC LAW/MUNICIPAL LAW/COUNTY LAW/EXECUTIVE LAW/EMERGENCY RESPONSE/GOVERNMENTAL IMMUNITY

The County Was Negligent Per Se Due to Its Violation of the Provision of the Vehicle and Traffic Law Requiring Loads in Open Trucks be Covered---Plaintiff Was Struck by Debris Which Came Off an Uncovered Load---The Governmental Immunity Conferred by the Executive Law During a Response to an Emergency (the Truck Was Carrying Debris from the Clean-Up After Hurricane Irene) Did Not Extend to this Situation (Purpose and Scope of the Government's "Emergency" Immunity Under the Executive Law Explained)

Plaintiff was injured when a piece of lumber fell off an open truck owned by the county. Plaintiff was driving her vehicle when the debris came off the county truck and struck her in the head. The county truck was being used to transport debris in the aftermath of Hurricane Irene. The Third Department determined that, by transporting unsecured debris in an open truck, the county had violated Vehicle and Traffic Law 380-a (1) and, therefore, the county was negligent per se. The court interpreted Vehicle and Traffic Law 380-a to mean that a prima facie case of a violation of the statute is made out by proof a load in an open truck was not covered. Once that showing is made, the owner of the truck will not be deemed to have violated the statute, despite the lack of a cover, if the owner can show the load was secure such that no cover was required. No such showing was possible here. The court rejected the county's argument that the emergency-related immunity conferred by the Executive Law applied here. The court noted the purpose of the Executive-Law immunity is to allow the government to make decisions during an emergency---which roads to clear first, for instance---without fear of liability, but the "emergency" immunity did not insulate the county from liability for its negligence in every context:

> Executive Law § 25 (1) provides that, "[u]pon the threat or occurrence of a disaster, the chief executive of any political subdivision is hereby authorized and empowered to and shall use any and all facilities, equipment, supplies, personnel and other resources of his [or her] political subdivision in such manner as may be necessary or appropriate to cope with the disaster or any emergency resulting therefrom." To be sure, this statute, which vests a political subdivision's chief executive "with the power to respond to a local disaster or the immediate threat of a disaster, . . . reflects an awareness by the . . . Legislature that in emergency situations prompt and immediate unilateral action is necessary to preserve and protect life and property" ... . Consistent with that awareness, the statute further provides, as noted previously, that "[a] political subdivision shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of any officer or employee in carrying out the provisions of this section" (Executive Law § 25 [5]).
>
> In our view, the scope of the immunity conferred by Executive Law § 25 is clear. When faced with a disaster, a political subdivision's chief executive may, for example, decide where to set up a makeshift hospital or aid station, prioritize and determine which streets to clear or allocate supplies and personnel as he or she sees fit, and such discretionary determinations, in turn, will not serve as a basis upon which to expose the political subdivision to liability. In other words, a disgruntled homeowner who is confronted with a flooded basement and is living on an impassable residential street cannot seek to hold a locality liable for damages simply because its chief executive deemed it more important to first clear a path to the local hospital or to pump out the holding cells in the local police station. That said, the immunity conferred by Executive Law § 25 (5) does not, to our analysis, grant a political subdivision carte blanche to perform a discretionary function in any manner that it sees fit — particularly in a manner that poses a danger to the traveling public. Here, a valid — and discretionary — determination may well have been made that the removal of storm debris from,

among other locations, the DPW garage was a priority and, further, that transporting such debris in open containers was the most efficient and expeditious way to do so. The discretionary nature of these broad, resource-based decisions, however, did not obviate the need for defendants to comply with the provisions of Vehicle and Traffic Law § 380-a (1) in terms of the actual transport of such debris. As the immunity conferred by Executive Law § 25 (5) does not, in our view, extend to the particular facts of this case, Supreme Court properly denied defendants' cross motion for summary judgment dismissing plaintiff's complaint. ...

Vehicle and Traffic Law § 380-a (1), which provides that "[i]t shall be unlawful to operate on any public highway any open truck or trailer being utilized for the transportation of any loose substances, unless said truck or trailer has a cover, tarpaulin or other device of a type and specification . . . which completely closes in the opening on. . . said truck or trailer while said truck or trailer shall be so operated, so as to prevent the falling of any such substances therefrom. However, if the load is arranged so that no loose substance can fall from or blow out of such truck, the covering is not necessary." * * *

In our view, in order to discharge her initial burden on her motion for summary judgment, plaintiff need only have shown that defendants failed to utilize a cover; at that point, the burden shifted to defendants to demonstrate that no statutory violation actually occurred because the load was arranged in such a manner that no cover was necessary. To hold otherwise would place a nearly insurmountable burden upon plaintiff, as the manner in which the container was loaded and the contents were arranged inevitably lies within the exclusive knowledge of defendants... . **Pierce v Hickey, 2015 NY Slip Op 04914, 3rd Dept 6-11-15**

NEGLIGENCE/NEGLIGENT RETENTION AND SUPERVISION OF EMPLOYEE/NEGLIGENT SUPERVISION OF STUDENT/EDUCATION-SCHOOL LAW/EMPLOYMENT LAW

School Employee's After-Hours Inappropriate Behavior Involving a Student Was Not Proximately Caused by Negligent Supervision/Retention of the Employee or Negligent Supervision of the Student on the Part of the School District

The Second Department reversed Supreme Court and granted the defendant school district's motion to dismiss the complaint. The school's marching band director, Perna, engaged in inappropriate communications with plaintiff's child, KS, a student who was in the marching band. The communications by computer and cell phone took place off school grounds after hours. The Second Department determined the band director's after-hours behavior was not proximately caused by negligent retention or supervision of Perna or negligent supervision of KS:

> Because the inappropriate conduct by Perna toward KS, the plaintiff's child, occurred after school hours and off school grounds by means of their personal computers and cellular phones, the causes of action alleging negligent retention and supervision cannot provide a basis for liability against the appellants. Although KS first met Perna through the marching band, KS's injuries were not proximately caused by any negligent retention or supervision by the appellants ... . In opposition, the plaintiff failed to raise a triable issue of fact.
>
> Additionally, the Supreme Court should have granted that branch of the appellants' motion which was for summary judgment dismissing so much of the complaint as alleged negligent supervision of KS, since the appellants established, prima facie, that the wrongful acts occurred outside of the school grounds ... and, in opposition, the plaintiff failed to raise a triable issue of fact. **MS, etc. v Arlington Cent. School Dist., 2015 NY Slip Op 04290, 2nd Dept 5-20-15**

NEGLIGENCE/NEGLIGENT SUPERVISION/EDUCATION-SCHOOL LAW/MOTION TO SET ASIDE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE

Negligence and Proximate Cause Inextricably Interwoven---Verdict Finding that Defendant Was Negligent but Such Negligence Was Not the Proximate Cause of Plaintiff's Injury Properly Set Aside as Against the Weight of the Evidence

The plaintiff-student was sexually assaulted at school. The jury found the school was negligent in its supervision of its students, but that the negligence was not the proximate cause of plaintiff's injury. The Second Department determined the verdict was properly set aside as against the weight of the evidence. The issues of negligence and proximate cause were inextricably interwoven, such that finding the negligence was not the proximate cause of injury was against the weight of the evidence:

> "A jury verdict should not be set aside as contrary to the weight of the evidence unless the jury could not have reached the verdict by any fair interpretation of the evidence" ... . " A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause'" ... .
>
> Under the circumstances of this case, the issues of negligence and proximate cause were inextricably interwoven, such that the jury's finding that the defendants were negligent, but that their negligence was not a substantial factor in causing the infant plaintiff's injuries, was contrary to the weight of the evidence ... . **Victoria H. v Board of Educ. of City of N.Y., 2015 NY Slip Op 05156, 2nd Dept 6-17-15**

NEGLIGENCE/NEGLIGENT SUPERVISION OF STUDENTS/EDUCATION-SCHOOL LAW/MUNICIPAL LAW/CIVIL PROCEDURE

Supervision, Even If Inadequate, Could Not Have Prevented Injury Caused by the Sudden, Unanticipated Act of Another Student---Summary Judgment to Defendant Properly Granted

The First Department determined that plaintiff's injury on the playground could not have been prevented by supervision. Therefore the alleged inadequate supervision was not a proximate cause of the injury. Plaintiff was injured when he hit a pole while running away from another student. The court noted that the board of education, not the city, is the proper party. The city is a separate legal entity not responsible for the torts of the board:

> As to the claim against the Board, it is well settled that
>
> > "[s]chools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable for every thoughtless or careless act by which one pupil may injure another. A teacher owes it to his [or her] charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances ... .
>
> "Even if a breach of the duty of supervision is established, the inquiry is not ended; the question arises whether such negligence was the proximate cause of the injuries sustained" ... . " Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the [defendant school district] is warranted'" ... . Thus, "[a]n 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" ... .
>
> Here, even assuming that plaintiff could demonstrate that the supervision during the gym class was inadequate, the Board established a prima facie case for summary judgment by demonstrating that the accident was the result of a series of sudden and spontaneous acts and that any lack of supervision was not the proximate cause of the infant plaintiff's injury ... . **Jorge C. v City of New York, 2015 NY Slip Op 03772, 1st Dept 5-5-15**

NEGLIGENCE/NOTICE OF CONDITION

Defendant Entitled to Summary Judgment--No Notice of Wet Condition Where Plaintiff Fell

Reversing Supreme Court, the Second Department determined the defendant was entitled to summary judgment in a slip and fall case. The defendant demonstrated it did not have actual or constructive notice of the condition (wet floor). An affidavit by a member of the maintenance crew stated that the area where plaintiff fell had been inspected 10 to 15 minutes before the fall and there had been no complaints about a wet condition. The court explained the relevant law:

> The owner or possessor of property has a duty to maintain his or her property "in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" ... . A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it ... . To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall ... . "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" ... .
>
> The defendant established its prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that it neither created nor had actual or constructive notice of the condition alleged by the plaintiff to have caused the accident. In support of its motion, the defendant relied upon, among other things, the affidavit of Charles Barber, a member of the maintenance crew at the subject store on the date of the accident. Barber averred that he had inspected the area where the plaintiff alleged that she fell approximately 10 to 15 minutes prior to the accident and observed no water in the area at that time. He further averred in his affidavit that at no point prior to the accident did he ever receive any complaints of any kind concerning the area where the plaintiff allegedly fell. **Mehta v Stop & Shop Supermarket Co., LLC, 2015 NY Slip Op 05450, 2nd Dept 6-24-15**

NEGLIGENCE/OPEN AND OBVIOUS CONDITION

Question of Fact Whether Embankment Near a Stream Was an "Open and Obvious" Dangerous Condition at 3 a.m.

The Second Department reversed Supreme Court's grant of summary judgment to the defendants (property owners). Plaintiff, who had been invited onto the property, fell off an embankment near a stream and fractured his ankle. Plaintiff was among a group who had gathered around a bonfire in an area which had been used for that purpose by defendants. The fall took place at 3 a.m. The Second Department determined there was a question of fact whether the dangerous condition was open and obvious (because it was dark):

> "A landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" ... . "The nature and scope of that duty and the persons to whom it is owed require consideration of the likelihood of injury to another from a dangerous condition on the property, the seriousness of the potential injury, the burden of avoiding the risk and the foreseeability of a potential plaintiff's presence on the property" .... "Liability may be imposed upon a landowner who fails to take reasonable precautions in order to prevent those accidents which might foreseeably occur as the result of dangerous terrain" ... .
>
> However, a landowner does not have a duty to protect against an open and obvious condition, which, as a matter of law, is not inherently dangerous ... . Moreover, the question "of whether a condition is hidden or open and obvious is generally for the finder of fact to determine" ..., although, in a proper case, a condition may be found open and obvious as a matter of law. Nonetheless, whether a condition is open and obvious "cannot be divorced from the surrounding circumstances," and a condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured ... . **Barone v Risi, 2015 NY Slip Op 04265, 2nd Dept 5-20-15**

Slippery Dock Was an Open and Obvious Condition---Landowner Had No Duty to Protect Against the Condition

Plaintiff was injured when he stepped on a dock from a boat. Plaintiff alleged the dock was slippery. The Second Department determined Supreme Court should have granted defendant's motion for summary judgment because a landowner has no duty to protect against an open and obvious condition:

> A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property" ... . Here, the defendant met its prima facie burden of establishing its entitlement to judgment as a matter of law ... . "[A] landowner has no duty to protect or warn against an open and obvious condition that is inherent or incident to the nature of the property, and that could be reasonably anticipated by those using it" ... . A slippery condition on a dock is necessarily incidental to its nature and location near a body of water ... . **Mossberg v Crow's Nest Mar. of Oceanside, 2015 NY Slip Op 04618, 2nd Dept 6-3-15**

NEGLIGENCE/PROXIMATE CAUSE DETERMINED AS A MATTER OF LAW

Sole Proximate Cause of Plaintiffs' Injuries Should Have Been Determined as a Matter of Law---Complaint Against Non-Negligent Driver (Whose Car Was Pushed into the Pedestrian-Plaintiffs by the Negligent-Driver's Car) Should Have Been Dismissed

Reversing Supreme Court, the Second Department found that the proximate cause of the accident should have been determined as a matter of law and the complaint against the non-negligent driver should have been dismissed. The negligent driver violated the Vehicle and Traffic Law by attempting to make a left turn and crossing the lane in which the non-negligent driver was travelling. The non-negligent driver 's car collided with negligent driver's car and then struck plaintiffs (pedestrians). Here it was clear that the negligent-driver's actions were the sole proximate of the plaintiffs' injury as a matter of law:

> "A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" ... . "There can be more than one proximate cause of an accident" ..., and "[g]enerally, it is for the trier of fact to determine the issue of proximate cause" ... . "However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts" ... . **Velez v Mandato, 2015 NY Slip Op 05174, 2nd Dept 6-17-15**

NEGLIGENCE/REAR-END COLLISIONS

Questions of Fact About the Sequence of Two Rear-End Collisions Precluded Summary Judgment

The First Department, over a dissent, determined questions of fact about the sequence of rear-end collisions precluded summary judgment. DiPaoli, the driver of the front vehicle, was at a complete stop at a red light. The middle vehicle was driven by Passos, the plaintiff. The last vehicle was an MTA bus. From the deposition testimony, it was unclear whether the plaintiff's vehicle struck the first vehicle before the bus struck plaintiff's vehicle. The court explained the applicable law:

> When approaching another vehicle from behind, drivers are required to maintain a reasonably safe rate of speed, maintain control over the vehicle, and use reasonable care to avoid a collision, by, among other things, including maintaining a safe distance (Vehicle and Traffic Law § 1129[a]). Under the law applicable to rear end collisions, a presumption of negligence is established by proof that a stopped car was struck in the rear ... . However, that presumption can be rebutted if the operator of the rear vehicle comes forward with an adequate non-negligent explanation for the accident ... . **Passos v MTA Bus Co., 2015 NY Slip Op 04916, 1st Dept 6-11-15**

NEGLIGENCE/REAR-END COLLISIONS/SEQUENCE OF COLLISIONS

Question of Fact About Sequence of Rear-End Collisions Precluded Summary Judgment

The Second Department determined a question of fact had been raised about whether the middle driver in a three-car rear-end collision was negligent. Although the middle-car driver alleged she was struck from behind and pushed into the lead car, the third-car driver alleged the middle car struck the lead car before he struck the middle car:

> Supreme Court erred in granting the motions of the plaintiff [lead car driver] and [the middle-car driver] for summary judgment. Based on the plaintiff's account of the accident, those movants

established, prima facie, their freedom from comparative fault and that [third-car driver] was negligent based on the presumption of negligence that arises from a rear-end collision with a stopped or stopping vehicle ... . However, [third-car driver's] affidavit, which recited that his vehicle only struck the [middle] vehicle after the [middle] vehicle had already collided with the lead vehicle, raised triable issues of fact as to the sequence of the collisions, whether [the middle-car driver] was at fault, and the proximate cause of the plaintiff's alleged injuries .... . **Gavrilova v Stark, 2015 NY Slip Op 05153, 2nd Dept 6-17-15**

NEGLIGENCE/RELEASES/GENERAL OBLIGATIONS LAW/CIVIL PROCEDURE/AMENDMENT OF PLEADINGS

Release Null and Void Under the General Obligations Law--Plaintiff Paid a Fee to Participate in the Basketball Game In Which He Was Injured

Plaintiff paid a fee to participate in a basketball league and signed a release of liability. He was injured during a game when his hand went through the glass of a door behind a basketball hoop. The defendants sought permission to amend their answer to assert the defense of release and Supreme Court allowed the amendment. The Second Department determined the motion for leave to amend the answer should have been denied because the affirmative defense was "patently devoid of merit." General Obligations Law 5-326 nullifies any such release where the owner or operator of a sports facility charges a fee for use of the facility. **Falzone v City of New York, 2015 NY Slip Op 04273, 2nd Dept 5-20-15**

[General Obligations Law 5-326 provides: "Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable."]

NEGLIGENCE/RES IPSA LOQUITUR

Res Ipsa Loquitur Doctrine Can Apply to an Elevator Maintenance Company Even Where there Is No Proof the Company Had Actual or Constructive Notice of Elevator Misleveling

The First Department, in a full-fledged opinion by Justice Gische, over a two-justice partial dissent, determined that an elevator maintenance company could be liable for a fall allegedly caused by misleveling of an elevator under the doctrine of res ipsa loquitur, even though there was no evidence the elevator maintenance company had actual or constructive notice of the problem. The plaintiff's allegations of the misleveling, coupled with the settled principle that elevator misleveling does not occur in the absence of negligence, raised a question of fact under the res ipsa loquitur criteria:

> Res ipsa loquitur permits a fact finder to infer negligence based upon the sheer occurrence of an event where a plaintiff proffers sufficient evidence that (1) the occurrence is not one which ordinarily occurs in the absence of negligence; (2) it is caused by an instrumentality or agency within the defendant's exclusive control; and (3) it was not due to any voluntary action or contribution on the plaintiff's part ... . If a plaintiff establishes these elements, then the issue of negligence should be given to a jury to decide ... .
>
> Res ipsa loquitur does not create a presumption of negligence; rather it is a rule of circumstantial evidence that allows the jury to infer negligence ... . A defendant is free to rebut the inference by presenting different facts or otherwise arguing that the jury should not apply the inference in a particular case ... . Notice of a defect is inferred when the doctrine applies and the plaintiff need not offer evidence of actual or constructive notice in order to proceed ... . Thus, while there is no proof of actual or constructive notice in this case, res ipsa loquitur can still support plaintiff's claim ... . **Ezzard v One E. Riv. Place Realty Co., LLC, 2015 NY Slip Op 03791, 1st Dept 5-5-15**

NEGLIGENCE/RES IPSA LOQUITUR/MEDICAL MALPRACTICE

There Is No Blanket Prohibition Against Relying on the Doctrine of Res Ipsa Loquitur in a Medical Malpractice Case

In affirming the denial of summary judgment to the defendant in a medical malpractice case, the Third Department noted that plaintiff is not precluded from relying on the doctrine of res ipsa loquitur in a medical

malpractice action. Here it is was alleged the improper insertion of an IV damaged a nerve: "While the proof adduced at trial ultimately may be insufficient to establish the required elements of res ipsa loquitur ..., thereby rendering the submission of such a charge to the jury unwarranted ..., there is no blanket prohibition upon invoking this doctrine in the context of a medical malpractice action ... . **Weeks v St. Peter's Hosp., 2015 NY Slip Op 03909, 3rd Dept 5-7-15**

NEGLIGENCE/RULES OF THE CITY OF NEW YORK/SIDEWALKS (NEW YORK CITY)

Compliance With the Rules of the City of New York (RCNY) Re: a Sidewalk Vault Cover Did Not Override Cable Company's General Duty Not to Create a Hazardous Condition

Plaintiff tripped on a sidewalk in front of defendant's (Palm Beach's) property in the vicinity of a vault cover installed by defendant cable company (Cablevision). The Second Department determined the causes of action against both defendants properly survived summary judgment. There was no showing Palm Beach did not have constructive notice of the condition. Cablevision argued that dismissal was warranted because it had complied with the Rules of the City of New York (RCNY) concerning sidewalk installations. Supreme Court properly held that the duties imposed by the regulations were in addition to the generally duty not to create a hazardous condition:

> Contrary to the contention of the Cablevision defendants, they cannot be absolved of such liability by either the "guarantee period" set forth in 34 RCNY 2-11(e)(16)(ii) ("Permittees shall be responsible for permanent restoration and maintenance of street openings and excavations for a period of three years on unprotected streets") or the 12-inch rule set forth in 34 RCNY 2-07(b)(1) and (2) (requiring owners of covers or gratings to "monitor[ ] the condition of the covers and gratings and the area extending twelve inches outward from the perimeter of the hardware" and to "replace or repair" any defective cover or grating and any defective street condition found within twelve inches of the cover or grating). As the Supreme Court correctly concluded, the regulations relied on by the Cablevision defendants impose upon them a duty to maintain their vault and the surrounding area that is separate from, and in addition to, their duty not to create hazardous conditions ... . **Shehata v City of New York, 2015 NY Slip Op 04305, 2nd Dept 5-20-15**

NEGLIGENCE/SET ASIDE VERDICT, MOTION TO

Jury's Finding that the Defendant Was Negligent but that the Negligence Was Not the Proximate Cause of the Accident Was Against the Weight of the Evidence---Motion to Set Aside the Verdict Should Have Been Granted---New Trial Ordered

The Third Department determined Supreme Court should have granted plaintiff's motion to set aside the verdict. Plaintiff was injured when her bicycle struck a recessed manhole cover. Defendant construction company had placed barrels in the roadway to create a pedestrian walkway. The placement of barrels served to direct users of the walkway toward the recessed manhole. The jury found the placement of the barrels negligent but further found that negligence was not the proximate cause of the accident. The verdict was against the weight of the evidence because the only reason the placement of the barrels would be deemed negligent is that the barrels diverted traffic toward the recessed manhole:

> "A jury's finding that a party was at fault but that [such] fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause" ... . Further, we view the evidence in the light most favorable to the nonmoving party, defendant, and afford deference to the jury's credibility determinations ... . A "plaintiff's own conduct may be a superceding cause which severs the causal connection between [the] defendant's negligence and the injury [when] a plaintiff's negligence [is] more than mere contributory negligence, which would be relevant in apportioning culpable conduct" ... .
>
> * * * The only theory presented at trial as to why such placement was negligent, as indicated in the jury instructions, was that it diverted traffic toward a dangerous recessed manhole cover. Given that the uncontested evidence was that plaintiff was diverted in just such a manner, no fair interpretation of the evidence "would support the conclusion that [plaintiff's] conduct was so extraordinary or unforeseeable as to make it unreasonable to hold defendant[] responsible for the resulting damages" ... . Therefore, Supreme Court erred in denying plaintiff's motion to set aside the verdict. **Durrans v Harrison & Burrowes Bridge Constructors, Inc., 2015 NY Slip Op 03896, 3rd Dept 5-7-15**

NEGLIGENCE/SET ASIDE VERDICT, MOTION TO/EVIDENCE

Criteria for Setting Aside a Verdict as Against the Weight of the Evidence Explained

The Second Department determined plaintiff's motion to set aside the defense verdict as against the weight of the evidence was properly denied. Plaintiff, a bicyclist, was injured when he struck the open door of defendant's (Roche's) vehicle. Defendant testified the door was ajar, not fully open: "A jury verdict should be set aside as contrary to the weight of the evidence only if the jury could not have reached the verdict by any fair interpretation of the evidence ... . A jury's finding that a party was at fault but that such fault was not a proximate cause of the accident is inconsistent and against the weight of the evidence only when the issues are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause ... . [W]here there is a reasonable view of the evidence under which it is not logically impossible to reconcile a finding of negligence but no proximate cause, it will be presumed that, in returning such a verdict, the jury adopted that view... . However, where a jury verdict with respect to negligence and proximate causation is irreconcilably inconsistent, because the only reasonable view of the evidence is that a defendant's negligence was a proximate cause of the plaintiff's injuries, that verdict must be set aside as contrary to the weight of the evidence ... . In this case, it was within the jury's province to credit Roche's testimony that she did not open her car door into the plaintiff's path. The jury reasonably could have concluded that Roche was negligent in some other respect—such as the positioning of her car or her act of leaving the door "slightly ajar"—but that, despite such negligence, the plaintiff should have been able to avoid the collision and, thus, his conduct was the sole proximate cause of the accident." [quotations omitted] **Membreno v Roche, 2015 NY Slip Op 04102, 2nd Dept 5-13-15**

NEGLIGENCE/SIDEWALK DEFECT

Plaintiff's Inability to Identify the Precise Sidewalk Defect Which Caused Her Fall (In a Photograph) Did Not Warrant Summary Judgment to the Defendant---Plaintiff Testified She Tripped on a Bump in the Sidewalk

The First Department determined that plaintiff's inability to identify the precise sidewalk defect over which she tripped did not warrant granting summary judgment to the defendant. Plaintiff testified her foot struck a bump in the sidewalk but she was unable to identify the defect in a photograph of the sidewalk. Under the circumstances the plaintiff was not required to identify the particular defect which caused her fall in order to avoid summary judgment. She was able to demonstrate a "nexus" between a defect and her fall:

> At her deposition, plaintiff testified that she fell because her foot hit a bump in the sidewalk. Defendants moved for summary judgment on the ground that plaintiff's inability to identify the bump or defect in photographs shown to her at her deposition prevented her from being able to prove that her accident was proximately caused by a sidewalk defect for which they were responsible ... . Under the circumstances, plaintiff's testimony was sufficient to demonstrate a causal "nexus" between a defect in the sidewalk in front of [defendant's] property and her fall, and she was not required to prove "precisely which particular" defect in the sidewalk caused her to fall in order to avoid summary judgment ... . **Kovach v PJA, LLC, 2015 NY Slip Op 03931, 1st Dept 5-7-15**

NEGLIGENCE/SIDEWALK DEFECT/DUTY TO MAINTAIN SIDEWALK IMPOSED BY ORDINANCE

Ordinance Imposing a Duty Upon Abutting Property Owners to Keep Sidewalks in Good Repair Raised a Question of Fact whether a Defect Caused by a Tree Root Should Have Been Repaired by the Defendant---The Defect Was Not So Significant As to Allow a Determination of Defendant's Liability as a Matter of Law

The Fourth Department determined the existence of an ordinance imposing upon abutting property owners the duty to maintain the sidewalk created a question of fact whether defendant breached that duty. Apparently the defect was caused by a root from a tree on village property which defendant alleged he had no authority to disturb. The ordinance, however did not include any exceptions to the duty to repair. The defect was not of such significance that summary judgment on liability as a matter of law was warranted:

> ... "[I]t is well established that, as an abutting landowner, [defendant] is not liable for injuries sustained as the result of a defect in the sidewalk unless[, inter alia,] . . . there is a local ordinance charging [defendant] with the duty to maintain and repair the sidewalk and imposing liability for injuries resulting from [defendant's] failure to do so" ... . Here, in opposition to the motion, plaintiff submitted relevant portions of the General Code of the Village of Hamburg (Village), which charges landowners such as defendant with the duty to "repair, keep safe and maintain any sidewalk abutting [the landowner's] premises," and imposes liability on the landowner "for any injury or damage by reason of omission or failure to repair, keep safe, and maintain such sidewalk"

(Village of Hamburg General Code § 203-26 [B]; see § 203-28 [A] [2]).

We conclude that, by submitting that local ordinance, plaintiff raised an issue of fact whether defendant breached the duty imposed on it to maintain the sidewalk abutting its property. Although defendant contends that the alleged defect in the sidewalk was created by a tree root that it had no authority to disturb because it originated from a tree on property owned and maintained by the Village, we note that the local ordinance contains no exceptions to the duty imposed on abutting landowners to maintain the sidewalk, even if the allegedly dangerous condition was created by a root extending from Village property. In any event, it cannot be said as a matter of law that defendant could not have repaired the alleged defect in the sidewalk without cutting the tree root that purportedly created it ... .

We agree with defendant, however, that the court erred in granting that part of plaintiff's cross motion for partial summary judgment on the issue of negligence against defendant, and we therefore modify the order accordingly. "Generally, a sidewalk defect presents an issue of fact for a jury . . . , unless . . . the defect is so trivial as to warrant disposition [in defendant's favor] on summary judgment" ... . Here, we cannot conclude that the alleged defect, as depicted in photographs included in the record, is of such significance that defendant may be held liable as a matter of law ... . **Shatzel v 152 Buffalo St., Ltd., 2015 NY Slip Op 05333, 4th Dept 6-19-15**

NEGLIGENCE/STRICT PRODUCTS LIABILITY/ASBESTOS/FORESEEABILITY/ DISMANTLING, SALVAGING, DEMOLISHING THE PRODUCT

Dismantling, Salvaging or Demolishing a Product Is Not a Foreseeable Use of the Product

The First Department determined the dismantling, salvaging and demolishing of valves containing asbestos did not constitute a foreseeable use of the valves. The complaint against the manufacturer of the valves, sounding in strict products liability and negligence, was dismissed.

"A manufacturer who sells a product in a defective condition is liable for injury which results to another when the product is used for its intended purpose or for an unintended but reasonably foreseeable purpose" (Lugo v LJN Toys, 75 NY2d 850, 852 1990] [citations omitted]; see also New Holland at 53-54). The issue, which has not been squarely addressed by the courts of this State, is whether dismantling constitutes a reasonably foreseeable use of a product. * * *

"To recover for injuries caused by a defective product, the defect must have been a substantial factor in causing the injury, and the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable'" ... . As plaintiff did not use [defendant's] manufactured product in a reasonably foreseeable manner and his salvage work was not an intended use of the product, the complaint should have been dismissed. **Hockler v William Powell Co., 2015 NY Slip Op 04765, 1st Dept 6-9-15**

NEGLIGENCE/STRICT PRODUCTS LIABILITY/CONTRACT LAW

Manufacturers Responsible for Packaging a Product Owed a Duty to Plaintiff Injured When the Packaging Failed Under Negligence, Strict Products Liability and Contractual Theories

Plaintiff was injured when the packaging of a product failed. The product was manufactured pursuant to a contract between plaintiff's employer and one manufacturer, ABS. ABS contracted with a second manufacturer, Keystone, to nickel-plate the product. Both manufacturers were responsible for aspects of the product's packaging. The Fourth Department determined that the manufacturers' motions for summary judgment were properly denied. Both owed a duty to plaintiff under negligence and strict products liability theories. In addition, ABS owed a duty to the plaintiff as a third-party beneficiary of the contract with plaintiff's employer. And Keystone owed a contractual duty to the plaintiff as well because, although there was no third-party beneficiary relationship, Keystone had launched an instrument of harm. **Filer v Keystone Corp., 2015 NY Slip Op 03628, 4th Dept 5-1-15**

NEGLIGENCE/STRICT PRODUCTS LIABILITY/DEFECTIVE DESIGN

Elements of a Defective Design Cause of Action Described

The Third Department determined questions of fact had been raised about whether a machine was defectively designed. Plaintiff was injured when he attempted to make adjustments while the machine was running. There was evidence the adjustments could have been made safely using another access point. The

court provided a good explanation of the elements of a defective-design cause of action:

> Liability for a defectively designed product "attaches when the product, as designed, presents an unreasonable risk of harm to the user" ... . A successful cause of action for defective design exists where a plaintiff is able to establish "that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury" ... . To demonstrate a product was not "reasonably safe," the injured party must demonstrate both that there was a substantial likelihood of harm and that "it was feasible to design the product in a safer manner" .. . A claim may be defeated where a defendant demonstrates that the product's "utility outweighs its risks [because] the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost" ... . This "risk-utility analysis" requires consideration of "'(1) the product's utility to the public as a whole, (2) its utility to the individual user, (3) the likelihood that the product will cause injury, (4) the availability of a safer design, (5) the possibility of designing and manufacturing the product so that it is safer but remains functional and reasonably priced, (6) the degree of awareness of the product's potential danger that can reasonably be attributed to the injured user, and (7) the manufacturer's ability to spread the cost of any safety-related design changes'" ... . Generally, the risk/utility analysis presents a factual question for a jury ... . **Barclay v Techno-Design, Inc., 2015 NY Slip Op 04708, 3rd Dept 6-4-15**

NEGLIGENCE/STRICT PRODUCTS LIABILITY/PROXIMATE CAUSE/FORESEEABILITY/SUPERSEDING CAUSE---INTERVENING ACT

Injury While Trying to Pick Up a Fallen 3000 Pound Roll of Paper Was a Foreseeable Consequence of an Alleged Equipment Defect Which Caused the Roll to Fall

The Fourth Department determined the summary judgment motion of the defendants---manufacturers and modifiers of a pallet truck---was properly denied. The complaint alleged the pallet truck and the roll cradle with which the pallet truck was modified were defective, causing a 3000 pound roll of paper to fall off the truck. Plaintiff was severely injured while trying to lift the fallen roll. The defendants' arguments that any defects in the pallet truck and roll cradle were not the proximate cause of the injury, and the attempt to pick up the fallen roll was the superseding cause of the injuries, were rejected. The court determined the cause of the injury was within the class of foreseeable hazards associated with a fallen roll and the risk of the intervening act (lifting the fallen roll) was the same risk that renders the actor negligent:

> "As a general rule, the question of proximate cause is to be decided by the finder of fact, aided by appropriate instructions" ... . Where the cause of an accident is "within the class of foreseeable hazards that [a] duty exists to prevent, the [defendant] may be held liable, even though the harm may have been brought about in an unexpected way" ... . We conclude that the hazard that caused plaintiff's injury, i.e., the movement of the roll while it was being placed back in an upright position, was "within the class of foreseeable hazards" associated with a roll falling off the allegedly defective pallet truck ..., and thus a jury "could rationally [find] that . . . there was a causal connection between [defendants' alleged] negligence and plaintiff's injuries" ... . We thus reject the contention of defendants that the falling roll merely "furnished the occasion" for plaintiff's accident.
>
> We also reject the contention of defendants that the actions of plaintiff and his coworkers in attempting to upright the roll were a superseding cause of plaintiff's injuries. "An intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act is the very same risk which renders the actor negligent" ... . As noted above, the risk of the roll falling while being uprighted is the same risk underlying plaintiffs' allegations of negligence, and we conclude that the actions of plaintiff and his coworkers were not "of such an extraordinary nature" as to relieve defendants of liability ... . **Ard v Thompson & Johnson Equip. Co., Inc., 2015 NY Slip Op 03985, 4th Dept 5-8-15**

NEGLIGENCE/TREE WELLS/SIDEWALKS

Abutting Property Owners Not Liable for Falls in Sidewalk Tree Wells (NYC)

The Second Department noted that, pursuant to the New York City Administrative Code, abutting property owners are not responsible for falls within city-owned tree wells (within sidewalks). Defendant's motion for summary judgment should have been granted:

> The [defendant] argued that it could not be held liable under § 7-210 of the Administrative Code of

the City of New York (hereinafter the Administrative Code), which imposes tort liability on abutting property owners for the failure to maintain city-owned sidewalks in a reasonably safe condition, because the plaintiff fell in a tree well, which is not considered to be part of a sidewalk for purposes of Administrative Code § 7-210. The Supreme Court denied the motion.

A tree well does not fall within the definition of "sidewalk" as that term is defined by section 7-210 of the Administrative Code and thus, "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" ... .

Here, the [defendant] established its prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff fell in a tree well, not any part of the surrounding sidewalk, and that it had no duty to maintain the tree well, as that tree well was owned by the City of New York ... . In opposition, the plaintiff failed to raise a triable issue of fact. **Newkirk v City of New York, 2015 NY Slip Op 04620, 2nd Dept 6-3-15**

NEGLIGENCE/TRIVIAL DEFECT

1/2 to 3/4 Inch Defect in Sidewalk Not Trivial As a Matter of Law

In denying defendant's motion for summary judgment on the ground that the 1/2 to 3/4 defect in the sidewalk (which extended across two adjoining slabs) where plaintiff tripped and fell was trivial, the Fourth Department explained the relevant criteria: "[W]hether a dangerous or defective exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" ... . "[T]here is no minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable" ... . Although "in some instances . . . the trivial nature of the defect may loom larger than another element[,] . . . [a] mechanistic disposition of a case based exclusively on the dimension of the [pavement] defect" is inappropriate ... . Thus, a determination whether a particular defect is actionable requires examination of "the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury" ... . **Greco v City of Buffalo, 2015 NY Slip Op 03966, 4th Dept 5-8-15**

Defect Was Trivial As a Matter of Law---Criteria Explained

The Second Department determined the slip an fall case should have been dismissed. The defect was trivial as a matter of law: "... [P]roperty owners may not be held liable for trivial defects, not constituting a trap or nuisance, over which a pedestrian might merely stumble, stub his or her toes, or trip ... . There is no minimal dimension test or per se rule that the condition must be of a certain height or depth to be actionable ... . In determining whether a defect is trivial as a matter of law, the court must examine all of the facts presented, "including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance' of the injury ... . "Photographs which fairly and accurately represent the accident site may be used to establish that a defect is trivial and not actionable ... ". [internal quotations omitted] **Santacruz v Taco Bell of Am., LLC, 2015 NY Slip Op 04111, 2nd Dept 5-13-15**

NEGLIGENCE/VEHICLE AND TRAFFIC LAW

Presumption Vehicle Was Being Driven with the Owner's Consent (Vehicle & Traffic Law 388) Was Not Overcome by Testimony of Vehicle Owner and Her Daughter---Summary Judgment Should Not Have Been Awarded on that Ground

The Second Department noted, in the context of a summary judgment motion, the testimony of the vehicle owner, Varela, and her daughter, an interested witness, was not sufficient to rebut the presumption that another was driving the vehicle with Verela's consent (Vehicle and Traffic Law 388):

> The Supreme Court should have denied that branch of Varela's motion which was for summary judgment dismissing the complaint insofar as asserted against her. "Vehicle and Traffic Law § 388 creates a strong presumption that the driver of a vehicle is operating it with the owner's consent, which can only be rebutted by substantial evidence demonstrating that the vehicle was not operated with the owner's express or implied permission" ... . " The uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission, does not, by itself, overcome the presumption of permissive use'" ... . The question of consent is ordinarily one for the jury ... . **Blassberger v Varela, 2015 NY Slip Op 04796, 2nd Dept 6-10-15**

NEGLIGENCE/VEHICLE AND TRAFFIC LAW/HIGHWAY WORKERS/STANDARD OF CARE/RECKLESS DISREGARD FOR SAFETY/STATUTORY IMMUNITY/MUNICIPAL LAW/COUNTY LAW

Driver of Street Sweeper Which Struck Plaintiff's Car Entitled to Statutory Immunity

The Third Department determined the driver of a street sweeper was engaged in highway work (re: Vehicle and Traffic Law 1103) at the time the sweeper collided with plaintiff's vehicle. Therefore the "reckless disregard for the safety of others" standard of care applied to the sweeper driver. The driver was working on a highway and had to make several passes to clean up spilled gravel. Because it was a divided highway, the sweeper driver had to make a u-turn and return on the opposite side of highway to make another pass. The immunity afforded by Vehicle and Traffic Law 1103 applies only when actual work on the highway is being done, not when a worker is driving to or from the work site. The Third Department held that the statutory immunity was available here, even though the accident did not occur as the sweeper was engaged, because the driver was forced to use a circuitous route to complete the assigned task:

> With exceptions not applicable here, the safety rules and regulations set forth in the Vehicle and Traffic Law do "not apply to persons . . . while actually engaged in work on a highway nor . . . to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation" (Vehicle and Traffic Law § 1103 [b]...). If the person is "actually engaged" in work or a hazardous operation, the applicable standard of care is "reckless disregard for the safety of others," but the exception does not apply where the person is traveling to or from the hazardous operation ... . **Matsch v Chemung County Dept. of Pub. Works, 2015 NY Slip Op 04374, 3rd Dept 5-21-15**

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS/INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

No Allegation Plaintiffs' "Physical Safety" Was Endangered Re: Cause of Action for Negligent Infliction of Emotional Distress/No Allegation of Sufficiently Extreme and Outrageous Conduct Re: Cause of Action for Intentional Infliction of Emotional Distress---Those Causes of Action Were Therefore Properly Dismissed

The plaintiffs alleged defendants defrauded them in connection with a deed which purported to transfer plaintiffs' property to a third party and the related mortgages. In addition to the action to quiet title pursuant to Real Property Actions and Proceedings Law, the plaintiffs alleged causes of action for negligent and intentional infliction of emotional distress (among several others). The Second Department determined those causes of action were properly dismissed and explained the pleading defects, notably (1) the absence of a duty which could give rise to tort liability, (2) the failure to allege plaintiffs' "physical safety" was endangered (negligent infliction of emotional distress), and (3) the failure to allege sufficiently extreme and outrageous conduct (intentional infliction of emotional distress):

> Here, as the [defendants who initially serviced the loan payments made by plaintiffs] correctly assert, the complaint fails to state a cause of action to recover damages for negligent or intentional infliction of emotional distress as against them. The relationship between the plaintiffs and those defendants "does not give rise to a duty which could furnish a basis for tort liability" in negligence ... . Further, the plaintiffs did not allege that their "physical safety" was endangered or that they were caused to fear for their physical safety, which is generally an element of a cause of action based on negligent infliction of emotional distress ... . Moreover, the conduct complained of is not sufficiently extreme and outrageous to support the cause of action to recover for damages for intentional infliction of emotional distress ... . **Pirrelli v OCWEN Loan Servicing, LLC, 2015 NY Slip Op 04625, 2nd Dept 6-3-15**

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS/INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS/PRIVATE NUISANCE/LANDLORD-TENANT

"Extreme and Outrageous Conduct" Is Not an Element of "Negligent Infliction of Emotional Distress"---Elements of Private Nuisance, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress Explained in Some Depth---Complaint Should Have Been Dismissed for Failure to State a Cause of Action

The Second Department, in a full-fledged opinion by Justice Miller, reversed Supreme Court and dismissed the complaint for failure to state a cause of action. The opinion is important because it clarified "negligent infliction of emotional distress," explaining that "extreme and outrageous conduct" is not one of the elements. Although the court held that the complaint did not state causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, or private nuisance, the nature of those causes of action was explained in some depth. The defendants owned property next door to the plaintiffs' home. The defendants rented to tenants, who were not parties to the lawsuit. The tenants apparently held loud parties at which drugs were used and sold. The plaintiffs at one point called the police to complain about the tenants' behavior. Subsequently two masked men entered plaintiffs' home to intimidate them. Plaintiff-husband ultimately shot the two intruders and in the process accidently shot his dog. The men were arrested by the police. The opinion is too detailed to properly summarize here, but the essence of the court's ruling is that the tenants' behavior was not sufficiently linked to any acts or omissions by the defendants. The court wrote:

> The elements of a private nuisance cause of action are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" ... . * * * ... [T]he duty to abate a private nuisance existing on real property arises from the power to possess the property and control the activities that occur on it. Accordingly, a landowner who has relinquished possession of his or her property will not be liable for a private nuisance that arises on the property if the landowner neither created the nuisance nor had notice of it at the time that possession of the property was transferred ... . In the absence of any such knowledge or consent to the objectionable activity which may be attributable to the landowner at the time the lease is executed, the common-law duty to abate a nuisance that exists during the course of a tenancy lies with the tenant, in his or her capacity as the one in possession of the property ... .
>
> ... [U]nder New York law, a cause of action alleging intentional infliction of emotion distress "has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" ... . * * * " Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'" ... . * * * Although the individuals who broke into the plaintiffs' home may have engaged in extreme and outrageous conduct, the complaint alleges no basis upon which the intruders' conduct may be imputed to the defendants. The defendants' intentional conduct, as alleged in the complaint, amounts to nothing more than a failure to ensure that their tenants and their friends refrained from committing the acts described in the complaint. * * *
>
> [Re: negligent infliction of emotional distress] .... [T]o the extent that certain of this Court's past decisions have indicated that extreme and outrageous conduct is an element of negligent infliction of emotional distress ... , those cases should no longer be followed. ... [A] breach of a duty of care "resulting directly in emotional harm is compensable even though no physical injury occurred" ... . However, the mental injury must be "a direct, rather than a consequential, result of the breach" ... , and the claim must possess "some guarantee of genuineness" ... . Applying the correct standard to the complaint in this case, we conclude that the plaintiffs' failure to adequately allege extreme and outrageous conduct is not fatal to their cause of action alleging negligent infliction of emotional distress ... . Nevertheless, we conclude that the complaint is deficient in another respect, as it failed to adequately allege facts that would establish that the mental injury was "a direct, rather than a consequential, result of the breach" ... . **Taggart v Costabile, 2015 NY Slip Op 05464, 2nd Dept 6-24-15**

PUBLIC AUTHORITIES LAW/NEW YORK CITY TRANSIT AUTHORITY/INTEREST ON JUDGMENT

Pursuant to the Public Authorities Law, Interest on a Judgment To Be Paid by the New York City Transit Authority Cannot Exceed 3%

The First Department noted that, although plaintiff procured a judgment (after trial) for past lost earnings against the city, the judgment will ultimately be paid by non-party New York City Transit Authority. Therefore, pursuant to Public Authorities Law 1212(6), the interest on the judgment cannot exceed 3 %. **Soltero v City of New York, 2015 NY Slip Op 04770, 1st Dept 6-9-15**

PUBLIC HEALTH LAW/GROUP HOMES FOR THE DEVELOPMENTALLY DISABLED/RESIDENTIAL HEALTH CARE FACILITIES/PRIVATE RIGHT OF ACTION PURSUANT TO PUBLIC HEALTH LAW 2801-d

The Private Right of Action Afforded to Patients in "Residential Health Care Facilities" Pursuant to Public Health Law 2801-d Does Not Apply to Residents of a Group Home for the Developmentally Disabled

Plaintiff's brother, Brian, is developmentally disabled and resided in a group home operated by the defendant. Plaintiff alleged her brother was injured as a result of the negligence of defendant's employees and brought suit under Public Health Law 2801-d, which allows a private right of action by patients against "residential health care facilities." The Fourth Department determined the group home was not a "residential health care facility" within the meaning of the Public Health Law 2801-d and, therefore, the causes of action based on that statute should have been dismissed:

> In contrast to a hospital or nursing home, the group home owned and operated by defendant is governed by the Mental Hygiene Law and regulated by the Office for People with Developmental Disabilities (OPWDD), and operates pursuant to a certificate issued by the Commissioner of OPWDD (see Mental Hygiene Law article 16; 14 NYCRR part 686; see also Mental Hygiene Law § 13.07). The group home is classified as an "individualized residential alternative" community residence, defined as "a facility providing room, board, and individualized protective oversight" for "persons who are developmentally disabled and who, in addition to these basic requirements, need supportive interpersonal relationships, supervision, and training assistance in the activities of daily living" (14 NYCRR 686.99 [l] [2] [iii]). Under the plain language of the regulations governing it, the group home does not serve "principally" as a facility "for the rendering of health-related service" governed by Public Health Law article 28 (§ 2800). **Burkhart v People, Inc., 2015 NY Slip Op 04974, 4th Dept 6-12-15**

REAL ESTATE/CONTRACT LAW/DEEDS/MERGER OF CONTRACT AND DEED/UNIFORM VENDOR AND PURCHASER RISK ACT (UVPRA)/GENERAL OBLIGATIONS LAW

Contract Merged with the Deed and Any Rights Afforded Purchaser by the Uniform Vendor and Purchaser Risk Act Were Extinguished Upon Transfer of Title

After transfer of title, the purchaser alleged that the property had been damaged between the execution of the purchase contract and the transfer of title. The Third Department determined summary judgment was properly awarded the seller. The property was sold "as is" and the contract did not survive the transfer of title. Any rights granted purchaser under the Uniform Vendor and Purchaser Risk Act (UVPRA), which allows for rescission in some cases, were extinguished upon the transfer of title:

> Unless a land sale contract expressly provides otherwise, a vendor bears the risk of loss until legal title or possession has been transferred to the purchaser ... . However, a contract for the sale of real property merges with the deed and, as a result, the terms of the contract do not survive transfer of title unless the parties clearly specify otherwise ... . Here, the terms and conditions of the auction provided that the sale would be governed by the Uniform Vendor and Purchaser Risk Act (hereinafter UVPRA), which provides a purchaser with the right to rescind the sale contract or recover money paid toward the purchase price under certain circumstances (see General Obligations Law § 5-1311 [1] [a]). However, there was no indication that plaintiff's rights under the UVPRA would survive transfer of title. In fact, the terms and conditions provided that the property would be sold "as is" and that a purchaser would not have recourse against defendant for any defects stemming from the sale. Therefore, any rights that plaintiff may have asserted under the UVPRA were extinguished when title was transferred to plaintiff. **Burkins &**

Foley Trucking & Stor., Inc. v County of Albany, 2015 NY Slip Op 05252, 3rd Dept 6-18-15

REAL ESTATE/CONTRACT LAW/CONTINGENT PURCHASE CONTRACT/GENERAL OBLIGATIONS LAW

Purchasers Entitled to Return of Downpayment Under Terms of the Purchase Contract and Pursuant to General Obligations Law 5-1311---Home Damaged by Hurricane Sandy Before Appraisal by Lender

The Second Department determined Supreme Court should have granted the purchasers' motion for summary judgment on the complaint seeking return of the downpayment. The contract for sale of real property was contingent upon purchasers receiving a commitment for a loan. The commitments received by the purchasers were contingent upon a property appraisal. The house was damaged in Hurricane Sandy and the lender, based upon the post-Sandy appraisal, would not issue the loan. The Second Department determined the purchasers were entitled to a return of their downpayment under the terms of the contract and pursuant to General Obligations Law 5-1311:

> "For more than a century it has been well settled in this State that a vendee who defaults on a real estate contract without lawful excuse, cannot recover the down payment" ... . Where, however, the obligations of a purchaser under a contract of sale are contingent upon the issuance of a firm financing commitment by a lender, a purchaser may be entitled to recover the down payment if he or she was unable to secure a firm commitment in accordance with the terms of the contract ... .
>
> Here, the contract of sale was conditioned upon the issuance of a written commitment from an institutional lender. The contract of sale expressly provided that "a commitment conditioned on the Institutional Lender's approval of an appraisal shall not be deemed a Commitment' hereunder until an appraisal is approved." Accordingly, the plaintiffs established their prima facie entitlement to judgment as a matter of law by demonstrating that they were unable to secure a firm commitment in accordance with the contract of sale, and that they were entitled to the return of their down payment pursuant to the terms of the contract ... . In addition, the plaintiffs demonstrated, prima facie, that they were entitled to a return of their down payment by virtue of General Obligations Law § 5-1311, since a "material part" of the property was destroyed by Hurricane Sandy before legal title or possession of the property could be transferred (General Obligations Law § 5-1311[1][a][1]). **Walsh v Catalano, 2015 NY Slip Op 05468, 2nd Dept 6-24-15**

REAL PROPERTY/ADVERSE POSSESSION

Good, Fact-Based Analysis of the Requirements for Adverse Possession

Reversing Supreme Court's grant of summary judgment to the plaintiffs on their adverse-possession claim, the Third Department determined a question of fact had been raised about whether plaintiffs' use of the disputed land was with the defendants' permission, which would defeat the "hostility" element of adverse possession. The Third Department offered a detailed fact-based analysis which provides an excellent lesson on the law of adverse possession. The court noted, on the issue of exclusivity, the claim that defendants occasionally maintained the disputed property during the plaintiffs' absence was not enough to raise a question of fact about the plaintiffs' exclusive use of the property:

> To establish their claim for adverse possession, plaintiffs are required to prove by clear and convincing evidence that their possession of the disputed property "[was] hostile and under a claim of right, actual, open and notorious, exclusive and continuous for the statutory period of 10 years" ... . Additionally, where, as here, the adverse possession claim is not based upon a written instrument, the party asserting the claim "must establish that the land was 'usually cultivated or improved' or 'protected by a substantial inclosure'" ... .
>
> As for [defendant's] alleged maintenance of the disputed property during plaintiffs' absences, "exclusivity is not defeated even if the true owner makes occasional forays onto the property . . .. [A]ll that is required is possession consistent with the nature of the property so as to indicate exclusive ownership" (1-5 Warren's Weed, New York Real Property § 5.33 [2015]). In our view, plaintiffs' exclusive, regular use and maintenance of the disputed property during their periods of occupation were consistent with the seasonal nature of their property. The occasional maintenance that defendants allegedly performed or directed during plaintiffs' absences — which was performed without plaintiffs' knowledge and did not interfere in any way with plaintiffs' possession or use of the disputed property — was insufficient to meet defendants' prima facie burden to establish that plaintiffs' use of the property was not exclusive ... . **Bergmann v Spallane, 2015 NY Slip Op 04713, 3rd Dept 6-4-15**

REAL PROPERTY/DEEDS/ATTORNEY-IN-FACT

Attorney-in-Fact Used His Power to Create a Gift (by Deed) to Himself and/or Third Parties---Deed Declared Null and Void

The Fourth Department determined the deed purporting to transfer a life estate to the attorney-in-fact was null and void. Essentially, the attorney-in-fact used his power to make a gift to himself and/or third parties, which created an unrebutted presumption of impropriety:

> It is well settled that "[a] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal" ... . "The relationship of an attorney-in-fact to his principal is that of agent and principal . . . and, thus, the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing' . . . Consistent with this duty, an agent may not make a gift to himself or a third party of the money or property which is the subject of the agency relationship" ... . "In the event such a gift is made, there is created a presumption of impropriety [that can] be rebutted [only] with a clear showing that the principal intended to make the gift" ..., or that the gift was in the principal's best interest ... . **Borders v Borders, 2015 NY Slip Op 04022, 4th Dept 5-8-15**

REAL PROPERTY/DEEDS/RESTRICTIVE COVENANTS

Restrictive Covenant Was Part of a Common Development Scheme and Was Enforceable by All Property Owners In the Subdivision

The Second Department determined a restrictive covenant requiring that one parcel in a subdivision remain undeveloped was enforceable by property owners in the subdivision. The covenant was part of a common development scheme created for the benefit of all property owners. The covenant stated that the parcel "shall be maintained . . . in perpetuity as open space preserving same in its present natural condition and not permitting or causing thereon any construction, improvements or alterations of the existing natural state of the premises. This restriction shall run with the land in perpetuity." Defendants were seeking to build an access road across the parcel. The Second Department explained: . "The law has long favored free and unencumbered use of real property, and covenants restricting use are strictly construed against those seeking to enforce them ... . Courts will enforce such restraints only where the party seeking enforcement establishes their application by clear and convincing evidence ... . However, where proved by clear and convincing evidence, they are to be enforced pursuant to their clear meaning...". [internal quotations omitted] **Fader v Taconic Tract Dev., LLC, 2015 NY Slip Op 04272, 2nd Dept 5-20-15**

REAL PROPERTY/EASEMENTS

Alterations to Easement Okay---They Did Not Interfere With the Easement-Holder's Right of Passage

The Third Department determined the alterations made to an ingress and egress easement along a private road, including the installation of a gate, were not actionable because they did not interfere with the easement holder's right of passage:

> It is well settled that "[t]he extent and nature of an easement must be determined by the language contained in the grant, aided where necessary by any circumstances tending to manifest the intent of the parties" ... . Here, the easement specifically granted plaintiff and defendants the right of "ingress and egress and for electric, gas, water, sewer and similar services over, under and along [the] farm road" on the McLean property. Importantly then, "[a] right of way along a private road belonging to another person does not give the [easement holder] a right that the road shall be in no respect altered or the width decreased, for his [or her] right . . . is merely a right to pass with the convenience to which he [or she] has been accustomed" ... . In the absence of a demonstrated intent to provide otherwise, an easement of ingress and egress may be narrowed, covered, gated or fenced off, "'so long as the easement holder's right of passage is not impaired'"... . **Boice v Hirschbihl, 2015 NY Slip Op 04191, 3rd Dept 5-14-15**

REAL PROPERTY/EASEMENTS/UTILITY EASEMENT

Owner of Land through Which Power Lines Pass Pursuant to a Utility Easement (Servient Owner) Does Not Have a Duty to Maintain the Easement---Servient Owner Not Liable for Damage to Abutting Property Stemming from a Vegetation Fire Started by Sparks from the Power Lines

The Second Department determined the easement which allowed the power company's lines to pass through the owner's property did not impose a duty to maintain the easement on property owner. Vegetation around the power lines caught fire causing damage to an abutting landowner's property. The plaintiff insurer paid the claim and sued the owner of the land through which the power lines passed (the servient owner). The Second Department explained that "a servient owner has no duty to maintain an easement to which its property is subject. Indeed, a servient owner has a passive duty to refrain from interfering with the rights of the dominant owner" ... . **Encompass Ins. Co. of Am. v Long Is. Power Auth., 2015 NY Slip Op 03800, 2nd Dept 5-6-15**

REAL PROPERTY/MORTGAGEE IN POSSESSION/ NUISANCE/NEGLIGENCE/TRESPASS/CIVIL PROCEDURE

Mortgagee in Possession Has a Duty to Care for the Property/Criteria for Determining a Motion to Dismiss for Failure to State a Cause of Action, Where Documentary Evidence Is Submitted, Explained

In the context of a motion to dismiss for failure to state a cause of action (where documentary evidence was submitted), the Second Department determined a mortgagee in possession of property (here because the property owner went bankrupt) has a duty to care for the property which is identical a property owner's duty. Here plaintiffs alleged the property, which had been damaged by fire, was allowed to deteriorate to the extent that plaintiffs' neighboring property was damaged. The causes of action for nuisance, negligence and trespass survived the motion to dismiss. The court noted its role when documentary evidence is submitted in support of a motion to dismiss for failure to state a cause of action:

> A motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" ... . While the documentary evidence submitted by One West established that it did not own the defendants' property at any relevant time ... , that evidence did not "utterly refute" the plaintiffs' contention that One West had a duty based on its status as a mortgagee in possession. In fact, the documents, which establish ownership, did not address the plaintiffs' contention regarding One West's alleged status as a mortgagee in possession ... . Accordingly the Supreme Court erred in granting the motion insofar as it sought dismissal of the complaint pursuant to CPLR 3211(a)(1).
>
> In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the court should accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" ... . "Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" ... .
>
> The plaintiffs' contention that [defendant] was a mortgagee in possession has not been shown to be "not a fact at all" ... . If [defendant] were, in fact, a mortgagee in possession, it was "bound to employ the same care and supervision over the mortgaged premises that a reasonably prudent owner would exercise in relation to his [or her] own property; he [or she] is bound to make reasonable and needed repairs, and is responsible for any loss or damage occasioned by his willful default or gross neglect in this regard" ... . Thus, the complaint, as augmented by the affidavit of the plaintiff Emeta Allen, which was submitted in opposition to the motion to dismiss ..., properly set forth causes of action alleging nuisance, negligence, and trespass, and the plaintiffs have causes of action sounding in nuisance, negligence, and trespass. **Allen v Echeverria, 2015 NY Slip Op 04075, 2nd Dept 5-13-15**

REAL PROPERTY LAW/SEVERANCE OF JOINT TENANCY/CONTRACT LAW

"Agreement to Agree" Insufficient to Sever a Joint Tenancy

The Third Department noted that a joint tenancy with right of survivorship can be severed by written agreement, but determined the email correspondence, which evinced the parties' intent to sever the joint tenancy, did not accomplish the severance because material terms, including price, were not addressed: "Real Property Law § 240-c (3) (a) allows for the severance of a joint tenancy "pursuant to a written agreement of all joint tenants." However, "a contract must be definite in its material terms in order to be enforceable" ... . For this reason, an agreement to agree, where such terms are left to future negotiations, is unenforceable ...". **Matter of Wyman (Riddle), 2015 NY Slip Op 03908, 3rd Dept 5-7-15**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL)/FORECLOSURE

Because Prior Mortgage Foreclosure Action Had Been Abandoned Plaintiff Was Not Entitled to Dismissal of the Instant Action Pursuant to Real Property Actions and Proceedings Law (RPAPL) 1301(3) (Which Prohibits More than One Such Action at a Time)

The Second Department determined Real Property Actions and Proceedings Law (RPAPL) 1301(3) did not require dismissal of plaintiff's foreclosure action. Although the statute prohibits more than one action to recover a mortgage debt at a time, the pending action had been abandoned (although not formally discontinued). Therefore plaintiff's action was viable:

> RPAPL 1301(3) provides that "[w]hile [an] action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." The purpose of this statute is to protect the mortgagor "from the expense and annoyance" of simultaneously defending against two independent actions to recover the same mortgage debt ... . Courts have recognized that this statute "should be strictly construed since it is in derogation of a plaintiff's common-law right to pursue the alternate remedies of foreclosure and recovery of the mortgage debt at the same time" ... .
>
> Under the circumstances of this case, the Supreme Court properly determined that the defendant John Conlin was not entitled to dismissal of the complaint pursuant to RPAPL 1301(3). The record supports the conclusion that the plaintiff's assignor, the former mortgagee, effectively abandoned its prior action to foreclose the mortgage because its status as a junior mortgagee made it improbable that foreclosure would satisfy the underlying debt. Although the foreclosure action was not formally discontinued, the effective abandonment of that action is a "de facto discontinuance" which militates against dismissal of the present action pursuant to RPAPL 1301(3) ... . **Old Republic Natl. Tit. Ins. Co. v Conlin, 2015 NY Slip Op 04826, 2nd Dept 6-10-15**

REAL PROPERTY TAX LAW

Petitioner Was Entitled to a Reduction in the Assessed Value of a Home Depot Store Based Upon Its Expert's Appraisal

The Third Department determined the trial court had properly found petitioner's expert-appraisal of the value of a Home Depot store to be the most appropriate. Petitioner was therefore entitled to a reduction in the assessed value of the property. The Third Department carefully explained the valuation methods used by the competing experts (that discussion is not summarized here). As to the courts' role in property-tax assessment proceedings, the Third Department explained:

> A local tax assessment is presumptively valid and, to overcome that presumption, a petitioner must present substantial evidence that the property is overvalued ... . Petitioner met this threshold burden here through its submission of the detailed appraisal of Harland, a certified real estate appraiser with considerable experience, who utilized accepted methodologies and adequately set forth his calculations and the necessary details regarding the properties ... . The appropriateness of the comparable properties used by Harland in his analysis goes to the weight to be given to his appraisal, not, as respondents contend, the appraisal's competency to raise a valid dispute regarding valuation ... .
>
> With petitioner having rebutted the presumptive validity of the assessments, Supreme Court was obligated to "weigh the entire record, including evidence of claimed deficiencies in the assessment, to determine whether petitioner has established by a preponderance of the evidence that its property has been overvalued" ... . "Where, as here, conflicting expert evidence is

presented, we defer to the trial court's resolution of credibility issues, and consider whether the court's determination of the fair market value of the subject property is supported by or against the weight of the evidence" ... . **Matter of Home Depot U.S.A. Inc. v Assessor of the Town of Queensbury, 2015 NY Slip Op 05556, 3rd Dept 6-25-15**

REAL PROPERTY TAX LAW (RPTL)/VOLUNTARY TAX PAYMENTS/CIVIL PROCEDURE/SUA SPONTE RAISING OF THE STATUTE OF LIMITATIONS DEFENSE/WAIVER OF DEFENSE/MUNICIPAL LAW/COUNTY LAW

Tax Payments Made Voluntarily Cannot Be Recovered Under a Mistake of Law Theory/Supreme Court Should Not Raise a "Non-Subject-Matter-Jurisdiction" Defense Sua Sponte

The Third Department determined Supreme Court properly denied petitioner's request for a refund of real estate taxes paid re: optic cable installations located on private rights-of-way because petitioner had not protested the tax payments and made them voluntarily. In addition, the court noted that the court should not have raised the statute of limitations defense sua sponte because the defense did not implicate subject matter jurisdiction:

> ... [U]nless subject matter jurisdiction is implicated, a court should not raise an issue sua sponte when a party is prejudiced by its inability to respond ... . Here, because respondent Essex County failed to raise the statute of limitations as an affirmative defense in a pre-answer motion to dismiss or in its answer (see CPLR 3211 [a] [5]; [e]; 7804 [f]), it was improper for Supreme Court to raise it sua sponte ... . * * *
>
> ... [W]e find no reason to disturb Supreme Court's partial denial of the petition on the ground that petitioner failed to demonstrate that it paid the taxes involuntarily. To recover payments made under a mistake of law, as in the present case ... , a taxpayer is required to show that the payments were made involuntarily ... . This requirement ensures that governmental entities have notice that they may need to provide for tax refunds ... . Here, petitioner fully paid all of the relevant taxes and offered no proof that it did so under protest or that such payments were otherwise involuntary ... . Indeed, petitioner did nothing to indicate that its payments were involuntary until nearly 18 months after the final contested tax bill was paid, when petitioner submitted its RPTL 556-b correction applications ... . **Matter of Level 3 Communications, LLC v Essex County, 2015 NY Slip Op 04899, 3rd Dept 6-11-15**

PRACTICE POINT

A court does not have the authority to, sua sponte, raise a "non-subject-matter-jurisdiction" defense to an action. If a party does not raise the statute of limitations defense, for example, in its answer or in a pre-answer motion to dismiss, the party has waived the defense.

RELEASES/CONTRACT LAW/FRAUD

Question of Fact Whether Plaintiff Was Fraudulently Induced to Sign a Release---Relevant Law Explained

The Second Department determined plaintiff raised a triable issue of fact concerning whether plaintiff was fraudulently induced to sign a release re: a potential personal-injury action. The release was signed three days after the accident when the plaintiff was still on pain medication and it was alleged the insurance adjuster told her the offered funds were for plaintiff's "inconvenience" and not to compensate for her injuries. The court explained relevant law:

> " A release is a contract, and its construction is governed by contract law'" ... . "Generally, a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress'" ... .
>
> "A signed release shifts the burden of going forward . . . to the [plaintiff] to show that there has been fraud, duress or some other fact which will be sufficient to void the release'" ... . "A plaintiff seeking to invalidate a release due to fraudulent inducement must establish the basic elements of fraud, namely a representation of a material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury'" ... . Moreover, there is a requirement that a release covering both known and unknown injuries be " fairly and knowingly made'" ... . **Powell v Adler, 2015 NY Slip Op 04466, 2nd Dept 5-27-15**

RETIREMENT AND SOCIAL SECURITY LAW/JUDICIARY LAW/SUPREME COURT JUSTICES/PENSIONS/STATUTORY INTERPRETATION

Supreme Court Justices Who Are "Certificated" to Continue on the Bench at Age 70 Are Entitled to Both Their Pensions and Their Salaries

The Third Department, in a full-fledged opinion by Justice Clark, reversing Supreme Court, determined Judges who reach the age of 70 and are "certificated to continue their services on the Supreme Court bench" are entitled to receive both their pensions and their judicial salaries. To hold otherwise violates the plain meaning of Retirement and Social Security law 212 (1) which reads: "any retired person may continue as retired and, without loss, suspension or diminution of his or her retirement allowance, earn [an amount not greater than statutorily prescribed] in a position or positions in public service." That same provision provides that "there shall be no earning limitations under the provisions of [Retirement and Social Security Law § 212] on or after the calendar year in which any retired person attains age [65]"... . **Matter of Loehr v Administrative Bd. of the Cts. of the State of N.Y.2015 NY Slip Op 05243, 3rd Dept 6-18-15**

TAX LAW/INCOME TAX/STATUS AS RESIDENTS OF NEW YORK

Nondomiciliary's Presence In New York State for Part of a Day Constitutes Presence for a "Day" for Income Tax Purposes

The Third Department determined presence in New York State for part of a day constitutes presence for a "day" when calculating the number of days a nondomiciliary resides in New York State for income tax purposes:

> The Administrative Law Judge determined that, as per 20 NYCRR 105.20 (c), each of the 26 partial days constituted a day in New York under the statute, bringing Zanetti's total days in New York over 183 and, thus, resulting in petitioners being residents of this state for income tax purposes (see Tax Law § 605 [b] [1] [B]). ...
>
> The residency classification can have significant consequences since New York residents pay income tax on their worldwide income whereas nonresidents are taxed only on their New York source income (see Tax Law §§ 612, 631...). A nondomiciliary may be considered a New York resident for income tax purposes if he or she maintains a permanent place of abode in this state and spends in excess of 183 days of the year here (see Tax Law § 605 [b] [1] [B]...). The permanent place of abode element is not at issue here. With regard to days in New York, the pertinent regulation of respondent Commissioner of Taxation and Finance provides that, with certain exceptions not relevant in this proceeding, "presence within New York State for any part of a calendar day constitutes a day spent within New York State" (20 NYCRR 105.20 [c]). **Matter of Zanetti v New York State Tax Appeals Trib., 2015 NY Slip Op 03894, 3rd Dept 5-7-15**

TAX LAW/QUALIFIED EMPIRE ZONE ENTERPRISE (QEZE)/GENERAL MUNICIPAL LAW/ADMINISTRATIVE LAW

Court Deferred to the Agency's Interpretation of a Statute Because the Interpretation Involved Knowledge and Understanding of the Underlying Operational Practices (In the Usual Case, a Court Will Not Defer to an Agency's Interpretation of a Statute)/The Term "Business Enterprise" in Tax Law 14 (a) Refers to the Taxable Entity, Not the Legal Entity

The Third Department deferred to the interpretation of a statute by the Tax Appeals Tribunal which found that petitioners were not entitled to Qualified Enterprise Zone Enterprise (QEZE) tax reduction credits and refundable Empire Zone (EZ) wage credits. The case turned on the Tribunal's definition of a business enterprise. The Tribunal determined the term refers to the taxable entity, not the legal entity. Because the interpretation of the relevant statute, Tax Law 14 (a), involved knowledge and understanding of the underlying operational practices, the court deferred to the agency's determination. (In the usual case a court need not defer to an agency's interpretation of a statute):

> The parties' primary disagreement here centers on whether the term business enterprise under Tax Law § 14 (a) refers to the taxable entity or the legal entity. The Tax Law does not define business enterprise, and this Court will "defer to the governmental agency charged with the responsibility for administration of [a] statute in those cases where interpretation or application involves knowledge and understanding of underlying operational practices" ... . While, as a general rule, courts will not defer to administrative agencies in matters of pure statutory interpretation, where, as here, the question is "'one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially,'" deference is appropriate ... . To prevail over the Tribunal's construction of the statute, petitioners must establish that their "interpretation

of the statute is not only plausible, but also that it is the only reasonable construction"... .

In our view, it cannot be said that the Tribunal acted irrationally in construing the term business enterprise in accordance with an entity's classification for state and federal income tax purposes. **Matter of Ayoub v Tax Appeals Trib. of the State of N.Y., 2015 NY Slip Op 05240, 3rd Dept 6-18-15**

TAX LAW/REAL ESTATE TAXES/LANDLORD-TENANT/TAX ESCALATION CLAUSE/LEASE

Question of Fact Whether Landlord Entitled to Pass On Increased Real Estate Taxes (Pursuant to a Tax Escalation Clause)---Increase Cannot Be Tied to Improvements Which Solely Benefit the Landlord

The First Department determined the landlord should not have been granted summary judgment. Plaintiff-tenant sought a declaration that it was not responsible for increased real estate taxes related to improvements to the building which benefitted only the landlord and not the tenant. The matter was sent back for a determination whether and to what extent the improvements benefitted only the landlord:

> The Court of Appeals has made clear that "[i]t is not the aim of . . . a [tax escalation] clause . . . to impose upon the tenant responsibility for increases in real estate taxes resulting from improvements on the property redounding solely to the benefit of the landlord" ... .
>
> The motion court incorrectly found that this principle was limited to circumstances where the improvement involved a vertical or horizontal enlargement of the building. ... The improvement at issue is a renovation solely of the residential aspects of the building. Plaintiff is a commercial tenant. Our declaration here simply states the well settled principle regarding tax escalation clauses. **Enchantments Inc. v 424 E. 9th LLC2015 NY Slip Op 05409, 1st Dept 6-23-15**

TOWN LAW/MUNICIPAL LAW/TOWN BOARD/DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW/GOVERNMENTAL IMMUNITY/QUALIFIED IMMUNITY/ENVIRONMENTAL LAW/WETLANDS CONSTRUCTION

Town Board's Terminating, Without Notice, Plaintiff's Construction Project Violated Plaintiff's Right to Substantive Due Process/Town Was Not Entitled to Qualified Immunity

The plaintiff had cleared the way for building on land which included wetlands by obtaining the necessary permits and waivers from the Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACE) when, without notice, the town board passed a resolution rescinding a previously issued sewer tap-in waiver and terminating the construction project. Among other theories, plaintiff sued under 42 USC 1983 (deprivation of property without due process of law) and won. On appeal the due process violation verdict was upheld. The Fourth Department explained the criteria for the due process cause of action and noted that the defendant town was not entitled to qualified immunity because the town board's actions violated plaintiff's constitutional rights:

> ... [W]e note that the Court of Appeals has set forth a two-part test for substantive due process violations: "[f]irst, [a plaintiff] must establish a cognizable property interest, meaning a vested property interest, or more than a mere expectation or hope to retain the permit and continue their improvements; they must show that pursuant to State or local law, they had a legitimate claim of entitlement to continue construction' . . . Second, [a plaintiff] must show that the governmental action was wholly without legal justification" ... . Under the first prong, "a legitimate claim of entitlement to a permit can exist only where there is either a certainty or a very strong likelihood' that an application for approval would have been granted" ... . "Where an issuing authority has discretion in approving or denying a permit, a clear entitlement can exist only when that discretion is so narrowly circumscribed that approval of a proper application is virtually assured' "... . * * *
>
> We reject defendant's contention that the state constitutional claims should be dismissed because defendant is entitled to qualified immunity. " A government official is entitled to qualified immunity provided his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person

would have known' " ... . Defendant failed to establish that it was objectively reasonable for the Town Board to believe that its conduct in withdrawing the sewer tap-in waiver request on ... was appropriate ... . Instead, the evidence established that the Town Board members acted without knowing the history of the project and acted knowing that only the Planning Board had to take action, i.e., to give site plan approval for the property. Despite the existence of plaintiff's constitutionally protected property interest in the ... tap-in waiver request, the Town Board acted ... to withdraw that waiver request, which was a violation of plaintiff's constitutional rights. As such, defendant is not entitled to qualified immunity. **Acquest Wehrle, LLC v Town of Amherst, 2015 NY Slip Op 05346, 4th Dept 6-19-15**

TRUSTS AND ESTATES/REAL PROPERTY LAW/DEEDS/WILLS/DUE EXECUTION

Questions of Fact Re: Whether a Deed Was Forged and Whether a Will Was Duly Executed

The Second Department determined there existed questions of fact whether a deed was a forgery and whether a will was duly executed. In the course of the decision, the court explained: (1) there can be no bona fide purchasers or encumbrancers of real property based on a forged deed; (2) the transfer of title of real property devised under a will title vests on death not probate; (3) forged deeds are null and void ab initio; and (4) there was insufficient proof due execution of the will---no proof an attorney drafted the will or supervised its execution--no proof decedent possessed testamentary capacity:

> Pursuant to Real Property Law § 266, a bona fide purchaser or encumbrancer for value is protected in his or her title unless he or she had previous notice of the alleged prior fraud by the seller ... . However, a person cannot be a bona fide purchaser or encumbrancer for value through a forged deed, as it is void and conveys no title ... .
>
> Generally, "title to real property devised under the will of a decedent vests in the beneficiary at the moment of the testator's death and not at the time of probate" ... . Here, however, since the validity of the will is being challenged by the petitioner, it was incumbent upon the respondents, as the proponents of the will, to prove due execution of the will and testamentary capacity ... .
>
> ... [T]he ... evidence was insufficient to establish that the will was executed in accordance with the formalities required by law (see EPTL 3-2.1), and that the decedent was of sound mind and memory when he executed the will and understood the nature and consequences of executing the will ... . While there is a presumption of regularity where the drafting attorney supervised the will's execution ..., here, there was no evidentiary support for the respondents' conclusory contention that the will was drafted by [the attorney] or that he supervised the execution ceremony. Moreover, the respondents failed to adduce any evidence demonstrating that the decedent possessed testamentary capacity when he signed the will. **Matter of Raccioppi, 2015 NY Slip Op 04135, 2nd Dept 5-13-15**

UNEMPLOYMENT INSURANCE

"Mystery Shopper" Not an Employee

The Third Department determined claimant, a mystery shopper, was not an employee entitled to unemployment benefits because the employer, Confero, exercised minimal control over claimant's work:

> Here, claimant testified that, when a new mystery shopping event became available, he was notified via email by a scheduling company and then was able to view the assignment on Confero's website. Claimant had the liberty of choosing what assignments, if any, he wanted to perform and, after he accepted an assignment, Confero did not even require that claimant perform the assignment himself. Rather, claimant had the discretion to send a substitute in his place so long as he provided notification to the scheduling company to ensure that the substitute was not overexposed at a given location. Although each assignment came with certain tasks that claimant had to perform, the manner in which he performed those tasks was fully within his discretion. Significantly, Confero did not require that claimant perform any minimum number of assignments, request that he seek permission for time off or set forth a particular work schedule. According to Confero's president, claimant was free to work as little or as much as he wanted. For each assignment that he completed, claimant was paid a nonnegotiable fixed fee that was set by Confero's client. Further evidencing a lack of control, Confero did not provide claimant with any training, supply him with any equipment or require him to attend any meetings, and it fully permitted him to work for competing companies, which he did regularly. **Matter of Chan (Confero Consulting Assoc., Inc.--Commissioner of Labor), 2015 NY Slip Op 03890, 3rd Dept 5-7-15**

Instructor at a Not-for-Profit Theater Company Was an Employee, Not an Independent Contractor

The Third Department determined a playwrighting instructor at a not-for-profit theater company, Primary Stages Company, was an employee entitled to unemployment insurance benefits:

> We note that, for purposes of our review, we consider instructors and teachers to be professionals ... . Accordingly, in deciding if such individuals are employees, the pertinent inquiry is "whether the purported employer retains control of important aspects of the services performed" ... .
>
> Here, Primary Stages utilized an informal process in retaining claimant, as it was familiar with her through her affiliation with a writers' group and simply inquired if she was interested in teaching writing classes. Claimant responded in the affirmative and entered into a written agreement with Primary Stages under which she was paid a flat fee of $1,900 per class. Primary Stages furnished the classroom and also provided a teaching assistant. Although claimant retained the discretion to set the course curriculum, claimant and Primary Stages worked together to establish the class schedule that Primary Stages then distributed to prospective students. Primary Stages was responsible for providing all school facilities and a teaching assistant, finding students to fill the classes and collecting their tuition. The school cancelled classes if there was low enrollment, in which case the instructor would not be paid. If claimant could not teach a class, she needed to notify Primary Stages and, if she or other instructors were unable to complete a course assignment, Primary Stages would find a replacement whose selection was often based upon the recommendation of the instructor. Furthermore, Primary Stages circulated an evaluation form to students for feedback on the instructor at the end of the course and, if the evaluation was unsatisfactory, it would not rehire that instructor. **Matter of Wilner (Primary Stages Co. Inc.--Commissioner of Labor), 2015 NY Slip Op 03902, 3rd Dept 5-7-15**

Customer Service Representative Working from Home Properly Determined to Be an Employee

The Third Department determined there was substantial evidence to support the finding claimant was an employee of PRF. Claimant worked from home booking reservations at off-site parking facilities near airports:

> Although claimant and other representatives worked from home and were required to provide their own Internet service, PRF furnished them with special phones that utilized the voice over Internet protocol necessary to assist customers. In addition, PRF provided training on use of the phones as well as the services that it provided to its customers. Although PRF did not establish set hours and allowed the representatives to hold other jobs, it set up a schedule online that the representatives completed by selecting the hours that they wished to work, and PRF emailed them their final schedules. Claimant and the other representatives submitted invoices for hours worked that PRF would, in turn, check against their work schedules. Notably, PRF was able to monitor the representatives while they were assisting customers to verify that they were working and to ensure quality service. Moreover, PRF handled customer complaints and took corrective action where necessary. **Matter of Aussicker (Park Ride Fly USA--Commissioner of Labor), 2015 NY Slip Op 04376, 3rd Dept 5-21-1**

Contract Attorney Was an Employee Despite "Independent Contractor" Designation in a Written Employment Agreement

The Third Department determined a "contract attorney" hired by an attorney (Brody) for document-review in a class-action case was an employee entitled to unemployment insurance benefits, despite claimant's designation as an independent contractor in a written agreement:

> Whether an employer-employee relationship exists is a factual determination for the Board, and its decision will be upheld if supported by substantial evidence" ... . As here, "in cases where the rendering of professional services is involved, an employment relationship can be found where there is substantial evidence of control over important aspects of the services performed other than results or means" ... .
>
> Here, claimant was paid an agreed-upon hourly rate and required to work at least 45 hours a week, but not more than 50. He was also given specified hours each day to report to his assigned work station, he was required to take a daily unpaid 30 minute lunch break and was occasionally required to report to work on weekends. He was allowed to take unpaid days off, provided that he requested the time off in advance. He received daily assignments from an associate attorney of Brody, who supervised his work. In addition to document review, claimant

also assisted in the litigation by providing Brody with written memoranda summarizing deposition testimony, work that included claimant's attendance at meetings with attorneys from other firms involved in the litigation. In our view, substantial evidence supports the Board's decision that Brody retained sufficient overall control of claimant's services to establish an employment relationship, despite evidence in the record that could support a contrary conclusion ... . The fact that claimant signed a written agreement designating him as an independent contractor does not compel a different result ... . **Matter of Singhal (Commissioner of Labor), 2015 NY Slip Op 04550, 3rd Dept 5-28-15**

Election Poll Worker Not an Employee---Not Entitled to Unemployment Insurance Benefits

The Third Department determined an election poll worker was not an employee entitled to unemployment insurance benefits:

> "An employer-employee relationship exists when the evidence shows that the employer exercises control over the results produced or the means used to achieve the results [although] control over the means [used to achieve those results] is the more important factor to be considered" ... .
>
> Here, claimant testified that she responded affirmatively to a card received in the mail from the Board of Elections asking if she was available to work on election day; she thereafter received training and was assigned to a polling place, where she worked as a poll worker or inspector on election day. Her duties included setting up and overseeing tables, signing in voters, showing them how to use the voting machines, keeping track of voting cards and printing a tally of votes at the end of the day, which were reported to the Board of Elections.
>
> Poll clerks, like election inspectors, are appointed, trained, compensated and perform duties as mandated by statute and overseen by the New York State Board of Elections (see Election Law §§ 3-400, 3-402, 3-404, 3-412, 3-420; see also Election Law § 3-102). In the City of New York, they are compensated at a per diem rate established by the Mayor (see Election Law § 3-420 [1]). While, pursuant to those governing statutes, the Board of Elections may have exercised some supervision over the poll workers and their training, this is insufficient, by itself, to establish an employer-employee relationship, and the record is devoid of any proof that any such supervision exercised exceeded that required by law, or that additional duties or requirements were imposed beyond those provided by statute ... . **Matter of Chorekchan (New York City Bd. of Elections--Commissioner of Labor), 2015 NY Slip Op 04552, 3rd Dept 5-28-15**

Music Teachers Were Employees Entitled to Unemployment Insurance Benefits---Criteria for Professionals, Like Musicians, Who Do Not Lend Themselves to Direct Supervision or Control, Explained

The Third Department determined music teachers were employees of Encore Music, a service which connected students with teachers for a portion of the fees paid by the students. Encore unsuccessfully argued the teachers were independent contractors:

> ..."[W]here the details of the work performed are difficult to control because of considerations such as professional . . . responsibilities," courts have applied the "'overall control'" test, which requires that the employer exercise control over "'important aspects of the services performed'" ..., a test which has been applied to musicians who "do not easily lend themselves to direct supervision or control" ... . Further, "an organization which screens the services of professionals, pays them at a set rate and then offers their services to clients exercises sufficient control to create an employment relationship" ... .
>
> ...Encore screened the teachers, checked their references, conducted criminal background checks and then matched students to teachers based upon a variety of factors, including qualifications. Encore thereafter followed up with the students after lessons to ensure that they were satisfied. Encore set the lesson fees, which were generally the same for all teachers with some exceptions, billed students directly and paid teachers regardless of whether the students paid Encore. Although teachers used their own equipment, determined the lesson plans or methods and could decline students, they were required to sign a contract that provided that they would, "when reasonably requested by [Encore], act as a music lesson instructor." The contract also contained a clause prohibiting teachers from soliciting Encore's students that was in effect during the contract and for three years after its expiration, although teachers were allowed to work for competitors and to have their own private students. **Matter of Encore Music Lessons LLC (Commissioner of Labor), 2015 NY Slip Op 04553, 3rd Dept 5-28-15**

Sales Rep Was an Employee Entitled to Unemployment Insurance Benefits

The Third Department determined a cellular phone sales representative was an employee entitled to unemployment insurance benefits:

> Whether an employer-employee relationship exists within the meaning of the unemployment insurance law "is a factual issue for the Board to resolve 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" .... .
> ... The record establishes that Cellular Sales precluded sales representatives from selling competing products and its products outside of the "territory" absent its prior written consent, suggested, and in certain instances required, that products be sold at a minimum price, set sales goals for the sales representatives to attain and provided a script that sales representatives were to "[s]tick to . . . on every customer opportunity" regarding a certain cellular phone. In addition, Cellular Sales specified a certain dress code and provided that any sales representative not meeting such dress code in its store would be "address[ed]" by a leader. Cellular Sales also required sales representatives to, among other things, complete certain mandatory training that it paid for, to "strictly comply" with its directives regarding use, disclosure and application of marketing information and to know and follow certain "procedures for the market." ...[T]he record establishes that Cellular Sales dictated the number of sales representatives that would work in the store on a given day, provided each sales representative with a Cellular Sales email address and business cards, required, for a certain period of time, that sales representatives send customers thank you cards that it provided and supplied the sales representatives with products for demonstrations. The record also indicates that Cellular Sales reprimanded sales representatives regarding tardiness, held mandatory meetings, required sale representatives who chose to work in the store to submit their availability and requests for days off and, once a shift was assigned, required a sales representative to secure coverage if he or she could not work on the assigned shift. **Matter of Pratt (Cellular Sales of N.Y., LLC--Commissioner of Labor), 2015 NY Slip Op 04549, 3rd Dept 5-28-15**

UNEMPLOYMENT INSURANCE/BUSINESS CLOSURE

Claimant Did Not Demonstrate a Compelling Reason to Close His Business---Unemployment Insurance Benefits Denied

The Third Department determined a business owner who voluntarily closed his business was not entitled to unemployment insurance benefits because a compelling reason for the closure was not demonstrated:

> "When a claimant closes an operating business, the issue of whether he or she is qualified to receive benefits turns upon whether there was a compelling reason to close the business" ... . Here, claimant testified that, beginning in 2009, his business began to decline and that, between 2009 and 2012, there was a 50% drop-off of catering contracts. The corporation's tax returns reflect, however, gross receipts of $297,167 in 2009, with a net income of $2,522, gross receipts of $281,397 in 2010, with a net income of $4,997, and gross receipts of $279,755 in 2011, with a net income of $764. Claimant's individual tax returns reveal that he was paid a moderate salary in each of these three years. At the time he closed the business at the end of August 2012, claimant estimated corporate gross receipts of $220,970 for the year to date, with a net income of $26,620, after payment of claimant's salary, in a sum that was lower than the prior years, but was not an extreme departure from his prior earnings. Although the decline in business had required claimant to reduce personnel, there was no proof that the business was otherwise unable to meet its financial obligations. Claimant owned the building where he ran the business, and there was no mortgage; the premises were rented to the business for favorable tax treatment. Although claimant testified that, at the time he closed the business he had no bookings for October 2012 to December 2012, he also testified that his business was seasonal and that this was generally a slow time. In our view, the record thus establishes that this was a viable business, and the Board's decision is supported by substantial evidence ... . **Matter of O'Connell (Commissioner of Labor), 2015 NY Slip Op 04176, 3rd Dept 5-14-15**

UNEMPLOYMENT INSURANCE/PRECEDENT

Transcriber of Administrative Hearings Was an Employee Entitled to Unemployment Insurance Benefits---Appeals Board Not Required to Follow or to Explain Why It Didn't Follow an "Unappealed" Ruing by an Administrative Law Judge

The Third Department determined claimant, who transcribed administrative hearings for "The Mechanical Secretary," was an employee entitled to unemployment insurance benefits. The court noted that the unemployment insurance appeals board was not required to explain why it did not follow a prior "unappealed" ruling by an administrative law judge which went the other way:

> "Whether an employment relationship exists within the meaning of the unemployment insurance law is a question of fact, no one factor is determinative and the determination of the [Board], if supported by substantial evidence on the record as a whole, is beyond further judicial review even though there is evidence in the record that would have supported a contrary conclusion" ... . "An employer- employee relationship exists when the evidence shows that the employer exercises control over the results produced or the means used to achieve the results" ... . Here, the record establishes that The Mechanical Secretary advertised for transcriber positions. The president would interview the applicants and assess the quality of their work. The transcriber was required to have certain equipment, but The Mechanical Secretary would loan the transcriber a transcription machine if needed. The Mechanical Secretary arranged to have the work delivered to and picked up from the transcribers within a certain area. In claimant's case, however, because she did not live in close proximity to the company, she was required to pick her work up at its office and to return the completed work to that office by 9:00 a.m. Claimant was occasionally reimbursed for her travel expenses. Significantly, The Mechanical Secretary set the nonnegotiable pay rate, supplied all the paper needed by the transcribers, and reviewed the final product for mistakes and would correct any minor mistakes or, where the mistakes were significant, send it back to be corrected by the transcriber. Furthermore, The Mechanical Secretary had to be notified if a transcriber was going to take any vacation. Given the evidence produced, we find that there is substantial evidence to support the Board's finding that The Mechanical Secretary exercised a sufficient degree of control over claimant's work to establish an employment relationship ... .
>
> We are unpersuaded by The Mechanical Secretary's contention that the Board was bound by a prior unappealed Administrative Law Judge decision that found medical transcribers that it had used to be independent contractors. Claimant, who is not a medical transcriber, was not involved in that prior proceeding such that there was a full and fair opportunity for her to contest the decision, nor is the Board "required to conform to the precedent established in the prior unappealed decision or offer a rational explanation for not doing so" ... .**Matter of Ingle (The Mech. Secretary, Inc.--Commissioner of Labor), 2015 NY Slip Op 05553, 3rd Dept 6-25-15**

UNEMPLOYMENT INSURANCE/PRECEDENT/SUITABLE EMPLOYMENT

Factory-Work Packaging Yogurt Was Not "Suitable Employment" for a Skilled Carpenter

The Third Department reversed the Unemployment Insurance Appeals Board's determination claimant was not eligible for unemployment insurance benefits because he refused suitable employment. Claimant is a skilled carpenter. He refused a yogurt-packaging job in a factory. The yogurt-packaging job was not, under the circumstances, "suitable employment" for the claimant:

> Pursuant to Labor Law § 593 (2), a claimant who refuses "an offer of employment for which he or she is reasonably fitted by training and experience" will be disqualified from receiving unemployment insurance benefits ... . Significantly, a "claimant need not accept every job offered but, rather[,] only those job offers which bear a reasonable relationship to [the] claimant's skills" ... . Here, it is undisputed that claimant was skilled in finish carpentry and had no experience working in a factory. Consequently, substantial evidence does not support the Board's decision that he refused an offer of suitable employer ... . The Board's decision, in fact, runs contrary to a similar case in which the Board awarded benefits to another claimant who worked at the millwork company as a skilled craftsman and refused the same offer to work as a packager in a yogurt factory ... . In view of the foregoing, the Board's decision must be reversed. **Matter of Reisen (Commissioner of Labor), 2015 NY Slip Op 05560, 3rd Dept 6-25-15**

USURY/GENERAL OBLIGATIONS LAW/LIMITED LIABILITY COMPANY LAW/CRIMINAL LAW

Promissory Note Reflecting a Loan to a Limited Liability Company Was Criminally Usurious As Well As Void Under the General Obligations Law---Provision Purporting to Reduce the Interest Rate to a Non-Usurious Rate If the Original Rate Were Found to be Usurious Did Not Save the Note

The Second Department determined a promissory note imposing an annual interest rate of more than 25% (60% here) was criminally usurious (Penal Law 190.40) and could not be saved by a provision purporting to reduce the interest rate to a non-usurious rate if the original rate were found to be usurious. The court noted that, although a limited liability company (the defendant here) cannot assert the defense of civil usury, a limited liability company can assert the defense of criminal usury. In addition, the note was void under General Obligations Law 5-511 because the interest rate exceeded 16%. **Fred Schutzman Co. v Park Slope Advanced Med., PLLC, 2015 NY Slip Op 04447, 2nd Dept 5-27-1**

WORKERS' COMPENSATION LAW

Open Question About Whether Claimant Was Permanently Disabled Indicated Claimant's Case Was Not Truly Closed in 2005---Transfer of Claim to the Special Fund (for Closed Cases) Properly Denied

The Third Department determined open questions about whether the claimant was permanently disabled demonstrated that claimant's case was not truly closed in 2005. Therefore transfer of the claim to the Special Fund was not warranted:

> "Workers' Compensation Law § 25-a shifts liability for a claim to the Special Fund where a workers' compensation case that was fully closed is reopened more than seven years after the underlying injury occurred and more than three years after the last payment of compensation" ... . "Whether there has been a true closing of the case is a factual issue for the Board to resolve and its determination in this regard will be upheld if supported by substantial evidence" ... .
>
> Here, a report based upon an independent medical examination of claimant was filed with the Board in 2005 in which the examiner opined that claimant had reached maximum medical improvement at that time and classified her as suffering from a mild degree of disability. Inasmuch as this report raised the issue of claimant having a permanent disability, which remained unresolved in 2011 when the employer requested that liability shift to the Special Fund, substantial evidence supports the Board's decision that the case was not truly closed at that time and Workers' Compensation Law § 25-a did not apply ... . **Matter of Kettavong v Livingston County SNF, 2015 NY Slip Op 04556, 3rd Dept 5-28-15**

Approval of an MRI Within Seven Years of Closure of Claimant's Case Effectively Reopened the Case---Transfer to the Special Fund for Closed Cases Was Error

The Third Department determined the fact that an MRI had been approved demonstrated that the claimant's case had not been closed for the requisite seven years. Liability therefore was not shifted to the Special Fund for closed cases:

> Pursuant to Workers' Compensation Law § 25-a, the Special Fund becomes liable for claims that are reopened more than seven years from the date of the injury and three years after the last payment of compensation ... . There is no dispute that this case was initially closed as of June 20, 2005. In its amended decision, the Board determined that the case was first reopened in April 2012 when the MRI was requested, but closed once that application was approved. Finding that the case was again reopened when surgery was requested on June 26, 2012, the Board determined that the requisite seven-year time period had passed, shifting liability to the Special Fund.
>
> This sequence calls into question whether the case was "truly closed" when the MRI request was approved. We have previously recognized that a "decision authorizing [an] MRI [does] not constitute a true closing of the case as [the] claimant's future treatment depended upon the results of the MRI and, thus, further action was contemplated although not planned at that time" ... . The same holds true here. As such, we conclude that the Board erred in concluding that the case was closed when the MRI was authorized. Correspondingly, since the case was reopened when the MRI was requested in April 2012, within the statutory seven-year period, liability does not shift to the Special Fund. **Matter of Bank v Village of Tuckahoe, 2015 NY Slip Op 04894, 3rd Dept 6-11-15**

WORKERS' COMPENSATION LAW/ADMINISTRATIVE LAW/STATUTORY CONSTRUCTION

Courts Do Not Defer to an Agency's Construction of a Statute---Workers' Compensation Board's Determination, Based Upon the Construction of Workers' Compensation Law 25, Reversed

In the context of a "conciliation process" pursuant to Workers' Compensation Law 25, the Third Department explained the court's role in reviewing the determination of an agency when statutory construction is the sole issue. Unlike the factual determinations of an agency, to which courts must defer, no such deference is afforded an agency's construction of a statute. Reversing the Workers' Compensation Board, the Third Department held that the statute unambiguously entitled claimant to a penalty imposed upon the employer for failure to timely make compensation payments:

> Where, as here, the issue is one of pure statutory construction, no deference need be accorded to the Board's interpretation of the statutory framework ... . As to our construction of Workers' Compensation Law § 25, "the text of a statute is the best evidence of legislative intent and, where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used" ... . Further, the provisions within that statute must be "construed together unless a contrary legislative intent is expressed, and courts must harmonize the related provisions in a way that renders them compatible" ... .
>
> Turning to the relevant statutory provisions, Workers' Compensation Law § 25 has two mechanisms for penalizing employers or workers' compensation carriers who fail to make timely payment of compensation following a decision. The first provides that, "[i]f the employer or its insurance carrier shall fail to make payments of compensation according to the terms of the award within [10] days . . ., there shall be imposed a penalty equal to [20%] of the unpaid compensation which shall be paid to the injured worker or his or her dependents" (Workers' Compensation Law § 25 [3] [f]). The second provides that, if payment is not made within 10 days of a proposed conciliation decision becoming final, "the chair [of the Board] shall impose . . . a fine of [$500] for failure to live up to the terms of the decision upon verification that payment has not been timely made" (Workers' Compensation Law § 25 [2-b] [h]; see 12 NYCRR 312.5 [i]).
>
> The statutory scheme unambiguously entitles claimant to the penalty described in Workers' Compensation Law § 25 (3) (f). **Matter of Liberius v New York City Health & Hosps. Corp., 2015 NY Slip Op 04706, 3rd Dept 6-4-15**

PRACTICE POINT

In the usual circumstance, courts need not defer to an agency's interpretation of a statute. If it is arguable the agency misinterpreted a statute, a court will decide that issue "on the merits."

WORKERS' COMPENSATION LAW/GENERAL MUNICIPAL LAW/MUNICIPAL LAW

Lien for Attorney's Fees (Re: Workers' Compensation Award) Can Be Satisfied Before Reimbursing Municipality for Benefits Paid by the Municipality to the Injured Corrections Officer Pursuant the General Municipal Law

The Third Department determined that a lien for attorney's fees could be attached to Workers' Compensation benefits prior to reimbursing a municipality for benefits paid to the municipal employee pursuant to the General Municipal Law. Claimant corrections officer was injured on the job. Under General Municipal Law 207-c municipal employers are required to pay full wages to corrections officers injured in the performance of their duties. Workers' Compensation Law 30 (3) provides that the amount of the payments made under the General Municipal Law shall be credited against any award of compensation pursuant to the Workers Compensation Law. The municipality argued it was entitled to the entire amount paid to the employee and the amount should not be reduced by the attorney's fees (a lien on the Workers' Compensation award). The Third Department disagreed:

> General Municipal Law § 207-c requires municipal employers to pay full wages to correction officers who are injured in the performance of their duties. Workers' Compensation Law § 30 (3) provides that the amount of such payments "shall be credited against any award of compensation" that may also be made to such an officer. The employer contends that the mandatory language of the Workers' Compensation Law provision entitles employers to full credit for such payments and, thus, precludes the attachment of a lien for counsel fees. However, Workers' Compensation Law § 24 likewise uses mandatory language in providing that, when approved by the Board, counsel fees "shall become a lien upon the compensation awarded . . . [and] shall be paid therefrom only in the manner fixed by the [B]oard" (emphasis added). The lien attaches when the

compensation is awarded "and takes precedence over the employer's right to reimbursement of funds previously paid to the claimant-employee" ... . The purpose of enacting Workers' Compensation Law § 30 (3) was not to preclude counsel fees, but "to avoid duplicate benefits to an injured [officer], the combined total of which might exceed the salary [the officer] would have received for the period" if the injury had not occurred ... . Workers' Compensation Law § 30 (3) must be harmoniously interpreted with the Workers' Compensation Law as a whole and with General Municipal Law § 207-c ... . We find nothing in the statutory language indicating a legislative intent to treat employees who receive benefits under General Municipal Law § 207-c differently from other injured employees by departing from the statutory scheme for payment of counsel fees set forth in Workers' Compensation Law § 24. **Matter of McCabe v Albany County Sheriff's Dept., 2015 NY Slip Op 05236, 3rd Dept 6-18-15**

WORKERS' COMPENSATION LAW/SPECIAL ERRAND EXCEPTION/COMING AND GOING RULE

"Special Errand" Exception to the "Going and Coming" Rule Applied---Workers' Compensation Claim Is Plaintiff's Sole Remedy

The Second Department determined plaintiff's sole remedy against her employer (defendant Margaret Layton) was a Workers' Compensation claim. Plaintiff was asked by Layton to walk Layton's dog because Layton was in court on a personal matter and could not walk the dog herself. Plaintiff fell down a staircase in Layton's home, apparently in the course of walking the dog. The Second Department held that the walking of the dog "fell within the 'special errand' exception to the 'going and coming' rule of the Workers' Compensation Law, thus making workers' compensation the plaintiffs' sole remedy" ... In the usual case, injury incurred going to or coming from work is not within the ambit of the Workers' Compensation Law . **Curley v Layton, 2015 NY Slip Op 04270, 2nd Dept 5-20-15**

WORKERS' COMPENSATION LAW/STATUTORY LIEN

Even When the Injured Worker, Who Had Received Workers' Compensation Benefits, Successfully Sues His Employer (As Opposed to a "Stranger") for His Injuries, the Workers' Compensation Carrier Has a Lien Against the Recovery Pursuant to Workers' Compensation Law 29(1)

The Third Department noted that, even though the worker who had received workers' compensation benefits successfully sued his employer (as opposed to a third party) for his injuries, the workers' compensation carrier still had a lien against the recovery (Workers' Compensation Law 29(1)):

> "When a claimant obtains recovery in a civil action for the same injuries that were the predicate for workers' compensation benefits, the carrier has a lien against any recovery (see Workers' Compensation Law § 29 [1]), even where the action is brought against an employer" ... . Indeed, as the Court of Appeals has recently reaffirmed, "'[Workers' Compensation Law §] 29, read in its entirety and in context, clearly reveals a legislative design to provide for reimbursement of the compensation carrier whenever a recovery is obtained in tort for the same injury that was a predicate for the payment of compensation benefits'" ... . The Court reasoned that "[i]t would be unreasonable to read the statute as mandating a different result merely because the recovery came out of the pockets of a coemployee [or the employer] and not from the resources of a stranger" ... . **Ronkese v Tilcon N.Y., Inc., 2015 NY Slip Op 04908, 3rd Dept 6-11-15**

ZONING/SPECIAL USE PERMIT/WIND TURBINES/LAND USE ORDINANCE/TOWN LAW/MUNICIPAL LAW/ADMINISTRATIVE LAW

Town Planning Board's Approval of the Installation of Wind Turbines Should Not Have Been Reversed---Board Properly Considered All the Factors Mandated by the Land Use Ordinance and Supreme Court Did Not Have the Authority to Substitute Its Judgment for the Board's

The Third Department, reversing Supreme Court, determined that the town planning board had properly issued a special use permit for the installation of wind turbines. The court noted that the burden of proof on the owner for seeking a special exception (special use permit) is lower than the burden for seeking a variance. The court held that all of the analytical factors mandated by the land use ordinance had been properly considered by the board and Supreme Court did not have the authority to substitute its own judgment for the board's:

> The Land Use Ordinance permits specified uses in the area where the project is to be built and allows "[a]ll other uses" for which a special use permit is obtained. Contrary to petitioners'

assertion, while the project is not allowed as of right in the district, the fact that it is "permitted . . . is 'tantamount to a legislative finding that [it] is in harmony with the general zoning plan and will not adversely affect the neighborhood'" ... . As such, "the burden of proof on an owner seeking a special exception is lighter than that on an owner seeking a variance, [with] the former only being required to show compliance with any legislatively imposed conditions on an otherwise permitted use" ... . The determination of the Board that those conditions had been met here will be upheld if it "has a rational basis and is supported by substantial evidence in the record" ... .

The parties do not dispute upon this appeal, and we agree with Supreme Court, that the Board's findings with regard to six of the eight conditions enumerated in the Land Use Ordinance are supported by substantial evidence. The first of the remaining two conditions requires that the "[l]ocation, use and size of structure, nature and intensity of operations involved, size of site in relation to it, and location of site with respect to existing or future streets giving access, are such that it will be in harmony with orderly development of the district." The second requires that the "[l]ocation, nature and height of buildings, walls, fences and signs will not discourage the appropriate development and use of adjacent land and buildings or impair their value."

With regard to those two conditions, the wind turbines are almost 500 feet tall when the rotor blades are fully vertical [FN2]. Notwithstanding their size, the Board pointed out that the turbines are located in an area where high-voltage electric transmission lines have already altered the landscape, and noted that other factors minimized the impact of the project upon the viewshed. The project will have minimal impact upon traffic after construction is completed and, given the economic benefits that will accrue to participating landowners, the Board found that it would help to preserve existing uses of the surrounding properties. Moreover, the Board cited a study in the record finding that property values would not be impacted by the project. The Board also pointed to proof that the applicant had entered into setback agreements with nonparticipating landowners who resided within 2,000 feet of the turbines, further ensuring that the project would not impair the use of nearby parcels or development in the zoning district. Supreme Court pointed to conflicting evidence submitted by petitioners with regard to both conditions but, even if that evidence was properly considered, "a court may not substitute its own judgment" where substantial evidence supports the determination of the Board ... . **Matter of Frigault v Town of Richfield Planning Bd., 2015 NY Slip Op 04355, 3rd Dept 5-21-15**

ZONING/ADMINISTRATIVE LAW/AREA VARIANCES/GENERAL CITY LAW/TOWN LAW

Application for Area Variances Properly Denied---Court's Review Criteria Explained---General City Law and Town Law Criteria for Area Variance Explained

The Second Department determined the city zoning board properly denied the application for area variances. The court explained its role in reviewing the board's determination and the criteria applied to applications for area variances under the General City Law and the Town Law:

> " Local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion'" ... . "Therefore, a zoning board's determination should be sustained if it is not illegal, has a rational basis, and is not arbitrary and capricious" ... .
>
> In determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing "the benefit to the applicant if the variance is granted . . . against the detriment to the health, safety and welfare of the neighborhood or community by such grant" (General City Law § 81-b[4][b];... see also Town Law § 267-b[3]). The zoning board must also consider: "(i) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (ii) whether the benefit sought by the applicant can be achieved by some method feasible for the applicant to pursue, other than an area variance; (iii) whether the requested area variance is substantial; (iv) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (v) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance" (General City Law § 81-b[4][b]...). **Matter of Goodman v City of Long Beach, 2015 NY Slip Op 04484, 2nd Dept 5-27-15**

ZONING/AREA VARIANCE/ARBITRARY AND CAPRICIOUS STANDARD/GENERAL CITY LAW

Denial of an Area Variance for a Parking Lot, Based Solely on the Subjective/Aesthetic Objections of Residents, Was Arbitrary and Capricious---Statutory Factors Not Applied to the Decision-Making Process

The Second Department reversed Supreme Court, finding the Zoning Board of Appeals' (ZBA's) denial of an area variance (re: a parking lot for residents of a cooperative),based solely upon the subjective objections of town residents, was arbitrary and capricious. The ZBA's decision did not address the statutory factors applied to area variances:

> Pursuant to General City Law § 81-b, in determining whether to grant an application for an area variance, a zoning board must weigh the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted ... . This inquiry also includes a consideration of whether (1) granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than an area variance; (3) the requested area variance is substantial; (4) granting the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) the alleged difficulty was self-created (see General City Law § 81-b[4][b]...).
>
> Here, while it was rational for the ZBA to conclude that the requested variance was substantial, its determination to deny the variance was otherwise conclusory and lacked an objective factual basis. In particular, no evidence was adduced which demonstrated that the health, safety, and welfare of the neighborhood or community would be detrimentally affected by the granting of the requested variance ... . Rather, the ZBA was merely presented with the subjective objections and general community opposition of neighboring property owners, most of whom expressed their subjective opinions as to the negative aesthetics of a parking lot. Further, the ZBA did not provide an objective basis upon which to conclude that the petitioner had a feasible alternative to the requested variance, and there was no evidence that the situation was self-created. In light of the current condition of the property, the legality of using the lot as a small parking lot, and the fact that the lot is fenced so as to block ground-level water views, the ZBA failed to explain how the expansion of the number of spaces in the lot would change the character of the neighborhood.
>
> Accordingly, the record does not contain sufficient evidence to support the rationality of the ZBA's determination denying the proposed area variance ... . Since the ZBA's determination was irrational and arbitrary and capricious, the Supreme Court should have granted the petition, annulled the ZBA's determination, and remitted the matter to the ZBA for the issuance of the requested area variance. **Matter of Marina's Edge Owner's Corp. v City of New Rochelle Zoning Bd. of Appeals, 2015 NY Slip Op 04851, 2nd Dept 6-10-15**

PRACTICE POINT

In assessing the likelihood of overturning an agency's determination, look at any statutory and/or regulatory factors that the agency is required to consider. The agency's failure to follow or address those factors is a solid ground for reversal.

ZONING/AREA VARIANCES/VILLAGE LAW

Application for Area Variance Properly Denied---Analytical Criteria Described

The Second Department determined the village zoning board properly denied petitioner's application for an area variance by considering all of the required factors enumerated in Village Law 7-712-b(3): "When determining whether to grant an application for an area variance, a Village zoning board of appeals, pursuant to Village Law § 7-712-b(3), must engage in a balancing test weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community if the variance is granted" ... . A Village board of zoning appeals must also consider "whether (1) an undesirable change will be produced in the character of the neighborhood, or a detriment to nearby properties will be created by the granting of the area variance, (2) the benefit sought by the applicant can be achieved by some other method, other than an area variance, feasible for the applicant to pursue, (3) the required area variance is substantial, (4) the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district, and (5) the alleged difficulty was self created" ... . **Matter of Affordable Homes of Long Is., LLC v Monteverde, 2015 NY Slip Op 04480, 2nd Dept 5-27-15**

ZONING/STATUTORY INTERPRETATION/ADMINISTRATIVE LAW/RESIDENTIAL USE/AGRICULTURAL USE

Zoning Board's Interpretation of Village Ordinances Upheld---Keeping of Chickens Is Not an Allowed "Residential Use"

The Third Department determined the village zoning board of appeals' interpretation of a zoning ordinance had a rational basis. Petitioner sought a ruling allowing him to keep chickens in a residential zone. Because "poultry husbandry" was specifically mentioned in the zoning ordinances as an agricultural use, and was not mentioned as an allowed residential use, the board's interpretation was upheld as "neither irrational nor unreasonable:"

> Here, Village of Champlain Zoning Code § 119-20 (B) states that the permitted uses in an R1 residential district are "one- and two-family dwellings" and "accessory uses." The code allows for accessory uses that are "of a nature customarily incidental and subordinate to the principal use of the structure, such as garages, outbuildings, swimming pools, energy collection devices and the keeping of domesticated animals" (Village of Champlain Zoning Code § 119-16). The code also defines "agriculture" as "[t]he use of land for agricultural purposes, including tilling of the soil, dairying, pasture, apiculture, arboriculture, horticulture, floriculture, viticulture, forestry, animal and poultry husbandry and the necessary accessory uses for packing or storing of products" (Village of Champlain Zoning Code § 119-16). The code further states that "[a]ny use not listed as permitted [w]ithin a [z]oning district is assumed to be prohibited in that [z]oning district" (Village of Champlain Zoning Code § 119-191). **Matter of Meier v Village of Champlain Zoning Bd. of Appeals, 2015 NY Slip Op 05245, 3rd Dept 6-18-15**

COURT OF APPEALS

ADMINSTRATIVE LAW/MUNICIPAL LAW/NEW YORK CITY TAXI AND LIMOUSINE COMMISSION (TLC)/TAXI OF TOMORRW (T o T)

NYC Taxi and Limousine Commission (TLC) Had the Authority to Enter a 10-Year Exclusive Agreement with Nissan for the Production of the "Taxi of Tomorrow (T o T)," NYC's Official Taxicab

The Court of Appeals determined the NYC Taxi and Limousine Commission (TLC) did not exceed the authority granted the commission by the City Council when it entered a 10-year exclusive agreement with Nissan to provide the "Taxi of Tomorrow (T o T)," New York City's official taxicab:

> A legislature may enact a general statutory provision and delegate power to an agency to fill in the details, as long as reasonable safeguards and guidelines are provided to the agency (see Boreali v Axelrod, 71 NY2d 1, 10 [1987]). As a creation of a legislative body, the TLC possesses the powers expressly conferred by the City Council, as well as those "required by necessary implication" ... . "[A]n agency can adopt regulations that go beyond the text of [its enabling] legislation, provided they are not inconsistent with the statutory language or its underlying purposes" ... . The question before us is whether the authority granted to the TLC by the City Council included the power to enact the ToT rules, or whether the agency has exceeded its authority and acted in a manner not contemplated by the legislative body ... . * * *
>
> The City Council granted the TLC extremely broad authority to enact rules, including the ToT rules. The TLC was created with the stated purposes of "continuance, further development and improvement of taxi and limousine service in the city of New York" (NY City Charter § 2300). The City Charter provides that the TLC is authorized, "consonant with the promotion and protection of the public comfort and convenience[,] to adopt and establish an overall public transportation policy governing taxi . . . services as it relates to the overall public transportation network of the city; to establish . . . standards for equipment safety and design; . . . and to set standards and criteria for the licensing of vehicles" used in taxi service (NY City Charter § 2300 [emphasis added]). * * *
>
> In granting the TLC this broad authority, the City Charter includes guidelines for the TLC to consider, such as "safety, and design, comfort, convenience, noise and air pollution control and efficiency in the operation of vehicles" (NY City Charter § 2303 [b] [6]). Although the TLC has generally applied the "specs method" when promulgating rules about the design of taxis, it points to a major shortcoming of that method — the situation where no available model meets the specs in the rules as, for example, when Ford discontinued the Crown Victoria ... . The TLC determined that "[t]he most obvious alternative to vehicle specifications [is the] competitive selection of taxicab vehicle models," as embodied in the ToT project ... . This new method was intended to be a more efficient way to reach the same result and, in our view, falls within the broad authority granted to the TLC. **Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn., 2015 NY Slip Op 05514, CtApp 6-25-15**

APPEALS/CRIMINAL LAW

Court of Appeals Can Not Hear the Appeal of an Issue Not Preserved by Objection

The Court of Appeals could not hear the defendant's appeal because the issue was not preserved by an objection or by an express decision on the question by the trial court. "The issue argued on this appeal is whether the police were required to again read defendant his Miranda rights when they interviewed him a second time, at his request and in the presence of counsel. In particular, defendant contends that the courts below erred in determining that the presence of counsel obviated the need for police to advise him of his right to remain silent during the second interview. Defendant, however, did not make this argument in his motion papers to the trial court or at the suppression hearing. Moreover, while a general objection — such as that contained in defendant's omnibus motion — is sufficient to preserve an issue for our review when the trial court "expressly decided the question raised on appeal" ..., here, Supreme Court did not expressly decide the issue of whether the police were required to advise defendant of his right to remain silent under the circumstances presented by the second interview." **People v Graham, 2015 NY Slip Op 03767, CtApp 5-7-15**

ARTICLE 78/PROHIBITION/SEPARATION OF POWERS

Court Can Not Use Its Contempt Power to Compel the District Attorney to Prosecute a Criminal Matter

The District Attorney did not wish to proceed with disorderly conduct prosecutions against persons who demonstrated in support of the Occupy Movement. The City Court judge handling the cases, however, ordered the district attorney to appear at a scheduled suppression hearing, threatening to exercise the court's contempt powers if the district attorney did not appear. The district attorney appeared but informed the judge no witnesses would be called. When the judge persisted, again threatening to use the contempt powers, the district attorney brought an Article 78 proceeding seeking a writ of prohibition. The writ was granted and the Court of Appeals affirmed. Under the doctrine of separation of powers, only the district attorney can decide whether to prosecute. The courts can not compel the prosecution of criminal actions:

> "Prohibition is available to restrain an inferior court or Judge from exceeding its or his [or her] powers in a proceeding over which the court has jurisdiction" ... . To demonstrate a clear legal right to the extraordinary writ of prohibition, a petitioner is required to show that the challenged action was "in reality so serious an excess of power incontrovertibly justifying and requiring summary correction" ... .
>
> "The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions" ... . Under the doctrine of separation of powers, courts lack the authority to compel the prosecution of criminal actions ... . Such a right is solely within the broad authority and discretion of the district attorney's executive power to conduct all phases of criminal prosecution (see County Law § 700 [1]...).
>
> The courts below correctly determined that a trial court cannot order the People to call witnesses at a suppression hearing or enforce such a directive through its contempt powers. Any attempt by the Judge here to compel prosecution through the use of his contempt power exceeded his jurisdictional authority. It is within the sole discretion of each district attorney's executive power to orchestrate the prosecution of those who violate the criminal laws of this State ... . **Matter of Soares v Carter, 2015 NY Slip Op 03879, CtApp 5-7-15**

CIVIL PROCEDURE/APPEALS/CPLR 205 (a)/COMMENCEMENT OF A NEW ACTION WITHIN SIX MONTHS OF TERMINATION OF PRIOR ACTION

For Purposes of CPLR 205 (a) (Allowing the Commencement of a New Action within Six Months of the Termination of a Prior Action) a Prior Action Terminates When a Nondiscretionary Appeal Is "Exhausted," Even If the Appeal Is Dismissed As Abandoned

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that the six-month period for commencing a new action after the termination of a prior action afforded by CPLR 205 (a) runs from the termination of an appeal, even if the appeal is dismissed as abandoned. Here the plaintiff started an action in federal court which was dismissed by District Court. Plaintiff then appealed as of right to the Second Circuit. The appeal was dismissed for failure to file the brief and appendix. Plaintiff, before the federal appeal was dismissed, started an action in state court. The state court action was started more than six months after the District Court had dismissed the federal action and defendants moved to dismiss the state action under CPLR 205 (a). The Court of Appeals held that the CPLR 205 (a) six-month period did not start running until the federal appeal was dismissed. Therefore the state action was timely commenced:

> In its current form, CPLR 205 (a) provides:
>
> "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period." * * *
>
> ... [T]his Court has not addressed the issue of when a prior action terminates for purposes of CPLR 205 (a) where, as here, an appeal is taken as of right but is dismissed by the intermediate appellate court due to the plaintiff's failure to perfect. We resolve that question now by ... holding that, where an appeal is taken as of right, the prior action terminates for purposes of CPLR 205 (a) when the nondiscretionary appeal is truly "exhausted," either by a determination on the merits or by dismissal of the appeal, even if the

appeal is dismissed as abandoned. **Malay v City of Syracuse, 2015 NY Slip Op 04164, CtApp 5-14-15**

CIVIL PROCEDURE/CHOICE OF LAW/RESTRICTIVE COVENANTS/NON-SOLICITATION OF CUSTOMERS/CONTRACT LAW/EMPLOYMENT LAW

Florida's Law of Restrictive Covenants Re: Non-Solicitation of Customers by a Former Employee Violates New York Public Policy by Favoring Employers at the Expense of Employees

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined the Florida law on restrictive covenants re: non-solicitation of customers by a former employee violated the public policy of New York State. Therefore the choice-of-law provision in the employee agreement was unenforceable. The Court of Appeals went on to find that, applying New York law, questions of fact precluded a determination whether the non-solicitation agreement at issue should be enforced. With respect to the public policy violation, the court explained:

> ... Florida law requires a party seeking to enforce a restrictive covenant only to make a prima facie showing that the restraint is necessary to protect a legitimate business interest, at which point the burden shifts to the other party to show that the restraint is overbroad or unnecessary (see Fla Stat § 542.335 [1] [c]). If the latter showing is made, the court is required to "modify the restraint and grant only the relief reasonably necessary to protect" the employer's legitimate business interests (Fla Stat § 542.335 [1] [c]). In contrast to this focus solely on the employer's business interests, under New York's three-prong test, "[a] restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. A violation of any prong renders the covenant invalid" ... . Whereas Florida shifts the burden of proof after the employer demonstrates its business interests (see Fla Stat § 542.335 [1] [c]), New York requires the employer to prove all three prongs of its test before the burden shifts ... . Further, Florida law explicitly prohibits courts from considering the harm or hardship to the former employee (see Fla Stat § 542.335 [1] [g] [1]). This directly conflicts with New York's requirement that courts consider, as one of three mandatory factors, whether the restraint "impose[s] undue hardship on the employee" ... .
>
> Additionally, under Florida law, courts are required to construe restrictive covenants in favor of protecting the employer's interests, and may not use any rules of contract interpretation that would require the construction of a restrictive covenant narrowly or against the restraint or drafter (see Fla Stat § 542.335 [1] [h]). In contrast, New York law provides that "[c]ovenants not to compete should be strictly construed because of the 'powerful considerations of public policy which militate against sanctioning the loss of a [person's] livelihood'" ... . **Brown & Brown, Inc. v Johnson, 2015 NY Slip Op 04876, Ct App 6-11-15**

CONTRACT LAW/BREACH OF REPRESENTATIONS AND WARRANTIES/ACCRUAL OF BREACH OF CONTRACT CAUSE OF ACTION/STATUTE OF LIMITATIONS

In an Action Stemming from the Purchase of Residential Mortgage-Backed Securities, the Breach of Defendant's Representations and Warranties Concerning the Borrowers' Incomes, Occupancy Status and Debt Obligations Occurred on the Date the Contract Was Executed (Starting the Six-Year Statute of Limitations at that Point)---Defendant's Obligation to Cure or Repurchase Did Not Constitute a Second Contract---Defendant's Refusal to Cure or Repurchase, Therefore, Did Not Start the Running of Another Six-Year Limitations Period

The Court of Appeals, in a full-fledged opinion by Judge Read, in an action involving residential mortgage-backed securities, determined that a cause of action based upon breach of representations and warranties accrued on the date the contract was executed. A few years after the parties executed a mortgage loan purchase agreement (MLPA) and a pooling a servicing agreement (PSA) borrowers began to default, resulting in hundreds of millions in losses. Upon investigation it was determined that the underlying mortgage loans failed to comply with the defendant's representations and warranties about the borrowers' incomes, occupancy status and existing debts. The Court of Appeals held that the breach of the representations and warranties occurred when the MLPA was executed on March 28, 2006. The action was commenced on the last day of the limitations period (on March 28, 2012), but was untimely because the contractual conditions precedent to suit had not been complied with as of that date. Plaintiff argued that the defendant's refusal to cure or repurchase after notification in January, 2012, breached a second contract and started the six-year statute running from that point. The Court of Appeals held that the defendant's repurchase obligation was not a valid

agreement "to undertake a separate obligation, the breach of which does not arise until some future date...". "[Defendant's] cure or repurchase obligation could not reasonably be viewed as a distinct promise of future performance. It was dependent on, and indeed derivative of, [defendant's] representations and warranties, which did not survive the closing and were breached, if at all, on that date..." . **ACE Sec. Corp. v DB Structured Prods., Inc., 2015 NY Slip Op 04873, CtApp 6-11-15**

CONTRACT LAW/"ABSOLUTE AND UNCONDITIONAL" GUARANTY OF PAYMENT/FRAUD

An Unconditional Guaranty of Payment of a Another's Obligations Is Enforceable by Summary Judgment In Lieu of a Complaint In New York, Even In the Face of an Allegation the Underlying Judgment Was the Result of Collusion and Fraud

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined an unconditional guaranty (re: payment of corporate debts) was a proper basis for summary judgment in lieu of a complaint, notwithstanding defendant's (unsupported) allegation the underlying judgment was the result of collusion and fraud. An unconditional guaranty is enforceable in New York, even where it is alleged the guaranty itself was the product of fraud:

> Guarantees that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guarantees that are "absolute and unconditional," have been consistently upheld by New York courts * * *.
>
> This Court has acknowledged the application of these absolute guarantees even to claims of fraudulent inducement in the execution of the guaranty ... .* * *
>
> Here, defendant personally guaranteed the obligations owed by Agra Canada under the Purchase Agreement, as well as obligations owed by Agra USA. Moreover, defendant specifically agreed that his "liability under this Guaranty shall be absolute and unconditional irrespective of (1) any lack of validity or enforceability of the agreement; . . . or (iv) any other circumstance which might otherwise constitute a defense available to, or a discharge of, the Seller (Agra Canada) or a guarantor." By its plain terms, in broad, sweeping and unequivocal language, the Guaranty forecloses any challenge to the enforceability and validity of the documents which establish defendant's liability for payments arising under the Purchase Agreement, as well as to any other possible defense to his liability for the obligations of the Agra businesses. **Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro, 2015 NY Slip Op 04753, CtApp 6-9-15**

CONTRACT LAW/ASSIGNMENT OF NOTES/ASSIGNMENT OF RIGHT TO BRING TORT ACTION/FRAUD

An Assignment of a Note, Which Was Silent About Whether the Assignment of the Right to Bring a Tort Action Was Included, Did Not, Under New York Law, Include the Right to Bring a Tort Action

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined the assignment of a note, which was silent about whether the assignment included the right to bring a tort action, did not include such a right. Therefore the Second Circuit's certified question whether the assignee of the note had standing to sue Morgan Stanley for fraud was answered in the negative. The case arose out of the collapse in value of sub-prime residential mortgage-backed securities. The court explained the relevant New York law:

> To be sure, fraud claims are freely assignable in New York ... . It has long been held, however, that the right to assert a fraud claim related to a contract or note does not automatically transfer with the respective contract or note ... . Thus, where an assignment of fraud or other tort claims is intended in conjunction with the conveyance of a contract or note, there must be some language — although no specific words are required — that evinces that intent and effectuates the transfer of such rights ... . Without a valid assignment, "only the . . . assignor may rescind or sue for damages for fraud and deceit" because "the representations were made to it and it alone had the right to rely upon them" ... . **Commonwealth of Pa. Pub. Sch. Employees' Retirement Sys. v Morgan Stanley & Co., Inc., 2015 NY Slip Op 05591, CtApp 6-30-15**

CRIMINAL LAW/ACCOMPLICE LIABILITY/JURY INSTRUCTION OUTSIDE PRESENCE OF DEFENDANT

Although a Close Case, the Evidence Supported Defendant's Manslaughter Conviction Under an Accomplice Theory---the Judge's Informing the Jury of the Correct Dates of the Offense, Outside the Presence of the Parties, with the Parties' Consent, Was Not a Mode of Proceedings Error Requiring Reversal

Noting that it was a close case, the Court of Appeals determined the evidence supported defendant's conviction for manslaughter under an accomplice theory. Defendant struck the victim with a beer bottle and then chased after another man. There was conflicting testimony about whether defendant was present when another man who was with the defendant struck the victim with a baseball bat. Viewing the evidence in the light most favorable to the People, the evidence of a "community of purpose" among accomplice and principal was sufficient. Further, the court determined the judge's correcting an error in the jury instructions by informing the jury of the correct dates of the offenses outside the presence of the parties, but with the parties' consent, was not a mode of proceedings error requiring reversal. **People v Scott, 2015 NY Slip Op 04874, CtApp 6-11-15**

CRIMINAL LAW/APPEALS/DRUG LAW REFORM ACT (DLRA)

No Appeal to the Court of Appeals Lies from the Appellate Division's Affirmance of the Denial of Resentencing Pursuant to the 2004 Drug Law Reform Act (DLRA)

The Court of Appeals determined no appeal lies from the Appellate Division's affirmance of the denial of resentencing pursuant to the 2004 Drug Law Reform Act (DLRA). The fact that the order (denying resentencing) was consolidated with appealable orders did not confer jurisdiction to hear the appeal upon the Court of Appeals:

> "It is well established that no appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute," and courts "may not resort to interpretative contrivances to broaden the scope and application of statutes" governing the availability of an appeal ... . [W]e have held that no statutory provision authorizes a defendant to appeal from an Appellate Division order affirming the denial of the defendant's resentencing application pursuant to the 2005 Drug Law Reform Act ... . The 2004 DLRA includes similar language relating to appeals; accordingly, no appeal lies from an order of the Appellate Division affirming the denial of a resentencing application under the 2004 DLRA ... . Faced with this barrier to our review, defendant contends that the Appellate Division's consolidation of the order denying resentencing with other, appealable orders, transformed the nonappealable order into one that we may consider. We disagree. The Appellate Division's authority to consolidate appeals stems from its inherent authority to administer and manage its proceedings. The Appellate Division's use of this inherent authority does not expand or modify the scope of our jurisdiction, which is established by statute. **People v Lovett, 2015 NY Slip Op 05512, CtApp 6-25-15**

CRIMINAL LAW/APPEALS/WAIVER OF APPEAL

Waiver of Appeal Encompasses Sentencing Court's Denial of Youthful Offender Status

The Court of Appeals, over a two-judge dissent, determined a defendant who has waived his right to appeal may not (on appeal) raise the sentencing court's denial of youthful offender status. The Court of Appeals described the limited circumstances under which fundamental issues may be raised on appeal despite a waiver of appeal. Among them is the sentencing court's failure to consider youthful offender status for an eligible defendant. However, if the sentencing court considered the issue, it is encompassed by the waiver:

> "[G]enerally, an appeal waiver will encompass any issue that does not involve a right of constitutional dimension going to 'the very heart of the process'" ... . This Court has recognized that the right to a speedy trial, challenges to the legality of a court-imposed sentence, questions about a defendant's competency to stand trial, and whether the waiver was obtained in a constitutionally acceptable manner cannot be foreclosed from appellate review ... . * * *
>
> It is well settled that once considered, a youthful offender adjudication is a matter left to the sound discretion of the sentencing court and therefore any review is limited (see CPL 720.20 [1] [a]). ..."[W]hen a defendant enters into a guilty plea that includes a valid waiver of the right to appeal, that waiver includes any challenge to the severity of the sentence. By pleading guilty and waiving the right to appeal, a defendant has forgone review of the terms of the plea, including harshness or excessiveness of the sentence" ... . To the extent defendant appeals the harshness of

his sentence or the sentencing court's exercise of discretion in denying youthful offender status, his appeal waiver forecloses the claim.

We therefore conclude that a valid waiver of the right to appeal, while not enforceable in the face of a failure to consider youthful offender treatment, forecloses appellate review of a sentencing court's discretionary decision to deny youthful offender status once a court has considered such treatment. **People v Pacherille, 2015 NY Slip Op 04027, CtApp 5-12-15**

Although the Right to Appeal Could Have Been Defined More Fully, Defendant's Waiver of Appeal In Response to a Colloquy Conducted by the Prosecutor Deemed Sufficient

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissent, determined defendant's waiver of appeal was valid, noting the nature of the right to appeal could have been defined more fully. "Regarding the waiver of the right to appeal, the following exchange ... took place between the prosecutor and defendant: 'Q Do you understand that as a condition of this plea you are waiving the right to appeal your conviction and sentence to the Appellate Division Second Department? A Yes. Q Have you discussed this waiver of the right to appeal with your attorney? A Yes. Q In consideration of this negotiated plea[,] do you now voluntarily waive your right to appeal your conviction and sentence under this indictment? A Yes.' " The Court of Appeals noted "County Court adequately described the right to appeal without lumping it into the panoply of rights normally forfeited upon a guilty plea." [The dissent pointed out that the responsibility for the colloquy re: the waiver of appeal was delegated to the prosecutor here:]

....[W]e conclude that the record before us sufficiently demonstrates that defendant knowingly and intelligently waived his right to appeal. There is no meaningful distinction between the plea colloquy here and the colloquy upheld in Nicholson, in which defendant acknowledged his understanding that he was "giving up [his] right to appeal, that is, to take to a higher court than this one any of the legal issues connected with this case" (Nicholson, 6 NY3d at 254). As in Nicholson, the plea colloquy here was sufficient because County Court adequately described the right to appeal without lumping it into the panoply of rights normally forfeited upon a guilty plea. In fact, the People went even further in this case and obtained defendant's confirmation that he had discussed the waiver of the right to appeal with his attorney and that he was waiving such right in consideration of his negotiated plea, as well as counsel's confirmation that all motions pending or decided were being withdrawn. Thus, while the better practice would have been to define the nature of the right to appeal more fully — as the court did in Nicholson — the Appellate Division correctly determined that no further elaboration was necessary on the phrase "right to appeal your conviction and sentence to the Appellate Division Second Department" in view of the whole colloquy, particularly given this defendant's background, including his extensive experience with the criminal justice system and multiple prior guilty pleas that resulted in terms of imprisonment. **People v Sanders, 2015 NY Slip Op 04755, CtApp 6-9-15**

CRIMINAL LAW/ATTORNEYS/RIGHT TO COUNSEL/POSITION ADVERSE TO CLIENT'S/CONFLICT OF INTEREST (WITH CLIENT)

In the Face of Defendant's Claims Defense Counsel Did Not Adequately Represent Him, Counsel's Answering the Judge's Questions About Defendant's Allegations (Which Were Rejected by the Court) Did Not Place Defense Counsel in a Position Adverse to the Defendant's

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined that defense counsel's answering the judge's questions about his performance did not place the attorney in a position adverse to his client's. The client, prior to trial, sought the appointment of new counsel by filing a form ("Affidavit in Support of Motion for Reassignment of Counsel") circling every reason for the appointment of new counsel listed on the form, including the failure to discuss strategy, the failure to seek discovery, the failure to contest identification evidence, and the failure to communicate with the defendant. The form did not reach the judge until after the defendant's trial and conviction. The defendant did not mention the motion or his concerns during the trial. The judge, based on his observations during the trial, determined many of the circled claims on the form were not true. The judge asked the attorney about what he had done prior to trial and the attorney explained what he had done. In so doing, the attorney did not take a position adverse to the defendant's:

"The right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option" ... . A defendant may be entitled to new counsel, however, "upon showing good cause for a substitution, such as a conflict of interest or other irreconcilable conflict with counsel" (id. [internal quotation marks omitted]). Here, defendant claims that he was entitled to new defense counsel because counsel's responses to the allegations of

ineffectiveness created an actual conflict of interest.

Although an attorney is not obligated to comment on a client's pro se motions or arguments, he may address allegations of ineffectiveness "when asked to by the court" and "should be afforded the opportunity to explain his performance" ... .

We have held that counsel takes a position adverse to his client when stating that the defendant's motion lacks merit ..., or that the defendant, who is challenging the voluntariness of his guilty plea, "made a knowing plea . . . [that] was in his best interest" ... . Conversely, we have held that counsel does not create an actual conflict merely by "outlin[ing] his efforts on his client's behalf" ... and "defend[ing] his performance" ... .

Applying these settled principles to the facts in this case, we conclude that defense counsel's comments in response to the judge's questions did not establish an actual conflict of interest. Defense counsel did not suggest that his client's claims lacked merit. Rather, he informed the judge when he met with defendant and for how long, what they discussed, what the defense strategy was at trial and what discovery he gave or did not give to defendant. Thus, he never strayed beyond a factual explanation of his efforts on his client's behalf. **People v Washington, 2015 NY Slip Op 05511, CtApp 6-25-15**

CRIMINAL LAW/CRIMINAL PROCEDURE LAW/710.30 NOTICE OF INTENT TO INTRODUCE OUT-OF-COURT IDENTIFICATION

The People Were Required to Give Pre-Trial Notice of an Out-of-Court Identification of Defendant by Officer Viewing the Controlled Buy from Across the Street---Identification Was Not So Free From the Risk of Undue Suggestiveness that It Could Be Considered Merely "Confirmatory"---Error Was Harmless In the Face of Overwhelming Evidence

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined the People were required to provide the pre-trial statutory notice of the intent to introduce evidence of an out-of-court identification of the defendant by the officer (Detective Vanacore) who viewed the underlying controlled drug purchase (by an undercover officer) from across the street. The error was deemed harmless however. Noting that the identification at issue was not so free from the risk of undue suggestiveness as to render the identification merely "confirmatory," the court offered a clear explanation of the reasons for the statutory pre-trial notice requirement:

"CPL 710.30 could not be clearer" ... . When the People intend to offer at trial "testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such," the statute requires the People to notify the defense of such intention within 15 days after arraignment and before trial (CPL 710.30 [1] [b]). Not only is "[t]he statutory mandate . . . plain" but the procedure is "simple" ... . The People serve their notice upon defendant, the defendant has an opportunity to move to suppress and the court may hold a Wade hearing (see id.). If the People fail to provide notice, the prosecution may be precluded from introducing such evidence at trial.

The notice statute was "a legislative response to the problem of suggestive and misleading pretrial identification procedures" ... . In enacting the notice requirement, the Legislature "attempt[ed] to deal effectively with the reality that not all police-arranged identifications are free from unconstitutional taint" ... .

The purpose of the notice requirement is two-fold: it provides the defense with "an opportunity, prior to trial, to investigate the circumstances of the [evidence procured by the state] and prepare the defense accordingly" and "permits an orderly hearing and determination of the issue of the fact . . . thereby preventing the interruption of trial to challenge initially the admission into evidence of the [identification]" ... . Thus, the statute contemplates "pretrial resolution of the admissibility of identification testimony where it is alleged that an improper procedure occurred" ... .
* * *

Detective Vanacore's surveillance of defendant does not constitute an "observation of . . . defendant . . . so clear that the identification could not be mistaken" thereby obviating the risk of undue suggestiveness ... . Therefore, the People were required to serve their notice concerning Detective Vanacore's observations. **People v Pacquette, 2015 NY Slip Op 05595, CtApp 6-30-15**

CRIMINAL LAW/DOUBLE JEOPARDY

The Acts of Applying for a Fake Non-Driver ID Card and Possessing the Fake Non-Driver ID Card Upon Arrest (Four-Months After Submitting the Application) Did Not Constitute a Single Criminal Venture---the Prohibition Against Double Jeopardy Did Not Preclude the Second Charge

The Court of Appeals, in a full-fledged opinion by Judge Lippman, determined defendant was not entitled to the dismissal of charges on double jeopardy grounds. Defendant had used his son's identification information to procure a non-driver ID card in Suffolk County. Several months later defendant was stopped by police in Westchester County, presented the fake non-driver ID card, and was subsequently charged with possession of a forged instrument in the second degree. Defendant pled guilty to possession of a forged instrument third degree. When defendant's son returned to New York State (after a four-year absence) and applied for a driver's license in Westchester County, authorities became aware of defendant's submission (in Westchester County) of a fake application (MV-44 form) for the non-driver ID. Defendant was then charged in Westchester County with possession of a forged instrument (the ID application form) as well as forgery. The Court of Appeals held that the two offenses were not "integrated, interdependent acts as seen in conspiracy cases or complex frauds...". Therefore, unlike individual acts within such conspiracies or complex frauds, the two acts did not constitute a "single criminal venture." The court noted: "A closer case might be presented had defendant applied for a driver's license in Suffolk County with his son's papers and showed the temporary driver's license later that same day when his car was stopped by police. In such circumstances, the timing and criminal purpose of the two acts would be more interrelated than the circumstances presented here:"

> Under CPL 40.20, a subsequent prosecution for offenses involving the "same criminal . . . transaction," as defined by CPL 40.10 (2), violates the statutory bar against double jeopardy unless an exception applies.
>
> "'Criminal transaction' means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture" (CPL 40.10 [2]). * * *
>
> Part (b) of the CPL 410.10 definition "tends to be more applicable to crimes that involve planned, ongoing organized criminal activity, such as conspiracies, complex frauds or larcenies, or narcotics rings" (7 NY Prac., New York Pretrial Criminal Procedure § 2:6 [2d ed.]). This Court has recognized statutory violations of double jeopardy protections in drug trafficking cases where the "embracive nature of the crime of conspiracy" presents unique circumstances ... .
>
> Here, under the test presented by CPL 40.10 (2) (a), the offense of submitting a forged MV-44 form and the offense of presenting a forged non-driver ID to the police were many months apart and ... involved different forged instruments — the non-driver's license and the MV-44 application form — making them different criminal transactions. The Suffolk County charge was based on defendant's completion and filing of the application form. The offense was complete once defendant submitted the forged application to the DMV in June 2009. The Westchester offense occurred four months later and was based on defendant's presentation of the forged non-driver's license to the officer. With the non-driver ID card in hand, defendant could give the appearance of a clean record, which would enable him to evade his criminal history and obtain a loan or employment under a false identity. Applying the alternative test defined by CPL 40.10 (2) (b), this case does not involve the integrated, interdependent acts as seen in conspiracy cases or complex frauds, and as such does not constitute a "single criminal venture" ... . **People v Lynch, 2015 NY Slip Op 04754, CtApp 6-9-15**

CRIMINAL LAW/DRUG LAW REFORM ACT/PAROLE

Reduced Sentences Pursuant to the Drug Law Reform Act Apply to Those on Parole As Well As Those Who Are Incarcerated

The Court of Appeals, in a full-fledged opinion by Judge Lippman, over a two-judge dissent, determined that the ability to apply for a reduced sentence for drug offenses pursuant to the Drug Law Reform Act applied to those on parole, as well as those who are incarcerated: "The issue presented by this appeal is whether the 2011 amendments to CPL 440.46 expanded the class of defendants eligible for resentencing under the Drug Law Reform Act to include those who are on parole at the time resentencing is sought. We left this question open in People v Paulin (17 NY3d 238, 243 [2011]) and People v Santiago (17 NY3d 246, 247 [2011]), and now hold that the amendments did expand eligibility to parolees ..." . **People v Brown, 2015 NY Slip Op 04163, CtApp 5-14-15**

CRIMINAL LAW/DUPLICITY

Charging the Defendant with the Use of Two Weapons During a Single Incident Did Not Render the Indictment Duplicitous---Only Proof of the Use of One Weapon Was Required

The indictment alleged the defendant committed assault and reckless endangerment by using a pistol and a rifle. The proof at trial demonstrated the defendant shot the victim twice, using two weapons, in the course of the same incident. The judge charged the jury using the conjunctive language of the indictment. When the jury asked if it must find both weapons were used to commit the offenses, the judge explained that only the use of one of the weapons needed to be proved. The Court of Appeals affirmed, concluding the indictment was not duplicitous, i.e., the indictment did not charge two crimes in a single indictment count:

> CPL 200.30 (1) requires that "each count of an indictment may charge one offense only." Thus, a count is duplicitous if it charges more than one offense. ..."[W]hether multiple acts may be charged as a continuing crime is resolved by reference to the language in the penal statute to determine whether the statutory definition of the crime necessarily contemplates a single act." Under Penal Law § 120.10 (1), a person is guilty of assault in the first degree when "with intent to cause serious physical injury to another person, he [or she] causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument." Thus, the prosecution was not required to prove that defendant used two weapons. Penal Law § 120.25 states that a person is guilty of reckless endangerment in the first degree when, "under circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person." Again, the prosecution was not required to prove that defendant used both weapons.
>
> ...[T]he evidence at trial did not render the charges duplicitous. There was evidence that defendant attacked the victim out of one impulse - to seek revenge for the fiancée's alleged assault on defendant's sister...."[A]s a general rule . . . it may be said that where a defendant, in an uninterrupted course of conduct directed at a single victim, violates a single provision of the Penal Law, he commits but a single crime." Although defendant used two guns, this was a single incident ... . **People v Flanders, 2015 NY Slip Op 03768, CtApp 5-7-15**

CRIMINAL LAW/ENTERPRISE CORRUPTION/JURY INSTRUCTIONS/INEFFECTIVE ASSISTANCE OF COUNSEL

"Continuity" Element of a Criminal Enterprise Explained---Substantive Arguments Re: the Erroneous Use of "And" Instead of "Or" In the Jury Instructions and the "Ineffective Assistance" Stemming from the Failure to Object to the Instructions--the Majority Held the Error Was Not Preserved and the Seriousness of the Error Was Not So Clear-Cut as to Implicate Ineffective Assistance--the Dissent Argued the Jury-Instruction Error Was Preserved and Was Reversible

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a dissent, affirmed the defendants' enterprise corruption convictions. The enterprise here involved a doctor and a chiropractor (the defendants), medical clinics, faked accidents, faked injuries, kickbacks to lawyers, fraudulent insurance claims, etc. The court explained that there is no requirement that the People prove the enterprise would continue in the absence of a key participant to demonstrate the "continuity" element of the enterprise, i.e., that the "structure [of the enterprise is] distinct from the predicate illict pattern." In addition, the majority determined an acknowledged jury-instruction error (using "and" instead of "or") was unpreserved, and rejected an ineffective assistance argument which was based on the failure to object to the erroneous jury charge. In rejecting the ineffective assistance argument, the majority noted that whether the jury-instruction error was reversible was a close question. If the error had been clearly reversible, the majority explained, the ineffective assistance argument would have prevailed. The dissent argued that the jury-instruction error was preserved and constituted reversible error. The jury-instruction and ineffective assistance discussions. like the enterprise corruption discussion, are extensive and substantive. With respect to the proof requirements for the "continuity" element of enterprise corruption, the court wrote:

> Were the People required to prove, beyond a reasonable doubt, that a criminal enterprise would survive the removal of a key participant, it would be impossible in most cases to demonstrate the existence of a criminal enterprise. Except where the leading participant was in fact removed some time before the enterprise disbanded, the People would be expected to prove an unknowable proposition concerning a counterfactual scenario in which events occurred differently from the actual world. We have never required such an exercise. Moreover, there is no reason to treat a criminal structure as less deserving of enhanced penalty if its key figure is so essential to the

organization that his or her absence would threaten its criminal agenda. A criminal enterprise is no less a criminal enterprise if it has a powerful leader. Finally, if we were to require a criminal enterprise to be able to survive the removal of a key figure, criminal organizations could avoid enhanced penalties simply by placing all control in the hands of one person. It cannot have been the intent of the Legislature to allow such a loophole.

Instead, what is meant by the continuity element of the statute is that to be a criminal enterprise, an organization must continue "beyond the scope of individual criminal incidents" (Penal Law § 460.10 [3]), and must possess "constancy and capacity exceeding the individual crimes committed under the association's auspices or for its purposes" ... . In other words, the requirement is not that the group would continue in the absence of a key participant, but rather that it continues to exist beyond individual criminal incidents. A team of people who unite to carry out a single crime or a brief series of crimes may lack structure and criminal purpose beyond the criminal actions they carry out; such an ad hoc group is not a criminal enterprise. If a group persists, however, in the form of a "structured, purposeful criminal organization" (id. at 659), beyond the time required to commit individual crimes, the continuity element of criminal enterprise is met. **People v Keschner, 2015 NY Slip Op 05596, CtApp 6-30-15**

CRIMINAL LAW/EVIDENCE/IMPROPER "EXPERT" TESTIMONY/"SUMMATION WITNESSES"

Allowing a Detective Who Was Involved in the Investigation of Defendant's Case to Testify as an "Expert" Was Error (Harmless Here However)--Although the Detective Was Ostensibly to Testify as an Expert Who Could "Translate" Code Words Used in Recorded Conversations, His Testimony Extended into Many Areas Which Did Not Involve Code Words, Thereby Imbuing HIs Entire Testimony with an Aura of Expertise---Such Improper "Expert" Testimony Usurps the Jury's Role

Although the error was deemed harmless here, the Court of Appeals, in a full-fledged opinion by Judge Lippman, determined it was error to allow a detective, who was involved in the underlying murder investigation, to testify as an "expert." The detective was asked to explain the meaning of so-called "code words" used in recorded conversations admitted into evidence. But it was clear that the trial court allowed the detective to testify as an "expert" on matters that had nothing to do with translating code words. As a result, the detective's testimony was imbued with an aura of expertise which could have improperly added weight to his testimony in the eyes of the jury. Because this issue has not been addressed by New York courts, the Court of Appeals turned to two Second Circuit cases which held the improper "expert" testimony, on topics not beyond the "ken of the jurors," usurped the jury's role:

> We have, for example, permitted expert testimony by a police sergeant respecting the way in which street-level drug sales are transacted to help a jury understand why the failure to recover drugs or marked buy-money from an individual apprehended in a buy-and-bust operation is not necessarily indicative of the accused's misidentification (People v Brown, 97 NY2d 500 [2002]). It is instructive to note, however, that the testimony of the sergeant in Brown was carefully limited by the trial court to a discrete issue beyond the ken of ordinary jurors, and that the sergeant was not himself involved in the underlying investigation and gave no testimony as to what had actually occurred during the buy-and-bust there involved. The situation is very different where a police officer, qualified as an expert, has participated in the investigation of the matter being tried and, with the mantel of an expert steeped in the particulars of the case, gives seemingly authoritative testimony directly instructive of what facts the jury should find. Our cases have not dealt with this problematic scenario, but those of the Second Circuit, most notably United States v Mejia (545 F3d 179 [2d Cir 2008]) and United States v Dukagjini (326 F3d 45 [2d Cir 2002]), have.
>
> In both of those cases, law enforcement officers involved in the investigations upon which the defendants' prosecutions were founded were duly qualified as experts but permitted to testify as apparent experts beyond their expertise and upon matters well within the grasp of lay jurors. In exploring the full reach of the permission they had been afforded, they became summation witnesses, instructing the jury comprehensively and with an aura of expertise, as to how the particular factual issues presented in each case should be resolved. This, said the Mejia court, amounted to a "usurpation of the jury's role" (545 F3d at 191), and was objectionable as well, in both Mejia and Dukagjini, for operating to inject hearsay into the evidentiary mix and to abridge the defendants' constitutional right to confront the witnesses against them; both case agent witnesses, as putative experts, had premised their testimony largely on inadmissible out-of-court statements, even when that testimony ceased to be expert and went only towards proving particular facts. **People v Inoa, 2015 NY Slip Op 04790, CtApp 6-10-15**

CRIMINAL LAW/EVIDENCE/INTENT

Intent to Rob Sufficiently Proven by Circumstantial Evidence

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined there was sufficient evidence to support the attempted robbery conviction. Defendant, when the business was closed, was dressed in dark clothes, wearing a mask, and carrying a handgun (BB gun) while pounding on the door of the business asking to enter. The defendant never was allowed inside and ran when the police arrived. The defendant argued there was no evidence he intended to commit robbery, as opposed to some other crime. The Court of Appeals found the circumstantial evidence of an intent to commit robbery sufficient:

> ...[H]ere there was evidence that defendant, who was unknown to any of the employees present that morning, and had no apparent business at Wendy's, nevertheless showed up masked and armed, carrying a backpack, seeking entry at 6:30 am through a locked rear door not used by the public, with an escape vehicle conveniently parked nearby. This fit the pattern common to an early morning robbery of a commercial establishment and was sufficient to support the inference that defendant intended to steal. **People v Lamont, 2015 NY Slip Op 04165, CtApp 5-14-15**

CRIMINAL LAW/FELONY MURDER/BURGLARY

Entering the Victim's Domicile With the Intent to Assault the Victim Who Died from His Injuries Constitutes Felony Murder (Murder Committed During a Burglary)

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined defendant's felony murder conviction should stand. There was evidence the defendant entered the victim's apartment intending to assault, not kill, the victim. Therefore the defendant's causing the death of the victim in the course of the burglary constituted felony murder. The question whether entering the apartment with the intent to kill, and thereafter killing the victim, would also constitute felony murder remains unanswered. The court rejected defendant's argument that the felony murder statute requires that the death be caused in order to advance the underlying felony, finding that the statute requires only a logical nexus between a murder and a felony:

> Noting the Legislature's inclusion of burglary of all degrees, without qualification, as a predicate felony for felony murder, we observed "that persons within domiciles are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same criminal intent. Thus, the burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street" ... . It is clear that the Legislature chose to treat burglary differently than other crimes. Therefore, an individual who approaches another on the street with an intent to assault but causes the death of that person could be convicted of manslaughter, but not felony murder. It is entirely reasonable, however, that a person — like defendant — who unlawfully enters a building with the intent to commit an assault therein, but causes the death of another, may be convicted of felony murder, in recognition that the homicide occurs in the context of other criminal activity that enhances the seriousness of the offense. * * *
>
> Defendant also argues that his felony murder conviction rests on legally insufficient evidence because there is no evidence that he committed the murder "in the furtherance of" a burglary. He asserts that the statutory language "in the furtherance of" requires that the death be caused in order to advance or promote the underlying felony. We have not interpreted "in the furtherance of" so narrowly. The felony murder statute is intended to punish a perpetrator for a death he or she caused during the commission of a felony, but not a death that is coincidental to the felony ... . The "in furtherance of" element requires "a logical nexus between a murder and a felony" ... . Here, there is a clear logical nexus between defendant's felony of unlawfully entering the victim's apartment to assault him and the homicide, which was certainly not coincidental. **People v Henderson, 2015 NY Slip Op 05592, CtApp 6-30-15**

CRIMINAL LAW/SENTENCING/CONSECUTIVE SENTENCES

Assault and Robbery Committed by Separate Acts Involving the Same Victim--Consecutive Sentences Justified

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissent, determined defendant was properly sentenced consecutively for robbery and assault. The defendant first demanded that the victim turn over a necklace the victim was wearing. As the

victim was complying, the defendant shot the victim. The court determined the two crimes were committed by separate acts, thereby justifying consecutive sentences. The dissent dealt with a different issue: i.e., whether CPL 430.10 prohibited Supreme Court from "reconfiguring" defendant's sentence after the case was remitted to it by the Appellate Division. After the Appellate Division determined two of the original sentences should have been imposed concurrently, the original 40-year sentence was reduced to 25. On remand, the sentencing court "reconfigured" the sentences to bring them up again to 40 years. CPL 430.10 prohibits the sentencing court from "modifying" a sentence after it has begun to be served. The "reconfigured" 40-year sentence was affirmed here by the Court of Appeals. With respect to the consecutive sentences, the court explained:

> Penal Law § 70.25 (2) mandates that concurrent sentences be imposed for "two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other." We have held that, "[t]o determine whether consecutive sentences are permitted, a court must first look to the statutory definitions of the crimes at issue" to discern whether the actus reus elements overlap ... . Even where the crimes have an actus reus element in common, "the People may yet establish the legality of consecutive sentencing by showing that the 'acts or omissions' committed by defendant were separate and distinct acts" ... . Conversely, where "the actus reus is a single inseparable act that violates more than one statute, [a] single punishment must be imposed" ... . The People bear the burden of establishing the legality of consecutive sentencing by "identifying the facts which support their view" that the crimes were committed by separate acts ... .
>
> Even if, as defendant contends, the statutory elements of his robbery and assault convictions overlap, the People have demonstrated in this case that the assault count and the robbery count at issue were committed by separate and distinct acts. **People v Rodriguez, 2015 NY Slip Op 03877, Ct App 5-7-15**

CRIMINAL LAW/SEX OFFENDER REGISTRATION ACT (SORA)/FOREIGN "CONVICTIONS"

Plea of "Nolo Contendere" to a Sex Offense in Florida Constitutes a "Conviction" of a Sex Offense Requiring Registration in New York

Petitioner pled "nolo contendere" to a sex offense in Florida. Petitioner contended that the offense was based on his having consensual sex with a 15-year-old classmate when petitioner was 18. The Florida court withheld adjudication. The Court of Appeals determined petitioner was required to register as a sex offender upon his move to New York. The "nolo contendere" plea meets the definition of "conviction" in New York. A "sex offender" in New York is one who has been "convicted" of a "sex offense" which includes a felony in another jurisdiction for which the offender is required to register as a sex offender (the case here):

> We held in People v Daiboch (265 NY 125 [1934]), ... that the entry of a nolo contendere plea in another jurisdiction, followed by a judgment placing the defendant on probation for two years, was a prior conviction for purposes of sentencing the defendant as a second offender. Although Daiboch did not involve SORA, we confronted the same issue presented by this case: whether a defendant's out-of-state nolo contendere plea for which a non-incarceratory sentence was imposed qualifies as a conviction in New York. Nolo contendere pleas, like Alford pleas, are "no different from other guilty pleas" (Matter of Silmon v Travis, 95 NY2d 470, 475 [2000] [recognizing that an Alford plea may generally be used for the same purposes as any other conviction]). And because New York defines a conviction to include the entry of a guilty plea, regardless of the subsequent sentence or judgment, the ultimate disposition of petitioner's Florida conviction is irrelevant. New York distinguishes between a conviction and a "judgment of conviction," the latter of which includes "a conviction and the sentence imposed thereon" (CPL 1.20 [15]). As we have previously observed, the Legislature intended the Criminal Procedure Law to provide the "definitive meaning" of the term "conviction" for other criminal statutes, and it meant what it said when it defined "conviction" separately from a judgment or sentence ... . **Matter of Kasckarow v Board of Examiners of Sex Offenders of State of N.Y., 2015 NY Slip Op 03878, Ct App 5-7-15**

CRIMINAL LAW/SEX OFFENDER REGISTRATION ACT (SORA)/MODIFICATION HEARING

In a Risk Level Modification Proceeding, a Defendant Is Entitled to All the Documents Reviewed by the Board

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined defendant was entitled to access to all the documents reviewed by the New York State Board of Examiners of Sex Offenders (Board) in connection with the Board's recommendation that defendant's classification remain at risk level 3. However, County Court's refusal to grant an adjournment to allow defendant to gain access to missing documents (two emails) was not an abuse of discretion. The record evidence in support of the denial of the modification was overwhelming:

> Section 168-o (4), applicable when a petitioner seeks modification of the risk level, does not contain any language entitling a petitioner to pre-hearing discovery, but simply provides that a petitioner has a right to submit "any information relevant to the review" (Correction Law § 169-o [2]). Further, the right to petition the sentencing court to be "relieved of any further duty to register" under Correction Law § 168-o (1) does not permit the court to review the correctness of the initial risk level determination (see Correction Law § 168-g [4]...). While there are statutory differences in the two [*5]proceedings, we agree with defendant that the procedural due process rights, in regard to the requested documents, were the same. Thus, defendant was entitled to access to the documents.
>
> Nonetheless, it is well-settled that the decision to grant an adjournment is a matter of discretion for the hearing court ... . "When the protection of fundamental rights has been involved in requests for adjournments, that discretionary power has been more narrowly construed" ... . Under the circumstances of this case, it cannot be said the court abused its discretion as a matter of law in failing to adjourn the hearing to gather the two emails. **People v Lashway, 2015 NY Slip Op 04877, CtApp 6-11-15**

CRIMINAL LAW/YOUTHFUL OFFENDER STATUS

Where a Defendant Has Been Convicted of an Armed Felony or an Enumerated Sex Offense Pursuant to CPL (Criminal Procedure Law) 720.10(2)a)(ii ie (iii), Even If the Defendant Has Not Requested or Has Explicitly Waived "Youthful Offender" Status, the Court Must Determine, On the Record, Whether Mitigating Circumstances Exist, and, If So, Must Determine On the Record Whether the Defendant Should Be Adjudicated a Youthful Offender

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a partial three-judge dissent, determined "when a defendant has been convicted of an armed felony or an enumerated sex offense pursuant to CPL 720.10 (2) (a) (ii) or (iii), and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3). The court must make such a determination on the record 'even where [the] 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' pursuant to a plea bargain ... . If the court determines, in its discretion, that neither of the CPL 720.10 (3) factors exist and states the reasons for that determination on the record, no further determination by the court is required. If, however, the court determines that one or more of the CPL 720.10 (3) factors are present, and the defendant is therefore an eligible youth, the court then 'must determine whether or not the eligible youth is a youthful offender' (CPL 720.20 [1])." **People v Middlebrooks, 2015 NY Slip Op 04875, CtApp 6-11-15**

EDUCATION-SCHOOL LAW/EMPLOYMENT LAW/CORRECTIONS LAW/CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES

Denial of Petitioner's Application for Employment as a School-Bus Driver, Based Upon His Criminal Record, Was Not Arbitrary and Capricious Despite Petitioner's Good Employment Record and His Obtaining a Certificate of Relief from Civil Disabilities

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge dissent, determined petitioner was properly precluded by the Department of Education (DOE) from employment as a school-bus driver, based upon his criminal record. The offenses were committed when petitioner was in his 40's and petitioner had had no further contact with the criminal justice system for 15 years. Petitioner had obtained a certificate of relief from

civil disabilities and had a good employment record, which included transporting children. The Court of Appeals held that the DOE's action was not arbitrary and capricious because the DOE considered all of the statutory factors in Corrections Law 752. The Court of Appeals noted that obtaining a certificate of relief from civil disabilities establishes a presumption of rehabilitation, but the certificate does not establish a prima facie right to a license or employment:

> The Correction Law sets out eight factors that a public agency or private employer must consider when deciding whether one of the § 752 exceptions applies:
>
> > "(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
> > (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
> > (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his [or her] fitness or ability to perform one or more such duties or responsibilities.
> > (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
> > (e) The age of the person at the time of occurrence of the criminal offense or offenses.
> > (f) The seriousness of the offense or offenses.
> > (g) Any information produced by the person, or produced on his [or her] behalf, in regard to his [or her] rehabilitation and good conduct.
> > (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public." (Correction Law § 753 [1].)
>
> [The Court of Appeals has held] that "[a] failure to take into consideration each of these factors results in a failure to comply with the Correction Law's mandatory directive" ... . **Matter of Dempsey v New York City Dept. of Educ., 2015 NY Slip Op 04028, CtApp 5-12-15**

ENVIRONMENTAL LAW

General Permit System by Which Smaller Communities Obtain Authorization to Discharge Stormwater Does Not Violate Federal or State Law

The Court of Appeals, in a full-fledged opinion by Judge Read, over a three-judge partial dissent, determined that the system by which smaller municipalities can obtain authorization for stormwater discharge without a public hearing did not violate federal or state law. The court's own overview of this very complex opinion provides the best summary:

> Runoff from rain and snow melt courses over roofs, roads, driveways and other surfaces, picking up pollutants along the way. It then passes through municipal storm sewer systems into rivers and lakes, adding the pollutants accumulated during its journey to those bodies of water. These municipal storm sewer systems thus differ from other entities that discharge effluents into our State's surface waters (for example, industrial or commercial facilities and sewage treatment plants) in three major ways: precipitation is naturally occurring, intermittent and variable and cannot be stopped; although municipalities operate sewer systems, stormwater contamination results from the often unforeseen or unpredictable choices of individual residents and businesses (for example, to let litter pile up or to use certain lawn fertilizers), as well as decisions made long ago about the design of roads, parking lots and buildings; and because stormwater runoff flows into surface waters through tens of thousands of individual outfalls, each locality's contribution to the pollution of a particular river or lake is difficult to ascertain or allocate through numeric limitations.
>
> Federal and state law prohibit discharges of stormwater from New York's municipal separate storm sewer systems in urbanized areas (referred to as MS4s) without authorization under a State Pollutant Discharge Elimination System (SPDES) permit. As an alternative to an individual SPDES permit, municipal separate storm sewer systems that serve a population under 100,000 (or small MS4s) may seek to discharge stormwater under a SPDES general permit. The 2010 General Permit — the subject of this lawsuit — requires these municipal systems to develop, document and implement a Stormwater Management Program (SWMP) in compliance with detailed specifications developed by the New York State Department of Environmental Conservation (DEC or the Department) to limit the introduction of pollutants into stormwater to the maximum extent practicable. To obtain initial coverage (i.e.,

authorization to discharge) under the terms of the 2010 General Permit, small MS4s must first submit a complete and accurate notice of intention (NOI) to DEC.

After the 2010 General Permit took effect on May 1st of that year, the Natural Resources Defense Council, Inc. (NRDC) and seven other environmental advocacy groups (collectively, NRDC) brought this hybrid CPLR article 78 proceeding/declaratory judgment action against DEC to challenge certain aspects of the 2010 General Permit. NRDC claims generally that by allowing small MS4s to gain coverage under the 2010 General Permit based upon an NOI reviewed only for completeness and not subject to an opportunity for a public hearing, DEC has created an "impermissible self-regulatory system" that fails to force local governments to reduce the discharge of pollutants to the maximum extent practicable — the statutory standard — and violates federal and state law [FN2]. Equating NOIs with applications for individual SPDES permits, Supreme Court granted partial relief to NRDC (35 Misc 3d 652 [Sup Ct Westchester County 2012]). The Appellate Division, as relevant here, rejected NRDC's federal and state law challenges to the 2010 General Permit (120 AD3d 1235 [2d Dept 2014]). We granted NRDC leave to appeal (23 NY3d 901 [2014]), and now affirm. **Matter of Natural Resources Defense Council, Inc. v New York State Dept. of Envtl. Conservation, 2015 NY Slip Op 03766, CtApp 5-7-15**

FAMILY LAW/PERSON LEGALLY RESPONSIBLE (PLR)/JURISDICTION

Uncle Was Properly Found to Be a "Person Legally Responsible" for the Abused Child---He Was Therefore a Proper "Respondent" in a Child Abuse/Neglect Proceeding

The Court of Appeals, over a three-judge dissent, determined the abused child's uncle, as a person legally responsible (PLR) for the child's care, was a proper "respondent" in the child abuse/neglect proceeding. The uncle argued he was not a PLR for the abused child and Family Court therefore did not have jurisdiction over the abuse/neglect proceeding against him:

> "...[T]he common thread running through the various categories of persons legally responsible for a child's care is that these persons serve as the functional equivalent of parents" ... . We held that deciding whether "a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case" ... . We listed factors to be considered when determining who is a PLR, which include (1) "the frequency and nature of the contact," (2) "the nature and extent of the control exercised by the respondent over the child's environment," (3) "the duration of the respondent's contact with the child," and (4) "the respondent's relationship to the child's parents" ... . **Matter of Trenasia J. (Frank J.), 2015 NY Slip Op 03765, CtApp 5-7-15**

FAMILY LAW/JUVENILE DELINQUENCY/CRIMINAL LAW/SUPPRESSION OF STATEMENT/CUSTODIAL INTERROGATION/MIRANDA WARNINGS/JUSTIFICATION DEFENSE/HARMLESS ERROR

Failure to Suppress Statement Was Not Harmless Error Because the Statement Undermined the Justification Defense---Proof Burdens for "Harmless Error" and the Justification Defense Explained

The Court of Appeals determined the Appellate Division properly found that the "unwarned" statement made by 11-year-old Delroy should have been suppressed. The statement was made in Delroy's apartment when a police officer asked him "what happened?". Under the circumstances, "a reasonable 11 year old would not have felt free to leave" at the time the question was asked. Therefore the question amounted to "custodial interrogation" in the absence of the Miranda warnings. The Court of Appeals, disagreeing with the Appellate Division, ruled the error was not harmless because the statement undermined Delroy's defense of justification. There was no question Delroy stabbed the 12-year-old complainant. But questions were raised by the trial testimony whether the stabbing was in self-defense. With respect to proof burdens for "harmless error" and the justification defense, the Court of Appeals explained:

> A trial court's error involving a constitutionally protected right is harmless beyond a reasonable doubt only if "there is no reasonable possibility that the error might have contributed to defendant's conviction" ... . "The People must show that any error was harmless beyond a reasonable doubt [and] [i]n deciding whether the People have met this burden, we consider both the overall strength of the case against defendant and the importance to that case of the improperly admitted evidence" ... .
>
> The record shows that while there was no doubt that Delroy had stabbed the complainant, there

was evidence supporting Delroy's justification defense. "The defense of justification . . . permits one to use deadly physical force on another when one reasonably believes that deadly physical force is being used or imminently will be used by such other person" ... . The People bear the burden of disproving the defense of justification beyond a reasonable doubt ... . * * *

...[T]he People have not demonstrated that there is no reasonable possibility that the wrongly admitted evidence might have contributed to the guilty finding. **Matter of Delroy S., 2015 NY Slip Op 04676, CtApp 6-4-15**

FORECLOSURE/DEFICIENCY JUDGMENTS/FAIR MARKET VALUE/REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

Where Proof of the Fair Market Value of Foreclosed Property (Offered in Support of a Motion for a Deficiency Judgment) Is Insufficient, Rather than Deny the Motion Outright, the Court Should Direct the Bank to Submit Additional Proof

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined Supreme Court properly failed to award a post-foreclosure-sale deficiency judgment to the bank because the bank's proof of the fair market value of the foreclosed property, although uncontested, was insufficient. However, Supreme Court should have allowed the bank to present additional proof establishing the fair market value:

> RPAPL 1371 (2) directs that, when a lender makes a motion for a deficiency judgment,
>
> > "the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment" ... .
>
> This provision is a directive that a court must determine the mortgaged property's "fair and reasonable market value" when a motion for a deficiency judgment is made. As such, when the court deems the lender's proof insufficient in the first instance, it must give the lender an additional opportunity to submit sufficient proof, so as to enable the court to make a proper fair market value determination. * * *
>
> It is, of course, within the court's discretion to elucidate the type of proof it requires so it can render a proper determination as to fair market value. The court may also order a hearing if it deems one necessary. In proceedings that are governed by section 1371, the court is in the best position to determine the type of proof that will allow it to comply with the directives of that section. Lenders seeking deficiency judgments, however, must always strive to provide the court with all the necessary information in their first application. **Flushing Sav. Bank, FSB v Bitar, 2015 NY Slip Op 04678, CtApp 6-4-15**

FORECLOSURE/STANDING

Possession of the Note, Not the Mortgage, Confers Standing to Foreclose

The Court of Appeals, in a full-fledged opinion by Judge Lippman, determined that possession of the note, not the mortgage, when the foreclosure proceedings are commenced is sufficient to confer standing upon the note-holder. " '[A]ny disparity between the holder of the note and the mortgagee of record does not stand as a bar to a foreclosure action because the mortgage is not the dispositive document of title as to the mortgage loan; the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose'... . . Accordingly, the [defendants'] argument that [plaintiff] lacked standing because it did not possess a valid and enforceable mortgage as of the commencement of this action is simply incorrect. The validity of the ... assignment of the mortgage is irrelevant to [plaintiff's] standing;"

> ... [T]o have standing, it is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law. In the current case, the note was transferred to [plaintiff] before the commencement of the foreclosure action — that is what matters.
>
> A transfer in full of the obligation automatically transfers the mortgage as well unless the parties agree that the transferor is to retain the mortgage (Restatement [Third] of Property [Mortgages] § 5.4, Reporter's Note, Comment b). The [defendants] misconstrue the legal principle that "an entity with a mortgage but no note lack[s] standing to foreclose" ... to also mean the

opposite — that an entity with a note but no mortgage lacks standing. Once a note is transferred, however, "the mortgage passes as an incident to the note" ... . **Aurora Loan Servs., LLC v Taylor, 2015 NY Slip Op 04872, CtApp 6-11-15**

FRAUD/FRAUDULENT INDUCEMENT/FRAUDULENT CONCEALMENT/JUSTIFIABLE RELIANCE

Whether Plaintiff "Justifiably Relied" on Alleged Misrepresentations Is Not Generally a Question Which Can Be Resolved in a Motion to Dismiss for Failure to State a Cause of Action

Reversing the appellate division, over two-judge dissent, the Court of Appeals determined (in the context of a motion to dismiss for failure to state a cause of action) plaintiff had sufficiently pled "justifiable reliance" on the representations at issue. The complaint alleged defendant (Goldman Sachs) "fraudulently induced plaintiff to provide financial guaranty for a synthetic collateralized debt obligation (CDO), known as ABACUS. In its complaint, plaintiff alleges that defendant fraudulently concealed the fact that its hedge fund client ..., which selected most of the portfolio investment securities in ABACUS, planned to take a "short" position in ABACUS, thereby intentionally exposing plaintiff to substantial liability; had plaintiff known this information, it would not have agreed to the guaranty." The complaint further alleged defendant affirmatively misrepresented the role of the hedge fund in answer to plaintiff's questions. Those allegations were sufficient to survive a motion to dismiss:

> To plead a claim for fraud in the inducement or fraudulent concealment, plaintiff must allege facts to support the claim that it justifiably relied on the alleged misrepresentations. It is well established that "if the facts represented are not matters peculiarly within the [defendant's] knowledge, and [the plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations" ... . Moreover, "[w]hen the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy" ... . Nevertheless, the question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss ... . **ACA Fin. Guar. Corp. v Goldman, Sachs & Co., 2015 NY Slip Op 03876, Ct App 5-7-15**

INSURANCE LAW/CONTRACT LAW/HACKING OF COMPUTERS

Unambiguous Language in Rider Covered Loss Caused by Hackers Gaining Unauthorized Access to the Insured's Computers, Not Loss Caused by Fraudulent Billing Entries by Authorized Users

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the rider in a financial institution bond covered loss caused by hackers gaining access to the insured's computer system, not loss caused by the entry of fraudulent billing information into the computer system by authorized users. Here fraudulent medical claims made by authorized users of the computer system cost the insured (Universal) $18 million. The language of the relevant rider was deemed unambiguous:

> ... [W]e conclude that it unambiguously applies to losses incurred from unauthorized access to Universal's computer system, and not to losses resulting from fraudulent content submitted to the computer system by authorized users. The term "fraudulent" is not defined in the Rider, but it refers to deceit and dishonesty (see Merriam Webster's Collegiate Dictionary [10th ed 1993]). While the Rider also does not define the terms "entry" and "change," the common definition of the former includes "the act of entering" or "the right or privilege of entering, access," and the latter means "to make different, alter" (id.). In the Rider, "fraudulent" modifies "entry" or "change" of electronic data or computer program, meaning it qualifies the act of entering or changing data or a computer program. Thus, the Rider covers losses resulting from a dishonest entry or change of electronic data or computer program, constituting what the parties agree would be "hacking" of the computer system. The Rider's reference to "fraudulent" does not also qualify what is actually acted upon, namely the "electronic data" or "computer program" itself. The intentional word placement of "fraudulent" before "entry" and "change" manifests the parties' intent to provide coverage for a violation of the integrity of the computer system through deceitful and dishonest access.
>
> Other language in the Rider confirms that the Rider seeks to address unauthorized access. First, the Rider is captioned "Computer Systems," and the specific language at issue is found under the subtitle "Computer Systems Fraud." These

headings clarify that the Rider's focus is on the computer system qua computer system. Second, under "EXCLUSIONS," the Rider exempts from coverage losses resulting directly or indirectly from fraudulent instruments "which are used as source documentation in the preparation of Electronic Data, or manually keyed into a data terminal." If the parties intended to cover fraudulent content, such as the billing fraud involved here, then there would be no reason to exclude fraudulent content contained in documents used to prepare electronic data, or manually keyed into a data terminal. **Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA., 2015 NY Slip Op 05516, CtApp 6-25-15**

INSURANCE LAW/NO-FAULT INSURANCE BENEFITS/SUMMARY JUDGMENT ON OVERDUE CLAIMS/EVIDENCE

Once Payment of a No-Fault Claim Submitted by the Medical Provider to the Insurer Is Overdue (Because the Insurer Has Not Timely Denied, Paid or Asked for Verification of the Claim) the Medical Provider Is Entitled to Summary Judgment Upon the Submission of Proof, in Admissible Form, that the Statutory Claim Form Was Mailed to and Received by the Insurer---The Medical Provider Need Not Submit Proof of the Validity of the Underlying Medical Services

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over a dissent, determined, once a no-fault claim is overdue (because the insurance company has not denied the claim, asked for verification of the claim, or paid the claim, within the statutory time-period), the plaintiff-medical-provider is entitled to summary judgment on the overdue claims after submitting proof the statutory claim forms were mailed to and received by the insurer. There is no requirement that the plaintiff submit proof of the validity of the underlying medical services:

> ...[T]he Appellate Division properly determined that plaintiff met its prima facie summary judgment burden. As relevant here, to support its motion, plaintiff submitted the eight verification of treatment forms and Matatov's affidavit. The documents submitted by plaintiff meet the business records exception to the hearsay rule.
>
> Malatov's [the billing agent's] affidavit states that based on his business agreement with plaintiff, SUM Billing created the verification of treatment forms in the regular course of its business and that the forms were created soon after the services were provided by plaintiff ... . Indeed, the tight timetable of the no-fault scheme requires prompt submission of proof of claim in order to receive reimbursement. Matatov's affidavit outlines the office practices and procedures used by SUM Billing to mail claim forms to insurers and demonstrates that Matatov himself mails the forms. Matatov explained that SUM Billing relies on these forms in the performance of its business. Further, the affidavit states how and when the forms at issue here were created and that they were mailed to defendant within the statutory time frame. Thus, as plaintiff was able to demonstrate SUM Billing's office mailing practices and procedures, "a presumption arises that those notices have been received by the insure[rs]" ... . It is undisputed that defendant did not pay or deny seven out of the eight claims at issue. Consequently, those claims are overdue. Plaintiff, therefore, satisfied its burden on summary judgment by demonstrating the mailing of the proof of claim forms, and their receipt by the insurer. **Viviane Etienne Med. Care v Country-Wide Ins. Co., 2015 NY Slip Op 04787, CtApp 6-10-15**

INSURANCE LAW/UNINSURED/UNDERINSURED MOTORIST COVERAGE/POLICE VEHICLES

Police Vehicles Are Excluded from the Meaning of "Motor Vehicle" in the Insurance Law---Passenger-Police-Officer Injured In a Police Vehicle by an Uninsured/Underinsured Driver Is Not Covered Under the Uninsured/Underinsured Motorist Provision of the Police-Officer-Driver's Personal Policy

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, over a dissent, determined that a police vehicle is not a motor vehicle within the meaning of the Insurance Law. Therefore a police officer, who was injured in a police vehicle driven by another police officer, could not recover under the police-officer-driver's uninsured/underinsured motorist coverage in the driver's personal insurance policy:

> ... Insurance Law §§ 3420 (e) and 3420 (f) (1) do not directly define "motor vehicle" in so many words, but Insurance Law § 3420 (e) does refer to "a motor vehicle or a vehicle as defined in [VTL 388 (2)]." VTL 388 is the sole provision of VTL article 11, which governs civil liability for negligence in the operation of vehicles. VTL 388 (2) states, "As used in this section, 'vehicle' means a 'motor vehicle', as defined in [VTL 125], except fire and police vehicles," and certain other vehicles not relevant here (see VTL 388 [2]). * * *

... [B]ecause the liability insurance provision of Insurance Law § 3420 (e) had traditionally dovetailed with the coverage of VTL 388 and its predecessors, Insurance Law § 3420 (e) employed the phrase "of a motor vehicle or of a vehicle as defined in [VTL 388]" as an imprecise way of incorporating the limitations of VTL 388 into Insurance Law § 3420 (e). In other words, Insurance Law § 3420 (e) used VTL 388 (2) to redefine "motor vehicle" as exempting police vehicles from the automobile insurance sections of Insurance Law § 3420. Given that the uninsured motorist and SUM coverage sections of Insurance Law § 3420 had originated as outgrowths designed to simply fill the uninsured or underinsured motorist "gaps" in the compulsory insurance statute and Insurance Law § 3420 (e), rather than to expand the class of covered vehicles, the Court rightly decided that Insurance Law §§ (f) (1) and (f) (2) logically applied to the limited category of "motor vehicles" referenced in Insurance Law § 3420 (e), thus also excluding police vehicles. Since SUM coverage under Insurance Law § 3420 (f) (2) was just a variant of uninsured coverage under subsection (f) (1) of the same statute, the Court appropriately found that SUM coverage was likewise limited to non-police vehicles. **Matter of State Farm Mut. Auto. Ins. Co. v Fitzgerald, 2015 NY Slip Op 05626, CtApp 7-1-15**

LABOR LAW

Plaintiff, Who Fell Through an Open Manhole, Entitled to Summary Judgment on Labor Law 240 (1) Cause of Action---Failure to Set Up Guard Rails Was a Proximate Cause--Liability Imposed Regardless of Plaintiff's Own Negligence and Regardless of Whether the Owner, Contractor or Agent Supervised or Controlled the Work

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a two-judge dissent, determined plaintiff, who fell through an uncovered manhole, was entitled to partial summary judgment on his Labor Law 240 (1) claim based on testimony the manhole should have been surrounded by guard rails. The court also determined there was a question of fact whether the safety consultant, IMS, was liable as a "statutory agent" under Labor Law 240 (1). The court explained that the obligation to provide safety devices is a nondelegable duty which imposes liability regardless of whether owner, contractor or agent supervises or controls the work. Where 240 (1) is violated, the plaintiff's negligence is not a defense, unless plaintiff's negligence is the sole proximate cause of the injury:

Section 240 (1) provides, in relevant part:

"All contractors and owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor [certain enumerated] [*4]and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The statute imposes upon owners, contractors and their agents a nondelegable duty that renders them liable regardless of whether they supervise or control the work ... . "Where an accident is caused by a violation of the statute, the plaintiff's own negligence will not furnish a defense"; however, "where a plaintiff's own actions are the sole proximate cause of the accident, there can be no liability" ... . Thus, in order to recover under section 240 (1), the plaintiff must establish that the statute was violated and that such violation was a proximate cause of his injury ... . **Barreto v Metropolitan Tr. Auth., 2015 NY Slip Op 03875, CtApp 5-7-15**

LANDLORD-TENANT/SECTION 8 RENT SUBSIDIES/NEW YORK CITY HOUSING AUTHORITY (NYCHA)/STATUTE OF LIMITATIONS

Triggering Event for the Statute of Limitations Re: a Challenge of the Termination of Section 8 Rent Subsidies Is the Sending of the So-Called T-3 Letter-Notification, Irrespective of Whether the Two Prior Required Letter-Notifications Were Sent

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a three-judge dissent, determined that the so-called T-3 letter to tenants from the New York City Housing Authority (NYCHA), which notifies tenants of the termination of their Section 8 rent subsidies, is the triggering event for the four-month statute of limitations for challenging the termination. The applicable "*Williams* consent judgment" mandates a three-step procedure for termination of the rent subsidies, essentially three notifications to tenants, of which the T-3 letter is the last. The issue before the court was whether the NYCHA's inability to show the first two notifications were properly sent prevented the statute of limitations from running when the T-3 letter was sent. The Court of Appeals held that, although the failure to follow the three-step procedure is a defense to the termination of the subsidies, the statute of limitations for any challenge properly runs from the sending of the T-3 letter:

The plain language of the Williams consent judgment draws a distinction between what is required to commence the limitations period for a challenge to a termination of Section 8 benefits, on the one hand, and what is required for NYCHA to establish the merit of such a termination — including NYCHA's full compliance with the notice requirements — on the other hand. **Matter of Banos v Rhea, 2015 NY Slip Op 04029, CtApp 5-12-15**

MENTAL HYGIENE LAW ARTICLE 10 PROCEEDINGS/SEX OFFENDERS/TRIALS/TESTIFYING BY ELECTRONIC APPEARANCE

In Extraordinary Circumstances, Testimony by Two-Way Video Conference Can Be Used In Mental Hygiene Law Article 10 Proceedings

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined that the judge in a Mental Hygiene Law article 10 proceeding has the discretion, in extraordinary circumstances, to allow testimony by electronic appearance (live two-way video conference). Here, however, the respondent objected to the procedure and the State did not demonstrate the requisite extraordinary circumstances. The error was deemed harmless however:

> ...[W]e hold that permitting the two-way, live video testimony ... was within the discretion of the court. As we have previously explained, "[l]ive televised testimony is certainly not the equivalent of in-person testimony, and the decision to excuse a witness's presence in the courtroom should be weighed carefully. Televised testimony requires a case-specific finding of necessity; it is an exceptional procedure to be used only in exceptional circumstances" ... . [Here} [p]ermitting [the witness] to deliver her testimony via video conference over respondent's objection without requiring a proper showing of exceptional circumstances was error. **Matter of State of New York v Robert F., 2015 NY Slip Op 04162, Ct App 5-14-15**

MENTAL HYGIENE LAW/GUARDIANS OF INCAPACITATED PERSONS/DEBTS OF INCAPACITATED PERSONS. TRUSTS AND ESTATES. STATUTORY INTERPRETATION

The Guardian of an Incapacitated Person May Not, After the Incapacitated Person's Death, Use Guardianship Funds to Pay a Debt Incurred by the Incapacitated Person Prior to Death (Here a Debt Owed the Nursing Home Where the Incapacitated Person Was Cared For)

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined Mental Hygiene Law 81.44 does not permit "a guardian to retain property of an incapacitated person after the incapacitated person has died for the purpose of paying a claim against the incapacitated person that arose before such person's death." "... [T]he issue [here was] whether property held by ... [the] guardian at the time of [the incapacitated person's] death automatically became the property of her estate or could be withheld by [the guardian] for the purpose of paying the claim, out of the guardianship account, that [the nursing home] had noticed before [the incapacitated person] died." Based upon the legislative history of Mental Hygiene Law 81.44, the court determined that, after an incapacitated person's death, the guardian may use guardianship funds only to pay claims related to the administration of the guardianship, and may not use them to pay debts incurred by the incapacitated person:

> The plain language of subdivision (d) of Mental Hygiene Law § 81.44 requires that it is to be read in conjunction with subdivision (e) of the same section, which considers the property a guardian may retain following the death of an incapacitated person. Further, our precedent requires such a review ... . In subdivision (e) of section 81.44, the Legislature allowed a guardian to retain from the estate of a deceased incapacitated person "property equal in value to the claim for administrative costs, liens and debts" (emphasis added). That construct suggests that the Legislature meant to permit the retention only of property equal in value to the expenses incurred with respect to the administration of the guardianship, i.e., property needed to satisfy administrative costs, administrative liens, and administrative claims. * * *
>
> ...[The legislative history] compels the conclusion that the Legislature did not intend for section 81.44 to permit a guardian to retain funds following the death of an incapacitated person for the purpose of paying a claim (other than a claim related to the administration of the guardianship) against the incapacitated person that arose before that person's death. Inasmuch as [the nursing home's] claim for medical services

rendered to [the incapacitated person] is unrelated to the administration of her guardianship, we conclude that Mental Hygiene Law § 81.44 does not allow [the guardian] to withhold from [the incapacitated person's] estate funds to pay [the incapacitated person's] debt to [the nursing home]. **Matter of Shannon, 2015 NY Slip Op 04789, CtApp 6-10-15**

MUNICIPAL LAW/IMPLIED DEDICATION AS PUBLIC PARKLAND/PUBLIC TRUST DOCTRINE/ENVIRONMENTAL LAW

City Had Not Impliedly Dedicated Certain Parcels of Land as Public Parklands---Therefore the Parcels, Which Had Been Used as Public Parks, Were Not Protected by the Public Trust Doctrine and Could Be Sold by the City Without the Approval of the State Legislature

The Court of Appeals determined certain city-owned parcels of land which had been used as public parkland had not been impliedly dedicated as public parklands. Therefore the parcels were not under the protection of the public trust doctrine and could be sold by the city without the approval of the state legislature:

> In support of their appeal, petitioners again advance their argument that the City's actions manifest its intent to impliedly dedicate the parcels as parkland. Under the public trust doctrine, a land owner cannot alienate land that has been impliedly dedicated to a public use without obtaining the approval of the Legislature ... . A party seeking to establish such an implied dedication and thereby successfully challenge the alienation of the land must show that: (1) "[t]he acts and declarations by the land owner indicating the intent to dedicate his land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication" and (2) that the public has accepted the land as dedicated to a public use ... .
>
> It remains an open question whether the second prong of the implied dedication doctrine applies to a municipal land owner, but we need not and do not resolve that issue on this appeal because we conclude that the City's acts are not an unequivocal manifestation of an intent to dedicate the parcels as permanent parkland. With respect to the element of the owner's intent — the only matter contested in this appeal — if a landowner's acts are "equivocal, or do not clearly and plainly indicate the intention to permanently abandon the property to the use of the public, they are insufficient to establish a case of dedication" ... . * * *
>
> Here, as the Appellate Division noted, several documents created prior to this litigation demonstrate that the City did not manifest an unequivocal intent to dedicate the contested parcels for use as public parks. The permit, memorandum of understanding and lease/license relating to Mercer Playground, LaGuardia Park and LaGuardia Corners Gardens, respectively, show that "any management of the parcels by the [DPR] was understood to be temporary and provisional" ... . Thus, those documents' restrictive terms show that, although the City permitted and encouraged some use of these three parcels for recreational and park-like purposes, it had no intention of permanently giving up control of the property. And, as the Appellate Division observed, "the City's "refus[al of] various requests to have the streets de-mapped and re-dedicated as parkland" ... further indicates that the City has not unequivocally manifested an intent to dedicate the parcels as parkland. **Matter of Glick v Harvey, 2015 NY Slip Op 05593, CtApp 6-30-15**

NEGLIGENCE/COMMUNITY COLLEGES/COUNTY LAW/EDUCATION LAW/MUNICIPAL LAW

County Was Not Responsible for the Day to Day Operation of Community College and Did Not Own the Dormitory Where Plaintiff's Decedent Suffered Cardiac Arrest and Died---County Owed No Duty of Care to Plaintiff's Decedent

Plaintiff's decedent died of cardiac arrest in a Sullivan County Community College (SCCC) dormitory. Plaintiff sued the county, alleging the dormitory should have been equipped with a defibrillator and/or should have had an emergency medical response plan in effect. The Court of Appeals determined the complaint against the county was properly dismissed. Although the county was the "sponsor" of the community college, it did not own the dormitory and did not manage the day-to-day operation of the community college, which was handled by the board of trustees (Education Law 6306):

> While the County exercises significant influence and control over SCCC's finances, only the College's board of trustees is authorized to manage SCCC's facilities; therefore, it alone is charged with the duty of care ... . And here, the County additionally established that it did not even own the dormitory where decedent's accident occurred ... . **Branch v County of Sullivan, 2015 NY Slip Op 04756, CtApp 6-9-15**

NEGLIGENCE/MEDICAL MALPRACTICE/"FOREIGN OBJECT"/STATUTE OF LIMITATIONS/CPLR 214-a

Catheter, Although Deliberately Inserted During Surgery for Temporary Monitoring Purposes, Was a "Foreign Object" Within the Meaning of CPLR 214-a---Action Brought Within One Year of the Discovery of the Catheter (22 Years after Insertion) Was Timely

The Court of Appeals, in a comprehensive opinion by Judge Read, determined a catheter left in plaintiff's heart after surgery in 1986 (when plaintiff was three years old) was a "foreign object." Therefore the statute of limitations did not start to run until the presence of the catheter was "discovered" in 2008. Plaintiff's complaint, brought within one year of discovery, was therefore timely. The issue was whether the catheter could be considered a "fixation device" because it was intentionally inserted. If so, the one-year-from-discovery "foreign object" statute of limitations (see CPLR 214-a) would not have applied and the complaint would have been untimely. The Court of Appeals held that the catheter (which was to temporarily monitor heart function after surgery) was not a "fixation device" because, although it was intentionally inserted, it was not inserted to serve a "postsurgery healing function" and it was to be removed a few days after insertion. Thus the catheter was different in kind from a "fixation device," such as a "stent" or a "suture," deliberately inserted to serve a "healing function:"

> Here, the catheter inserted in the left atrium of plaintiff's heart performed no securing or supporting role during or after surgery. As explained by plaintiff's expert, and uncontroverted by defendants, the catheters functioned like a sentinel, allowing medical personnel to monitor atrial pressure so that they might take corrective measures as required; the catheters were, in the words of plaintiff's expert, "a conduit for information from [plaintiff's] cardiovascular system." Because the catheters under the facts of this case are therefore not fixation devices (or chemical compounds or prosthetic aids or devices), they are not categorically excluded from the foreign object exception in CPLR 214-a.
>
> The question then becomes whether the catheters are analogous to tangible items like ... clamps ... or other surgical paraphernalia (e.g., scalpels, sponges, drains) likewise introduced into a patient's body solely to carry out or facilitate a surgical procedure. We conclude that they are ...

. **Walton v Strong Mem. Hosp., 2015 NY Slip Op 04786, CtApp 6-10-15**

NEGLIGENCE/MUNICIPAL LAW (NEW YORK CITY)/VEHICLE AND TRAFFIC LAW/RULES OF THE CITY OF NEW YORK (RCNY)

"Reckless Disregard" Standard of Care Applies to Operators of Street Sweepers in New York City---Standard Explained

The Court of Appeals determined the "reckless disregard" standard in Vehicle and Traffic Law 1103, not the ordinary negligence standard, applied to the operator of a New York City street sweeper who was in the process of cleaning the street when the sweeper struck plaintiff's car. A question of fact had been raised whether the applicable standard of care was violated:

> ... [U]nder VTL § 1642, the City of New York is authorized to establish additional rules, including rules that supercede those of the State (see VTL § 1642 [a] ["the legislative body of any city having a population in excess of one million, may by local law . . . restrict or regulate traffic on or pedestrian use of any highway . . .]). At the time of the accident, 34 RCNY [Rules of the City of New York] § 4-02 (d) (1)(v) provided that VTL § 1103 applies "to any person or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway" and that "such persons are not relieved from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions of this subparagraph protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others" (34 RCNY § 4-02 [d] [1] [iv]).
>
> In Riley [95 NY2d 455], this Court held that the unambiguous language of VTL § 1103 (b), as further supported by its legislative history, made clear that the statute exempts from the rules of the road all vehicles, including sanitation sweepers, which are "actually engaged in work on a highway" (95 NY2d at 460), and imposes on such vehicles a recklessness standard of care (see id. at 466). The Court further concluded that liability under that standard is established upon a showing that the covered vehicle's operator '"has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow' and has done so with conscious indifference to the outcome" (id. at

466...). **Deleon v New York City Sanitation Dept., 2015 NY Slip Op 04788, CtApp 6-9-15**

NEGLIGENCE/STRICT LIABILITY/ANIMAL LAW

There Is No Cause of Action for "Negligent Handling" of a Dog in New York

The Court of Appeals, in a memorandum decision addressing two dog-related personal injury cases, with two concurring opinions, and over three dissenting opinions, kept New York law as it was with respect to the available causes of action for injuries caused by dogs. Negligence theories are not available, and a strict liability theory requires proof the dog-owners were aware of the dog's propensity to cause injury. In one case (Doerr v Goldsmith) the dog was called by one of its owners and ran across a bike path where plaintiff, a bicyclist, struck the dog and was injured. In the other case (Dobinski v Lockhart), dogs were let out of the owners' house and ran into the road where plaintiff-bicyclist struck one of the dogs and was injured. The court kept the existing distinction between domestic pets and farm animals. The owner of a farm animal which wanders off the farm and causes injury may be liable for negligently allowing the farm animal to escape. The same theory of owner-negligence was not extended to domestic animals (dogs here). The dog owners who allowed their dog to run across a bike path in response to a command could not be held liable for negligence in handling the dog. And the dog owners whose dogs ran into the road after being let outside could not be liable for negligently handling the dogs and could not held strictly liable in the absence of proof they were aware of the dogs' relevant propensity:

> Under the circumstances of these cases and in light of the arguments advanced by the parties, Bard v Jahnke (6 NY3d 592 [2006]) constrains us to reject plaintiffs' negligence causes of action against defendants arising from injuries caused by defendants' dogs ... . We decline to overrule our recently reaffirmed precedent (see Bloomer, 21 NY3d at 918; Petrone, 12 NY3d at 547-555). Furthermore, our holding in Hastings v Sauve (21 NY3d 122 [2013]) does not allow plaintiffs to recover based on defendants' purported negligence in the handling of their dogs, which were not domestic farm animals subject to an owner's duty to prevent such animals from wandering unsupervised off the farm (see Hastings, 21 NY3d at 124-126).
>
> [In Dobinski v Lockhart] the Appellate Division properly granted summary judgment to defendants with respect to plaintiff's strict liability cause of action. Defendants carried their initial burden on summary judgment of establishing that they did not know of any vicious propensities on the part of their dogs. In response, plaintiff failed to demonstrate the existence of a triable issue of fact as to whether defendants had notice of the animals' harmful proclivities, and consequently, defendants were entitled to summary judgment on plaintiff's strict liability claim ... . **Doerr v Goldsmith, 2015 NY Slip Op 04752, CtApp 6-9-15**

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS/RIGHT OF SEPULCHER/PUBLIC HEALTH LAW/MUNICIPAL LAW

The Medical Examiner Who Conducted an Autopsy of Plaintiffs' 17-Year-Old Son Upon the Son's Death in an Auto Accident Was Not Under a Statutory or Ministerial Duty to Return the Brain or to Inform Plaintiffs He Had Removed The Brain for Further Examination and Testing

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a two-judge dissent, determined the medical examiner, who conducted an autopsy of plaintiffs' 17-year-old son after his death in a car accident, was under no statutory or ministerial duty to inform plaintiffs he had removed plaintiffs' son's brain for further examination and testing, nor was he under a duty to return the brain. Plaintiffs therefore did not have a "negligent infliction of emotional distress" or "violation of right of sepulcher" cause of action against the city. (Plaintiffs had been awarded significant damages at trial:)

> When the Legislature enacted statutes granting medical examiners (and others) the authority to conduct autopsies and dissections (see Public Health Law §§ 4209; 4210), it acknowledged through the enactment of section 4215 (1) that there would be situations where the decedent's body may not be buried or incinerated within a reasonable time after the decedent's death, as per section 4200 (1)'s directive. Thus, section 4215 strikes a balance permitting the lawful dissection of a body, while concomitantly ensuring that once the lawful purposes have been accomplished the body will be buried, incinerated or properly disposed of as per section 4200 (1), and that the penalties for the interference or injuries to the body would "apply equally to the remains of the body after dissection . . ."
>
> When section 4200 (1) and section 4215 (1) are read in tandem, there is no language that would cause a medical examiner to divine from section 4215 (1) that he or she is required to return not

only decedent's body, but the organs and tissue samples that the medical examiner is legally permitted to remove. Similarly, our right of sepulcher jurisprudence does not mandate that a medical examiner return decedent's organs and tissue samples. Thus, because there was no governing rule or statutory command requiring a medical examiner to turn over organs and tissue samples, it could not be said that he or she has a ministerial duty to do so. At most, a medical examiner's determination to return only the body without notice that organs and tissue samples are being retained is discretionary, and, therefore, no tort liability can be imposed for either the violation of the common-law right of sepulcher or Public Health Law § 4215 (1). Once a medical examiner returns a decedent's body sans the organs and tissue samples, the medical examiner for all intents and purposes has complied with the ministerial duty under section 4215 (1). Absent a duty to turn over organs and tissue samples, it cannot be said that the medical examiner has a legal duty to inform the next of kin that organs and tissue samples have been retained. * * *

There is simply no legal directive that requires a medical examiner to return organs or tissue samples derived from a lawful autopsy and retained by the medical examiner after such an autopsy. The medical examiner's obligations under both the common-law right of sepulcher and Public Health § 4215 (1) are fulfilled upon returning the deceased's body to the next of kin after a lawful autopsy has been conducted. If the Legislature believes that next of kin are entitled to notification that organs, tissues and other specimens have been removed from the body, and that they are also entitled their return prior to burial of the body or other disposition, it should enact legislation delineating the medical examiner's obligations in that regard, as it is the Legislature that is in the best position to examine the issue and craft legislation that will consider the rights of families and next of kin while concomitantly taking into account the medical examiner's statutory obligations to conduct autopsies. **Shipley v City of New York, 2015 NY Slip Op 04791, CtApp 6-10-15**

PHYSICIAN-PATIENT PRIVILEGE/SEXUAL ABUSE OF A CHILD/CRIMINAL LAW

Admission of Child Abuse Made by Defendant to Psychiatrist Protected by Physician-Patient Privilege---Even Though the Admission Can Be Disclosed in Child Protective Proceedings, the Privilege Applies in a Criminal Trial

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined that an admission of child sexual abuse made to the defendant's psychiatrist was privileged. The psychiatrist should not have been allowed to testify about the admission at defendant's trial. The error was not harmless. The Court made it clear that the relaxed evidentiary standards in child protective proceedings where physicians are required to report abuse, do not extend to the context of a criminal trial where the defendant's liberty is at stake:

> The Legislature has determined that the protection of children is of paramount importance, so much so that it has either limited or abrogated the privilege through statutory enactments.
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> The People erroneously assert that these exceptions place offenders on notice that the physician-patient privilege does not apply to statements or admissions triggering a duty to disclose. But it is one thing to allow the introduction of statements or admissions in child protection proceedings, whose aim is the protection of children, and quite another to allow the introduction of those same statements, through a defendant's psychiatrist, at a criminal proceeding, where the People seek to punish the defendant and potentially deprive him of his liberty. Evidentiary standards are necessarily lower in the former proceedings than in the latter because the interests involved are different. Thus, the relaxed evidentiary standards in child protection proceedings lend no credence to the People's argument that defendant should have known that any admission of abuse he made to his psychiatrist would not be kept confidential. **People v Rivera, 2015 NY Slip Op 03764, CtApp 5-7-15**

PREEMPTION/ATTORNEYS/MUNICIPAL LAW/NEW YORK CITY LOCAL LAW/ADMINISTRATIVE CODE OF THE CITY OF NEW YORK/JUDICIARY LAW/REGULATION OF DEBT COLLECTION

Local Law, Which Regulates the Conduct of Attorneys Who Regularly Engage in (Nonlegal) Activities Traditionally Performed by Debt Collectors, Not Preempted by the Judiciary Law

The Court of Appeals, over a two-judge dissent, answering a certified question from the Second Circuit, determined that New York City's Local Law 15, which regulates debt-collection practices, including some debt-collection practices used by attorneys, was not preempted by the Judiciary Law. The Local Law only reaches attorneys who regulary engage in activities traditionally performed by debt collectors. The court found no conflict between the Local Law and the Judiciary Law (no "conflict" preemption). And the court found that the Judiciary Law does not evince an intent to preempt the field of regulating nonlegal services performed by attorneys (no "field" preemption):

> Local Law 15, enacted in 2009, amended the debt collection legislation in several ways. Significantly, it expanded the definition of "debt collection agency" to "include a buyer of delinquent debt who seeks to collect such debt either directly or through the services of another by, including but not limited to, initiating or using legal processes or other means to collect or attempt to collect such debt" (Administrative Code of City of NY § 20-489 [a]). The amendments continued a limited exemption for attorneys or law firms that were "collecting a debt in such capacity on behalf of and in the name of a client solely through activities that may only be performed by a licensed attorney" (Administrative Code of City of NY § 20-489 [a][5]). The exemption, however, did not cover "any attorney-at-law or law firm or part thereof who regularly engages in activities traditionally performed by debt collectors, including, but not limited to, contacting a debtor through the mail or via telephone with the purpose of collecting a debt or other activities as determined by rule of the commissioner" (Administrative Code of City of NY § 20-489 [a][5]). * * *
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> Plaintiffs assert both conflict and field preemption in connection with the argument that Local Law 15 is preempted by the Judiciary Law. The Local Law, by its terms, governs the conduct of debt collection agencies. Although attorneys that are acting in a debt collecting capacity may fall within its penumbra, it does not purport to regulate attorneys as such. In fact, it clearly states that it does not pertain to attorneys who are engaged in the practice of law on behalf of a particular client. There is no express conflict between the broad authority accorded to the courts to regulate attorneys under the Judiciary Law and the licensing of individuals as attorneys who are engaged in debt collection activity falling outside of the practice of law and, thus, the Local Law does not impose an additional requirement for attorneys to practice law. Rather, the regulatory schemes can be seen as complementary to, and compatible with, one another. * * *
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> The courts' authority to regulate attorney conduct does not evince an intent to preempt the field of regulating nonlegal services rendered by attorneys. "Intent to preempt the field may 'be implied from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area'" (People v Diack, 24 NY3d 674, 679 [2014] [citations omitted]). Although the courts may have preempted the field of regulating attorney misconduct, that authority does not extend to all nonlegal aspects of attorney behavior, which can be governed by both civil and criminal law, including regulatory proscriptions. To the extent that the courts have exercised some authority over nonlegal services provided by attorneys (see Rules of Professional Conduct 5.7), the regulation in that area is not "so detailed and comprehensive so as to imply that" the field has been preempted ... . **Eric M. Berman, P.C. v City of New York, 2015 NY Slip Op 05594, CtApp 6-30-15**

REAL PROPERTY/DEEDS/MORTGAGES/FORGED DEED/FRAUD/STATUTE OF LIMITATIONS

A Forged Deed Is Void Ab Initio and Any Encumbrance on Real Property Based Upon a Forged Deed Is Null and Void---Action Based Upon a Forged Deed Is Not Therefore Subject to the Six-Year Statute of Limitations for Fraud

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent, determined that a forged deed is void ab initio and neither a forged deed nor a mortgage interest based upon a forged deed is valid at any time. Therefore, the six-year statute of limitations for fraud does not apply and the action was not time-barred: "The legal question raised in this appeal is whether plaintiff ... is time-barred under CPLR 213 (8) from seeking to set aside and cancel, as null and void, defendant Bank of America's mortgage interest in real property conveyed on the authority of a forged deed.

Under our prior case law it is well-settled that a forged deed is void ab initio, meaning a legal nullity at its inception. As such, any encumbrance upon real property based on a forged deed is null and void. Therefore, the statute of limitations set forth in CPLR 213 (8) does not foreclose plaintiff's claim against defendant. " **Faison v Lewis. 2015 NY Slip Op 04026, Ct App 5-12-15**

TRUSTS AND ESTATES/WILLS/REVOCATION BY DESTRUCTION

Questions Concerning the Presumption that a Will Not Found After a Thorough Search Had Been Revoked (by Destruction) Should Have Been Resolved Before the Will Was Admitted to Probate---Matter Remitted to Surrogate's Court

The Court of Appeals, in a full-fledged opinion by Judge Lippman, with a cautionary concurrence (describing the majority's factual discussion as dicta, not binding on remittal), determined that there was an open question whether a 1996 will had been revoked. No will was found upon decedent's death in 2010 and letters of administration were issued to decedent's parents. Petitioner sought to revoke the letters and admit to probate a 1996 will which was drawn up when decedent was married to petitioner's son. Petitioner had been named executor in the 1996 will. The 1996 will left all of decedent's property to her then husband (petitioner's son). Decedent and petitioner's son divorced in 2007. Based upon the testimony of decedent's ex-husband (petitioner's son), the majority concluded it was possible there were four "duplicate original" 1996 wills, one of which had been in the possession of the decedent at her Clayton, New York, residence. Because that will was not found after a thorough search, a presumption arose that the 1996 will had been destroyed by the decedent and thereby revoked. The open questions concerning whether decedent was in possession of a "duplicate original" 1996 will (as opposed to merely a copy), and whether that will was revoked by destruction, should have been resolved before admitting the 1996 will to probate. The matter was remitted to Surrogate's Court to settle the open questions:

> A will may, of course, be revoked not only by means of a writing executed in the manner of a will, but by the testator's act of destroying it with revocatory intent (EPTL 3-4.1 [a] [2] [A] [i]), which act achieves the revocatory purpose even if there remain will duplicates outstanding (Crossman v Crossman, 95 NY 145, 152 [1884]). That a testator has in fact revoked a will by destruction is strongly presumed where the will, although once possessed by the testator, cannot be found posthumously despite a thorough search ... . The presumption, once raised, "stands in the place of positive proof" ... and must be rebutted by the will's proponent as a condition of probate
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> Here, the facts of record, adduced in critical part through the testimony of petitioner's son, supported inferences that decedent executed her 1996 will in quadruplicate, with each document having been meant to possess the force of an original instrument; that one of the will duplicates was kept at the Clayton, New York home where decedent resided after her divorce; and that, after a thorough search, no will was found there. Plainly, these circumstances sufficed to raise the presumption that decedent revoked her 1996 will by destroying it. It is equally plain that that presumption was not rebutted. None of the other duplicate wills was produced or otherwise accounted for. And, although petitioner now urges that the unproduced duplicates were merely copies, the uncertain status of the will duplicates, although commented upon by the Surrogate, was never resolved. We are left then with a will admitted to probate upon a record sufficient only to disprove it.
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> It is precisely to avoid such an incongruous outcome that the governing rule of proceeding has long been that "[a]s soon as it is brought to the attention of the surrogate that there are duplicates of a will presented to him for probate, it is proper that he should require [the] duplicates to be presented, not for the purpose of admitting both as separate instruments to probate, but that he may be assured whether the will has been revoked, and whether each completely contains the will of the testator" (Crossman, 95 NY at 152...). Here, it is manifest that the Surrogate's attention was drawn to the existence of will duplicates, but the consequently arising issues as to the will's validity were not resolved as they should have been in accordance with Crossman's instruction. Petitioner was required not merely to exclude the possibility, but to rebut the legal presumption of revocation, sufficiently raised by the ex-husband's testimony as to the existence of will duplicates, one of which had been kept, but was not found after decedent's passing, at her post-divorce residence. **Matter of Lewis, 2015 NY Slip Op 04674, CtApp 6-4-15**