NEW YORK APPELLATE DIGEST, LLC

Bruce F. Freeman, Esq., Editor

Email: NewYorkAppellateDigest@gmail.com

Phone: 585 645 8902

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

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Major Categories Addressed In The Digest This Month:

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The Second Department determined the tolling provision in CPLR 205 which allows an action which was dismissed (but not on the merits) to be started again within six months applies to Article 78 actions seeking review of an administrative ruling, here a ruling by the NYS Liquor Authority:

> As the petitioner correctly contends, CPLR 205(a) applies not only to actions but also to special proceedings under CPLR article 78 ... . The toll of CPLR 205(a) would not apply, however, if the prior proceeding was dismissed on the merits; thus, the court must determine whether the order dismissing the prior proceeding is entitled to res judicata effect ... .
>
> Here, the prior proceeding was dismissed after being marked off the calendar. Contrary to the Authority's contention, "[a] dismissal of an action by being marked off the Trial Calendar is not a dismissal on the merits," and "[a] new action on the same theory is therefore not barred by the doctrine of res judicata"... . Moreover, there is nothing in the order denying the petitioner's motion to restore the prior proceeding to the calendar which suggests that the prior proceeding was dismissed with prejudice ... . **Matter of Lindenwood Cut Rate Liquors, Ltd. v New York State Liq. Auth., 2018 NY Slip Op 03680, Second Dept 5-23-18**

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THE MEANING OF 'SUBSTANTIAL EVIDENCE' SUFFICIENT TO SUPPORT A DETERMINATION IN AN ADMINISTRATIVE HEARING EXPLAINED (SECOND DEPT).

The Second Department, in confirming the Commissioner of Public Safety's termination of General Municipal Law 207-a benefits for an injured firefighter, explained what the term "substantial evidence" means in the context of an administrative hearing:

> ... [A]fter an examination, the respondents' medical examiner found that the petitioner was capable of returning to light duty and that there would be a "medium to moderate" chance that he would be able to resume full duty if he underwent spinal fusion surgery. Thereafter, the respondents' fire chief sent the petitioner a letter ordering him to return to work ... , to assume a light duty position, or risk losing his benefits. A second letter ... directed the petitioner to schedule the fusion surgery. The petitioner did not return to work ... , and did not undergo surgery, choosing instead to proceed with a challenge of the return to work order.
>
> After a hearing, the hearing officer concluded that the fire chief's orders were "reasonable and rational," and that the petitioner's failure to comply with those orders was without justification. The respondents adopted the recommendations of the hearing officer. The petitioner commenced this CPLR article 78 proceeding to review the determination.
>
> The petitioner argues that the respondents' determination is not supported by substantial evidence. We disagree. "Substantial evidence means more than a mere scintilla of evidence and the test of whether substantial evidence exists in a record is one of rationality, taking into account all the evidence on both sides"... . **Matter of Sestito v City of White Plains, 2018 NY Slip Op 03528, Second Dept 5-16-18**

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ADMINISTRATIVE LAW, MUNICIPAL LAW (NYC), CONSTITUTIONAL LAW.

ALLOWING UBER DRIVERS TO PICK UP PASSENGERS VIA SMARTPHONE APPLICATION IS NOT AN UNCONSTITUTIONAL TAKING OF THE PROPERTY OF TAXI CAB AND LIMOUSINE DRIVERS (SECOND DEPT).

The Second Department determined the decision of the New York City Taxi and Limousine Commission (TLC) to allow companies such as Uber to pick up passengers via a smartphone application did not constitute an unconstitutional taking of the property of the petitioners, taxi cab and limousine drivers. The decision is complex and comprehensive, and can not be fairly summarized here:

> ... [W]e agree with the Supreme Court's determination that the TLC's alleged decision to "allow black cars to pick up e-hails" did not, as a matter of law, constitute an unconstitutional taking of the petitioners' property ... . The crux of the petitioners' claim is that the TLC's decision to "allow black cars to pick up e-hails" has diminished the value of their medallions, decreased the number of taxicab trips per day, and reduced their medallion income. However, "[p]roperty' does not include a right to be free from competition"... . Accordingly, the TLC's decision to allow companies such as Uber to pick up passengers via a smartphone application does not interfere with a taxicab's use of its medallion or exclusive right to pick up passengers via street hail. **Matter of Glyka Trans, LLC v City of New York, 2018 NY Slip Op 03129, Second Dept 5-2-18**

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ADMINISTRATIVE LAW, MUNICIPAL LAW (NYC), CIVIL PROCEDURE.

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The Second Department determined the petitioner credit union (Progressive) which holds security interests in over 1400 taxicab medallions as collateral for over $700 million in loans did not have standing to contest the New York City Taxi and Limousine Commissions (TLC) ruling allowing Uber to pick up passengers via smartphone:

> Although it is clear that Progressive would suffer an injury different from that of the public at large, it failed to adequately allege that it would suffer direct harm as a result of the TLC's purported failure to enforce taxicab medallion owners' exclusive right to hails. Progressive's alleged injury—the "deteriorating financial condition of [its] medallion loan portfolio"—is an indirect consequence of the injuries that it alleged were suffered by medallion owners ... .
>
> The alleged impairment of Progressive's security interests in thousands of taxicab medallions does not fall within the relevant zone of interests sought to be protected by the ... laws and rules [governing the TLC]. ...
>
> .. .Progressive failed to demonstrate that the interests it sought to assert, i.e., protecting medallion owners' exclusive right to hails, were germane to its organizational purposes and that its "mission makes it an appropriate representative of its members' interests" ... . **Matter of Melrose Credit Union v City of New York, 2018 NY Slip Op 03131, Second Dept 5-2-18**

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ARBITRATION

ARBITRATION, FAMILY LAW, CONTRACT LAW, RELIGION.

ARBITRATION AWARD BY A RABBINICAL COURT IN THIS DIVORCE PROCEEDING SHOULD NOT HAVE BEEN VACATED, FAILURE TO FOLLOW THE EQUITABLE DISTRIBUTION LAW DID NOT VIOLATE PUBLIC POLICY, UNCONSCIONABILITY IS NOT A STATUTORY GROUND FOR VACATING AN ARBITRATION AWARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the arbitration award by a Rabbinical Court in this divorce proceeding should not have been vacated. The fact that the Equitable Distribution Law was not followed did not warrant vacation of the award because parties can elect to deviate from the Domestic Relations Law (no violation of public policy). The Second Department further held that unconscionability is not a statutory ground for reviewing or setting aside an arbitration award:

> Judicial review of an arbitration award is extremely limited (see CPLR 7510, 7511...). "Outside of the narrowly circumscribed exceptions of CPLR 7511, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact'" ... .
>
> "An award is irrational only where there is no proof whatever to justify the award" ... . Moreover, that showing must be made by clear and convincing evidence ... . Here, the very limited record does not even reveal what evidence was submitted to the arbitrators regarding, among other things, the parties' assets and financial condition. Therefore, the Supreme Court lacked any basis upon which to conclude that the award was irrational.
>
> "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" ... .
>
> ... [W]e disagree with the Supreme Court's determination that the ... award was unconscionable on its face. Unconscionability is a doctrine grounded in contract law, which can be applied to invalidate an agreement to arbitrate ... or a marital agreement entered into before or during the marriage ... . The doctrine, which requires proof of both procedural unconscionability in the formation of the contract, as well as substantive unconscionability in the terms of the contract ... , is not a statutory ground upon which an arbitration award may be reviewed, let alone set aside... . If the arbitral procedure was tainted by corruption, fraud, or misconduct, or the partiality of an arbitrator appointed as a neutral, the proper remedy is to move to vacate the award pursuant to CPLR 7511(b)(1)(i) or (ii). **Zar v Yaghoobzar, 2018 NY Slip Op 03170, Second Dept 5-2-18**

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ATTORNEYS

ATTORNEYS, CIVIL PROCEDURE, MEDICAL MALPRACTICE.

ALTHOUGH THE HOSPITAL'S POTENTIAL LIABILITY IN THIS MEDICAL MALPRACTICE ACTION WAS PURELY VICARIOUS ATTORNEYS FOR BOTH THE HOSPITAL AND THE EMPLOYEE-PHYSICIAN WERE PROPERLY ALLOWED TO PARTICIPATE IN THE TRIAL, PLAINTIFFS' MID-TRIAL REQUEST TO CALL AN EXPERT WITNESS PROPERLY DENIED (THIRD DEPT).

The Third Department determined the trial court in this medical malpractice action did not err in allowing the continued participation of the attorney for defendant hospital (AMH) after the action against the hospital had been dismissed. After the dismissal of the action against the hospital, the only liability the hospital faced was vicarious liability for the actions of its physician employee, who was represented by another attorney. The Second Department further found that the plaintiffs' request, made for the first time at trial, to call an expert to establish, by cell phone and tower information (GIS), the location of a physician who had been called to assist at the hospital was properly denied:

> Following the dismissal of all claims of direct negligence asserted against AMH, plaintiffs renewed their motion to have the role of AMH's counsel limited. While the dismissal of the direct negligence claims rendered AMH's potential liability purely vicarious in nature, we are unable to conclude that Supreme Court's refusal to limit the role of AMH's counsel during the remainder of the trial to essentially that of a spectator was in error. Because AMH's liability would be determined by the jury's findings in relation to plaintiffs' claims of negligence against Olsen [its physician-employee], AMH was entitled to participate in the efforts to defeat those claims ... . Supreme Court promised to exert control over the cross-examination of the remaining witnesses by AMH's counsel, indicating its intent to prevent any attempt by AMH to "reiterate or to plow ground that has already been plowed by one side or the other," and the record reflects that counsel's cross-examination of these witnesses, if any, was limited and dealt primarily with different material than that explored on direct examination. The balanced approach taken by the court served to ensure defendants' valued right to representation by counsel of their choosing while also protecting plaintiffs against the possibility of unduly cumulative and duplicative proof ... . Under these circumstances, we find no "clear abuse of discretion" in the course of action taken by Supreme Court nor any prejudice to plaintiffs as a result thereof ... . * * *
>
> ... [P]laintiffs first notified defendants of their intention to call a GIS expert more than three years after defendants' respective demands for expert disclosure and during the midst of the trial. Notably, [the physcian's] cell phone number was provided to plaintiffs during a pretrial deposition more than a year and a half earlier and, thus, plaintiffs possessed the essential facts necessary to investigate the matter — and, if necessary, to retain an expert — long before trial. Plaintiffs' claim that they did not realize the significance of the calls, and thus the need to subpoena the phone records, until shortly before trial did not, as Supreme Court found, constitute good cause for the delay ... . Moreover, we agree with Supreme Court that, given the complex and technical issues presented by the proposed GIS testimony, the mid-trial disclosure of this expert would have prejudiced defendants ... . **Lasher v Albany Mem. Hosp., 2018 NY Slip Op 03402, Third Dept 5-10-18**

ATTORNEYS (ALTHOUGH THE HOSPITAL'S POTENTIAL LIABILITY IN THIS MEDICAL MALPRACTICE ACTION WAS PURELY VICARIOUS ATTORNEYS FOR BOTH THE HOSPITAL AND THE EMPLOYEE-PHYSICIAN WERE PROPERLY ALLOWED TO PARTICIPATE IN THE TRIAL, PLAINTIFFS' MID-TRIAL REQUEST TO CALL AN EXPERT WITNESS PROPERLY DENIED (THIRD DEPT))/CIVIL PROCEDURE (ATTORNEYS, TRIAL, ALTHOUGH THE HOSPITAL'S POTENTIAL LIABILITY IN THIS MEDICAL MALPRACTICE ACTION WAS PURELY VICARIOUS ATTORNEYS FOR BOTH THE HOSPITAL AND THE EMPLOYEE-PHYSICIAN WERE PROPERLY ALLOWED TO PARTICIPATE IN THE TRIAL, PLAINTIFFS' MID-TRIAL REQUEST TO CALL AN EXPERT WITNESS PROPERLY DENIED (THIRD DEPT))/CIVIL PROCEDURE (EXPERT WITNESSES, PLAINTIFFS' MID-TRIAL REQUEST TO CALL AN EXPERT WITNESS PROPERLY DENIED (THIRD DEPT))/MEDICAL MALPRACTICE (ATTORNEYS, TRIAL, ALTHOUGH THE HOSPITAL'S POTENTIAL LIABILITY IN THIS MEDICAL MALPRACTICE ACTION WAS PURELY VICARIOUS ATTORNEYS FOR BOTH THE HOSPITAL AND THE EMPLOYEE-PHYSICIAN WERE PROPERLY ALLOWED TO

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ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

DEFENDANT ATTORNEYS DID NOT DEMONSTRATE PLAINTIFFS SUFFERED NO DAMAGES AS A RESULT OF DELAYS IN THE DEFENDANTS' HANDLING OF EVICTION PROCEEDINGS, ALLEGING THAT PLAINTIFFS' DAMAGES WERE SPECULATIVE MERELY POINTED TO GAPS IN PLAINTIFFS' PROOF AND WAS INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN DEFENDANTS' FAVOR (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the defendant attorneys failed to demonstrate plaintiffs suffered no damages in this legal malpractice action. Plaintiffs alleged defendants delayed in evicting plaintiffs' tenants resulting in $500,000 in lost rent. Defendants, in their motion for summary judgment, alleged only that plaintiffs' damages were speculative, which merely pointed to gaps in plaintiffs' proof and is never enough for an award of summary judgment:

> The defendants failed to submit evidence establishing, prima facie, that the plaintiffs are unable to prove at least one essential element of the cause of action alleging legal malpractice ... . The defendants' styling of the plaintiffs' damages theory as "speculative" was merely an effort to point out gaps in the plaintiff's proof, which was insufficient to meet the defendants' burden as the party moving for summary judgment ... .
>
> Moreover, even if the plaintiffs' damages cannot be precisely calculated at this stage, expenses to the client resulting from attorney delays are deemed to be ascertainable damages in connection with a legal malpractice cause of action ... . **Iannucci v Kucker & Bruh, LLP, 2018 NY Slip Op 03514, Second Dept 5-16-18**

ATTORNEYS (MALPRACTICE, DEFENDANT ATTORNEYS DID NOT DEMONSTRATE PLAINTIFFS SUFFERED NO DAMAGES AS A RESULT OF DELAYS IN THE DEFENDANTS' HANDLING OF EVICTION PROCEEDINGS, ALLEGING THAT PLAINTIFFS' DAMAGES WERE SPECULATIVE MERELY POINTED TO GAPS IN PLAINTIFFS' PROOF AND WAS INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN DEFENDANTS' FAVOR (SECOND DEPT))/LEGAL MALPRACTICE (DEFENDANT ATTORNEYS DID NOT DEMONSTRATE PLAINTIFFS SUFFERED NO DAMAGES AS A RESULT OF DELAYS IN THE DEFENDANTS' HANDLING OF EVICTION PROCEEDINGS, ALLEGING THAT PLAINTIFFS' DAMAGES WERE SPECULATIVE MERELY POINTED TO GAPS IN PLAINTIFFS' PROOF AND WAS INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN DEFENDANTS' FAVOR (SECOND DEPT))/NEGLIGENCE (LEGAL MALPRACTICE, DEFENDANT ATTORNEYS DID NOT DEMONSTRATE PLAINTIFFS SUFFERED NO DAMAGES AS A RESULT OF DELAYS IN THE DEFENDANTS' HANDLING OF EVICTION PROCEEDINGS, ALLEGING THAT PLAINTIFFS' DAMAGES WERE SPECULATIVE MERELY POINTED TO GAPS IN PLAINTIFFS' PROOF AND WAS INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN DEFENDANTS' FAVOR (SECOND DEPT))/EVIDENCE (SUMMARY JUDGMENT, MALPRACTICE, DEFENDANT ATTORNEYS DID NOT DEMONSTRATE PLAINTIFFS SUFFERED NO DAMAGES AS A RESULT OF DELAYS IN THE DEFENDANTS' HANDLING OF EVICTION PROCEEDINGS, ALLEGING THAT PLAINTIFFS' DAMAGES WERE SPECULATIVE MERELY POINTED TO GAPS IN PLAINTIFFS' PROOF AND WAS INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN DEFENDANTS' FAVOR (SECOND DEPT))/SUMMARY JUDGMENT (EVIDENCE, LEGAL MALPRACTICE, DEFENDANT ATTORNEYS DID NOT DEMONSTRATE PLAINTIFFS SUFFERED NO DAMAGES AS A RESULT OF DELAYS IN THE DEFENDANTS' HANDLING OF EVICTION PROCEEDINGS, ALLEGING THAT PLAINTIFFS' DAMAGES WERE SPECULATIVE MERELY POINTED TO GAPS IN PLAINTIFFS' PROOF AND WAS INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN DEFENDANTS' FAVOR (SECOND DEPT))

ATTORNEYS, NEGLIGENCE, LEGAL MALPRACTICE.

PLAINTIFF'S LEGAL MALPRACTICE ACTION PROPERLY SURVIVED A MOTION TO DISMISS, PLAINTIFF DEMONSTRATED THAT, 'BUT FOR' THE ATTORNEYS' WITHDRAWAL OF AN APPEAL, PLAINTIFF WOULD HAVE PREVAILED AND MAY NOT HAVE BEEN TERMINATED FROM HIS EMPLOYMENT (FIRST DEPT).

The First Department determined the plaintiff's legal malpractice action properly survived the motion to dismiss. Plaintiff sufficiently alleged that "but for" the attorneys' withdrawing an appeal plaintiff would have been entitled to a pretermination hearing in his effort to keep his job as a police officer. Plaintiff was terminated after the appeal was withdrawn:

> The allegations in the complaint establish that but for defendants' conduct in withdrawing the appeal from Justice Ecker's ruling, and in sending a different lawyer than the one promised to represent him at the reinstatement hearing, he would not have incurred damages ... . Plaintiff showed that he would have prevailed on the appeal had it not been withdrawn, because Justice Ecker erred in concluding that plaintiff's conviction of assault in the third degree, based on criminal negligence ... constituted a violation of his oath of office, i.e., arose from "knowing or intentional conduct indicative of a lack of moral integrity," and warranted termination without a hearing pursuant to Public Officers Law § 30(1)(e) ... .
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> Had plaintiff prevailed on appeal, he would have obtained a pretermination hearing, which, ... in contrast to the reinstatement hearing he received, would have allowed him to argue for disciplinary measures other than termination. Plaintiff thus sufficiently alleged that defendants caused him actual ascertainable damages of lost salary and other benefits ... . **Roth v Ostrer, 2018 NY Slip Op 03218, First Dept 5-3-18**

ATTORNEYS (MALPRACTICE, PLAINTIFF'S LEGAL MALPRACTICE ACTION PROPERLY SURVIVED A MOTION TO DISMISS, PLAINTIFF DEMONSTRATED THAT 'BUT FOR' THE ATTORNEYS' WITHDRAWAL OF A APPEAL, PLAINTIFF WOULD HAVE PREVAILED AND MAY NOT HAVE BEEN TERMINATED FROM HIS EMPLOYMENT (FIRST DEPT))/NEGLIGENCE (ATTORNEYS, PLAINTIFF'S LEGAL MALPRACTICE ACTION PROPERLY SURVIVED A MOTION TO DISMISS, PLAINTIFF DEMONSTRATED THAT 'BUT FOR' THE ATTORNEYS' WITHDRAWAL OF A APPEAL, PLAINTIFF WOULD HAVE PREVAILED AND MAY NOT HAVE BEEN TERMINATED FROM HIS EMPLOYMENT (FIRST DEPT))/LEGAL MALPRACTICE (LAINTIFF'S LEGAL MALPRACTICE ACTION PROPERLY SURVIVED A MOTION TO DISMISS, PLAINTIFF DEMONSTRATED THAT 'BUT FOR' THE ATTORNEYS' WITHDRAWAL OF A APPEAL, PLAINTIFF WOULD HAVE PREVAILED AND MAY NOT HAVE BEEN TERMINATED FROM HIS EMPLOYMENT (FIRST DEPT))

BANKING LAW

BANKING LAW, UNIFORM COMMERCIAL CODE, NEGLIGENCE, EVIDENCE.

BANK DID NOT DEMONSTRATE IT ACTED IN ACCORDANCE WITH GENERAL BANKING RULES OR PRACTICES WHEN IT CASHED FORGED CHECKS, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE ACTION PROPERLY DENIED (SECOND DEPT),

The Second Department determined defendant bank's (Capital One's) motion for summary judgment in this forged-check negligence action was properly denied (without the need to consider the opposing papers). One of plaintiff corporation's employees forged company checks made out to herself amounting to over $84,000. Plaintiff sued the bank for negligence pursuant to Uniform Commercial Code (UCC) article 4:

> Under article 4 of the UCC, with regard to repeated forgeries by the same wrongdoer, the customer's failure to exercise reasonable care and promptness in examining its bank statements and to timely notify the bank of the forgeries in accordance with UCC 4-406(2)(b) generally will result in the customer being precluded from asserting claims against the bank in connection with the loss associated with any such forgeries ... . However, the loss of repeated forgeries may be shifted back to the bank in the circumstance where the bank failed to use ordinary care in paying the forged checks ... . With regard to the issue of ordinary care, UCC 4-103(3) provides that "in the absence of special instructions, action or non-action consistent with clearing house rules and the like or with a general banking usage not disapproved by this Article, prima facie constitutes the exercise of ordinary care." Thus, under this "safe harbor" provision, a bank can ensure that its conduct at least prima facie meets an ordinary care standard, by showing that it acted in accordance with general banking rules or practices ... . However, it is the bank, as the party that benefits from the "safe harbor" provision, that bears the burden of proving general clearing house rules or general banking usage in order to establish ordinary care ... .
>
> Capital One did not meet its burden of showing that it acted in accordance with general banking rules or general clearing house rules, and therefore, it failed to demonstrate prima facie that it exercised ordinary care in paying the forged checks ... .Capital One's submissions failed to provide any evidentiary basis that its processing of the forged checks comported with general banking usage. **Redgrave Elec. Maintenance, Inc. v Capital One, N.A., 2018 NY Slip Op 0316, Second Dept 5-2-18**

BANKING LAW (BANK DID NOT DEMONSTRATE IT ACTED IN ACCORDANCE WITH GENERAL BANKING RULES OR PRACTICES WHEN IT CASHED FORGED CHECKS, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE ACTION PROPERLY DENIED (SECOND DEPT))/UNIFORM COMMERCIAL CODE (FORGED CHECKS, BANK DID NOT DEMONSTRATE IT ACTED IN ACCORDANCE WITH GENERAL BANKING RULES OR PRACTICES WHEN IT CASHED FORGED CHECKS, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE ACTION PROPERLY DENIED (SECOND DEPT))/EVIDENCE (BANKING LAW, UNIFORM COMMERCIAL CODE, FORGED CHECKS, BANK DID NOT DEMONSTRATE IT ACTED IN ACCORDANCE WITH GENERAL BANKING RULES OR PRACTICES WHEN IT CASHED FORGED CHECKS, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE ACTION PROPERLY DENIED (SECOND DEPT))/NEGLIGENCE (BANKING LAW, FORGED CHECKS, BANK DID NOT DEMONSTRATE IT ACTED IN ACCORDANCE WITH GENERAL BANKING RULES OR PRACTICES WHEN IT CASHED FORGED CHECKS, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE ACTION PROPERLY DENIED (SECOND DEPT))/CHECKS (BANKING LAW, UNIFORM COMMERCIAL CODE, FORGED CHECKS, BANK DID NOT DEMONSTRATE IT ACTED IN ACCORDANCE WITH GENERAL BANKING RULES OR PRACTICES WHEN IT CASHED FORGED CHECKS, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE ACTION PROPERLY DENIED (SECOND DEPT))/FORGED CHECKS (BANKING LAW, UNIFORM COMMERCIAL CODE, BANK DID NOT DEMONSTRATE IT ACTED IN ACCORDANCE WITH GENERAL BANKING RULES OR PRACTICES WHEN IT CASHED FORGED CHECKS, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE ACTION PROPERLY DENIED (SECOND DEPT))

CIVIL PROCEDURE

CIVIL PROCEDURE.

DEFENDANTS' MOTION TO CHANGE VENUE SHOULD HAVE BEEN GRANTED BASED UPON CONVENIENCE OF MATERIAL WITNESSES (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion to change venue should have been granted;

> The motion court exercised its discretion in an improvident manner in light of defendants' demonstration that the convenience of material nonparty witnesses would be better served by the change ... . Defendants submitted the affidavits of four first responders and plaintiff's coworker, all of whom averred that they would testify as witnesses but would be inconvenienced by traveling to New York County. The accident occurred in Sullivan County, and other than one defendant's registered principal place of business, and one of plaintiff's physicians maintaining an office in the county, this matter has no contact with New York County (... . Plaintiff's argument that the affidavits submitted by defendants were not sufficiently detailed is unpersuasive, and plaintiff offers nothing to rebut defendants' assertions that his coworker, the first responders, and the sheriff who investigated the accident were material witnesses, as they averred in their affidavits ... . Furthermore, plaintiff's assertion that he has alleged violations of the Labor Law, and thus liability may be resolved prior to trial, is not relevant ... . **Taylor v Montreign Operating Co., LLC, 2018 NY Slip Op 03222, First Dept 5-3-18**

CIVIL PROCEDURE (DEFENDANTS' MOTION TO CHANGE VENUE SHOULD HAVE BEEN GRANTED BASED UPON CONVENIENCE OF MATERIAL WITNESSES (FIRST DEPT))/VENUE (DEFENDANTS' MOTION TO CHANGE VENUE SHOULD HAVE BEEN GRANTED BASED UPON CONVENIENCE OF MATERIAL WITNESSES (FIRST DEPT))/WITNESSES, CONVENIENCE OF (VENUE, DEFENDANTS' MOTION TO CHANGE VENUE SHOULD HAVE BEEN GRANTED (FIRST DEPT))/VENUE (DEFENDANTS' MOTION TO CHANGE VENUE SHOULD HAVE BEEN GRANTED BASED UPON CONVENIENCE OF MATERIAL WITNESSES (FIRST DEPT))

CIVIL PROCEDURE.

JOHN DOE NAMED IN TIMELY COMPLAINT DID NOT REFER TO THE LLC NAMED IN THE COMPLAINT FILED AFTER THE STATUTE OF LIMITATIONS HAD RUN, MOTION TO DISMISS PROPERLY GRANTED (FIRST DEPT).

The First Department determined that the "John Doe" defendant named in a timely filed complaint did not refer to the limited liability company named in the complaint filed after the statute of limitations had run:

> The motion court properly dismissed the complaint on the ground that it was served after the statutory limitations period had expired. Plaintiff's claims arose on January 14, 2008. The original complaint in this action, which was filed on January 6, 2014 (just days before the six-year statute of limitations expired), did not name Stack's LLC as a defendant, nor did it name defendant Stack's LLC (Delaware). The amended complaint, which for the first time named Stack's LLC (Delaware) as a defendant, was not filed until January 24, 2014 — more than a week after the statute had run. Plaintiff cannot properly rely on CPLR 1024 as a shield from the statute of limitations. Even assuming that the appellation "John Doe" referred to a corporation rather than a natural person, the complaint's description of the John Doe defendant was not described in such a way as to fairly apprise Stack's LLC (Delaware) that it was an intended defendant ... . Thus, the inadequate description rendered the action jurisdictionally defective ... . **Markov v Stack's LLC (Delaware), 2018 NY Slip Op 03238, First Dept 5-3-18**

CIVIL PROCEDURE (JOHN DOE NAMED IN TIMELY COMPLAINT DID NOT REFER TO THE LLC NAMED IN THE COMPLAINT FILED AFTER THE STATUTE OF LIMITATIONS HAD RUN, MOTION TO DISMISS PROPERLY GRANTED (FIRST DEPT))/CPLR 1024 (JOHN DOE NAMED IN TIMELY COMPLAINT DID NOT REFER TO THE LLC NAMED IN THE COMPLAINT FILED AFTER THE STATUTE OF LIMITATIONS HAD RUN, MOTION TO DISMISS PROPERLY GRANTED (FIRST DEPT))/JOHN DOE (COMPLAINTS, (JOHN DOE NAMED IN TIMELY COMPLAINT DID NOT REFER TO THE LLC NAMED IN THE COMPLAINT FILED AFTER THE STATUTE OF LIMITATIONS HAD RUN, MOTION TO DISMISS PROPERLY GRANTED (FIRST DEPT))/COMPLAINTS (JOHN DOE NAMED IN TIMELY COMPLAINT DID NOT REFER TO THE LLC NAMED IN THE COMPLAINT FILED AFTER THE STATUTE OF LIMITATIONS HAD RUN, MOTION TO DISMISS PROPERLY GRANTED (FIRST DEPT))

CIVIL PROCEDURE.

ESSENTIAL EVIDENCE SUBMITTED IN REPLY PAPERS PROPERLY CONSIDERED BECAUSE A SURREPLY WAS ALLOWED (FIRST DEPT).

The First Department noted that essential evidence in reply papers was properly considered by the court because a surreply was allowed:

> ... [T]o support amending a personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit "competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff" ... . The affirmation of plaintiffs' expert, which stated that to a reasonable degree of medical certainty the decedent's injury led to his death, was sufficient, for the purposes of CPLR 3025(b), to establish a causal connection between the decedent's death and the originally alleged negligence by defendants ... . Plaintiff's submission of the expert's affirmation on reply is not fatal to the motion, because defendant was permitted to submit a surreply. **Frangiadakis v 51 W. 81st St. Corp., 2018 NY Slip Op 03331, First Dept 5-8-18**

CIVIL PROCEDURE (REPLY PAPERS, ESSENTIAL EVIDENCE SUBMITTED IN REPLY PAPERS PROPERLY CONSIDERED BECAUSE A SURREPLY WAS ALLOWED (FIRST DEPT))/REPLY PAPERS (CIVIL PROCEDURE, ESSENTIAL EVIDENCE SUBMITTED IN REPLY PAPERS PROPERLY CONSIDERED BECAUSE A SURREPLY WAS ALLOWED (FIRST DEPT)

CIVIL PROCEDURE.

MOTION TO EXTEND TIME TO SERVE DEFENDANT IN THIS MEDICAL MALPRACTICE ACTION PROPERLY GRANTED, EVEN THOUGH STATUTE OF LIMITATIONS HAD EXPIRED (SECOND DEPT).

The Second Department determined plaintiff's motion to extend the time to serve defendant (Nayak) in this medical malpractice action was properly granted, even though the statute of limitations expired in the interim between filing the summons and complaint and the motion to extend. Plaintiff's attempt at timely service was found to be defective:

> The plaintiff's cross motion pursuant to CPLR 306-b to extend the time to serve Nayak with the summons and complaint was properly granted in the interest of justice ... . When deciding whether to grant an extension of time to serve a summons and complaint in the interest of justice, "the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" ... Here, the record established that the plaintiff exercised diligence in timely filing, and in attempting to serve Nayak and notify Nayak and her insurance carrier of the summons and complaint within the 120-day period following the filing of the summons and complaint, although the attempt to serve Nayak was ultimately deemed defective ... . While the action was timely commenced, the statute of limitations had expired when the plaintiff cross-moved for relief, the plaintiff promptly cross-moved for an extension of time to serve Nayak, and there was no identifiable prejudice to Nayak attributable to the delay in service ... . **Furze v Stapen, 2018 NY Slip Op 03338, Second Dept 5-9-18**

CIVIL PROCEDURE (SERVICE OF PROCESS, MOTION TO EXTEND TIME TO SERVE DEFENDANT IN THIS MEDICAL MALPRACTICE ACTION PROPERLY GRANTED, EVEN THOUGH STATUTE OF LIMITATIONS HAD EXPIRED (SECOND DEPT))/EXTEND TIME TO SERVE (MOTION TO EXTEND TIME TO SERVE DEFENDANT IN THIS MEDICAL MALPRACTICE ACTION PROPERLY GRANTED, EVEN THOUGH STATUTE OF LIMITATIONS HAD EXPIRED (SECOND DEPT))/CPLR 306-b (SERVICE OF PROCESS, MOTION TO EXTEND TIME TO SERVE DEFENDANT IN THIS MEDICAL MALPRACTICE ACTION PROPERLY GRANTED, EVEN THOUGH STATUTE OF LIMITATIONS HAD EXPIRED (SECOND DEPT))/SERVICE OF PROCESS (MOTION TO EXTEND TIME TO SERVE DEFENDANT IN THIS MEDICAL MALPRACTICE ACTION PROPERLY GRANTED, EVEN THOUGH STATUTE OF LIMITATIONS HAD EXPIRED (SECOND DEPT))

CIVIL PROCEDURE.

DEFENDANT'S MOTION FOR A CHANGE OF VENUE IN THIS TRAFFIC ACCIDENT CASE PROPERLY GRANTED BASED UPON CONVENIENCE OF WITNESSES (FIRST DEPT).

The First Department determined the defendant's (Target's) motion to change venue in this traffic accident case was properly granted:

> Supreme Court did not improvidently exercise its discretion in granting Target's motion to change venue to Suffolk County even though plaintiff properly placed venue in New York County based upon Target's principal place of business at the time the action was commenced (see CPLR 503[a], [c]). The motor vehicle accident happened in Suffolk County, plaintiffs and codefendants live in that county, the decedent received her medical treatment there ... . Target also submitted the affidavits of two Suffolk County police officers, who averred that they were involved in the investigation including interviewing witnesses at the accident location and that they would be inconvenienced by having to travel to New York County because it would cause them to be absent from their police duties for a full day ... .
>
> That the police officers signed affidavits in favor of the motion to change venue establishes that they were aware of the action and demonstrates that they are willing to testify at trial. It was proper for the motion court to consider the police officers' convenience, because their testimony regarding their investigation as to how the accident happened bears on liability... . Furthermore, the police officers' affidavits are not insufficient because they do not set forth their home addresses, since it is undisputed that they work in Suffolk County ... . **Kochan v Target Corp., 2018 NY Slip Op 03445, First Dept 5-10-18**

CIVIL PROCEDURE (VENUE, DEFENDANT'S MOTION FOR A CHANGE OF VENUE IN THIS TRAFFIC ACCIDENT CASE PROPERLY GRANTED BASED UPON CONVENIENCE OF WITNESSES (FIRST DEPT))/VENUE (DEFENDANT'S MOTION FOR A CHANGE OF VENUE IN THIS TRAFFIC ACCIDENT CASE PROPERLY GRANTED BASED UPON CONVENIENCE OF WITNESSES (FIRST DEPT))/TRAFFIC ACCIDENTS (CIVIL PROCEDURE, VENUE, DEFENDANT'S MOTION FOR A CHANGE OF VENUE IN THIS TRAFFIC ACCIDENT CASE PROPERLY GRANTED BASED UPON CONVENIENCE OF WITNESSES (FIRST DEPT))/CPLR 503 (VENUE, DEFENDANT'S MOTION FOR A CHANGE OF VENUE IN THIS TRAFFIC ACCIDENT CASE PROPERLY GRANTED BASED UPON CONVENIENCE OF WITNESSES (FIRST DEPT))

CIVIL PROCEDURE.

MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate the default judgment and serve an amended answer should have been granted:

> Pursuant to CPLR 5015(a)(1), a party seeking to vacate a default must demonstrate a reasonable excuse for his or her default and a potentially meritorious claim or defense ... . "The determination of what constitutes a reasonable excuse lies within the Supreme Court's discretion" ... . "Whether there is a reasonable excuse for a default is a discretionary, 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"... . "[T]he court has discretion to accept law office failure as a reasonable excuse ... where that claim is supported by a detailed and credible explanation of the default at issue" ... . "While it is generally within the discretion of the court to determine what constitutes a reasonable excuse, reversal is warranted if that discretion is improvidently exercised" ... .
>
> Here, the affidavits and documentary evidence submitted by the defendant in support of his motion, taken together, set forth a detailed and credible explanation for the defendant's failure to appear at the hearing and for any delay in moving to vacate his default ... . In addition, there was no showing of prejudice to the plaintiff, and no evidence that the defendant willfully defaulted or otherwise intended to abandon his defense of this action ... . Furthermore, the defendant's submissions demonstrated a potentially meritorious defense to the complaint ... . **Gately v Drummond, 2018 NY Slip Op 03507, Second Dept 5-16-18**

CIVIL PROCEDURE (MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT))/DEFAULT (MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT))/CPLR 5015 (MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED (SECOND DEPT))

CIVIL PROCEDURE.

ARGUMENTS FIRST RAISED IN REPLY PAPERS PROPERLY REJECTED (SECOND DEPT).

The Second Department noted that arguments first raised in reply papers were properly rejected:

> After the plaintiff commenced this action, inter alia, to recover damages for malicious prosecution, the defendants moved to dismiss the complaint ... . [T]he Supreme Court granted the defendants' unopposed motion to dismiss the complaint ... .
>
> More than eight months later, the plaintiff moved for leave to enter a default judgment in her favor. After opposition papers were served, the plaintiff served a reply affirmation, in which she requested that the Supreme Court consider her motion to be one to vacate the order of dismissal, and thereupon, for leave to enter a default judgment in her favor. The court denied, as academic, the plaintiff's motion for leave to enter a default judgment in light of the dismissal order. The court also denied the plaintiff's application to deem her motion to also be considered as one to vacate the dismissal order, and the plaintiff appeals from that portion of the order.
>
> The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion ... . Here, the plaintiff's reply papers included new arguments in support of the motion, new grounds and evidence for the motion, and expressly requested relief that was dramatically unlike the relief sought in her original motion ... . Therefore, those contentions, and the grounds and evidence in support of them, were not properly before the Supreme Court ... . Accordingly, we agree with the court's determination to deny the plaintiff's application to deem her motion to also be considered as one to vacate the dismissal order. **Lee v Law Offs. of Kim & Bae, P.C., 2018 NY Slip Op 03516, Second Dept 5-16-18**

CIVIL PROCEDURE (ARGUMENTS FIRST RAISED IN REPLY PAPERS PROPERTY REJECTED (SECOND DEPT))/REPLY PAPERS (CIVIL PROCEDURE, ARGUMENTS FIRST RAISED IN REPLY PAPERS PROPERTY REJECTED (SECOND DEPT))

CIVIL PROCEDURE.

THE TIME PERIOD FOR LEARNING THE IDENTITY OF DEFENDANTS DOES NOT BEGIN TO RUN WHEN A PLAINTIFF RETAINS COUNSEL, HERE THE ACTION WAS COMMENCED WHEN COUNSEL WAS RETAINED THREE DAYS BEFORE THE EXPIRATION OF THE STATUTE OF LIMITATIONS, THE COMPLAINT NAMED DEFENDANTS AS 'JOHN DOES' WHO WERE NOT IDENTIFIED UNTIL AFTER THE STATUTE HAD RUN, THE ACTION WAS DEEMED TIME-BARRED (THIRD DEPT).

The Third Department determined the time period for substituting a named defendant for a "John Doe" in a complaint does not begin to run when plaintiff retains counsel. Plaintiff alleged an overhead door fell on him and brought a negligence and products liability action naming "John Doe" defendants. The action was commenced when plaintiff retained counsel on August 1, 2014, three days before the statute of limitations expired. The attorney acted quickly by sending an investigator to the accident scene. The named defendants were added to amended complaints after the statute had run. The Third Department held Supreme Court correctly dismissed the action as time-barred:

> A plaintiff who is unaware of the name or identity of a defendant may proceed against such defendant by designating so much of his or her name as is known (see CPLR 1024) and must show that he or she made timely and diligent efforts to ascertain the identity of an unknown defendant prior to the expiration of the statute of limitations... . In the absence of evidence that a plaintiff made the requisite timely and diligent efforts to identify an unknown defendant, he or she may not take advantage of the procedural mechanism provided by CPLR 1024 ... .
>
> We conclude that Supreme Court correctly determined that plaintiff failed to establish that he made timely and diligent efforts to discover defendants' identities prior to when the statute of limitations expired on August 4, 2014 ... . The only action that plaintiff took was retaining counsel on August 1, 2014, three days before the statute of limitations expired. Such fact, however, does not relieve him of his obligation to exercise diligent efforts. Indeed, we note that, upon retention, counsel immediately took action by sending an investigator to the accident scene. There is no explanation as to why plaintiff waited so long to retain counsel or any indication that he was somehow precluded from doing so prior to the expiration of the statute of limitations. Moreover, contrary to plaintiff's assertion, preaction discovery under CPLR 3102 (c) is not limited to those parties who appear with counsel.
>
> To that end, we reject plaintiff's assertion that whether he exercised due diligence must be measured from the point when he retained counsel ... . Plaintiff's additional contention that the duty to exercise due diligence for purposes of CPLR 1024 commences when litigation is reasonably foreseeable is improperly raised for the first time on appeal ... and, in any event, is without merit. **Walker v Glaxosmithkline, LLC, 2018 NY Slip Op 03581, Third Dept 5-17-18**

CIVIL PROCEDURE (JOHN DOES, THE TIME PERIOD FOR LEARNING THE IDENTITY OF DEFENDANTS DOES NOT BEGIN TO RUN WHEN A PLAINTIFF RETAINS COUNSEL, HERE THE ACTION WAS COMMENCED WHEN COUNSEL WAS RETAINED THREE DAYS BEFORE THE EXPIRATION OF THE STATUTE OF LIMITATIONS, THE COMPLAINT NAMED DEFENDANTS AS 'JOHN DOES' WHO WERE NOT IDENTIFIED UNTIL AFTER THE STATUTE HAD RUN, THE ACTION WAS DEEMED TIME-BARRED (THIRD DEPT))/CPLR 1024 (JOHN DOES, THE TIME PERIOD FOR LEARNING THE IDENTITY OF DEFENDANTS DOES NOT BEGIN TO RUN WHEN A PLAINTIFF RETAINS COUNSEL, HERE THE ACTION WAS COMMENCED WHEN COUNSEL WAS RETAINED THREE DAYS BEFORE THE EXPIRATION OF THE STATUTE OF LIMITATIONS, THE COMPLAINT NAMED DEFENDANTS AS 'JOHN DOES' WHO WERE NOT IDENTIFIED UNTIL AFTER THE STATUTE HAD RUN, THE ACTION WAS DEEMED TIME-BARRED (THIRD DEPT))/CPLR 3102 (JOHN DOES, THE TIME PERIOD FOR LEARNING THE IDENTITY OF DEFENDANTS DOES NOT BEGIN TO RUN WHEN A PLAINTIFF RETAINS COUNSEL, HERE THE ACTION WAS COMMENCED WHEN COUNSEL WAS RETAINED THREE DAYS BEFORE THE EXPIRATION OF THE STATUTE OF LIMITATIONS, THE COMPLAINT NAMED DEFENDANTS AS 'JOHN DOES' WHO WERE NOT IDENTIFIED UNTIL AFTER THE STATUTE HAD RUN, THE ACTION WAS DEEMED TIME-BARRED (THIRD DEPT))/JOHN DOES (CIVIL PROCEDURE, THE TIME PERIOD FOR LEARNING THE IDENTITY OF DEFENDANTS DOES NOT BEGIN TO RUN WHEN A PLAINTIFF RETAINS COUNSEL, HERE THE ACTION WAS COMMENCED WHEN COUNSEL WAS RETAINED THREE DAYS BEFORE THE EXPIRATION OF THE STATUTE OF LIMITATIONS, THE COMPLAINT NAMED DEFENDANTS AS 'JOHN DOES' WHO WERE NOT IDENTIFIED UNTIL AFTER THE STATUTE HAD RUN, THE ACTION WAS DEEMED TIME-BARRED (THIRD DEPT))

CIVIL PROCEDURE.

WHERE DEFENDANT PRESENTS EVIDENCE HE DID NOT RECEIVE NOTICE OF THE COURT CONFERENCES, HIS MOTION TO VACATE HIS DEFAULT MUST BE GRANTED AS A MATTER OF LAW (SECOND DEPT).

The Second Department determined defendant's motion to vacate his default should have been granted as a matter of law. Defendant submitted an affidavit stating that he had never been notified of the court conferences and the plaintiff did not offer any contrary evidence:

> Generally, to vacate an order striking a defendant's answer based upon his or her default in appearing for a scheduled conference before the court, the defendant is required to demonstrate both a reasonable excuse for his or her failure to appear and a potentially meritorious defense ... . However, "[i]n the absence of actual notice of [a] conference date, [a] defendant's failure to appear at that conference [cannot] qualify as a failure to perform a legal duty, the very definition of a default'" ... . In that situation, the defendant's default is considered a nullity and vacatur of the default "is required as a matter of law and due process, and no showing of a potentially meritorious defense is required" ... . **Notaro v Performance Team, 2018 NY Slip Op 03692, Second Dept 5-23-18**

CIVIL PROCEDURE (DEFAULT, MOTION TO VACATE, WHERE DEFENDANT PRESENTS EVIDENCE HE DID NOT RECEIVE NOTICE OF THE COURT CONFERENCES, HIS MOTION TO VACATE HIS DEFAULT MUST BE GRANTED AS A MATTER OF LAW (SECOND DEPT))/DEFAULT, MOTION TO VACATE (WHERE DEFENDANT PRESENTS EVIDENCE HE DID NOT RECEIVE NOTICE OF THE COURT CONFERENCES, HIS MOTION TO VACATE HIS DEFAULT MUST BE GRANTED AS A MATTER OF LAW (SECOND DEPT))/COURT CONFERENCES (DEFAULT, MOTION TO VACATE, WHERE DEFENDANT PRESENTS EVIDENCE HE DID NOT RECEIVE NOTICE OF THE COURT CONFERENCES, HIS MOTION TO VACATE HIS DEFAULT MUST BE GRANTED AS A MATTER OF LAW (SECOND DEPT))

CIVIL PROCEDURE.

PLAINTIFF MADE A SUFFICIENT START DEMONSTRATING NEW YORK HAS JURISDICTION OVER THE DEFENDANTS TO WARRANT JURISDICTIONAL DISCLOSURE AND A HEARING (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff had made a sufficient showing that New York may have jurisdiction over the defendants to warrant jurisdictional disclosure:

> ... [P]laintiff made a "sufficient start" in establishing that New York courts have jurisdiction over defendants to warrant jurisdictional disclosure and a hearing... . On his motion to renew, plaintiff submitted sufficient evidence to warrant a finding of jurisdiction on the papers alone (... CPLR 2221[e], [f]). The evidence shows that plaintiff was hired by defendants, a corporation and two individuals, all residents of Louisiana, after an in-person meeting in New York and that defendants engaged in extensive communications with him by telephone, email, in-person meetings, and document exchanges for two years while he was in New York representing them in various matters. **Mischel v Safe Haven Enters., LLC, 2018 NY Slip Op 03902, First Dept 5-31-18**

CIVIL PROCEDURE (JURISDICTION, PLAINTIFF MADE A SUFFICIENT START DEMONSTRATING NEW YORK HAS JURISDICTION OVER THE DEFENDANTS TO WARRANT JURISDICTIONAL DISCLOSURE AND A HEARING (FIRST DEPT))/JURISDICTION (CIVIL PROCEDURE, PLAINTIFF MADE A SUFFICIENT START DEMONSTRATING NEW YORK HAS JURISDICTION OVER THE DEFENDANTS TO WARRANT JURISDICTIONAL DISCLOSURE AND A HEARING (FIRST DEPT))/LONG ARM JURISDICTION (PLAINTIFF MADE A SUFFICIENT START DEMONSTRATING NEW YORK HAS JURISDICTION OVER THE DEFENDANTS TO WARRANT JURISDICTIONAL DISCLOSURE AND A HEARING (FIRST DEPT))/SUFFICIENT START (LONG ARM JURISDICTION, PLAINTIFF MADE A SUFFICIENT START DEMONSTRATING NEW YORK HAS JURISDICTION OVER THE DEFENDANTS TO WARRANT JURISDICTIONAL DISCLOSURE AND A HEARING (FIRST DEPT))

CIVIL PROCEDURE.

DEFENDANT WHO HAD APPEARED IN THE ACTION BUT HAD SINCE MOVED TO SOUTH CAROLINA COULD BE COMPELLED TO APPEAR AT TRIAL BY A SUBPOENA MAILED TO HIS NEW YORK ATTORNEY (FIRST DEPT).

The Second Department determined a trial subpoena issued to a defendant in a medical malpractice action compelled defendant's attendance despite his having moved to South Carolina:

> ... [T]he plaintiffs mailed a subpoena to the office of the defendant's attorneys, located in Mineola, New York. The subpoena commanded the defendant to appear at the trial of this action to give testimony as part of the plaintiffs' direct case. The defendant moved to quash the subpoena, arguing that he was no longer subject to the jurisdiction of the court because he had moved from New York to South Carolina during the pendency of the action. The Supreme Court denied the motion, and the defendant appeals.
>
> A court of record generally has the power "to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court" (Judiciary Law § 2-b[1]). "Where the attendance at trial of a party or person within the party's control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with [CPLR 2103(b)] to the party's attorney of record" (CPLR 2303-a). Here, the trial subpoena was properly served upon the defendant's attorneys pursuant to CPLR 2303-a and 2103(b)(2). Contrary to the defendant's contention, because he is a party to this action, over whom personal jurisdiction had been obtained, he is "found in the state" within the meaning of Judiciary Law § 2-b(1) ... . **Chicoine v Koch, 2018 NY Slip Op 03825, Second Dept 5-30-18**

CIVIL PROCEDURE (DEFENDANT WHO HAD APPEARED IN THE ACTION BUT HAD SINCE MOVED TO SOUTH CAROLINA COULD BE COMPELLED TO APPEAR AT TRIAL BY A SUBPOENA MAILED TO HIS NEW YORK ATTORNEY (FIRST DEPT))/SUBPOENAS (DEFENDANT WHO HAD APPEARED IN THE ACTION BUT HAD SINCE MOVED TO SOUTH CAROLINA COULD BE COMPELLED TO APPEAR AT TRIAL BY A SUBPOENA MAILED TO HIS NEW YORK ATTORNEY (FIRST DEPT))/TRIALS (SUBPOENAS, DEFENDANT WHO HAD APPEARED IN THE ACTION BUT HAD SINCE MOVED TO SOUTH CAROLINA COULD BE COMPELLED TO APPEAR AT TRIAL BY A SUBPOENA MAILED TO HIS NEW YORK ATTORNEY (FIRST DEPT))

CIVIL PROCEDURE, APPEALS.

MOTION TO REMOVE A PERSONAL INJURY ACTION FROM CIVIL COURT TO SUPREME COURT SHOULD NOT HAVE BEEN GRANTED BECAUSE IT WAS NOT ACCOMPANIED BY A REQUEST TO AMEND THE AD DAMNUM CLAUSE, NOTICE OF APPEAL WAS TIMELY BECAUSE DEFENDANT WAS NEVER SERVED WITH A NOTICE OF ENTRY (SECOND DEPT).

The Second Department determined the motion to remove a personal injury action from Civil Court to Supreme Court (King's County) should not have been granted because no motion to amend the ad damnum clause was made. The court noted that because the defendant was never served with notice of entry of the order granting plaintiff's motion, the notice of appeal was timely filed:

> The plaintiff ... moved pursuant to CPLR 325(b) to remove the action to the Supreme Court, Kings County. In the order appealed ... , the Supreme Court granted the motion. It is undisputed that a written notice of entry of the order ... was never served on the defendant.
>
> Since the defendant was not served with a proper notice of entry, the defendant's time to appeal never commenced running, and its notice of appeal was therefore timely filed (see CPLR 5513[a]...).
>
> A motion to remove an action from the Civil Court to the Supreme Court pursuant to CPLR 325(b) must be accompanied by a request for leave to amend the ad damnum clause of the complaint pursuant to CPLR 3025(b) ... . Here, the amount stated in the ad damnum clause was within the jurisdictional limits of the Civil Court, and no request for leave to amend the ad damnum clause was made. In the absence of an application to increase the ad damnum clause, the plaintiff's motion to remove the action to the Supreme Court should have been denied ... . **Hart v New York City Hous. Auth., 2018 NY Slip Op 03123, Second Dept 5-2-18**

CIVIL PROCEDURE (MOTION TO REMOVE A PERSONAL INJURY ACTION FROM CIVIL COURT TO SUPREME COURT SHOULD NOT HAVE BEEN GRANTED BECAUSE IT WAS NOT ACCOMPANIED BY A REQUEST TO AMEND THE AD DAMNUM CLAUSE, NOTICE OF APPEAL WAS TIMELY BECAUSE DEFENDANT WAS NEVER SERVED WITH A NOTICE OF ENTRY (SECOND DEPT))/REMOVAL (CIVIL PROCEDURE, MOTION TO REMOVE A PERSONAL INJURY ACTION FROM CIVIL COURT TO SUPREME COURT SHOULD NOT HAVE BEEN GRANTED BECAUSE IT WAS NOT ACCOMPANIED BY A REQUEST TO AMEND THE AD DAMNUM CLAUSE, NOTICE OF APPEAL WAS TIMELY BECAUSE DEFENDANT WAS NEVER SERVED WITH A NOTICE OF ENTRY (SECOND DEPT))/CPLR 325 (MOTION TO REMOVE A PERSONAL INJURY ACTION FROM CIVIL COURT TO SUPREME COURT SHOULD NOT HAVE BEEN GRANTED BECAUSE IT WAS NOT ACCOMPANIED BY A REQUEST TO AMEND THE AD DAMNUM CLAUSE, NOTICE OF APPEAL WAS TIMELY BECAUSE DEFENDANT WAS NEVER SERVED WITH A NOTICE OF ENTRY (SECOND DEPT))/CPLR 3025 (MOTION TO REMOVE A PERSONAL INJURY ACTION FROM CIVIL COURT TO SUPREME COURT SHOULD NOT HAVE BEEN GRANTED BECAUSE IT WAS NOT ACCOMPANIED BY A REQUEST TO AMEND THE AD DAMNUM CLAUSE, NOTICE OF APPEAL WAS TIMELY BECAUSE DEFENDANT WAS NEVER SERVED WITH A NOTICE OF ENTRY (SECOND DEPT))/AD DAMNUM CLAUSE (REMOVAL, MOTION TO REMOVE A PERSONAL INJURY ACTION FROM CIVIL COURT TO SUPREME COURT SHOULD NOT HAVE BEEN GRANTED BECAUSE IT WAS NOT ACCOMPANIED BY A REQUEST TO AMEND THE AD DAMNUM CLAUSE, NOTICE OF APPEAL WAS TIMELY BECAUSE DEFENDANT WAS NEVER SERVED WITH A NOTICE OF ENTRY (SECOND DEPT))/COMPLAINTS (AD DAMNUM CLAUSE, REMOVAL, MOTION TO REMOVE A PERSONAL INJURY ACTION FROM CIVIL COURT TO SUPREME COURT SHOULD NOT HAVE BEEN GRANTED BECAUSE IT WAS NOT ACCOMPANIED BY A REQUEST TO AMEND THE AD DAMNUM CLAUSE, NOTICE OF APPEAL WAS TIMELY BECAUSE DEFENDANT WAS NEVER SERVED WITH A NOTICE OF ENTRY (SECOND DEPT))

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE INSUFFICIENT, MOTION TO VACATE DEFAULT PROPERLY DENIED (FIRST DEPT).

The First Department determined law office failure was not sufficient to justify granting plaintiffs' motion to vacate the default judgment:

> ... [P]laintiffs' counsel affirmed that he had timely prepared opposition papers, but due to law office failure, the nature of which counsel failed to describe in any detail, the papers were never filed. Counsel affirmed that he was under the impression the motion was still being considered by the court when he happened to discover the default order. He further affirmed that, despite defendants' sworn affidavits of service, he was never served with the notices of entry of the default order.
>
> Here, in addition to the untimeliness of this CPLR 5015 motion to vacate, the bare and unsubstantiated assertions of law office failure are insufficient to establish a reasonable excuse for the default ... . Moreover, the record shows that plaintiffs had a prior pattern of dilatory conduct, indicating that the default was not an excusable isolated event or inadvertent error ... Because plaintiffs failed to provide an acceptable excuse for the default, it is unnecessary to address whether they demonstrated a meritorious cause of action ... . **Fernandez v Santos, 2018 NY Slip Op 03326, First Dept 5-8-18**

CIVIL PROCEDURE (DEFAULT, MOTION TO VACATE, LAW OFFICE FAILURE INSUFFICIENT, MOTION TO VACATE DEFAULT PROPERLY DENIED (FIRST DEPT))/ATTORNEYS (LAW OFFICE FAILURE INSUFFICIENT, MOTION TO VACATE DEFAULT PROPERLY DENIED (FIRST DEPT))/LAW OFFICE FAILURE (DEFAULT, MOTION TO VACATE, LAW OFFICE FAILURE INSUFFICIENT, MOTION TO VACATE DEFAULT PROPERLY DENIED (FIRST DEPT))/DEFAULT, MOTION TO VACATE (LAW OFFICE FAILURE INSUFFICIENT, MOTION TO VACATE DEFAULT PROPERLY DENIED (FIRST DEPT))/CPLR 5015 (DEFAULT, MOTION TO VACATE, LAW OFFICE FAILURE INSUFFICIENT, MOTION TO VACATE DEFAULT PROPERLY DENIED (FIRST DEPT))

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE REJECTED AS AN EXCUSE FOR FAILURE TO TIMELY ENTER A DEFAULT JUDGMENT, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department determined law office failure was not a sufficient excuse for plaintiff's failure to enter a default judgment in an action which alleged defendants failed to pay plaintiff the statutory minimum wage:

> "CPLR 3215(c) provides that [i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed'" ... . This statute is strictly construed, as "[t]he language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory inasmuch as courts shall' dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one year period, as those claims are then deemed abandoned" ... . Moreover, CPLR 3215(c) expressly provides that a court may dismiss a complaint as abandoned "upon its own initiative or on motion." The statute further provides, however, that the failure to timely seek a default may be excused if " sufficient cause is shown why the complaint should not be dismissed'"... . To establish the sufficient cause required by CPLR 3215(c), "the party opposing dismissal must demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action" ... . " The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court'" ... . While a court has the discretion to accept law office failure as a reasonable excuse, such excuse must be supported by detailed allegations of fact explaining the law office failure ... .
>
> Here, the plaintiff moved pursuant to CPLR 2004 for an extension of time to move for the entry of a default judgment and, thereupon, for leave to enter a default judgment against the defendants. CPLR 2004 allows a court to "extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown." "In exercising its discretion to grant an extension of time pursuant to CPLR 2004, a court may consider such factors as the length of the delay, the reason or excuse for the delay, and any prejudice to the opponent of the motion" ... .
>
> The plaintiff's excuse of law office failure did not rise to the level of a reasonable excuse, as it was vague, conclusory, and unsubstantiated ... . The excuse was contained in a brief paragraph in the supporting affirmation of an associate who stated, in sum and substance, that the attorney who commenced the action left the employ of the law firm of record, and the plaintiff's file was only discovered in May 2016 when the firm was relocating its offices. There was no affirmation from a principal of the law firm and no indication in the associate's affirmation that he had any personal knowledge of the purported law office failure or that he was even employed by the firm at the time it allegedly occurred. The one-year period to move for the entry of a default judgment lapsed in August 2015, and there is no indication that the attorney had left prior thereto. **Ibrahim v Nablus Sweets Corp., 2018 NY Slip Op 03515, Second Dept 5-16-18**

CIVIL PROCEDURE (DEFAULT JUDGMENT, LAW OFFICE FAILURE REJECTED AS AN EXCUSE FOR FAILURE TO TIMELY ENTER A DEFAULT JUDGMENT, CRITERIA EXPLAINED (SECOND DEPT))/ATTORNEYS (LAW OFFICE FAILURE, DEFAULT JUDGMENT, LAW OFFICE FAILURE REJECTED AS AN EXCUSE FOR FAILURE TO TIMELY ENTER A DEFAULT JUDGMENT, CRITERIA EXPLAINED (SECOND DEPT))/DEFAULT JUDGMENTS (LAW OFFICE FAILURE REJECTED AS AN EXCUSE FOR FAILURE TO TIMELY ENTER A DEFAULT JUDGMENT, CRITERIA EXPLAINED (SECOND DEPT))/LAW OFFICE FAILURE (DEFAULT JUDGMENTS, LAW OFFICE FAILURE REJECTED AS AN EXCUSE FOR FAILURE TO TIMELY ENTER A DEFAULT JUDGMENT, CRITERIA EXPLAINED (SECOND DEPT))/CPLR 3215 (DEFAULT JUDGMENT, LAW OFFICE FAILURE REJECTED AS AN EXCUSE FOR FAILURE TO TIMELY ENTER A DEFAULT JUDGMENT, CRITERIA EXPLAINED (SECOND DEPT))/CPLR 2004 (DEFAULT JUDGMENT, LAW OFFICE FAILURE REJECTED AS AN EXCUSE FOR FAILURE TO TIMELY ENTER A DEFAULT JUDGMENT, CRITERIA EXPLAINED (SECOND DEPT))

CIVIL PROCEDURE, CONTRACT, NEGLIGENCE.

EMAIL DID NOT MEET THE REQUIREMENTS OF CPLR 2104 FOR AN OUT OF COURT STIPULATION OF SETTLEMENT, SETTLEMENT AGREEMENT NOT ENFORCEABLE (SECOND DEPT).

The Second Department determined the writing and execution requirements for an out-of-court stipulation of settlement were not met by an e-mail sent by the defendant in a slip and fall case:

> To be enforceable, a stipulation of settlement must conform to the criteria set forth in CPLR 2104 ... . Where, as in the instant case, counsel for the parties did not enter into a settlement in open court, an "agreement between parties or their attorneys relating to any matter in an action . . . is not binding upon a party unless it is in a writing subscribed by him or his attorney" ... . The plain language of CPLR 2104 requires that "the agreement itself must be in writing, signed by the party (or attorney) to be bound" ... . An email message may be considered "subscribed" as required by CPLR 2104, and, therefore, capable of enforcement, where it "contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be treated as a signature" ... .
>
> Here, the email confirming the settlement agreement was sent by counsel for the party seeking to enforce the agreement, [defendant]. There is no email subscribed by the plaintiff, who is the party to be charged, or by her former attorney. In the absence of a writing subscribed by the plaintiff or her attorney, the settlement agreement is unenforceable against the plaintiff ... . **Kataldo v Atlantic Chevrolet Cadillac, 2018 NY Slip Op 03669, Second Dept 5-23-18**

CIVIL PROCEDURE (STIPULATION OF SETTLEMENT, EMAIL DID NOT MEET THE REQUIREMENTS OF CPLR 2104 FOR AN OUT OF COURT STIPULATION OF SETTLEMENT, SETTLEMENT AGREEMENT NOT ENFORCEABLE (SECOND DEPT))/STIPULATION OF SETTLEMENT (EMAIL DID NOT MEET THE REQUIREMENTS OF CPLR 2104 FOR AN OUT OF COURT STIPULATION OF SETTLEMENT, SETTLEMENT AGREEMENT NOT ENFORCEABLE (SECOND DEPT))/SETTLEMENT, STIPULATION OF (EMAIL DID NOT MEET THE REQUIREMENTS OF CPLR 2104 FOR AN OUT OF COURT STIPULATION OF SETTLEMENT, SETTLEMENT AGREEMENT NOT ENFORCEABLE (SECOND DEPT))/CPLR 2014 (STIPULATION OF SETTLEMENT, EMAIL DID NOT MEET THE REQUIREMENTS OF CPLR 2104 FOR AN OUT OF COURT STIPULATION OF SETTLEMENT, SETTLEMENT AGREEMENT NOT ENFORCEABLE (SECOND DEPT))/NEGLIGENCE (STIPULATION OF SETTLEMENT, EMAIL DID NOT MEET THE REQUIREMENTS OF CPLR 2104 FOR AN OUT OF COURT STIPULATION OF SETTLEMENT, SETTLEMENT AGREEMENT NOT ENFORCEABLE (SECOND DEPT))

CIVIL PROCEDURE, CORPORATION LAW .

ALTHOUGH DEFENDANT FOREIGN CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY, IT HAD DESIGNATED NEW YORK COUNTY AS ITS PLACE OF BUSINESS IN ITS FILING WITH THE SECRETARY OF STATE, MOTION TO CHANGE VENUE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion to change venue should not have been granted. Although defendant foreign corporation did not have a place of business in New York County, it had designated New York County as the location of its business in its filing with the Secretary of State:

> Wakefern, a foreign corporation, submitted a copy of its application for authorization to conduct business filed with the Secretary of State, in which it identified New York County as "[t]he county within this state where its office is to be located" ... . Wakefern's designation of New York County in its application is controlling for venue purposes, even if it does not actually have an office in New York County ... . **Janis v Janson Supermarkets LLC, 2018 NY Slip Op 03333, First Dept 5-8-18**

CORPORATION LAW (CIVIL PROCEDURE, VENUE, ALTHOUGH DEFENDANT FOREIGN CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY, IT HAD DESIGNATED NEW YORK COUNTY AS ITS PLACE OF BUSINESS IN ITS FILING WITH THE SECRETARY OF STATE, MOTION TO CHANGE VENUE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/CIVIL PROCEDURE (VENUE, CORPORATION LAW, ALTHOUGH DEFENDANT FOREIGN CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY, IT HAD DESIGNATED NEW YORK COUNTY AS ITS PLACE OF BUSINESS IN ITS FILING WITH THE SECRETARY OF STATE, MOTION TO CHANGE VENUE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/VENUE (CORPORATION LAW, ALTHOUGH DEFENDANT FOREIGN CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY, IT HAD DESIGNATED NEW YORK COUNTY AS ITS PLACE OF BUSINESS IN ITS FILING WITH THE SECRETARY OF STATE, MOTION TO CHANGE VENUE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/FOREIGN CORPORATIONS (CIVIL PROCEDURE, VENUE, ALTHOUGH DEFENDANT FOREIGN CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY, IT HAD DESIGNATED NEW YORK COUNTY AS ITS PLACE OF BUSINESS IN ITS FILING WITH THE SECRETARY OF STATE, MOTION TO CHANGE VENUE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))

CIVIL PROCEDURE, CORPORATION LAW, CONTRACT LAW, DEFAMATION.

ALTHOUGH THE DEFENDANT NEW YORK COMPANY IS A WHOLLY OWNED SUBSIDIARY OF AN ISRAELI COMPANY, THE TWO ENTITIES OPERATED INDEPENDENTLY SUCH THAT NEW YORK COULD NOT EXERCISE JURISDICTION OVER THE ISRAELI COMPANY, A QUALIFIED PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT).

The First Department found that a defendant company, IAI, which operates in Israel, was not subject to personal jurisdiction in New York under the theory that defendant IAINA, which operates in New York, was a department of IAI. The court explained the relevant criteria. The court further held that a common interest privilege (with respect to alleged defamatory remarks regarding the plaintiff, defendant IAINA's employee) does not insulate defendant from the alleged breach of a contractual non-disparagement clause:

> Defendants established that IAI North America, Inc. (IAINA), which does business in the State of New York, is not a mere department of IAI, which operates primarily in Israel, and therefore that jurisdiction over IAINA is not jurisdiction over IAI ... . The key executive personnel of the subsidiary were not assigned to their positions by the foreign parent, the subsidiary trained its own personnel, the parent did not write and publish all of the sales literature used by the subsidiary, and the subsidiary prepared its own financial statements ... . While IAINA is a wholly owned subsidiary of IAI, common ownership is "intrinsic to the parent-subsidiary relationship and, by [itself], not determinative"... . IAINA showed that it observed corporate formalities. Nothing in plaintiff's affirmation indicates that IAI interferes in the selection and assignment of IAINA's executive personnel, and the CEO of IAINA denied this. He also denied that IAI controlled IAINA's marketing and operational policies. Plaintiff claimed that IAI had control over the approval of IAINA's annual budget during the 11 years he worked at IAINA. However, this does not suffice ... .
>
> IAINA ... contends that the cause of action for breach of a non-disparagement clause should be dismissed because, even if it made disparaging remarks about plaintiff (its former employee), the remarks were privileged. However, the common interest privilege it relies on — which is part of the law of defamation — does not apply to a claim for breach of a non-disparagement clause ... . **Wolberg v IAI N. Am., Inc., 2018 NY Slip Op 03321, First Dept 5-8-18**

CIVIL PROCEDURE (ALTHOUGH THE DEFENDANT NEW YORK COMPANY IS A WHOLLY OWNED SUBSIDIARY OF AN ISRAELI COMPANY, THE TWO ENTITIES OPERATED INDEPENDENTLY SUCH THAT NEW YORK COULD NOT EXERCISE JURISDICTION OVER THE ISRAELI COMPANY, A QUALIFIED PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT))/JURISDICTION (CIVIL PROCEDURE, CORPORATIONS, ALTHOUGH THE DEFENDANT NEW YORK COMPANY IS A WHOLLY OWNED SUBSIDIARY OF AN ISRAELI COMPANY, THE TWO ENTITIES OPERATED INDEPENDENTLY SUCH THAT NEW YORK COULD NOT EXERCISE JURISDICTION OVER THE ISRAELI COMPANY, A QUALIFIED PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT))/CORPORATIONS (JURISDICTION, ALTHOUGH THE DEFENDANT NEW YORK COMPANY IS A WHOLLY OWNED SUBSIDIARY OF AN ISRAELI COMPANY, THE TWO ENTITIES OPERATED INDEPENDENTLY SUCH THAT NEW YORK COULD NOT EXERCISE JURISDICTION OVER THE ISRAELI COMPANY, A QUALIFIED PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT))/DEFAMATION (NON-DISPARAGEMENT CLAUSE, A QUALIFIED PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT))/QUALIFIED PRIVILEGE (DEFAMATION, NON-DISPARAGEMENT CLAUSE, A QUALIFIED PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT))/NON-DISPARAGEMENT CLAUSE (DEFAMATION, A QUALIFIED PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT))/CONTRACT LAW (DEFAMATION, NON-DISPARAGEMENT CLAUSE, A QUALIFIED

PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT))/PRIVILEGE (DEFAMATION, COMMON INTEREST, A QUALIFIED PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT))/COMMON INTEREST PRIVILEGE (DEFAMATION, A QUALIFIED PRIVILEGE RE DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE (FIRST DEPT))

CIVIL PROCEDURE, CORPORATION LAW, WORKERS' COMPENSATION LAW.

WORKER'S COMPENSATION TRUST DEEMED TO OWE THE WORKERS' COMPENSATION BOARD $220 MILLION, ATTEMPTS TO AMEND THE COMPLAINT TO ADD CAUSES OF ACTION AFTER THE STATUTE OF LIMITATIONS HAD RUN FAILED, CRITERIA EXPLAINED, CRITERIA FOR A GENERAL BUSINESS LAW 35O CAUSE OF ACTION AND PLEADING AN ALTER EGO THEORY ADDRESSED (THIRD DEPT).

The Third Department determined the relation-back doctrine did not apply to the attempts to amend the complaint in this Worker's Compensation trust action. The trust was formed as self-insurance for Workers' Compensation claims, but was determined to owe the Workers' Compensation Board $220 million. The decision is too complex to fairly summarize here. It comprehensively addresses the criteria for amending complaints, the relation-back doctrine, the General Business Law section 350 cause of action, and the corporate alter ego (piercing the corporate veil) pleading requirements:

> "[T]he rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" ... . A claim is palpably insufficient or patently devoid of merit where it would be barred by the applicable statute of limitations. ...
>
> Where the issue is whether a claim may be interposed against a defendant who was named as a party before the statute of limitations expired, the query is limited to whether the earlier complaint "gave notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" ... .
>
> "The relation back doctrine permits a [plaintiff] to amend a [complaint] to add a [defendant] even though the statute of limitations has expired at the time of amendment so long as the [plaintiff] can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added [defendant] is united in interest with a previously named [defendant], and (3) that the later-added [defendant] knew or should have known that, but for a mistake by [plaintiff] as to the later-added [defendant's] identity, the [action] would have also been brought against him or her" ... .
>
> The corporate veil will be pierced and liability imposed when either (1) there is complete domination of a corporation by an individual or another corporation with respect to the transaction being attacked that resulted in a fraud or wrong against the complaining party, or (2) "when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" ... . Here, the proposed complaint alleges only that [the two entities] had common owners, officers and directors and that they shared the same office space, addresses and telephone numbers. Such allegations, standing alone, are insufficient to plead the elements required to establish alter ego liability ... . **Belair Care Ctr., Inc. v Cool Insuring Agency, Inc., 2018 NY Slip Op 03196, Third Dept 5-3-18**

CIVIL PROCEDURE (COMPLAINTS, WORKER'S COMPENSATION TRUST DEEMED TO OWE THE WORKERS' COMPENSATION BOARD $220 MILLION, ATTEMPTS TO AMEND THE COMPLAINT TO ADD CAUSES OF ACTION AFTER THE STATUTE OF LIMITATIONS HAD RUN FAILED, CRITERIA EXPLAINED, CRITERIA FOR A GENERAL BUSINESS LAW 35O CAUSE OF ACTION AND PLEADING AN ALTER EGO THEORY ADDRESSED (THIRD DEPT))/AMENDMENT OF COMPLAINTS (WORKER'S COMPENSATION TRUST DEEMED TO OWE THE WORKERS' COMPENSATION BOARD $220 MILLION, ATTEMPTS TO AMEND THE COMPLAINT TO ADD CAUSES OF ACTION AFTER THE STATUTE OF LIMITATIONS HAD RUN FAILED, CRITERIA EXPLAINED, CRITERIA FOR A GENERAL BUSINESS LAW 35O CAUSE OF ACTION AND PLEADING AN ALTER EGO THEORY ADDRESSED (THIRD DEPT))/RELATION BACK DOCTRINE (AMENDMENT OF COMPLAINTS, WORKER'S COMPENSATION TRUST DEEMED TO OWE THE WORKERS' COMPENSATION BOARD $220 MILLION, ATTEMPTS TO AMEND THE COMPLAINT TO ADD CAUSES OF ACTION AFTER THE STATUTE OF LIMITATIONS HAD RUN FAILED, CRITERIA EXPLAINED, CRITERIA FOR A GENERAL BUSINESS LAW 35O CAUSE OF ACTION AND PLEADING AN ALTER EGO THEORY ADDRESSED (THIRD DEPT))/COMPLAINTS (AMENDMENT, WORKER'S COMPENSATION TRUST DEEMED TO OWE THE WORKERS' COMPENSATION BOARD $220 MILLION, ATTEMPTS TO AMEND THE COMPLAINT TO ADD CAUSES OF

ACTION AFTER THE STATUTE OF LIMITATIONS HAD RUN FAILED, CRITERIA EXPLAINED, CRITERIA FOR A GENERAL BUSINESS LAW 35O CAUSE OF ACTION AND PLEADING AN ALTER EGO THEORY ADDRESSED (THIRD DEPT))/CORPORATION LAW (PLEADING, ALTER EGO, PIERCING THE CORPORATE VEIL, CRITERIA FOR PLEADING AN ALTER EGO THEORY ADDRESSED (THIRD DEPT))/ALTER EGO (CORPORATION LAW, CRITERIA FOR PLEADING AN ALTER EGO THEORY ADDRESSED (THIRD DEPT))/CORPORATE VEIL, PIERCING (PLEADING, CRITERIA FOR PLEADING AN ALTER EGO THEORY ADDRESSED (THIRD DEPT))/GENERAL BUSINESS LAW 350 (PLEADING REQUIREMENTS FOR GENERAL BUSINESS LAW 350 CAUSE OF ACTION (THIRD DEPT))

CIVIL PROCEDURE, EVIDENCE.

COURT PROPERLY RELIED ON UNSIGNED COPIES OF A DEPOSITION TRANSCRIPT BECAUSE DEFENDANT DID NOT RETURN SIGNED COPIES WITHIN 60 DAYS AND DID NOT CHALLENGE THE ACCURACY OF THE TRANSCRIPT (FIRST DEPT).

The First Department noted that the court, in awarding summary judgment to plaintiff, properly relied upon unsigned copies of the transcript of the deposition testimony of defendant's witness because the defendant failed to return signed copies within 60 days and did not challenge the accuracy of the transcript (CPLR 3116(a)). **Shackman v 400 E. 85th St. Realty Corp., 2018 NY Slip Op 03223, First Dept 5-3-18**

CIVIL PROCEDURE (DEPOSITION TRANSCRIPTS, COURT PROPERLY RELIED ON UNSIGNED COPIES OF A DEPOSITION TRANSCRIPT BECAUSE DEFENDANT DID NOT RETURN SIGNED COPIES WITHIN 60 DAYS AND DID NOT CHALLENGE THE ACCURACY OF THE TRANSCRIPT (FIRST DEPT))/EVIDENCE (DEPOSITION TRANSCRIPTS, COURT PROPERLY RELIED ON UNSIGNED COPIES OF A DEPOSITION TRANSCRIPT BECAUSE DEFENDANT DID NOT RETURN SIGNED COPIES WITHIN 60 DAYS AND DID NOT CHALLENGE THE ACCURACY OF THE TRANSCRIPT (FIRST DEPT))/DEPOSITIONS (UNSIGNED TRANSCRIPTS, EVIDENCE, COURT PROPERLY RELIED ON UNSIGNED COPIES OF A DEPOSITION TRANSCRIPT BECAUSE DEFENDANT DID NOT RETURN SIGNED COPIES WITHIN 60 DAYS AND DID NOT CHALLENGE THE ACCURACY OF THE TRANSCRIPT (FIRST DEPT))/UNSIGNED DEPOSITIONS (COURT PROPERLY RELIED ON UNSIGNED COPIES OF A DEPOSITION TRANSCRIPT BECAUSE DEFENDANT DID NOT RETURN SIGNED COPIES WITHIN 60 DAYS AND DID NOT CHALLENGE THE ACCURACY OF THE TRANSCRIPT (FIRST DEPT))/CPLR 3116(a) (DEPOSITION TRANSCRIPTS, COURT PROPERLY RELIED ON UNSIGNED COPIES OF A DEPOSITION TRANSCRIPT BECAUSE DEFENDANT DID NOT RETURN SIGNED COPIES WITHIN 60 DAYS AND DID NOT CHALLENGE THE ACCURACY OF THE TRANSCRIPT (FIRST DEPT))

CIVIL PROCEDURE, INSURANCE LAW.

DEFENDANT CANADIAN INSURANCE COMPANY'S TIES TO NEW YORK WERE NOT SUFFICIENT TO ALLOW THE EXERCISE OF LONG-ARM JURISDICTION OVER THE COMPANY (FIRST DEPT).

The First Department determined defendant insurance company's connections to New York were insufficient to support long-arm jurisdiction:

> [D]efendant ... is incorporated in Canada, has its principal place of business in Canada, and is not authorized to do business in New York. Defendant issued a $10 million life insurance policy to a trust, designated on the policy application as the policy owner and beneficiary, which the record shows has its situs in New Jersey. The policy application was signed in New Jersey, and the receipt reflecting delivery of the policy identifies New Jersey as the place of execution. While the trustee may be a New York resident, he is neither the designated owner nor a beneficiary of the policy.
>
> Plaintiff cites no authority to support its argument that New York courts may exercise jurisdiction over defendant because the policy insured the life of a New York resident. Nor do defendant's purported ties to New York suffice. Plaintiff points out that the medical portion of the application was signed in New York by the insured and the medical examiner and that, before it was delivered to the trustee, the policy passed through two New York intermediaries. These transactions are not only too fleeting to provide a jurisdictional foundation, but are also not the acts from which plaintiff's claims arise ... . Even assuming, as the record suggests, that defendant assured plaintiff (which acquired ownership of the policy) of the incontestability of the policy by a letter faxed to a New York number, this is not sufficient to establish New York jurisdiction over defendant ... . **AMT Capital Holdings, S.A. v Sun Life Assur. Co. of Can., 2018 NY Slip Op 03318, First Dept 5-8-18**

CIVIL PROCEDURE (LONG ARM JURISDICTION, DEFENDANT CANADIAN INSURANCE COMPANY'S TIES TO NEW YORK WERE NOT SUFFICIENT TO ALLOW THE EXERCISE OF LONG-ARM JURISDICTION OVER THE COMPANY (FIRST DEPT))/LONG ARM JURISDICTION (DEFENDANT CANADIAN INSURANCE COMPANY'S TIES TO NEW YORK WERE NOT SUFFICIENT TO ALLOW THE EXERCISE OF LONG-ARM JURISDICTION OVER THE COMPANY (FIRST DEPT))/INSURANCE LAW (LONG ARM JURISDICTION, DEFENDANT CANADIAN INSURANCE COMPANY'S TIES TO NEW YORK WERE NOT SUFFICIENT TO ALLOW THE EXERCISE OF LONG-ARM JURISDICTION OVER THE COMPANY (FIRST DEPT))/CPLR 302 (LONG ARM JURISDICTION, DEFENDANT CANADIAN INSURANCE COMPANY'S TIES TO NEW YORK WERE NOT SUFFICIENT TO ALLOW THE EXERCISE OF LONG-ARM JURISDICTION OVER THE COMPANY (FIRST DEPT))

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.

ARGUMENT RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, HOSPITAL DID NOT DEMONSTRATE IT WAS NOT VICARIOUSLY LIABLE FOR A PHYSICIAN BECAUSE THE WRITTEN AGREEMENTS CONCERNING THE RELATIONSHIP BETWEEN THE HOSPITAL AND THE PHYSICIAN WERE NOT SUBMITTED (SECOND DEPT).

The Second Department, reversing Supreme Court, noted the argument plaintiff did not allege in the bill of particulars that defendant hospital was vicariously liable for the actions of a physician (Devlin) was raised for the first time in reply papers and, therefore, should not have been considered by the motion court. The Second Department went on to find that the hospital's motion for summary judgment arguing that it was not vicariously liable for Devlin's actions should not have been granted. Whether Devlin acted as an agent for the hospital depended upon written agreements which were not submitted with the motion papers:

> The function of reply papers is to address arguments made in opposition to the position taken by the movant, not to introduce new arguments or new grounds for the requested relief ... . Since the plaintiffs did not have the opportunity to oppose the new argument in a surreply, the court should not have granted relief based upon that argument ... .
>
> ... [T]he general rule is that a hospital may not be held vicariously liable for the acts of a physician who is not an employee of the hospital, but is one of a group of independent contractors ... . However, a hospital may be vicariously liable if a nonemployee physician acted as its agent or if it exercised control over the physician ... . Here, Devlin was an intensivist employed by the defendant Nassau Chest Physicians, P.C. (hereinafter Nassau Chest Physicians), who cared for [plaintiff] in the Hospital's intensive care unit after surgery was performed. She was the sole intensivist on duty for all four of the Hospital's intensive care units during her shift. Devlin only worked at the Hospital; she did not work for Nassau Chest Physicians at any other site. The Hospital claimed that she was not under its control and not its agent. However, the Hospital's relationship with Nassau Chest Physicians and Devlin's relationship with Nassau Chest Physicians were governed by written agreements, and those written agreements were not submitted in support of the motion. Since the defendants failed to submit this or other evidence establishing, prima facie, that Devlin was not under the Hospital's control and not its agent when she rendered care to Castro, they failed to demonstrate their prima facie entitlement to judgment as a matter of law ... . **Castro v Durban, 2018 NY Slip Op 03503, Second Dept 5-16-18**

CIVIL PROCEDURE (REPLY PAPERS, ARGUMENT RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, HOSPITAL DID NOT DEMONSTRATE IT WAS NOT VICARIOUSLY LIABLE FOR A PHYSICIAN BECAUSE THE WRITTEN AGREEMENTS CONCERNING THE RELATIONSHIP BETWEEN THE HOSPITAL AND THE PHYSICIAN WERE NOT SUBMITTED (SECOND DEPT))/REPLY PAPERS (MEDICAL MALPRACTICE, ARGUMENT RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, HOSPITAL DID NOT DEMONSTRATE IT WAS NOT VICARIOUSLY LIABLE FOR A PHYSICIAN BECAUSE THE WRITTEN AGREEMENTS CONCERNING THE RELATIONSHIP BETWEEN THE HOSPITAL AND THE PHYSICIAN WERE NOT SUBMITTED (SECOND DEPT))/MEDICAL MALPRACTICE (ARGUMENT RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, HOSPITAL DID NOT DEMONSTRATE IT WAS NOT VICARIOUSLY LIABLE FOR A PHYSICIAN BECAUSE THE WRITTEN AGREEMENTS CONCERNING THE RELATIONSHIP BETWEEN THE HOSPITAL AND THE PHYSICIAN WERE NOT SUBMITTED (SECOND DEPT))/NEGLIGENCE (MEDICAL MALPRACTICE, VICARIOUS LIABILITY, ARGUMENT RAISED FOR THE FIRST TIME IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED, HOSPITAL DID NOT DEMONSTRATE IT WAS NOT VICARIOUSLY LIABLE FOR A PHYSICIAN BECAUSE THE WRITTEN AGREEMENTS CONCERNING THE RELATIONSHIP BETWEEN THE HOSPITAL AND THE PHYSICIAN WERE NOT SUBMITTED (SECOND DEPT))

CIVIL PROCEDURE, TRUSTS AND ESTATES, FORECLOSURE.

COURT SHOULD NOT HAVE CONSIDERED AND RULED UPON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING AFTER A DEFENDANT DIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the death of a defendant in this foreclosure action precluded the court from hearing and determining plaintiff's motion for summary judgment, even with respect to the other defendants:

> As a general matter, "the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a legal representative for that decedent pursuant to CPLR 1015(a)" ... . "[A]ny determination rendered without such a substitution will generally be deemed a nullity"... .
>
> Here, the defendant Michael Costello died before the plaintiff's motion was made and before the orders appealed from were issued. Since a substitution had not been made, the Supreme Court should not have determined the merits of the plaintiff's motion, even to the extent that the plaintiff sought relief against the other defendants ... . Furthermore, although this Court has recognized, under certain limited circumstances, that "where a party's demise does not affect the merits of a case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution" ... , those circumstances are not present here ... . **American Airlines Fed. Credit Union v Costello, 2018 NY Slip Op 03335, Second Dept 5-9-18**

CIVIL PROCEDURE (DEATH OF A PARTY, COURT SHOULD NOT HAVE CONSIDERED AND RULED UPON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING AFTER A DEFENDANT DIED (SECOND DEPT))/TRUSTS AND ESTATES (CIVIL PROCEDURE, DEATH OF A PARTY, COURT SHOULD NOT HAVE CONSIDERED AND RULED UPON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING AFTER A DEFENDANT DIED (SECOND DEPT))/FORECLOSURE (DEATH OF A PARTY, CIVIL PROCEDURE, COURT SHOULD NOT HAVE CONSIDERED AND RULED UPON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING AFTER A DEFENDANT DIED (SECOND DEPT))/CPLR 1015 (DEATH OF A PARTY, COURT SHOULD NOT HAVE CONSIDERED AND RULED UPON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING AFTER A DEFENDANT DIED (SECOND DEPT))/DEATH OF A PARTY (CIVIL PROCEDURE, COURT SHOULD NOT HAVE CONSIDERED AND RULED UPON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING AFTER A DEFENDANT DIED (SECOND DEPT))/SUBSTITUTION (DEATH OF A PARTY, COURT SHOULD NOT HAVE CONSIDERED AND RULED UPON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING AFTER A DEFENDANT DIED (SECOND DEPT))

CONTRACT LAW

CONTRACT LAW.

DEFENDANTS' OWN MOTION PAPERS RAISED A QUESTION OF FACT WHETHER THE PARTIES INTENDED TO BE BOUND BY AN UNSIGNED LLC OPERATING AGREEMENT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS (SECOND DEPT).

The Second Department determined defendants' own motion papers raised a question of fact whether defendants intended to be bound by an unexecuted limited liability company operating agreement. Therefore defendants' motion for summary judgment in this breach of contract action was properly denied without reference to the opposing papers:

> Contrary to the defendants' contention, the agreement does not, on its face, demonstrate that the parties did not intend to be bound absent formal execution ... . Moreover, in support of their motion, the defendants submitted emails exchanged between the parties and their respective attorneys. The defendants failed to eliminate triable issues of fact as to whether the parties had agreed upon the major terms of the agreement and whether the parties began to perform the agreement. Accordingly, they failed to establish, prima facie, that the parties did not intend to be bound by the terms of the agreement ... . Therefore, the defendants were not entitled to summary judgment, regardless of the sufficiency of the plaintiffs' opposition papers ... . **223 Sam, LLC v 223 15th St., LLC, 2018 NY Slip Op 03118, Second Dept 5-2-18**

CONTRACT LAW (UNEXECUTED AGREEMENT, DEFENDANTS' OWN MOTION PAPERS RAISED A QUESTION OF FACT WHETHER THE PARTIES INTENDED TO BE BOUND BY AN UNSIGNED LLC OPERATING AGREEMENT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/UNEXECUTED CONTRACTS (DEFENDANTS' OWN MOTION PAPERS RAISED A QUESTION OF FACT WHETHER THE PARTIES INTENDED TO BE BOUND BY AN UNSIGNED LLC OPERATING AGREEMENT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/UNSIGNED CONTRACTS (DEFENDANTS' OWN MOTION PAPERS RAISED A QUESTION OF FACT WHETHER THE PARTIES INTENDED TO BE BOUND BY AN UNSIGNED LLC OPERATING AGREEMENT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))

CONTRACT LAW, CIVIL PROCEDURE.

PARTIES' CONDUCT AFTER THE PURPORTED TERMINATION OF THE SHAREHOLDERS' AGREEMENT COULD INDICATE THE PARTIES INTENDED THE CONTRACT TO CONTINUE (IMPLIED CONTRACT), DEFENDANT'S MOTION TO DISMISS THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the parties' conduct after a purported termination of a shareholders' agreement could indicate the parties intended the contract to continue (an implied contract). Defendant's motion to dismiss this breach of contract action should not have been granted:

> "On a motion to dismiss pursuant to CPLR 3211, we construe the pleadings liberally, accept the allegations in the complaint to be true, give [the] plaintiff[] the benefit of any favorable inferences and 'determine only whether the facts as alleged fit within any cognizable legal theory'"... . Supreme Court held that defendant could not have breached the shareholders' agreement in 2016, as the agreement explicitly terminated when he became the "only . . . remaining [s]hareholder" of the dealerships in 2007. It is true that "[w]hen a contract is terminated, such as by expiration of its own terms, the rights and obligations thereunder cease" ... . Nevertheless, "the conduct of parties to a contract following its termination may demonstrate that they intended to create an implied contract to be governed by the terms of the expired contract, and whether there was a 'meeting of the minds' required for formation of such an enforceable agreement is generally a question of fact" ... . It is undisputed that defendant continued to make monthly payments as required by the shareholders' agreement after the shares were conveyed, and this ongoing compliance with the agreement's terms required further inquiry into "the conduct of the parties to determine whether the terms of the [shareholders' agreement] continue[d] to apply" ... . Supreme Court accordingly erred in concluding, as a matter of law, that defendant could not have breached the terms of the shareholders' agreement due to its termination. **Harris v Reagan, 2018 NY Slip Op 03408, Third Dept 5-10-18**

CONTRACT LAW (PARTIES' CONDUCT AFTER THE PURPORTED TERMINATION OF THE SHAREHOLDERS' AGREEMENT COULD INDICATE THE PARTIES INTENDED THE CONTRACT TO CONTINUE (IMPLIED CONTRACT), DEFENDANT'S MOTION TO DISMISS THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/CIVIL PROCEDURE (MOTION TO DISMISS, PARTIES' CONDUCT AFTER THE PURPORTED TERMINATION OF THE SHAREHOLDERS' AGREEMENT COULD INDICATE THE PARTIES INTENDED THE CONTRACT TO CONTINUE (IMPLIED CONTRACT), DEFENDANT'S MOTION TO DISMISS THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/CPLR 3211(PARTIES' CONDUCT AFTER THE PURPORTED TERMINATION OF THE SHAREHOLDERS' AGREEMENT COULD INDICATE THE PARTIES INTENDED THE CONTRACT TO CONTINUE (IMPLIED CONTRACT), DEFENDANT'S MOTION TO DISMISS THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))/IMPLIED CONTRACT (PARTIES' CONDUCT AFTER THE PURPORTED TERMINATION OF THE SHAREHOLDERS' AGREEMENT COULD INDICATE THE PARTIES INTENDED THE CONTRACT TO CONTINUE (IMPLIED CONTRACT), DEFENDANT'S MOTION TO DISMISS THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT))

CONTRACT LAW, FRAUD, CIVIL PROCEDURE.

ALTHOUGH A PARTY WHO SIGNS AN AGREEMENT IS USUALLY DEEMED TO HAVE READ IT, A RELATIONSHIP OF TRUST AND CONFIDENCE BETWEEN THE PARTIES MAY ALLOW ONE PARTY TO RELY ON THE ASSURANCES OF THE OTHER, A CERTIFIED BUT UNSIGNED TRANSCRIPT OF A DEPOSITION WAS ADMISSIBLE BECAUSE IT HAD BEEN TIMELY MAILED TO OPPOSING COUNSEL (FIRST DEPT).

The First Department determined, although the usual rule is one who signs an agreement is deemed to have read it, the rule may not apply when there is a relationship of trust and confidence between the parties and reliance on the assurances of a party (here the parties to a trust agreement were father and son). Plaintiff alleged he was fraudulently induced to sign the agreement. The court noted that a certified, unsigned transcript of a deposition was admissible because the transcript had been mailed to opposing counsel more than 60 days before the motion was brought:

> Plaintiff's claim ... is that defendant led him to believe that the documentation that defendant presented for his signature (a trust agreement and two deeds) was for the conveyance of [one condominium unit] only. In fact, the paperwork provided for the conveyance of [two condominium units] to the trust. Ordinarily a person is bound by the terms of an instrument he or she signs, and may not claim to have justifiably relied on false representations concerning the contents of a document that he or she failed to read without valid excuse ... . In this case, however, whether this principle applies to bar plaintiff's fraudulent inducement claim ... cannot be determined as a matter of law because plaintiff alleges that he and defendant, his son, had a relationship of trust and confidence ... . **Tsai Chung Chao v Chao, 2018 NY Slip Op 03620, First Dept 5-17-18**

CONTRACT LAW (ALTHOUGH A PARTY WHO SIGNS AN AGREEMENT IS USUALLY DEEMED TO HAVE READ IT, A RELATIONSHIP OF TRUST AND CONFIDENCE BETWEEN THE PARTIES MAY ALLOW ONE PARTY TO RELY ON THE ASSURANCES OF THE OTHER, A CERTIFIED BUT UNSIGNED TRANSCRIPT OF A DEPOSITION WAS ADMISSIBLE BECAUSE IT HAD BEEN TIMELY MAILED TO OPPOSING COUNSEL (FIRST DEPT))/FRAUD (FRAUDULENT INDUCEMENT, ALTHOUGH A PARTY WHO SIGNS AN AGREEMENT IS USUALLY DEEMED TO HAVE READ IT, A RELATIONSHIP OF TRUST AND CONFIDENCE BETWEEN THE PARTIES MAY ALLOW ONE PARTY TO RELY ON THE ASSURANCES OF THE OTHER, A CERTIFIED BUT UNSIGNED TRANSCRIPT OF A DEPOSITION WAS ADMISSIBLE BECAUSE IT HAD BEEN TIMELY MAILED TO OPPOSING COUNSEL (FIRST DEPT))/CIVIL PROCEDURE (A CERTIFIED BUT UNSIGNED TRANSCRIPT OF A DEPOSITION WAS ADMISSIBLE BECAUSE IT HAD BEEN TIMELY MAILED TO OPPOSING COUNSEL (FIRST DEPT))/DEPOSITIONS (A CERTIFIED BUT UNSIGNED TRANSCRIPT OF A DEPOSITION WAS ADMISSIBLE BECAUSE IT HAD BEEN TIMELY MAILED TO OPPOSING COUNSEL (FIRST DEPT))

CONTRACT LAW, FRAUD, CONVERSION.

DEFENDANT'S ALLEGED FAILURE TO REPAY MONEY PAID BY PLAINTIFFS PURSUANT TO A CONTRACT WHICH HAD BEEN TERMINATED STATED A CAUSE OF ACTION FOR CONVERSION, FRAUD IN THE INDUCEMENT CAUSE OF ACTION PROPERLY DISMISSED BECAUSE IT WAS BASED UPON NON-ACTIONABLE FUTURE EVENTS AND NON-ACTIONABLE OPINION ON THE PART OF THE DEFENDANT (FIRST DEPT).

The First Department determined plaintiffs' cause of action for conversion should not have been dismissed and the cause action for fraud in the inducement was based upon non-actionable future conduct or events and non-actionable opinion. Plaintiffs hired defendant for extensive renovation work. Plaintiffs terminated the contract based upon defendant's allegedly fraudulent requests for payment which were not used for the claimed purposes. When plaintiffs terminated the contract they demanded the return of $400,000 of the $840,000 they had paid. Defendant returned only about $85,000 and did not provide an accounting:

> When plaintiffs terminated the contract mid-construction and demanded a return of $400,000 of the $840,000 they had paid, defendant allegedly returned only $84,622.65, without providing an accounting, and allegedly diverted the balance of such monies to his personal use. These allegations sufficiently state a cause of action for conversion ... .
>
> Plaintiffs' cause of action alleging fraud in the inducement was properly dismissed, as it is founded upon non-actionable promises of future conduct or events, rather than present fact ... and non-actionable opinion of defendant as to his entity's resources and capability of undertaking the luxury renovation work sought by plaintiffs ... . **Yablon v Stern, 2018 NY Slip Op 03650, First Dept 5-22-18**

CONTRACT LAW (DEFENDANT'S ALLEGED FAILURE TO REPAY MONEY PAID BY PLAINTIFFS PURSUANT TO A CONTRACT WHICH HAD BEEN TERMINATED STATED A CAUSE OF ACTION FOR CONVERSION, FRAUD IN THE INDUCEMENT CAUSE OF ACTION PROPERLY DISMISSED BECAUSE IT WAS BASED UPON NON-ACTIONABLE FUTURE EVENTS AND NON-ACTIONABLE OPINION ON THE PART OF THE DEFENDANT (FIRST DEPT))/CONVERSION (DEFENDANT'S ALLEGED FAILURE TO REPAY MONEY PAID BY PLAINTIFFS PURSUANT TO A CONTRACT WHICH HAD BEEN TERMINATED STATED A CAUSE OF ACTION FOR CONVERSION, FRAUD IN THE INDUCEMENT CAUSE OF ACTION PROPERLY DISMISSED BECAUSE IT WAS BASED UPON NON-ACTIONABLE FUTURE EVENTS AND NON-ACTIONABLE OPINION ON THE PART OF THE DEFENDANT (FIRST DEPT))/FRAUD IN THE INDUCEMENT (DEFENDANT'S ALLEGED FAILURE TO REPAY MONEY PAID BY PLAINTIFFS PURSUANT TO A CONTRACT WHICH HAD BEEN TERMINATED STATED A CAUSE OF ACTION FOR CONVERSION, FRAUD IN THE INDUCEMENT CAUSE OF ACTION PROPERLY DISMISSED BECAUSE IT WAS BASED UPON NON-ACTIONABLE FUTURE EVENTS AND NON-ACTIONABLE OPINION ON THE PART OF THE DEFENDANT (FIRST DEPT))

CONTRACT LAW, LANDLORD-TENANT, CIVIL PROCEDURE.

COMPLAINT DID NOT SUFFICIENTLY ALLEGE DEFENDANT HAD WAIVED THE REQUIREMENT OF WRITTEN NOTICE TO EXERCISE THE OPTION TO RENEW THE LEASE, PROPOSED AMENDMENT OF THE COMPLAINT WAS PALPABLY WITHOUT MERIT, MOTION TO AMEND WAS NOT FRIVOLOUS CONDUCT WARRANTING SANCTIONS (SECOND DEPT).

The Second Department determined the allegations in the complaint were insufficient to allege there was a waiver of the requirement that the option to renew the lease be in writing. Therefore the complaint was properly dismissed for failure to state a cause of action. The motion to amend the complaint was properly denied because the amendment was palpably insufficient or patently devoid of merit. The proposed amendment did not allege the existence of a specific agreement with the defendant. However, the motion to amend was not frivolous conduct and Supreme Court should not have awarded sanctions to defendant:

> "Although a party may waive his or her rights under an agreement or decree, waiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence" ... . Moreover, with respect to the plaintiff's allegations that [defendant's representative] stated that the defendant would not object to the assignment [of the lease to the prospective purchaser of plaintiff's business], subject to, inter alia, a credit check, "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" ... .
>
> The plaintiff's proposed amended complaint was palpably insufficient and devoid of merit. The plaintiff failed to allege that (1) it actually came to an agreement with the proposed purchaser six months prior to the expiration of the lease, (2) it gave the defendant notice of its intention to exercise the option within six months of the expiration of the lease, irrespective of whether it came to an agreement with the proposed purchaser, or (3) the proposed purchaser was creditworthy. ...
>
> ... [T]he plaintiff's conduct in moving for leave to amend the complaint and/or replead was not, under the circumstances, "frivolous" within the meaning of 22 NYCRR 130-1.1(c) ... . **NHD Nigani, LLC v Angelina Zabel Props., Inc., 2018 NY Slip Op 03135, Second Dept 5-2-18**

CONTRACT LAW (COMPLAINT DID NOT SUFFICIENTLY ALLEGE DEFENDANT HAD WAIVED THE REQUIREMENT OF WRITTEN NOTICE TO EXERCISE THE OPTION TO RENEW THE LEASE, PROPOSED AMENDMENT OF THE COMPLAINT WAS PALPABLY WITHOUT MERIT, MOTION TO AMEND WAS NOT FRIVOLOUS CONDUCT WARRANTING SANCTIONS (SECOND DEPT))/LANDLORD-TENANT (COMPLAINT DID NOT SUFFICIENTLY ALLEGE DEFENDANT HAD WAIVED THE REQUIREMENT OF WRITTEN NOTICE TO EXERCISE THE OPTION TO RENEW THE LEASE, PROPOSED AMENDMENT OF THE COMPLAINT WAS PALPABLY WITHOUT MERIT, MOTION TO AMEND WAS NOT FRIVOLOUS CONDUCT WARRANTING SANCTIONS (SECOND DEPT))/CIVIL PROCEDURE (SANCTIONS, FRIVOLOUS CONDUCT, MOTION TO AMEND THE COMPLAINT WAS NOT FRIVOLOUS CONDUCT WARRANTING SANCTIONS (SECOND DEPT))/SANCTIONS (FRIVOLOUS CONDUCT, MOTION TO AMEND THE COMPLAINT WAS NOT FRIVOLOUS CONDUCT WARRANTING SANCTIONS (SECOND DEPT))/FRIVOLOUS CONDUCT (MOTION TO AMEND THE COMPLAINT WAS NOT FRIVOLOUS CONDUCT WARRANTING SANCTIONS (SECOND DEPT))

COURT OF CLAIMS

COURT OF CLAIMS, NEGLIGENCE, ATTORNEYS.

MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS HIGHWAY ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, LAW OFFICE FAILURE NOT AN ADEQUATE EXCUSE (SECOND DEPT).

The Second Department determined the Court of Claims should not have granted claimant's motion for leave to file a late notice of claim in this highway accident case. Plaintiff's motorcycle skidded off the road and truck a guardrail. The accident report stated that plaintiff lost control of the motorcycle "for an unknown reason." The notice of claim should have filed within 90 days, but, due to law office failure, the attempt to file was made two and a half years late. Law office failure is not an adequate excuse. The accident report did not alert the state to the essential facts of the claim, and claimant did not show the state was not prejudiced by the delay:

> Court of Claims Act § 10(3) requires that a claim to recover damages for personal injuries caused by the negligence of an officer or employee of the state must be served upon the attorney general within 90 days after the accrual of such claim. However, "Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors, to allow a claimant to file a late claim" ... . The enumerated factors are whether the delay in filing was excusable, the State had notice of the essential facts constituting the claim, the State had an opportunity to investigate the circumstances underlying the claim, the claim appears to be meritorious, the State is prejudiced, and the claimant has any other available remedy ... . "No one factor is deemed controlling, nor is the presence or absence of any one factor determinative" ... . **Casey v State of New York, 2018 NY Slip Op 03120, Second Dept 5-2-18**

COURT OF CLAIMS (TRAFFIC ACCIDENTS, NOTICE OF CLAIM, MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS HIGHWAY ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/NOTICE OF CLAIM (COURT OF CLAIMS, TRAFFIC ACCIDENTS, NOTICE OF CLAIM, MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS HIGHWAY ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (COURT OF CLAIMS, NOTICE OF CLAIM, MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS HIGHWAY ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/ATTORNEYS (COURT OF CLAIMS, NOTICE OF CLAIM, LAW OFFICE FAILURE IS NOT AN ADEQUATE EXCUSE FOR FAILURE TO TIMELY FILE NOTICE OF CLAIM (SECOND DEPT))/LAW OFFICE FAILURE (COURT OF CLAIMS, NOTICE OF CLAIM, LAW OFFICE FAILURE IS NOT AN ADEQUATE EXCUSE FOR FAILURE TO TIMELY FILE NOTICE OF CLAIM (SECOND DEPT))

COURT OF CLAIMS, NEGLIGENCE, TRUSTS AND ESTATES.

FAILURE TO STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF THE COURT OF CLAIMS ACT IN THIS WRONGFUL DEATH CLAIM REQUIRED THAT THE CLAIM BE DISMISSED (SECOND DEPT).

The Second Department determined claimant's wrongful death action was properly dismissed because claimant failed to comply with the notice requirements of the Court of Claims Act and commenced the claim before the appointment of an administrator of her son's estate:

> " [B]ecause suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed"'... . Court of Claims Act § 10(3) provides that a claim to recover damages for personal injuries caused by the negligence of a state employee must be filed within 90 days after the accrual of such claim, unless the claimant within such time serves a written notice of intention to file a claim, in which event the claim must be filed within two years after the accrual of the claim ... . Court of Claims Act § 10(2) provides that a wrongful death claim must be filed within 90 days after the appointment of an executor or administrator of a decedent, unless the claimant within such time serves a written notice of intention to file a claim, in which event the claim must be filed within two years after the death of the decedent ... .
>
> Here, neither the claim nor the notice of intention to file a claim was filed within 90 days after the accrual of the personal injury claim, and thus, the personal injury claim was not timely. Moreover, since the claim was commenced prior to the claimant's appointment as administrator of her son's estate, she failed to comply with the requirements for commencing a wrongful death claim ... . The failures to strictly comply with Court of Claims Act § 10(2) and (3) were jurisdictional defects compelling dismissal of the claim ... . **Kiesow v State of New York, 2018 NY Slip Op 03670, Second Dept 5-23-18**

COURT OF CLAIMS (FAILURE TO STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF THE COURT OF CLAIMS ACT IN THIS WRONGFUL DEATH CLAIM REQUIRED THAT THE CLAIM BE DISMISSED (SECOND DEPT))/NOTICE OF INTENT (COURT OF CLAIMS, FAILURE TO STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF THE COURT OF CLAIMS ACT IN THIS WRONGFUL DEATH CLAIM REQUIRED THAT THE CLAIM BE DISMISSED (SECOND DEPT))/NOTICE OF CLAIM (COURT OF CLAIMS, FAILURE TO STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF THE COURT OF CLAIMS ACT IN THIS WRONGFUL DEATH CLAIM REQUIRED THAT THE CLAIM BE DISMISSED (SECOND DEPT))/WRONGFUL DEATH COURT OF CLAIMS, FAILURE TO STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF THE COURT OF CLAIMS ACT IN THIS WRONGFUL DEATH CLAIM REQUIRED THAT THE CLAIM BE DISMISSED (SECOND DEPT))/NEGLIGENCE (COURT OF CLAIMS, FAILURE TO STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF THE COURT OF CLAIMS ACT IN THIS WRONGFUL DEATH CLAIM REQUIRED THAT THE CLAIM BE DISMISSED (SECOND DEPT))/TRUSTS AND ESTATES (COURT OF CLAIMS, FAILURE TO STRICTLY COMPLY WITH THE NOTICE PROVISIONS OF THE COURT OF CLAIMS ACT IN THIS WRONGFUL DEATH CLAIM REQUIRED THAT THE CLAIM BE DISMISSED (SECOND DEPT))

CRIMINAL LAW

CRIMINAL LAW.

RECORD OF DEFENDANT'S ACQUITTAL SHOULD NOT HAVE BEEN UNSEALED FOR USE IN A SENTENCING PROCEEDING, RECORD SHOULD BE RESEALED BUT ERROR WAS HARMLESS (FIRST DEPT).

The First Department, over a two-judge concurrence, determined the record of defendant's acquittal should not have been unsealed for use by the sentencing court. The record should be resealed but the error did not require resentencing:

> ... [W]hile we agree with defendant that the unsealing was improper, we reject [defendant's] request for resentencing. In People v Patterson (78 NY2d 711 [1991]), the Court of Appeals held that suppression was not required where the police obtained identification evidence in violation of CPL 160.50, and the witness then identified the defendant in court. The Court ruled that "there is nothing in the history of CPL 160.50 or related statutes indicating a legislative intent to confer a constitutionally derived substantial right', such that the violation of that statute, without more, would justify invocation of the exclusionary rule with respect to subsequent independent and unrelated criminal proceedings" ... . We conclude that defendant is entitled to no greater relief based on the statutory violation that resulted in the court's consideration of the improperly unsealed information at sentencing than he would have been entitled to had the information been admitted at trial. ... . **People v Anonymous, 2018 NY Slip Op 03097, First Dept 5-1-18**

CRIMINAL LAW (SEALING OF ACQUITTAL RECORD, RECORD OF DEFENDANT'S ACQUITTAL SHOULD NOT HAVE BEEN UNSEALED FOR USE IN A SENTENCING PROCEEDING, RECORD SHOULD BE RESEALED BUT ERROR WAS HARMLESS (FIRST DEPT))/SEALING (CRIMINAL LAW, ACQUITTAL, SEALING OF ACQUITTAL RECORD, RECORD OF DEFENDANT'S ACQUITTAL SHOULD NOT HAVE BEEN UNSEALED FOR USE IN A SENTENCING PROCEEDING, RECORD SHOULD BE RESEALED BUT ERROR WAS HARMLESS (FIRST DEPT))/ACQUITTAL (SEALING OF ACQUITTAL RECORD, RECORD OF DEFENDANT'S ACQUITTAL SHOULD NOT HAVE BEEN UNSEALED FOR USE IN A SENTENCING PROCEEDING, RECORD SHOULD BE RESEALED BUT ERROR WAS HARMLESS (FIRST DEPT))

CRIMINAL LAW.

UNDER THE STIPULATED FACTS, THE DEFENDANT'S TRAGIC ERROR, MISTAKING THE VICTIM FOR A DEER, DID NOT RISE TO THE LEVEL OF CRIMINAL NEGLIGENCE, NEGLIGENT HOMICIDE CONVICTION REVERSED (THIRD DEPT).

The Third Department, reversing defendant's negligent homicide conviction, determined there was no valid line of reasoning that could have led to the verdict in this hunting accident case. The facts were stipulated in this nonjury trial. The victim, who was in the defendant's hunting party, was in an area all had agreed was off limits and there was evidence defendant reasonably mistook the victim for a deer:

> Viewing the evidence in the light most favorable to the People ... , there is no valid line of reasoning that could have led County Court to conclude that defendant engaged in any "blameworthy conduct" that created or contributed to a substantial and unjustifiable risk of death ... . As stipulated to by the parties, ... defendant had "no reason to believe [that] any of his three companions would be in the area where he was shooting." Defendant's hunting party was not engaged in the hunting practice of "driving" the deer ... , and they had instead agreed to hunt from separate, stationary tree stands that had been specifically positioned prior to the hunt "in such a way that no one would be shooting in the direction of another hunter." Additionally, ... defendant and the property owner had specifically advised the victim that, should he decide to again leave his designated stand before the hunt was over, he should take a specific route ... that was outside of the hunters' respective lines of fire. Moreover, there was no evidence that defendant had consumed any alcohol or drugs prior to the hunt, and he was unaware that the victim had cocaine and opiates in his system. While defendant made the tragic and deadly error of mistaking the camouflage-dressed victim for a buck, we cannot say — under the stipulated set of facts — that his actions rose to the level of criminal negligence ... . **People v Gerbino, 2018 NY Slip Op 03179, Third Dept 5-3-18**

CRIMINAL LAW (UNDER THE STIPULATED FACTS, THE DEFENDANT'S TRAGIC ERROR, MISTAKING THE VICTIM FOR A DEER, DID NOT RISE TO THE LEVEL OF CRIMINAL NEGLIGENCE, NEGLIGENT HOMICIDE CONVICTION REVERSED (THIRD DEPT))/NEGLIGENT HOMICIDE (UNDER THE STIPULATED FACTS, THE DEFENDANT'S TRAGIC ERROR, MISTAKING THE VICTIM FOR A DEER, DID NOT RISE TO THE LEVEL OF CRIMINAL NEGLIGENCE, NEGLIGENT HOMICIDE CONVICTION REVERSED (THIRD DEPT))/HUNTING ACCIDENT (NEGLIGENT HOMICIDE, (UNDER THE STIPULATED FACTS, THE DEFENDANT'S TRAGIC ERROR, MISTAKING THE VICTIM FOR A DEER, DID NOT RISE TO THE LEVEL OF CRIMINAL NEGLIGENCE, NEGLIGENT HOMICIDE CONVICTION REVERSED (THIRD DEPT))

CRIMINAL LAW.

SUPREME COURT SHOULD HAVE PLACED DEFENDANT IN A JUDICIAL DIVERSION PROGRAM IN THIS COCAINE-SALE CASE, CRITERIA AND PURPOSE EXPLAINED (FIRST DEPT).

The First Department determined Supreme Court should have placed defendant in a judicial diversion program in this cocaine-sale case. Defendant's need for money to support his marijuana use qualified him for diversion, despite his prior completion of a drug treatment program:

> The court improvidently exercised its discretion in denying defendant's request to participate in the judicial diversion program. The court based this determination on the erroneous ground that defendant had failed to establish that his "substance abuse or dependence [wa]s a contributing factor to [his] criminal behavior" (CPL 216.05[3][b][iii]). "The statute does not require that a defendant's . . . substance abuse or dependence be the exclusive or primary cause of the defendant's criminal behavior," but "only requires that it be a contributing factor" ... . In this case, defendant pleaded guilty to selling cocaine to an undercover police officer for $300, and was found carrying that amount in prerecorded buy money, an additional $880 in cash, and three cell phones. Defendant reported that his heavy use of marijuana cost him about $50 to $60 per day. In light of these facts and other particular circumstances of this case, defendant's need for enough money to fund that habit evidently contributed to his criminal behavior of selling cocaine.
>
> Accordingly, the court should order judicial diversion pursuant to CPL article 216, giving due recognition to the drug treatment program defendant has already completed. This result is consistent with one of the purposes of judicial diversion, which is to permit a defendant to achieve a disposition other than a felony conviction, where appropriate. **People v Alston, 2018 NY Slip Op 03324, First Dept 5-8-18**

CRIMINAL LAW (DIVERSION, SUPREME COURT SHOULD HAVE PLACED DEFENDANT IN A JUDICIAL DIVERSION PROGRAM IN THIS COCAINE-SALE CASE, CRITERIA AND PURPOSE EXPLAINED (FIRST DEPT))/JUDICIAL DIVERSION (CRIMINAL LAW, SUPREME COURT SHOULD HAVE PLACED DEFENDANT IN A JUDICIAL DIVERSION PROGRAM IN THIS COCAINE-SALE CASE, CRITERIA AND PURPOSE EXPLAINED (FIRST DEPT))/DIVERSION (CRIMINAL LAW, SUPREME COURT SHOULD HAVE PLACED DEFENDANT IN A JUDICIAL DIVERSION PROGRAM IN THIS COCAINE-SALE CASE, CRITERIA AND PURPOSE EXPLAINED (FIRST DEPT))/SENTENCING (JUDICIAL DIVERSION, SUPREME COURT SHOULD HAVE PLACED DEFENDANT IN A JUDICIAL DIVERSION PROGRAM IN THIS COCAINE-SALE CASE, CRITERIA AND PURPOSE EXPLAINED (FIRST DEPT))

CRIMINAL LAW.

INDICTMENT COUNT CHARGING 20 INDIVIDUAL INSTANCES OF CONTEMPT WAS DUPLICITOUS, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined the indictment which charged 20 individual crimes (contempt) in a single count was duplicitous:

> The criminal contempt count was duplicitous because defendant's acts of violating an order of protection by regularly but briefly showing up at the victim's apartment, over the course of about a month and 20 days, constituted distinct crimes that were required to be alleged in separate counts ... .
>
> Defendant preserved this argument by moving to dismiss that count on the same ground in his omnibus motion, which the court denied ... and we find the People's arguments on the issue of preservation unavailing. The defect was in the language of the indictment itself, and it did not depend on the trial evidence or the court's charge. **People v Villalon, 2018 NY Slip Op 03431, First Dept 5-10-18**

CRIMINAL LAW (INDICTMENT COUNT CHARGING 20 INDIVIDUAL INSTANCES OF CONTEMPT WAS DUPLICITOUS, CONVICTION REVERSED (FIRST DEPT))/DUPLICITOUS (CRIMINAL LAW, INDICTMENT COUNT CHARGING 20 INDIVIDUAL INSTANCES OF CONTEMPT WAS DUPLICITOUS, CONVICTION REVERSED (FIRST DEPT))/INDICTMENTS (DUPLICITOUS, INDICTMENT COUNT CHARGING 20 INDIVIDUAL INSTANCES OF CONTEMPT WAS DUPLICITOUS, CONVICTION REVERSED (FIRST DEPT))

CRIMINAL LAW.

NEW YORK LAW CONTROLS POLICE ENTRY AND SEARCH OF NEW JERSEY APARTMENT BUILDING, DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY IN THE COMMON AREAS OF THE BUILDING (FIRST DEPT).

The First Department determined New York law controlled the police entry and search of defendant's apartment building in New Jersey, and defendant did not have an expectation of privacy in the common areas of the building:

> We find it unnecessary to decide any questions of New Jersey search and seizure law, because we find that New York law governs the issues raised here. Suppression issues, including those arising out of a defendant's constitutional rights, are generally governed by the law of the forum, and "New York has a paramount interest in the application of its laws to this case" ... .
>
> ... [W]e find that "defendant has failed to establish a legitimate expectation of privacy in the common [areas] of his building, accessible to all tenants and their invitees" ... . The unremarkable fact that access to the building was controlled by a locked outer door does not create an expectation of privacy that would not otherwise exist ... . The basic principle ... is that general access to common areas negates a personal expectation of privacy in those areas for an individual resident. This principle applies except in unusual circumstances, such as where common areas are "shared for eating and bathing purposes essential to daily living and facilities for which are commonly found in any home" ... . At least where common areas are used primarily as a means of ingress and egress, to be used by the residents of individual units and their invitees, the presence of a locked outer door does not create a legitimate expectation of privacy. Accordingly, defendant's rights were not violated when the police used his key to enter the building. **People v Espinal, 2018 NY Slip Op 03613, First Dept 5-17-18**

CRIMINAL LAW (NEW YORK LAW CONTROLS POLICE ENTRY AND SEARCH OF NEW JERSEY APARTMENT BUILDING, DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY IN THE COMMON AREAS OF THE BUILDING (FIRST DEPT))/SEARCH AND SEIZURE (NEW YORK LAW CONTROLS POLICE ENTRY AND SEARCH OF NEW JERSEY APARTMENT BUILDING, DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY IN THE COMMON AREAS OF THE BUILDING (FIRST DEPT))/EXPECTATION OF PRIVACY (COMMON AREAS OF APARTMENT BUILDING, (NEW YORK LAW CONTROLS POLICE ENTRY AND SEARCH OF NEW JERSEY APARTMENT BUILDING, DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY IN THE COMMON AREAS OF THE BUILDING (FIRST DEPT))/APARTMENT BUILDINGS (CRIMINAL LAW, SEARCH AND SEIZURE, COMMON AREAS, NEW YORK LAW CONTROLS POLICE ENTRY AND SEARCH OF NEW JERSEY APARTMENT BUILDING, DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY IN THE COMMON AREAS OF THE BUILDING (FIRST DEPT))/COMMON AREAS (APARTMENT BUILDINGS, CRIMINAL LAW, SEARCH AND SEIZURE, NEW YORK LAW CONTROLS POLICE ENTRY AND SEARCH OF NEW JERSEY APARTMENT BUILDING, DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY IN THE COMMON AREAS OF THE BUILDING (FIRST DEPT))

CRIMINAL LAW.

ALTERNATE JUROR'S PARTICIPATION IN DELIBERATIONS REQUIRED A NEW TRIAL (SECOND DEPT).

The Second Department ordered a new trial for the defendant because an alternate juror deliberated with the other jurors. The trial judge attempted to fix the problem by having the jurors agree to start over and disregard the prior deliberations:

> During the trial in this matter, an alternate juror briefly participated in deliberations with 11 sworn members of the jury while the12th sworn juror was absent from the jury room. The Supreme Court denied the defendant's motion for a mistrial. The court then questioned each of the jurors about their ability to disregard the prior deliberations and start deliberations anew; each juror assured the court that he or she could do so. The court then denied the defendant's renewed motion for a mistrial, and instructed the jurors that all deliberations that had taken place with the alternate juror were a nullity which must be disregarded by the jury, and that deliberations were to start "fresh, anew, ab initio, from the beginning." After deliberations, the jury returned a verdict of guilty. The defendant appeals.
>
> The New York Constitution guarantees every criminal defendant a trial by jury ... . The constitutional right to a jury trial "includes the right to a jury of 12" ... . Pursuant to CPL 270.30, after the jury has retired to deliberate, the court must either, (1) with the consent of the defendant and the People, discharge the alternate jurors, or (2) direct the alternate jurors not to discuss the case and further direct that they be kept separate and apart from the regular jurors. CPL 310.10 prohibits anyone, including alternate jurors, from communicating with deliberating jurors.
>
> The error here not only violated CPL 270.30 and 310.10, but it deprived the defendant of his fundamental right to a trial by a jury of 12 ... . The error was not cured by the Supreme Court's instructions to the reconstituted jury. **People v Davis, 2018 NY Slip Op 03539, Second Dept 5-16-18**

CRIMINAL LAW (JURORS, ALTERNATE JUROR'S PARTICIPATION IN DELIBERATIONS REQUIRED A NEW TRIAL (SECOND DEPT))/JURORS (CRIMINAL LAW, ALTERNATE JUROR'S PARTICIPATION IN DELIBERATIONS REQUIRED A NEW TRIAL (SECOND DEPT))/ALTERNATE JURORS (CRIMINAL LAW, ALTERNATE JUROR'S PARTICIPATION IN DELIBERATIONS REQUIRED A NEW TRIAL (SECOND DEPT))/DELIBERATIONS (CRIMINAL LAW, JURORS, ALTERNATE JUROR'S PARTICIPATION IN DELIBERATIONS REQUIRED A NEW TRIAL (SECOND DEPT))

CRIMINAL LAW.

NO INDICATION IN THE INDICTMENT OR THE ALLOCUTION THAT THE THREE 'POSSESSION OF A SEXUAL PERFORMANCE BY A CHILD' OFFENSES TOOK PLACE AT DIFFERENT TIMES OR LOCATIONS, CONSECUTIVE SENTENCES NOT AUTHORIZED (THIRD DEPT).

The Third Department determined, based upon the wording of the indictment, the defendant should not have been given consecutive sentences the three counts of possession of a sexual performance of a child. The indictment alleged the offenses occurred at the same time and place:

> ... [T]he imposition of consecutive sentences for possession of a sexual performance by a child convictions were not authorized because his conduct amounted to a single criminal act ... . "It is well settled that sentences are authorized to be imposed consecutively if multiple offenses are committed through separate and distinct acts, even though they may be part of a single transaction"... . To justify consecutive sentences in this context, the People were required to establish, either through the indictment or the facts adduced during the allocution, that defendant came into possession of the images at separate and distinct times ... . Here, the counts in the indictment to which defendant pleaded guilty contained identical language as to the time, date and place of possession. Inasmuch as neither the indictment nor the facts adduced during the allocution establish that the digital images came into defendant's possession at separate and distinct times, consecutive sentences were not authorized ... . **People v Stein, 2018 NY Slip Op 03566, Third Dept 5-17-18**

CRIMINAL LAW (SENTENCING, NO INDICATION IN THE INDICTMENT OR THE ALLOCUTION THAT THE THREE 'POSSESSION OF A SEXUAL PERFORMANCE BY A CHILD' OFFENSES TOOK PLACE AT DIFFERENT TIME OR LOCATIONS, CONSECUTIVE SENTENCES NOT AUTHORIZED (THIRD DEPT))/SENTENCING (NO INDICATION IN THE INDICTMENT OR THE ALLOCUTION THAT THE THREE 'POSSESSION OF A SEXUAL PERFORMANCE BY A CHILD' OFFENSES TOOK PLACE AT DIFFERENT TIME OR LOCATIONS, CONSECUTIVE SENTENCES NOT AUTHORIZED (THIRD DEPT))

CRIMINAL LAW.

AFTER THE PEOPLE HAD EXERCISED THEIR PEREMPTORY CHALLENGES TO JURORS AND DEFENSE COUNSEL HAD BEGUN EXERCISING HER PEREMPTORY CHALLENGES, THE TRIAL COURT ALLOWED THE PEOPLE TO BELATEDLY MAKE A PEREMPTORY CHALLENGE, THAT WAS REVERSIBLE ERROR (FIRST DEPT).

The First Department determined it was reversible error to allow the People to belatedly exercise a peremptory challenge to a juror (Mrs. C) after the People had indicated the chosen jurors were acceptable and the defense attorney had started exercising her peremptory challenges:

> "The right of peremptory challenge given to an accused person is a substantial right," and the order in which peremptory challenges are made "is matter of substance" "intended for the benefit of the defendant"... . The statute governing the order for peremptory challenges is not a "mere rule of procedure," but is "a right secured to the defendant" ... . The requirement that the People make peremptory challenges first "is imperative," and violation of that rule is "a substantial, and not a mere technical error" ... .
>
> The People here had completed their peremptory challenges for the round, and expressly told the court that the remaining prospective jurors, including Ms. C., were acceptable. It was only while defense counsel was making her peremptory challenges that the People sought to belatedly challenge Ms. C. Under these circumstances, the court's decision to allow the challenge and excuse the juror constitutes reversible error .. . Although the People contend that there was no bad faith in their belated request to exercise the peremptory challenge, CPL 270.15(2) does not contain an exception for good faith. Nor has the Court of Appeals recognized a good faith exception in its decisions strictly construing the statute. **People v Robinson, 2018 NY Slip Op 03731, First Dept 5-24-18**

CRIMINAL LAW (JURORS, AFTER THE PEOPLE HAD EXERCISED THEIR PEREMPTORY CHALLENGES TO JURORS AND DEFENSE COUNSEL HAD BEGUN EXERCISING HER PEREMPTORY CHALLENGES, THE TRIAL COURT ALLOWED THE PEOPLE TO BELATEDLY MAKE A PEREMPTORY CHALLENGE, THAT WAS REVERSIBLE ERROR (FIRST DEPT))/JURORS (CRIMINAL LAW, AFTER THE PEOPLE HAD EXERCISED THEIR PEREMPTORY CHALLENGES TO JURORS AND DEFENSE COUNSEL HAD BEGUN EXERCISING HER PEREMPTORY CHALLENGES, THE TRIAL COURT ALLOWED THE PEOPLE TO BELATEDLY MAKE A PEREMPTORY CHALLENGE, THAT WAS REVERSIBLE ERROR (FIRST DEPT))/PEREMPTORY CHALLENGES (CRIMINAL LAW, JURORS, AFTER THE PEOPLE HAD EXERCISED THEIR PEREMPTORY CHALLENGES TO JURORS AND DEFENSE COUNSEL HAD BEGUN EXERCISING HER PEREMPTORY CHALLENGES, THE TRIAL COURT ALLOWED THE PEOPLE TO BELATEDLY MAKE A PEREMPTORY CHALLENGE, THAT WAS REVERSIBLE ERROR (FIRST DEPT))

CRIMINAL LAW.

PAROLE BOARD PROPERLY CONSIDERED PETITIONER'S YOUTH AT THE TIME HE COMMITTED SERIOUS CRIMES, PAROLE PROPERLY DENIED (THIRD DEPT).

The Third Department, in a comprehensive decision, determined the parole board had properly considered petitioner's youth at the time of the commission of the crimes and had properly denied parole. Petitioner was a few weeks from his eighteenth birthday when he committed the crimes and was 44 years old at his 2016 appearance before the parole board:

> ... [R]eview of the record leads us to the conclusion that the Board did consider the necessary statutory factors, as well as petitioner's youth at the time of the crimes. Specifically, at the hearing, the Board explored the facts underlying petitioner's crimes in detail and his insight into his crimes, as well as his release plans, prior criminal record, educational and institutional achievements, lengthy prison disciplinary record, sentencing minutes, COMPAS Risk and Needs Assessment instrument and numerous letters of support. Also, the hearing transcript demonstrates that petitioner's youth at the time that he committed the crimes was adequately explored. * * *
>
> A thorough review of the Board's decision evinces that all necessary statutory factors, as well as petitioner's youth and its attendant characteristics, were considered. Although the Board assigned greater weight to the seriousness of petitioner's crimes, his history of violence, his failure to complete recommended programming and his lengthy prison disciplinary record, we find that the ultimate determination is rational and, therefore, we will not disturb it ... . **Matter of Allen v Stanford, 2018 NY Slip Op 03888, Third Dept 5-31-18**

CRIMINAL LAW (PAROLE BOARD PROPERLY CONSIDERED PETITIONER'S YOUTH AT THE TIME HE COMMITTED SERIOUS CRIMES, PAROLE PROPERLY DENIED (THIRD DEPT))/PAROLE (PAROLE BOARD PROPERLY CONSIDERED PETITIONER'S YOUTH AT THE TIME HE COMMITTED SERIOUS CRIMES, PAROLE PROPERLY DENIED (THIRD DEPT))

CRIMINAL LAW, ANIMAL LAW, APPEALS.

DEFENDANT CONVICTED OF ASSAULT FIRST DEGREE FOR ALLOWING HIS DOG TO ATTACK THE VICTIM, EVIDENCE OF INTENT TO CAUSE SERIOUS INJURY WAS LEGALLY SUFFICIENT, MOTION FOR TRIAL ORDER OF DISMISSAL AT THE CLOSE OF THE EVIDENCE PRESERVED THE ISSUE BY REFERRING TO THE MOTION MADE AT THE CLOSE OF THE PEOPLE'S CASE (FOURTH DEPT).

The Fourth Department determined the evidence was legally sufficient to support the assault first conviction stemming from defendant's allowing his dog to attack the victim. The court noted that the motion for a trial order of dismissal at the close of the People's case was adequate to preserve the challenge to the legal sufficiency of the evidence of intent, even though the renewal of the motion at the close of evidence referred to the earlier motion:

> The conviction arises from a dog attack that caused the victim to sustain injuries that included broken bones in his hands and the amputation of a portion of one of his fingers. The victim as well as witnesses to the attack testified that two pit bull terriers that had escaped their owner's property attacked the victim, biting at his arms and legs, as the victim attempted to protect his dog from the pit bulls. Defendant, who was a friend of the owner of the pit bulls, arrived at the scene in a van driven by another man. Defendant exited the van, retrieved the two pit bulls and placed them in the van. After the pit bulls were secured in the van, the victim stood in front of the van and angrily told defendant that the police had been called and "you're not going anywhere." Defendant responded by asking the victim, "you coming at me? Are you going to stop me from leaving?" At that point defendant opened the van door and issued a command to the larger pit bull, who attacked the victim a second time, inflicting the injuries to the victim's hands.
>
> Defendant contends that the evidence is legally insufficient to support the conviction inasmuch as the People failed to prove that he intended to cause serious physical injury to the victim ... . Viewing the evidence in the light most favorable to the People ... , we conclude that the evidence is legally sufficient to establish such intent ... . **People v Bacon, 2018 NY Slip Op 03258, Fourth Dept 5-4-18**

CRIMINAL LAW (DOG ATTACK, DEFENDANT CONVICTED OF ASSAULT FIRST DEGREE FOR ALLOWING HIS DOG TO ATTACK THE VICTIM, EVIDENCE OF INTENT TO CAUSE SERIOUS INJURY WAS LEGALLY SUFFICIENT, MOTION FOR TRIAL ORDER OF DISMISSAL AT THE CLOSE OF THE EVIDENCE PRESERVED THE ISSUE BY REFERRING TO THE MOTION MADE AT THE CLOSE OF THE PEOPLE'S CASE (FOURTH DEPT))/ANIMAL LAW (CRIMINAL LAW, DOG ATTACK, DEFENDANT CONVICTED OF ASSAULT FIRST DEGREE FOR ALLOWING HIS DOG TO ATTACK THE VICTIM, EVIDENCE OF INTENT TO CAUSE SERIOUS INJURY WAS LEGALLY SUFFICIENT, MOTION FOR TRIAL ORDER OF DISMISSAL AT THE CLOSE OF THE EVIDENCE PRESERVED THE ISSUE BY REFERRING TO THE MOTION MADE AT THE CLOSE OF THE PEOPLE'S CASE (FOURTH DEPT))/DOGS (CRIMINAL LAW, DOG ATTACK, DEFENDANT CONVICTED OF ASSAULT FIRST DEGREE FOR ALLOWING HIS DOG TO ATTACK THE VICTIM, EVIDENCE OF INTENT TO CAUSE SERIOUS INJURY WAS LEGALLY SUFFICIENT, MOTION FOR TRIAL ORDER OF DISMISSAL AT THE CLOSE OF THE EVIDENCE PRESERVED THE ISSUE BY REFERRING TO THE MOTION MADE AT THE CLOSE OF THE PEOPLE'S CASE (FOURTH DEPT))/TRIAL ORDER OF DISMISSAL (CRIMINAL LAW, DEFENDANT CONVICTED OF ASSAULT FIRST DEGREE FOR ALLOWING HIS DOG TO ATTACK THE VICTIM, EVIDENCE OF INTENT TO CAUSE SERIOUS INJURY WAS LEGALLY SUFFICIENT, MOTION FOR TRIAL ORDER OF DISMISSAL AT THE CLOSE OF THE EVIDENCE PRESERVED THE ISSUE BY REFERRING TO THE MOTION MADE AT THE CLOSE OF THE PEOPLE'S CASE (FOURTH DEPT))/APPEALS (CRIMINAL LAW, TRIAL ORDER OF DISMISSAL, DEFENDANT CONVICTED OF ASSAULT FIRST DEGREE FOR ALLOWING HIS DOG TO ATTACK THE VICTIM, EVIDENCE OF INTENT TO CAUSE SERIOUS INJURY WAS LEGALLY SUFFICIENT, MOTION FOR TRIAL ORDER OF DISMISSAL AT THE CLOSE OF THE EVIDENCE PRESERVED THE ISSUE BY REFERRING TO THE MOTION MADE AT THE CLOSE OF THE PEOPLE'S CASE (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INEFFECTIVE, DESPITE DEFENDANT'S SIGNING OF A WRITTEN WAIVER (SECOND DEPT).

The Second Department determined defendant's waiver of appeal was ineffective, despite defendant's signing of a written waiver:

> ... [T]he record does not demonstrate that the defendant understood the distinction between the right to appeal and other trial rights forfeited incident to his plea of guilty ... . Furthermore, although the record on appeal reflects that the defendant executed written appeal waiver forms, the transcript of the plea proceedings shows that the court did not ascertain on the record whether the defendant had read the waivers or discussed them with defense counsel, or whether he was even aware of their contents ... . **People v Medina, 2018 NY Slip Op 03151, Second Dept 5-2-18**

CRIMINAL LAW (APPEALS, WAIVER OF APPEAL INEFFECTIVE, DESPITE DEFENDANT'S SIGNING OF A WRITTEN WAIVER (SECOND DEPT))/APPEALS (CRIMINAL LAW, WAIVER OF APPEAL INEFFECTIVE, DESPITE DEFENDANT'S SIGNING OF A WRITTEN WAIVER (SECOND DEPT))

CRIMINAL LAW, APPEALS.

POLICE ENTRY INTO A SINGLE USE BATHROOM IN A COMMERCIAL ESTABLISHMENT CONSTITUTED A SEARCH, DEFENDANT'S SUPPRESSION MOTION SHOULD NOT HAVE BEEN DENIED BASED UPON THE CONCLUSION THE DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY, MATTER REMITTED FOR CONSIDERATION OF ANOTHER ISSUE WHICH SUPREME COURT DID NOT RULE ON (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the defendant had an expectation of privacy in a single-use bathroom in an adult bookstore, His suppression motion should not, therefore, have been denied on the ground the police entry into the bathroom was not a search. The matter was remitted for consideration of the issue raised by the People at the suppression hearing which was not ruled on by Supreme Court:

> The court erred in denying defendant's suppression motion on the ground that the police entrance into a single-use restroom located in an adult film and novelty store was not a "search" for purposes of the Fourth Amendment. We conclude that, once he closed the door, defendant had a reasonable expectation of privacy while using the small, single-use restroom because at that point he was "entitled to assume that while inside he ... will not be viewed by others" ... . The closed door of the restroom was comparable to closed bathroom stalls in public restrooms, where a reasonable expectation of privacy exists ... . This expectation of privacy was not negated by the facts that the restroom was located in a commercial establishment and was unlocked ... .
>
> In the alternative, the People argue, as they did at the hearing, that the police entrance into the restroom was reasonable because it was based on probable cause to suspect that there was drug use occurring inside. However, because "the hearing court did not rule on this issue in denying the suppression motion, and therefore did not rule adversely against defendant on this point, we may not reach it on this appeal" ... . Accordingly, we hold the appeal in abeyance and remand for determination, based on the hearing minutes, of the issue raised at the hearing, but not decided ... . **People v Vinson, 2018 NY Slip Op 03437, First Dept 5-10-18**

CRIMINAL LAW (SEARCH AND SEIZURE, EXPECTATION OF PRIVACY, POLICE ENTRY INTO A SINGLE USE BATHROOM IN A COMMERCIAL ESTABLISHMENT CONSTITUTED A SEARCH, DEFENDANT'S SUPPRESSION MOTION SHOULD NOT HAVE BEEN DENIED BASED UPON THE CONCLUSION THE DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY, MATTER REMITTED FOR CONSIDERATION OF ANOTHER ISSUE WHICH SUPREME COURT DID NOT RULE ON (FIRST DEPT))/SEARCH AND SEIZURE (EXPECTATION OF PRIVACY, POLICE ENTRY INTO A SINGLE USE BATHROOM IN A COMMERCIAL ESTABLISHMENT CONSTITUTED A SEARCH, DEFENDANT'S SUPPRESSION MOTION SHOULD NOT HAVE BEEN DENIED BASED UPON THE CONCLUSION THE DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY, MATTER REMITTED FOR CONSIDERATION OF ANOTHER ISSUE WHICH SUPREME COURT DID NOT RULE ON (FIRST DEPT))/SUPPRESSION (SEARCH AND SEIZURE, EXPECTATION OF PRIVACY, POLICE ENTRY INTO A SINGLE USE BATHROOM IN A COMMERCIAL ESTABLISHMENT CONSTITUTED A SEARCH, DEFENDANT'S SUPPRESSION MOTION SHOULD NOT HAVE BEEN DENIED BASED UPON THE CONCLUSION THE DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY, MATTER REMITTED FOR CONSIDERATION OF ANOTHER ISSUE WHICH SUPREME COURT DID NOT RULE ON (FIRST DEPT))/EXPECTATION OF PRIVACY (SEARCH AND SEIZURE, POLICE ENTRY INTO A SINGLE USE BATHROOM IN A COMMERCIAL ESTABLISHMENT CONSTITUTED A SEARCH, DEFENDANT'S SUPPRESSION MOTION SHOULD NOT HAVE BEEN DENIED BASED UPON THE CONCLUSION THE DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY, MATTER REMITTED FOR CONSIDERATION OF ANOTHER ISSUE WHICH SUPREME COURT DID NOT RULE ON (FIRST DEPT))/APPEALS (CRIMINAL LAW, MATTER REMITTED FOR CONSIDERATION OF AN ISSUE WHICH SUPREME COURT DID NOT RULE ON (FIRST DEPT))

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INVALID, MATTER SENT BACK FOR YOUTHFUL OFFENDER DETERMINATION (FOURTH DEPT).

The Fourth Department determined the waiver of appeal was invalid and sent the matter back for a determination of youthful offender status:

> Supreme Court did not elicit the waiver until after defendant had pleaded guilty and, in any event, "the record fails to establish that [the court] engaged him in an adequate colloquy to ensure that the waiver was a knowing and voluntary choice" ... . Furthermore, "neither the written waiver of the right to appeal in the record nor the court's brief mention of that waiver during the plea proceeding distinguished the waiver of the right to appeal from those rights automatically forfeited upon a plea of guilty" ... .
>
> We further agree with defendant that the court erred in failing to determine whether he should be afforded youthful offender status ... . As the People correctly concede, defendant is an eligible youth, and the sentencing court must make "a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it" ... . **People v Willis, 2018 NY Slip Op 03291, Fourth Dept 5-4-18**

CRIMINAL LAW (WAIVER OF APPEAL INVALID, MATTER SENT BACK FOR YOUTHFUL OFFENDER DETERMINATION (FOURTH DEPT))/APPEALS (CRIMINAL LAW, WAIVER OF APPEAL INVALID, MATTER SENT BACK FOR YOUTHFUL OFFENDER DETERMINATION (FOURTH DEPT))/WAIVER OF APPEAL (CRIMINAL LAW, WAIVER OF APPEAL INVALID, MATTER SENT BACK FOR YOUTHFUL OFFENDER DETERMINATION (FOURTH DEPT))/YOUTHFUL OFFENDER (WAIVER OF APPEAL INVALID, MATTER SENT BACK FOR YOUTHFUL OFFENDER DETERMINATION (FOURTH DEPT))

CRIMINAL LAW, APPEALS.

PEOPLE CONCEDED ROBBERY THIRD SHOULD HAVE BEEN SUBMITTED TO THE JURY AS A LESSER INCLUDED OFFENSE, NO NEED FOR A NEW TRIAL, CONVICTION REDUCED (FIRST DEPT).

The First Department, reversing (modifying) defendant's conviction of robbery second, determined Supreme Court should have submitted robbery third to the jury as a lesser included offense. But because the People agreed that the conviction could be reduced to robbery third a new trial was not necessary:

> There was a reasonable view of the evidence supporting defendant's request for submission of third-degree robbery as a lesser included offense, and we have considered and rejected the People's argument that the issue is unpreserved. The appropriate remedy for this type of error would normally be a new trial. However, the People's concession that, if we reach this error, the conviction should be reduced to third-degree robbery renders a new trial unnecessary because the modification provides defendant with a greater remedy than he would have received had the trial court submitted that charge to the jury ... . **People v Cabassa, 2018 NY Slip Op 03810, First Dept 5-29-18**

CRIMINAL LAW (LESSER INCLUDED OFFENSES, PEOPLE CONCEDED ROBBERY THIRD SHOULD HAVE BEEN SUBMITTED TO THE JURY AS A LESSER INCLUDED OFFENSE, NO NEED FOR A NEW TRIAL, CONVICTION REDUCED (FIRST DEPT))/LESSER INCLUDED OFFENSES (PEOPLE CONCEDED ROBBERY THIRD SHOULD HAVE BEEN SUBMITTED TO THE JURY AS A LESSER INCLUDED OFFENSE, NO NEED FOR A NEW TRIAL, CONVICTION REDUCED (FIRST DEPT))/APPEALS (CRIMINAL LAW, LESSER INCLUDED OFFENSES, PEOPLE CONCEDED ROBBERY THIRD SHOULD HAVE BEEN SUBMITTED TO THE JURY AS A LESSER INCLUDED OFFENSE, NO NEED FOR A NEW TRIAL, CONVICTION REDUCED (FIRST DEPT))

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE AND ACTUAL INNOCENCE SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, DEFENDANT PRESENTED EVIDENCE DEFENSE COUNSEL NEVER SUBPOENAED A WITNESS (FOURTH DEPT).

The Fourth Department determined defendant's motion to vacate his conviction based upon ineffective assistance and actual innocence should not have been denied without a hearing:

> ... [T]he court erred in denying without a hearing that part of his motion based upon ineffective assistance of counsel. Defendant's specific claim is that defense counsel failed to secure the presence of a witness who had potentially exculpatory information, and we agree with defendant that such a failure may serve as the basis for a finding of ineffective assistance of counsel ... . At trial, defense counsel stated on the record that the witness had been subpoenaed to testify on defendant's behalf. The witness did not testify, however, and there is nothing in the trial record indicating why. According to defendant's moving papers, when the witness did not appear to testify, defense counsel merely stated: "Oh, well." There is no dispute that defense counsel did not attempt to utilize the procedure for securing the trial testimony of a material witness ... , or to seek a continuance to obtain the witness's voluntary compliance with the subpoena. Notably, the witness avers in her affidavit that she was never subpoenaed.
>
> The court denied that part of the motion based on its determination that defendant could have raised his claim on his direct appeal or in his prior CPL 440.10 motions ... . That was error. Because the witness resided in another state and went by a different surname, it was not until 2014—after defendant made his two prior CPL 440.10 motions—that defendant was able to obtain an affidavit from her. The affidavit contains information not contained in the trial record and substantially supports defendant's claim of ineffective assistance. Significantly, it raises an issue of fact whether the witness was ever subpoenaed by defense counsel. That issue of fact is separate and distinct from the witness's information about the murder itself, which was known to defendant through the 2004 police report. Defendant could not have discovered and raised the issue of fact until 2014, when he was able to identify, locate, and obtain an affidavit from the witness. **People v Borcyk, 2018 NY Slip Op 03256, Fourth Dept 5-4-18**

CRIMINAL LAW (MOTION TO VACATE CONVICTION, DEFENDANT'S MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE AND ACTUAL INNOCENCE SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, DEFENDANT PRESENTED EVIDENCE DEFENSE COUNSEL NEVER SUBPOENAED A WITNESS (FOURTH DEPT))/ATTORNEYS (MOTION TO VACATE CONVICTION, INEFFECTIVE ASSISTANCE, DEFENDANT'S MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE AND ACTUAL INNOCENCE SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, DEFENDANT PRESENTED EVIDENCE DEFENSE COUNSEL NEVER SUBPOENAED A WITNESS (FOURTH DEPT))/INEFFECTIVE ASSISTANCE (MOTION TO VACATE CONVICTION, DEFENDANT'S MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE AND ACTUAL INNOCENCE SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, DEFENDANT PRESENTED EVIDENCE DEFENSE COUNSEL NEVER SUBPOENAED A WITNESS (FOURTH DEPT))/ACTUAL INNOCENCE (MOTION TO VACATE CONVICTION, DEFENDANT'S MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE AND ACTUAL INNOCENCE SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, DEFENDANT PRESENTED EVIDENCE DEFENSE COUNSEL NEVER SUBPOENAED A WITNESS (FOURTH DEPT))/VACATE CONVICTION, MOTION TO (DEFENDANT'S MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE AND ACTUAL INNOCENCE SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, DEFENDANT PRESENTED EVIDENCE DEFENSE COUNSEL NEVER SUBPOENAED A WITNESS (FOURTH DEPT))

CRIMINAL LAW, ATTORNEYS.

COURT DID NOT CONDUCT SEARCHING INQUIRY INTO DEFENDANT'S REQUEST TO PROCEED PRO SE, CONVICTION REVERSED (FIRST DEPT).

The First Department, reversing defendant's conviction, determined that the court's inquiry into defendant's request to proceed pro se was inadequate:

> The knowing, voluntary, and intelligent waiver of the right to counsel by a defendant who seeks to proceed pro se requires a "searching inquiry" in which the court must communicate to the defendant both the "risks inherent in proceeding pro se" and "the singular importance of the lawyer in the adversarial system of adjudication" ... . Neither a defendant's expression of a strong desire to proceed pro se, nor elicitation of information demonstrating the defendant might be relatively capable of doing so, is a substitute for the two above-cited essential components of a searching inquiry, which were all but completely absent here. The relevant portion of the trial court's colloquy with defendant on this subject was essentially limited to warning him that self-representation was a "big mistake" and that the court had seen many pro se defendants convicted after trial.
>
> Even when the record is viewed as a whole, the required inquiry does not appear. Defendant had made several requests for self-representation before a calendar court. However, in each instance the court denied the request on the basis of its initial inquiry about defendant's understanding of the charges, without reaching the stage of the required pro se inquiry at issue on appeal. **People v Herbin, 2018 NY Slip Op 03811, First Dept 5-29-18**

CRIMINAL LAW (LESSER INCLUDED OFFENSES, PEOPLE CONCEDED ROBBERY THIRD SHOULD HAVE BEEN SUBMITTED TO THE JURY AS A LESSER INCLUDED OFFENSE, NO NEED FOR A NEW TRIAL, CONVICTION REDUCED (FIRST DEPT))/LESSER INCLUDED OFFENSES (PEOPLE CONCEDED ROBBERY THIRD SHOULD HAVE BEEN SUBMITTED TO THE JURY AS A LESSER INCLUDED OFFENSE, NO NEED FOR A NEW TRIAL, CONVICTION REDUCED (FIRST DEPT))/APPEALS (CRIMINAL LAW, LESSER INCLUDED OFFENSES, PEOPLE CONCEDED ROBBERY THIRD SHOULD HAVE BEEN SUBMITTED TO THE JURY AS A LESSER INCLUDED OFFENSE, NO NEED FOR A NEW TRIAL, CONVICTION REDUCED (FIRST DEPT))

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, HE IS ENTITLED TO A HEARING ON HIS MOTION TO VACATE THE JUDGMENT OF CONVICTION (SECOND DEPT).

The Second Department determined defendant was entitled to a hearing on his motion to vacate his conviction based upon ineffective assistance of counsel. Defendant demonstrated his attorney never informed him the plea included an aggravated felony which made deportation mandatory:

> A defendant has the right to the effective assistance of counsel before deciding whether to plead guilty ... . "Under the federal standard for ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different'" ... . "Under the state standard . . . the constitutional requirements for the effective assistance of counsel are met when the defense attorney provides meaningful representation'"... . In cases asserting ineffective assistance of counsel in the plea context, a defendant must show that "there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial"... , or "that the outcome of the proceedings would have been different" ... .
>
> Here, the defendant sufficiently alleged that defense counsel failed to fully inform him that a plea of guilty exposed him to mandatory removal from the United States and that, had he been so advised, a decision to reject the plea offer would have been rational ... . **People v Hungria, 2018 NY Slip Op 03545, Second Dept 5-16-18**

CRIMINAL LAW (DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, HE IS ENTITLED TO A HEARING ON HIS MOTION TO VACATE THE JUDGMENT OF CONVICTION (SECOND DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, HE IS ENTITLED TO A HEARING ON HIS MOTION TO VACATE THE JUDGMENT OF CONVICTION (SECOND DEPT))/INEFFECTIVE ASSISTANCE (DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, HE IS ENTITLED TO A HEARING ON HIS MOTION TO VACATE THE JUDGMENT OF CONVICTION (SECOND DEPT))/IMMIGRATION LAW (CRIMINAL LAW, DEPORTATION, DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, HE IS ENTITLED TO A HEARING ON HIS MOTION TO VACATE THE JUDGMENT OF CONVICTION (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE MANSLAUGHTER AND NEGLIGENT HOMICIDE CONVICTIONS WHERE SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE IN THIS TRAFFIC ACCIDENT CASE, THOSE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE, THE POLICE OFFICER WAS KILLED BY ANOTHER DRIVER WHO WAS PASSING BY THE ACCIDENT SCENE A SUBSTANTIAL AMOUNT OF TIME AFTER THE DEFENDANT'S ACCIDENT (SECOND DEPT).

The Second Department, reversing the manslaughter and negligent homicide convictions, over a dissent, determined that those convictions, although supported by legally sufficient evidence, were against the weight of the evidence. Defendant, whose blood alcohol level was .12, caused a highway traffic accident. Several drivers stopped and a police officer was at the scene. Another driver, who was in traffic passing by the stopped cars and the police officer, struck a car and the police officer was killed. The Second Department found that the accident in which the officer was killed, which occurred a substantial amount of time after defendant's accident, was not "temporally proximate" to the defendant's conduct:

> ... [T]he People adduced legally sufficient evidence that the defendant's actions set in motion the events that led to the death of the police officer, and that the defendant's conduct was a sufficiently direct cause of that result. It was reasonably foreseeable that the defendant's conduct, including driving while intoxicated, causing the initial collision, failing to stop after the initial collision, and causing a second collision, would cause a dangerous condition on the roadway that would pose a danger to police or other first responders, particularly in the immediate aftermath of the incidents and prior to the securing of the accident scene... . The People adduced legally sufficient evidence of causation as to the counts of manslaughter in the second degree, vehicular manslaughter in the second degree, aggravated criminally negligent homicide, and criminally negligent homicide. ...
>
> However, the jury verdict as to the manslaughter and homicide counts was against the weight of the evidence. In fulfilling our responsibility to conduct an independent review of the weight of the evidence ... , we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor ... . Here, the verdict as to the manslaughter and homicide counts was against the weight of the evidence, particularly in light of the evidence that the driver of the SUV that struck the police officer failed to pay attention to conditions on the roadway, including the presence of multiple stopped vehicles and debris on the road, and approached the accident scene at a speed in excess of the speed at which other vehicles were traveling ... . **People v Ryan, 2018 NY Slip Op 03380, Second Dept 5-9-18**

CRIMINAL LAW (TRAFFIC ACCIDENTS, ALTHOUGH THE MANSLAUGHTER AND NEGLIGENT HOMICIDE CONVICTIONS WHERE SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE IN THIS TRAFFIC ACCIDENT CASE, THOSE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE, THE POLICE OFFICER WAS KILLED BY ANOTHER DRIVER WHO WAS PASSING BY THE ACCIDENT SCENE A SUBSTANTIAL AMOUNT OF TIME AFTER THE DEFENDANT'S ACCIDENT (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, TRAFFIC ACCIDENTS,ALTHOUGH THE MANSLAUGHTER AND NEGLIGENT HOMICIDE CONVICTIONS WHERE SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE IN THIS TRAFFIC ACCIDENT CASE, THOSE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE, THE POLICE OFFICER WAS KILLED BY ANOTHER DRIVER WHO WAS PASSING BY THE ACCIDENT SCENE A SUBSTANTIAL AMOUNT OF TIME AFTER THE DEFENDANT'S ACCIDENT (SECOND DEPT))/LEGALLY SUFFICIENT EVIDENCE (CRIMINAL LAW, TRAFFIC ACCIDENTS, ALTHOUGH THE MANSLAUGHTER AND NEGLIGENT HOMICIDE CONVICTIONS WHERE SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE IN THIS TRAFFIC ACCIDENT CASE, THOSE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE, THE POLICE OFFICER WAS KILLED BY ANOTHER DRIVER WHO WAS PASSING BY THE ACCIDENT SCENE A SUBSTANTIAL AMOUNT OF TIME AFTER THE DEFENDANT'S ACCIDENT (SECOND DEPT))/WEIGHT OF THE EVIDENCE (CRIMINAL LAW, TRAFFIC ACCIDENTS, ALTHOUGH THE MANSLAUGHTER AND NEGLIGENT HOMICIDE CONVICTIONS WHERE SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE IN THIS TRAFFIC ACCIDENT CASE, THOSE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE, THE POLICE OFFICER WAS KILLED BY ANOTHER DRIVER WHO WAS PASSING BY THE ACCIDENT SCENE A SUBSTANTIAL AMOUNT OF TIME AFTER THE DEFENDANT'S ACCIDENT (SECOND DEPT))/VEHICULAR HOMICIDE (ALTHOUGH THE MANSLAUGHTER AND NEGLIGENT HOMICIDE CONVICTIONS WHERE SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE IN THIS TRAFFIC ACCIDENT CASE, THOSE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE, THE POLICE OFFICER WAS KILLED BY ANOTHER DRIVER WHO WAS PASSING BY THE ACCIDENT SCENE A

SUBSTANTIAL AMOUNT OF TIME AFTER THE DEFENDANT'S ACCIDENT (SECOND DEPT))/TRAFFIC ACCIDENTS (CRIMINAL LAW, ALTHOUGH THE MANSLAUGHTER AND NEGLIGENT HOMICIDE CONVICTIONS WHERE SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE IN THIS TRAFFIC ACCIDENT CASE, THOSE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE, THE POLICE OFFICER WAS KILLED BY ANOTHER DRIVER WHO WAS PASSING BY THE ACCIDENT SCENE A SUBSTANTIAL AMOUNT OF TIME AFTER THE DEFENDANT'S ACCIDENT (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS CHARGED WITH ENDANGERING THE WELFARE OF A CHILD BASED ON SEVERAL TYPES OF SEXUAL TOUCHING, BUT NOT KISSING, THE JURY WAS ALLOWED TO CONSIDER KISSING, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined defendant was convicted of endangering the welfare of a child based upon a theory that was not charged in the indictment. The endangering count of the indictment alleged defendant had subjected the victim to several types of sexual touching, but not kissing. The jury was allowed to consider the evidence of kissing. The defendant was acquitted of all counts except the endangering count:

> In summation, the People argued, over objection, that the defendant's guilt of endangering the welfare of a child was established by the conduct of kissing the complainant. The Supreme Court then instructed the jury, over objection, that in order to find the defendant guilty of endangering the welfare of a child under the relevant count, the jurors were required to find that the defendant knowingly acted in a manner likely to be injurious to the physical, mental, or moral welfare of the complainant, a child less than 17 years old, by engaging in sexual contact with her, defined, under the general definition in the Penal Law, as "any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party" ... . The jury returned a verdict of guilty on that count, and acquitted the defendant of the other counts submitted to it, which charged the defendant, inter alia, with engaging in vaginal and anal intercourse with the complainant.
>
> Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories ... . Here, the defendant was convicted of endangering the welfare of a child under a count of the indictment that limited the People to a particular theory or theories of endangering the welfare of a child. Therefore, the Supreme Court erred when it permitted the jury to consider a theory not charged in the indictment—that kissing endangered the complainant's welfare ... . Since the defendant's conviction may have been based upon an uncharged theory, the judgment of conviction must be reversed and a new trial ordered. **People v Vasquez, 2018 NY Slip Op 03382, Second Dept 5-9-18**

CRIMINAL LAW (INDICTMENTS, EVIDENCE, DEFENDANT WAS CHARGED WITH ENDANGERING THE WELFARE OF A CHILD BASED ON SEVERAL TYPES OF SEXUAL TOUCHING, BUT NOT KISSING, THE JURY WAS ALLOWED TO CONSIDER KISSING, CONVICTION REVERSED (SECOND DEPT))/INDICTMENTS (EVIDENCE, DEFENDANT WAS CHARGED WITH ENDANGERING THE WELFARE OF A CHILD BASED ON SEVERAL TYPES OF SEXUAL TOUCHING, BUT NOT KISSING, THE JURY WAS ALLOWED TO CONSIDER KISSING, CONVICTION REVERSED (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, INDICTMENTS, DEFENDANT WAS CHARGED WITH ENDANGERING THE WELFARE OF A CHILD BASED ON SEVERAL TYPES OF SEXUAL TOUCHING, BUT NOT KISSING, THE JURY WAS ALLOWED TO CONSIDER KISSING, CONVICTION REVERSED (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT PROVE AT THE SUPPRESSION HEARING THAT THE SEARCH OF DEFENDANT'S PERSON AFTER A STREET STOP WAS SUPPORTED BY PROBABLE CAUSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to suppress items taken from his person should have been granted because the sequence of events which would have legitimized the search was not proven at the hearing:

> ... [W]e agree with the People that the police had reasonable suspicion to detain defendant based on the detective's report that he saw a possible drug transaction in which a Hispanic man later identified as defendant, who was wearing a black leather jacket, handed a bag containing two small white objects to another man before walking away, in close temporal and spatial proximity to defendant's apprehension ... . However, this information did not establish probable cause to arrest and search defendant. The detective did not testify that he observed anything that appeared to be money being exchanged or handled by either of the two men, that there was anything furtive about their behavior aside from the sheer brevity of their encounter, or that the area was particularly drug prone ... .
>
> When the detective recovered a bag containing drugs after the apparent buyer discarded it, this clearly raised the level of suspicion to probable cause. However, the nontestifying officers had detained defendant based only on the information known at the time of the initial radioed report. The People's assertion that the search occurred after the testifying detective made a confirmatory identification of defendant is unsupported by the record. In fact, the detective could not specify when the search occurred, or when he learned about it, and the People did not call any witnesses to testify about the nature and timing of the search based on personal knowledge. **People v Ayarde, 2018 NY Slip Op 03750, First Dept 5-24-18**

CRIMINAL LAW (STREET STOP, SEARCH, THE PEOPLE DID NOT PROVE AT THE SUPPRESSION HEARING THAT THE SEARCH OF DEFENDANT'S PERSON AFTER A STREET STOP WAS SUPPORTED BY PROBABLE CAUSE (FIRST DEPT))/STREET STOPS (SEARCH, SEARCH, THE PEOPLE DID NOT PROVE AT THE SUPPRESSION HEARING THAT THE SEARCH OF DEFENDANT'S PERSON AFTER A STREET STOP WAS SUPPORTED BY PROBABLE CAUSE (FIRST DEPT))/SEARCH AND SEIZURE (STREET STOPS, THE PEOPLE DID NOT PROVE AT THE SUPPRESSION HEARING THAT THE SEARCH OF DEFENDANT'S PERSON AFTER A STREET STOP WAS SUPPORTED BY PROBABLE CAUSE (FIRST DEPT))

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE PEOPLE MADE AN UNTIMELY MOTION FOR A BUCCAL SWAB FOR DNA TESTING, THE ERROR DID NOT REQUIRE REVERSAL (SECOND DEPT).

The Second Department determined the People's motion to compel defendant to submit to a buccal swab for DNA testing was untimely under Criminal Procedure Law 240.90. But the admission of the evidence did not require reversal because the error did not implicate defendant's constitutional rights. **People v Cox, 2018 NY Slip Op 03698, Second Dept 5-23-18**

CRIMINAL LAW (ALTHOUGH THE PEOPLE MADE AN UNTIMELY MOTION FOR A BUCCAL SWAB FOR DNA TESTING, THE ERROR DID NOT REQUIRE REVERSAL (SECOND DEPT))/DNA (ALTHOUGH THE PEOPLE MADE AN UNTIMELY MOTION FOR A BUCCAL SWAB FOR DNA TESTING, THE ERROR DID NOT REQUIRE REVERSAL (SECOND DEPT))/BUCCAL SWAB (DNA, ALTHOUGH THE PEOPLE MADE AN UNTIMELY MOTION FOR A BUCCAL SWAB FOR DNA TESTING, THE ERROR DID NOT REQUIRE REVERSAL (SECOND DEPT))

CRIMINAL LAW, EVIDENCE.

TRIAL COURT PROPERLY GAVE THE GALBO JURY INSTRUCTION RE DEFENDANT'S POSSESSION OF STOLEN PROPERTY IN THIS BURGLARY CASE (SECOND DEPT).

The Second Department determined the trial court properly gave the Galbo charge in this burglary case:

> ... Supreme Court [did not] in giving the jury a Galbo charge (see People v Galbo, 218 NY 283) to the effect that the defendant's guilt of burglary could be inferred from his recent, unexplained, and exclusive possession of the stolen items. The prosecution presented both circumstantial and direct evidence, including admissions made by the defendant during a series of telephone calls, that the defendant committed the burglary and possessed the items, and there was no reasonable view of the evidence whereby the jury could have found that the defendant unlawfully possessed the property without also finding that he committed the burglary ... . **People v Jones, 2018 NY Slip Op 03703, Second Dept 5-23-18**

CRIMINAL LAW (BURGLARY, TRIAL COURT PROPERLY GAVE THE GALBO JURY INSTRUCTION RE DEFENDANT'S POSSESSION OF STOLEN PROPERTY IN THIS BURGLARY CASE (SECOND DEPT))/EVIDENCE (CRIMINAL LAW, BURGLARY, TRIAL COURT PROPERLY GAVE THE GALBO JURY INSTRUCTION RE DEFENDANT'S POSSESSION OF STOLEN PROPERTY IN THIS BURGLARY CASE (SECOND DEPT))/BURGLARY (JURY INSTRUCTIONS, TRIAL COURT PROPERLY GAVE THE GALBO JURY INSTRUCTION RE DEFENDANT'S POSSESSION OF STOLEN PROPERTY IN THIS BURGLARY CASE (SECOND DEPT))/JURY INSTRUCTIONS (BURGLARY, TRIAL COURT PROPERLY GAVE THE GALBO JURY INSTRUCTION RE DEFENDANT'S POSSESSION OF STOLEN PROPERTY IN THIS BURGLARY CASE (SECOND DEPT))/GALBO CHARGE (BURGLARY, TRIAL COURT PROPERLY GAVE THE GALBO JURY INSTRUCTION RE DEFENDANT'S POSSESSION OF STOLEN PROPERTY IN THIS BURGLARY CASE (SECOND DEPT))

CRIMINAL LAW, MENTAL HYGIENE LAW.

DEFENDANT DEMONSTRATED HE PLED GUILTY WITHOUT BEING INFORMED HE MIGHT BE SUBJECT TO CONFINEMENT UNDER THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT (SOMTA) AFTER COMPLETION OF HIS SENTENCE, HIS MOTION TO SET ASIDE HIS CONVICTION WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department determined defendant's motion to vacate his conviction by guilty plea was properly granted. Defendant demonstrated he was not informed of the possibility he would be subject to the Sex Offender Management and Treatment Act (SOMTA) which could result in further confinement pursuant to the Mental Hygiene Law upon the completion of his sentence:

> ... [T]he defendant, through evidence presented at the hearing, including his testimony, made the factual showing necessary to demonstrate that his plea of guilty was not knowing and voluntary. When the defendant pleaded guilty, he had already been adjudicated a level three predicate sex offender pursuant to the Sex Offender Registration Act ... based on a prior conviction. In addition, ... the defendant here was made the subject of a SOMTA proceeding. The defendant testified at the hearing that he would not have taken the plea bargain had he known of SOMTA. Under the circumstances of this case, the defendant showed that "the prospect of SOMTA confinement was realistic enough that it reasonably could have caused him, and in fact would have caused him, to reject an otherwise acceptable plea bargain" ... . **People v Balcerak, 2018 NY Slip Op 03138, Second Dept 5-2-18**

CRIMINAL LAW (VACATE CONVICTION, DEFENDANT DEMONSTRATED HE PLED GUILTY WITHOUT BEING INFORMED HE MIGHT BE SUBJECT TO CONFINEMENT UNDER THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT (SOMTA) AFTER COMPLETION OF HIS SENTENCE, HIS MOTION TO SET ASIDE HIS CONVICTION WAS PROPERLY GRANTED (SECOND DEPT))/MENTAL HYGIENE LAW (VACATE CONVICTION, DEFENDANT DEMONSTRATED HE PLED GUILTY WITHOUT BEING INFORMED HE MIGHT BE SUBJECT TO CONFINEMENT UNDER THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT (SOMTA) AFTER COMPLETION OF HIS SENTENCE, HIS MOTION TO SET ASIDE HIS CONVICTION WAS PROPERLY GRANTED (SECOND DEPT))/VACATE CONVICTION, MOTION TO (DEFENDANT DEMONSTRATED HE PLED GUILTY WITHOUT BEING INFORMED HE MIGHT BE SUBJECT TO CONFINEMENT UNDER THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT (SOMTA) AFTER COMPLETION OF HIS SENTENCE, HIS MOTION TO SET ASIDE HIS CONVICTION WAS PROPERLY GRANTED (SECOND DEPT))/SEX OFFENDER MANAGEMENT AND TREATMENT (SOMTA) (VACATE CONVICTION, DEFENDANT DEMONSTRATED HE PLED GUILTY WITHOUT BEING INFORMED HE MIGHT BE SUBJECT TO CONFINEMENT UNDER THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT (SOMTA) AFTER COMPLETION OF HIS SENTENCE, HIS MOTION TO SET ASIDE HIS CONVICTION WAS PROPERLY GRANTED (SECOND DEPT))

CRIMINAL LAW, MENTAL HYGIENE LAW, ATTORNEYS.

RESPONDENT, WHO PLED NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THE SUBSEQUENT CRIMINAL PROCEDURE LAW 330.20 COMMITMENT PROCEEDINGS, RESPONDENT'S COUNSEL SIMPLY ACCEPTED THE PSYCHIATRIC EXAMINATION REPORTS (THIRD DEPT).

The Third Department, reversing County Court, determined respondent (defendant) did not receive effect assistance of counsel in the commitment proceedings following his plea of not responsible by reason of mental disease of defect (re: assault charges).

> CPL 330.20 requires County Court to conduct an initial hearing within 10 days after receipt of psychiatric examination reports for the purpose of assigning an insanity acquittee to one of three "tracks" based upon his or her present mental condition ... . "Track-one [acquittees] are those found by the trial judge to suffer from a dangerous mental disorder; i.e., a mental illness that makes them a physical danger to themselves or others. Track-two [acquittees] are mentally ill, but not dangerous, while track-three [acquittees] are neither dangerous nor mentally ill" ... . County Court's finding in this case placed respondent in track one, a status "significantly more restrictive than track two" ... . "Track status, as determined by the initial commitment order, governs the acquittee's level of supervision in future proceedings and may be overturned only on appeal from that order, not by means of a rehearing and review" ... . Given the "vital[] importanc[e]" of track designation... , the initial commitment hearing was plainly "a critical stage of the proceedings during which respondent was entitled to the effective assistance of counsel, [requiring us to] consider whether counsel's performance therein viewed in totality amounted to meaningful representation" ... We agree with respondent that counsel's performance fell short of that standard.
>
> By affirmatively stating at the initial hearing that she "was not contesting any findings" contained within the psychiatric reports, respondent's counsel conceded that respondent had a dangerous mental disorder and, thus, implicitly consented to his confinement in a secure facility. Counsel did not call any witnesses or seek to cross-examine the psychiatrists who prepared the reports ... , nor did counsel consult an expert on respondent's behalf who may have offered a contrasting opinion as to his mental status or, at the very least, could have clinically assessed the examination reports and the approaches taken in reaching their ultimate conclusions ... . Despite petitioner's protestations to the contrary, there is no basis in this record to conclude that pursuit of any of these avenues — particularly cross-examination of the psychiatric examiners — would have been futile or otherwise destined for failure ... . Under these circumstances, we are simply unable to discern any plausible strategy or legitimate explanation for counsel's decision to completely acquiesce to the most severe track classification ... . **Matter of Matheson Kk., 2018 NY Slip Op 03195, Third Dept 5-3-18**

CRIMINAL LAW (INSANITY ACQUITEE, RESPONDENT, WHO PLED NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THE SUBSEQUENT CRIMINAL PROCEDURE LAW 330.20 COMMITMENT PROCEEDINGS, RESPONDENT'S COUNSEL SIMPLY ACCEPTED THE PSYCHIATRIC EXAMINATION REPORTS (THIRD DEPT))/MENTAL HYGIENE LAW (CRIMINAL LAW, INSANITY ACQUITTEE, RESPONDENT, WHO PLED NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THE SUBSEQUENT CRIMINAL PROCEDURE LAW 330.20 COMMITMENT PROCEEDINGS, RESPONDENT'S COUNSEL SIMPLY ACCEPTED THE PSYCHIATRIC EXAMINATION REPORTS (THIRD DEPT))/ATTORNEYS (CRIMINAL LAW, INEFFECTIVE ASSISTANCE, INSANITY ACQUITTEE, RESPONDENT, WHO PLED NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THE SUBSEQUENT CRIMINAL PROCEDURE LAW 330.20 COMMITMENT PROCEEDINGS, RESPONDENT'S COUNSEL SIMPLY ACCEPTED THE PSYCHIATRIC EXAMINATION REPORTS (THIRD DEPT))/INEFFECTIVE ASSISTANCE (ATTORNEYS, CRIMINAL LAW, INSANITY ACQUITTEE, RESPONDENT, WHO PLED NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THE SUBSEQUENT CRIMINAL PROCEDURE LAW 330.20 COMMITMENT PROCEEDINGS, RESPONDENT'S COUNSEL SIMPLY ACCEPTED THE PSYCHIATRIC EXAMINATION REPORTS (THIRD DEPT))/INSANITY ACQUITTEE (CRIMINAL LAW, ATTORNEYS, INEFFECTIVE ASSISTANCE, RESPONDENT, WHO PLED NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THE SUBSEQUENT CRIMINAL PROCEDURE LAW 330.20 COMMITMENT PROCEEDINGS, RESPONDENT'S COUNSEL SIMPLY ACCEPTED THE PSYCHIATRIC EXAMINATION REPORTS (THIRD DEPT))/COMMITMENT (CRIMINAL LAW, INSANITY ACQUITTEE, ATTORNEYS, RESPONDENT, WHO PLED NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, DID NOT

RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THE SUBSEQUENT CRIMINAL PROCEDURE LAW 330.20 COMMITMENT PROCEEDINGS, RESPONDENT'S COUNSEL SIMPLY ACCEPTED THE PSYCHIATRIC EXAMINATION REPORTS (THIRD DEPT))/CRIMINAL PROCEDURE LAW (CPL) 330.20 (COMMITMENT, INSANITY ACQUITTEE, RESPONDENT, WHO PLED NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THE SUBSEQUENT CRIMINAL PROCEDURE LAW 330.20 COMMITMENT PROCEEDINGS, RESPONDENT'S COUNSEL SIMPLY ACCEPTED THE PSYCHIATRIC EXAMINATION REPORTS (THIRD DEPT))

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

DENIAL OF A PETITION TO MODIFY A SEX OFFENDER REGISTRATION ACT (SORA) RISK ASSESSMENT IS APPEALABLE AS OF RIGHT, PETITION PROPERLY DENIED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Rivera, considering a question of first impression, determined a defendant can appeal, as of right, the denial of a petition to modify a Sex Offender Registration Act (SORA) risk classification. The Second Department further held that the petition was properly denied, in large part because defendant, who was 71 years old and in poor health, did not participate in any sex offender treatment programs and did not accept responsibility for his sex offenses:

> ... [N]othing in the language of Correction Law § 168-o(2) precludes this Court's exercise of its broad authority and jurisdiction to entertain and decide the instant appeal. In the context of SORA, we have long recognized the significant impact upon the defendant's liberty interest. Furthermore, we are cognizant of the ongoing responsibility and crucial importance in maintaining a balance between the procedural safeguards afforded to the defendant and the societal interests involved in protecting "the public from sex offenders" ... . [W]e hold that a sex offender may appeal from an order denying a petition for a downward modification of his risk level. **People v Charles, 2018 NY Slip Op 03864, Second Dept 5-30-18**

CRIMINAL LAW (SEX OFFENDER REGISTRATION ACT (SORA), DENIAL OF A PETITION TO MODIFY A SEX OFFENDER REGISTRATION ACT (SORA) RISK ASSESSMENT IS APPEALABLE AS OF RIGHT, IN THIS CASE THE PETITION WAS PROPERLY DENIED (SECOND DEPT))/SEX OFFENDER REGISTRATION ACT (SORA) (APPEALS, DENIAL OF A PETITION TO MODIFY A SEX OFFENDER REGISTRATION ACT (SORA) RISK ASSESSMENT IS APPEALABLE AS OF RIGHT, IN THIS CASE THE PETITION WAS PROPERLY DENIED (SECOND DEPT))/APPEALS (CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS, DENIAL OF A PETITION TO MODIFY A SEX OFFENDER REGISTRATION ACT (SORA) RISK ASSESSMENT IS APPEALABLE AS OF RIGHT, IN THIS CASE THE PETITION WAS PROPERLY DENIED (SECOND DEPT))

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

CORRECTION LAW DOES NOT REQUIRE SEX OFFENDER TO DISCLOSE HIS OR HER USE OF FACEBOOK, IT IS ENOUGH THAT THE SEX OFFENDER DISCLOSE EMAIL ADDRESSES AND SCREEN NAMES (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Pritzker, reversing defendant's conviction, determined the indictment charging defendant sex offender with a violation of the Correction Law for failing to disclose his use of Facebook was jurisdictionally defective. Disclosure of his Facebook use is not required by the Correction Law and, therefore, failure to disclose is not a crime. Defendant had complied with the requirements of Correction Law §§ 168-f (4) and 168-a (18) by disclosing his email address and screen names:

> ... [W]e conclude that the social media website or application — be it Facebook or any other social networking website or application — does not constitute a "designation used for the purposes of chat, instant messaging, social networking or other similar [I]nternet communication" (Correction Law § 168-a [18]). An Internet identifier is not the social networking website or application itself; rather, it is how someone identifies himself or herself when accessing a social networking account, whether it be with an electronic mail address or some other name or title, such as a screen name or user name. Defendant's failure to disclose his use of Facebook is not a crime, rendering the indictment jurisdictionally defective ... . **People v Ellis, 2018 NY Slip Op 03873, Third Dept 5-31-18**

CRIMINAL LAW (SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW DOES NOT REQUIRE SEX OFFENDER TO DISCLOSE HIS OR HER USE OF FACEBOOK, IT IS ENOUGH THAT THE SEX OFFENDER DISCLOSE EMAIL ADDRESSES AND SCREEN NAMES (THIRD DEPT))/SEX OFFENDER REGISTRATION ACT (SORA) (CORRECTION LAW DOES NOT REQUIRE SEX OFFENDER TO DISCLOSE HIS OR HER USE OF FACEBOOK, IT IS ENOUGH THAT THE SEX OFFENDER DISCLOSE EMAIL ADDRESSES AND SCREEN NAMES (THIRD DEPT))/CORRECTION LAW (SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW DOES NOT REQUIRE SEX OFFENDER TO DISCLOSE HIS OR HER USE OF FACEBOOK, IT IS ENOUGH THAT THE SEX OFFENDER DISCLOSE EMAIL ADDRESSES AND SCREEN NAMES (THIRD DEPT))/FACEBOOK (SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW DOES NOT REQUIRE SEX OFFENDER TO DISCLOSE HIS OR HER USE OF FACEBOOK, IT IS ENOUGH THAT THE SEX OFFENDER DISCLOSE EMAIL ADDRESSES AND SCREEN NAMES (THIRD DEPT))/SOCIAL NETWORKING (SEX OFFENDER REGISTRATION ACT (SORA), CORRECTION LAW DOES NOT REQUIRE SEX OFFENDER TO DISCLOSE HIS OR HER USE OF FACEBOOK, IT IS ENOUGH THAT THE SEX OFFENDER DISCLOSE EMAIL ADDRESSES AND SCREEN NAMES (THIRD DEPT))

DEFAMATION

DEFAMATION.

STATEMENTS POSTED ON FACEBOOK CONCERNING PLAINTIFF'S UNAUTHORIZED PARTIAL DEMOLITION OF A LANDMARK BUILDING WERE DEEMED NON-ACTIONABLE OPINION AND HYPERBOLE (SECOND DEPT).

The Second Department determined that defendant's Facebook posts were non-actionable opinion in this defamation action. Defendant, without obtaining the required certificate, had begun to demolish a building which had been designated a landmark. Defendant posted pictures of the building with comments that the demolition was a crime, that the plaintiff was a vampire, and that plaintiff, rather than gutting the building and maintaining the facade, intended to demolish the building and put up condominiums:

> The defendant established that [the] statements, which referred to the plaintiff's actions in causing the demolition of the building as a "crime" and referred to the plaintiff as a "vampire," constituted nonactionable opinion or rhetorical hyperbole ... .
>
> ... [T]he defendant asserted that the plaintiff had originally said that he would keep the building's historic facade and gut the interior to convert the building into apartments. The defendant further stated that the plaintiff's statement was "a lie" and that "[a]ll along he planned a big condo and he removed part of the metal roof and punched holes in it and failed to repair it so the elements would get in and slowly but surely destroy the building. This is known as demolition by intentional neglect.'" ...
>
> In distinguishing between statements of opinion and fact, the factors to be considered are: (1) whether the specific language at issue has a precise, readily understood meaning, (2) whether the statements are capable of being proven true or false, and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers that what is stated is likely to be opinion, not fact... Even apparent statements of fact may assume the character of opinion when made in public debate where the audience may anticipate the use of rhetoric or hyperbole ... . The question is not whether there is an isolated assertion of fact; rather, it is necessary to consider the writing as a whole, including its tone and apparent purpose, as well as the overall context of the publication, to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff ... . **Stolatis v Hernandez, 2018 NY Slip Op 03868, Second Dept 5-30-18**

DEFAMATION (STATEMENTS POSTED ON FACEBOOK CONCERNING PLAINTIFF'S UNAUTHORIZED PARTIAL DEMOLITION OF A LANDMARK BUILDING WERE DEEMED NON-ACTIONABLE OPINION AND HYPERBOLE (SECOND DEPT))/OPINION (DEFAMATION, (STATEMENTS POSTED ON FACEBOOK CONCERNING PLAINTIFF'S UNAUTHORIZED PARTIAL DEMOLITION OF A LANDMARK BUILDING WERE DEEMED NON-ACTIONABLE OPINION AND HYPERBOLE (SECOND DEPT))/HYPERBOLE (DEFAMATION, STATEMENTS POSTED ON FACEBOOK CONCERNING PLAINTIFF'S UNAUTHORIZED PARTIAL DEMOLITION OF A LANDMARK BUILDING WERE DEEMED NON-ACTIONABLE OPINION AND HYPERBOLE (SECOND DEPT))

DEFAMATION, CIVIL PROCEDURE.

TWO STATEMENTS FOUND TO BE NONACTIONABLE EXPRESSIONS OF OPINION IN THIS DEFAMATION ACTION, PLAINTIFFS HAVE NO PROOF BURDEN ON A MOTION TO DISMISS, DEFENDANTS NOT SHIELDED BY THE COMMUNICATIONS DECENCY ACT (SECOND DEPT).

The Second Department, modifying Supreme Court, determined two statements alleged by the plaintiffs to have been defamatory were nonactionable opinion (other defamatory statements alleged in the complaint properly survived the motion to dismiss). The court noted that plaintiffs have no burden to prove the allegations in a complaint in response to a motion to dismiss, and further found that the Communications Decency Act did not shield the defendants from liability:

> Here, the allegedly defamatory statements set forth in paragraphs 53 and 55 of the complaint—which asserted, among other things, that [the defendant president of the cooperative] was "attempting insult of American laws & freedom" and was attempting to "destroy Trump Village 4 and sell our buildings to the highest bidder after we are bankrupt"—constituted nonactionable expressions of opinion. The statements ... were not easily understandable, were largely incapable of being proven true or false, and, in context, signaled to the average reader that the statements were opinion, not fact. ...
>
> We reject the defendants' contention that the allegations of defamation fail to state a cause of action because their statements were protected by qualified privileges, and insufficient facts were alleged to show that they spoke with malice necessary to defeat those privileges ... . Since "the burden does not shift to the nonmoving party on a motion made pursuant to CPLR 3211(a)(7), a plaintiff has no obligation to show evidentiary facts to support [his or her] allegations of malice on [such] a motion'" ... . Here, to the extent that the defendants' statements may be shielded by any qualified privileges, the allegations of malice that were set forth in the complaint and in an affidavit submitted by [the cooperative president] preclude dismissal of the complaint insofar as asserted against the defendants for failure to state a cause of action ,,, ,
>
> We agree with the Supreme Court that the Communications Decency Act (47 USC § 230) did not warrant dismissal of the complaint at this juncture. A defendant is "immune from state law liability if (1) it is a provider or user of an interactive computer service'; (2) the complaint seeks to hold the defendant liable as a publisher or speaker'; and (3) the action is based on information provided by another information content provider'" ... . "[I]f a defendant service provider is itself the content provider,' it is not shielded from liability" ... . Here, the plaintiffs alleged that the defendants authored the defamatory statements, which would mean that the defendants were content providers within the meaning of the statute ... . **Trump Vil. Section 4, Inc. v Bezvoleva, 2018 NY Slip Op 03389, Second Dept 5-9-18**

DEFAMATION (TWO STATEMENTS FOUND TO BE NONACTIONABLE EXPRESSIONS OF OPINION IN THIS DEFAMATION ACTION, PLAINTIFFS HAVE NO PROOF BURDEN ON A MOTION TO DISMISS, DEFENDANTS NOT SHIELDED BY THE COMMUNICATIONS DECENCY ACT (SECOND DEPT))/OPINION (DEFAMATION, TWO STATEMENTS FOUND TO BE NONACTIONABLE EXPRESSIONS OF OPINION IN THIS DEFAMATION ACTION, PLAINTIFFS HAVE NO PROOF BURDEN ON A MOTION TO DISMISS, DEFENDANTS NOT SHIELDED BY THE COMMUNICATIONS DECENCY ACT (SECOND DEPT))/COMMUNICATIONS DECENCY ACT (DEFAMATION, TWO STATEMENTS FOUND TO BE NONACTIONABLE EXPRESSIONS OF OPINION IN THIS DEFAMATION ACTION, PLAINTIFFS HAVE NO PROOF BURDEN ON A MOTION TO DISMISS, DEFENDANTS NOT SHIELDED BY THE COMMUNICATIONS DECENCY ACT (SECOND DEPT))

DISCIPLINARY HEARINGS

DISCIPLINARY HEARINGS (INMATES).

INMATE PETITIONER HAD THE RIGHT TO CALL A PRISON OFFICER AS A WITNESS TO DETERMINE THE BASIS OF THE OFFICER'S KNOWLEDGE THAT PETITIONER POSSESSED A WEAPON, DETERMINATION ANNULLED BASED UPON THE DENIAL OF THAT RIGHT (SECOND DEPT).

The Second Department, annulling the disciplinary determination, held that the inmate-petitioner had the right to call a prison officer as a witness to ascertain the basis for the officer's knowledge that petitioner possessed a weapon. The petitioner alleged the weapon was placed in the petitioner's cell by someone else:

> A prison inmate facing a disciplinary hearing is not entitled to the same level of due process as a criminal defendant ... , but there are minimum standards for disciplinary hearings. The rules of the Department of Corrections and Community Supervision expressly provide that inmates have a conditional right to call witnesses: "The inmate may call witnesses on his behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals. If permission to call a witness is denied, the hearing officer shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented" (7 NYCRR 253.5[a]). Here, the petitioner did not dispute that the item in question was found in his cell, but he contended that the item must have been placed by someone else, and he asked that the superior officer who provided the information upon which a sergeant authorized the search be called as a witness. The hearing officer incorrectly ruled that the superior officer's testimony was not needed simply because, as the sergeant testified, the superior officer had provided reliable information in the past. The hearing officer overlooked the fact that, absent any countervailing consideration, such as a specific threat to institutional safety or correctional goals, the petitioner was entitled to have the superior officer asked about the basis of his knowledge that contraband could be found in the petitioner's cell ... .
>
> Since the Department of Corrections and Community Supervision failed to adhere to its own rule in the conduct of the hearing ... , the determination must be annulled, all references to the determination must be expunged from the petitioner's institutional record, and the matter remitted to the respondent for further proceedings, if the respondent be so advised ... . **Matter of Cumberland v Annucci, 2018 NY Slip Op 03357, Second Dept 5-9-18**

DISCIPLINARY HEARINGS (INMATES) (INMATE PETITIONER HAD THE RIGHT TO CALL A PRISON OFFICER AS A WITNESS TO DETERMINE THE BASIS OF THE OFFICER'S KNOWLEDGE THAT PETITIONER POSSESSED A WEAPON, DETERMINATION ANNULLED BASED UPON THE DENIAL OF THAT RIGHT (SECOND DEPT))/EVIDENCE (DISCIPLINARY HEARINGS (INMATES), (INMATE PETITIONER HAD THE RIGHT TO CALL A PRISON OFFICER AS A WITNESS TO DETERMINE THE BASIS OF THE OFFICER'S KNOWLEDGE THAT PETITIONER POSSESSED A WEAPON, DETERMINATION ANNULLED BASED UPON THE DENIAL OF THAT RIGHT (SECOND DEPT))

DISCIPLINARY HEARINGS (INMATES).

PETITIONER-INMATE, WHO WAS CONDUCTING A CLASS ON AFRICAN-AMERICAN HISTORY, DID NOT VIOLATE PRISON RULES PROHIBITING GANG ACTIVITY BY DISCUSSING THE BLACK PANTHER PARTY AND THE BLOODS (THIRD DEPT).

The Third Department, annulling the disciplinary determination, held that petitioner-inmate, who was teaching a course on African-American history, did not violate prison rules prohibiting gang activity by describing the the operating rules of the Black Panther Party or by commenting on the Bloods:

> While discussing the history of the Black Panther Party and its apparent code of ethics, known as the "Eight Points of Attention," petitioner stated that the eighth point was "[i]f we ever have to take captives, do not ill treat them." Later in the class while critiquing another group, known as "Damu" or the Bloods gang, he stated, in relevant part, that "they could be the biggest army across this country if they were to organize themselves." * * *
>
> A review of the videotape of the class clearly reveals that petitioner made the statements at issue while discussing African-American organizations from an historical, cultural and political perspective and that such statements were consistent with the approved subject matter of the class. At no point did petitioner advocate that the class participants, none of whom were revealed to be gang members, engage in violent behavior by actually taking hostages or that they organize by banding together to become members of the Bloods gang. Rather, the videotape discloses that petitioner engaged in a detailed discussion of various historical events during the 1½-hour class and recited facts regarding these organizations that he thought were relevant in an effort to engage the class participants. Viewing the statements in the proper context, the evidence does not establish that petitioner "engage[d] in any violent conduct or conduct involving the threat of violence either individually or in a group" ... or that he "l[ed], organize[d], participate[d], or urge[d] other inmates to participate, in a work-stoppage, sit-in, lock-in, or other actions which may be detrimental to the order of the facility" ... . Likewise, the evidence does not demonstrate that petitioner "engage[d] in or encourage[d] others in gang activities or meetings" ... . **Matter of Bottom v Annucci, 2018 NY Slip Op 03413, Third Dept 5-10-18**

DISCIPLINARY HEARINGS (INMATES) (PETITIONER-INMATE, WHO WAS CONDUCTING A CLASS ON AFRICAN-AMERICAN HISTORY, DID NOT VIOLATE PRISON RULES PROHIBITING GANG ACTIVITY BY DISCUSSING THE BLACK PANTHER PARTY AND THE BLOODS (THIRD DEPT))/GANGS (INMATES, DISCIPLINARY HEARINGS, PETITIONER-INMATE, WHO WAS CONDUCTING A CLASS ON AFRICAN-AMERICAN HISTORY, DID NOT VIOLATE PRISON RULES PROHIBITING GANG ACTIVITY BY DISCUSSING THE BLACK PANTHER PARTY AND THE BLOODS (THIRD DEPT))

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

PETITIONER, A PRIVATE SCHOOL FOR DEVELOPMENTALLY DISABLED CHILDREN, HAD EXHAUSTED ITS ADMINISTRATIVE REMEDIES IN SEEKING REIMBURSEMENT FROM THE NYC DEPARTMENT OF EDUCATION FOR 24-HOUR CARE FOR A STUDENT WITH AUTISM, MATTER REMITTED WITH INSTRUCTION THAT THE DOCTRINE OF ESTOPPEL, BASED UPON A PROMISE TO REIMBURSE, MAY APPLY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing Supreme Court, determined the petitioner, a private residential school for children with intellectual and developmental disabilities (Center for Discovery), had exhausted its administrative remedies in seeking reimbursement from the NYC Department of Education for providing 24-hour care for a student with autism (pursuant to an Individualized Education Plan or IEP). The matter was therefore sent back to Supreme Court. The First Department noted that, although estoppel is usually not available in an action against a governmental agency, it may be appropriate here based upon the respondent's alleged promise to reimburse petitioner and petitioner's reliance on that promise:

> ... [W]e disagree that the doctrine of "exhaustion of remedies" precludes review of this case... .
>
> A "final and binding" determination is one where the agency "reached a definitive position on the issue that inflicts actual, concrete injury," and the injury may not be "significantly ameliorated by further administrative action or by steps available to the complaining party" ... .
>
> Respondent reached a definitive position concerning reimbursement for the additional services mandated by the amended IEP that inflicted concrete injury on petitioner. Counsel's ... email clearly stated that the City would not be reimbursing petitioner for the additional services mandated by the amended IEP. Petitioner had no available means of seeking review of respondent's decision from respondent or any other City or State agency empowered to review, overturn, or reverse the City's determination concerning reimbursement for the services explicitly mandated by the City in the amended IEP. The email was thus the "final" determination of respondent City on the issue ... .
>
> Petitioner ... alleges that it relied on respondent's representation that it would be reimbursed for the additional services mandated and provided under the amended IEP. While estoppel is generally not available in an action against a government agency, this case presents a factual dispute as to the applicability of the doctrine that must be determined upon remand ... . **Matter of Center for Discovery, Inc. v NYC Dept. of Educ., 2018 NY Slip Op 03494, First Dept 5-15-18**

EDUCATION-SCHOOL LAW (PETITIONER, A PRIVATE SCHOOL FOR DEVELOPMENTALLY DISABLED CHILDREN, HAD EXHAUSTED ITS ADMINISTRATIVE REMEDIES IN SEEKING REIMBURSEMENT FROM THE NYC DEPARTMENT OF EDUCATION FOR 24-HOUR CARE FOR A STUDENT WITH AUTISM, MATTER REMITTED WITH INSTRUCTION THAT THE DOCTRINE OF ESTOPPEL, BASED UPON A PROMISE TO REIMBURSE, MAY APPLY (FIRST DEPT))/ADMINISTRATIVE LAW (EXHAUSTION OF REMEDIES, EDUCATION-SCHOOL LAW, PETITIONER, A PRIVATE SCHOOL FOR DEVELOPMENTALLY DISABLED CHILDREN, HAD EXHAUSTED ITS ADMINISTRATIVE REMEDIES IN SEEKING REIMBURSEMENT FROM THE NYC DEPARTMENT OF EDUCATION FOR 24-HOUR CARE FOR A STUDENT WITH AUTISM, MATTER REMITTED WITH INSTRUCTION THAT THE DOCTRINE OF ESTOPPEL, BASED UPON A PROMISE TO REIMBURSE, MAY APPLY (FIRST DEPT))/MUNICIPAL LAW (EDUCATION-SCHOOL LAW, PETITIONER, A PRIVATE SCHOOL FOR DEVELOPMENTALLY DISABLED CHILDREN, HAD EXHAUSTED ITS ADMINISTRATIVE REMEDIES IN SEEKING REIMBURSEMENT FROM THE NYC DEPARTMENT OF EDUCATION FOR 24-HOUR CARE FOR A STUDENT WITH AUTISM, MATTER REMITTED WITH INSTRUCTION THAT THE DOCTRINE OF ESTOPPEL, BASED UPON A PROMISE TO REIMBURSE, MAY APPLY (FIRST DEPT))/CIVIL PROCEDURE (EXHAUSTION OF REMEDIES, PETITIONER, A PRIVATE SCHOOL FOR DEVELOPMENTALLY DISABLED CHILDREN, HAD EXHAUSTED ITS ADMINISTRATIVE REMEDIES IN SEEKING REIMBURSEMENT FROM THE NYC DEPARTMENT OF EDUCATION FOR 24-HOUR CARE FOR A STUDENT WITH AUTISM, MATTER REMITTED WITH INSTRUCTION THAT THE DOCTRINE OF ESTOPPEL, BASED UPON A PROMISE TO REIMBURSE, MAY APPLY (FIRST

DEPT))/ESTOPPEL (MUNICIPAL LAW, PETITIONER, A PRIVATE SCHOOL FOR DEVELOPMENTALLY DISABLED CHILDREN, HAD EXHAUSTED ITS ADMINISTRATIVE REMEDIES IN SEEKING REIMBURSEMENT FROM THE NYC DEPARTMENT OF EDUCATION FOR 24-HOUR CARE FOR A STUDENT WITH AUTISM, MATTER REMITTED WITH INSTRUCTION THAT THE DOCTRINE OF ESTOPPEL, BASED UPON A PROMISE TO REIMBURSE, MAY APPLY (FIRST DEPT))

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, CIVIL PROCEDURE.

PLAINTIFF'S MOTION TO AMEND HER COMPLAINT BY ADDING A BATTERY CAUSE OF ACTION AGAINST A TEACHER AND A RESPONDEAT SUPERIOR CAUSE OF ACTION AGAINST THE SCHOOL SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED, RELATION-BACK DOCTRINE APPLIED TO THE NEW CAUSES OF ACTION (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff's motion to amend her complaint to add a battery cause of action against a teacher and a respondeat superior cause of action against the school should have been granted. Plaintiff alleged the defendant teacher struck her on the back of her head. The complaint alleged a negligence cause of action. Prior to trial plaintiff moved to amend the complaint to add the battery and respondeat superior causes of action. The motion was denied. The case went to trial and the jury rendered a defense verdict. Plaintiff will get a new trial on the two causes of action in the amended complaint:

> It is well settled that, "[i]n the absence of prejudice or surprise, leave to amend a pleading should be freely granted" ... . Plaintiff established that the relation-back doctrine applied for statute of limitations purposes with respect to the battery cause of action, which was based on the same facts and occurrence as the negligence cause of action and thus related back to the original complaint (see CPLR 203 [f]...). In opposition to the cross motion, defendants failed to establish that they would be prejudiced by plaintiff's delay in seeking leave to amend the complaint ... , inasmuch as the new causes of action were based upon the same facts as the negligence cause of action in the original complaint ... .
>
> Defendants argued in opposition to the cross motion that plaintiff failed to proffer any excuse for her delay in seeking leave to amend the complaint, but " [m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side' " ... . Therefore, although plaintiff provided no excuse for her delay in seeking leave to amend, that is of no moment because, as noted above, defendants have not shown that they were prejudiced by the delay ... . **Wojtalewski v Central Sq. Cent. Sch. Dist., 2018 NY Slip Op 03275, Fourth Dept 5-4-18**

EDUCATION-SCHOOL LAW (CIVIL PROCEDURE, PLAINTIFF'S MOTION TO AMEND HER COMPLAINT BY ADDING A BATTERY CAUSE OF ACTION AGAINST A TEACHER AND A RESPONDEAT SUPERIOR CAUSE OF ACTION AGAINST THE SCHOOL SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED, RELATION-BACK DOCTRINE APPLIED TO THE NEW CAUSES OF ACTION (FOURTH DEPT))/EMPLOYMENT LAW (EDUCATION-SCHOOL LAW, CIVIL PROCEDURE, PLAINTIFF'S MOTION TO AMEND HER COMPLAINT BY ADDING A BATTERY CAUSE OF ACTION AGAINST A TEACHER AND A RESPONDEAT SUPERIOR CAUSE OF ACTION AGAINST THE SCHOOL SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED, RELATION-BACK DOCTRINE APPLIED TO THE NEW CAUSES OF ACTION (FOURTH DEPT))/CIVIL PROCEDURE (AMEND COMPLAINT, PLAINTIFF'S MOTION TO AMEND HER COMPLAINT BY ADDING A BATTERY CAUSE OF ACTION AGAINST A TEACHER AND A RESPONDEAT SUPERIOR CAUSE OF ACTION AGAINST THE SCHOOL SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED, RELATION-BACK DOCTRINE APPLIED TO THE NEW CAUSES OF ACTION (FOURTH DEPT))/COMPLAINTS (AMENDMENT, PLAINTIFF'S MOTION TO AMEND HER COMPLAINT BY ADDING A BATTERY CAUSE OF ACTION AGAINST A TEACHER AND A RESPONDEAT SUPERIOR CAUSE OF ACTION AGAINST THE SCHOOL SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED, RELATION-BACK DOCTRINE APPLIED TO THE NEW CAUSES OF ACTION (FOURTH DEPT))/RELATION BACK DOCTRINE (AMENDMENT OF COMPLAINT, PLAINTIFF'S MOTION TO AMEND HER COMPLAINT BY ADDING A BATTERY CAUSE OF ACTION AGAINST A TEACHER AND A RESPONDEAT SUPERIOR CAUSE OF ACTION AGAINST THE SCHOOL SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED, RELATION-BACK DOCTRINE APPLIED TO THE NEW CAUSES OF ACTION (FOURTH DEPT))/CPLR 203 (AMENDMENT OF COMPLAINT, RELATION-BACK, PLAINTIFF'S MOTION TO AMEND HER COMPLAINT BY ADDING A BATTERY CAUSE OF ACTION AGAINST A TEACHER AND A RESPONDEAT SUPERIOR CAUSE OF ACTION AGAINST THE SCHOOL SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED, RELATION-BACK DOCTRINE APPLIED TO THE NEW CAUSES OF ACTION (FOURTH DEPT))

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, EMPLOYMENT LAW, HUMAN RIGHTS LAW.

EDUCATION LAW REQUIRES THAT PLAINTIFF FILE A NOTICE OF CLAIM AS A CONDITION PRECEDENT FOR AN ACTION AGAINST THE NYC DEPARTMENT OF EDUCATION ALLEGING A VIOLATION OF THE NYS HUMAN RIGHTS LAW (SECOND DEPT).

The Second Department determined plaintiff was required, pursuant to the Education Law, to file a notice of claim in an action alleging a violation of the NYS Human Rights Law:

> Contrary to the plaintiff's contention, since her complaint seeks both equitable relief and the recovery of damages, the filing of a notice of claim within three months after her claim arose was a condition precedent to the maintenance of this action against the defendants Department of Education of the City of New York (hereinafter Department of Education) and Chancellor Carmen Fariña (see Education Law 3813[1]...). In contrast to General Municipal Law §§ 50-e(1) and 50-i(1), Education Law § 3813(1) broadly requires the filing of a notice of claim as a condition precedent to an "action . . . for any cause whatever," which includes the plaintiff's causes of action pursuant to the New York State Human Rights Law (see Executive Law § 296). ... Further, the plaintiff was not excused from the notice of claim requirement since her action does not seek to vindicate a public interest ... , and does not seek judicial enforcement of a legal right derived through enactment of positive law ... .
>
> The Supreme Court improperly determined that the plaintiff was required to serve a notice of claim upon the defendant City of New York ... . Nonetheless, since this action relates to the plaintiff's employment with the Department of Education, the plaintiff failed to state a cause of action against the City, which is a legal entity distinct from the Department of Education ... . **Seifullah v City of New York, 2018 NY Slip Op 03867, Second Dept 5-30-18**

EDUCATION-SCHOOL LAW (NOTICE OF CLAIM, EDUCATION LAW REQUIRES THAT PLAINTIFF FILE A NOTICE OF CLAIM AS A CONDITION PRECEDENT FOR AN ACTION AGAINST THE NYC DEPARTMENT OF EDUCATION ALLEGING A VIOLATION OF THE NYS HUMAN RIGHTS LAW (SECOND DEPT))/NOTICE OF CLAIM (EDUCATION-SCHOOL LAW, EDUCATION LAW REQUIRES THAT PLAINTIFF FILE A NOTICE OF CLAIM AS A CONDITION PRECEDENT FOR AN ACTION AGAINST THE NYC DEPARTMENT OF EDUCATION ALLEGING A VIOLATION OF THE NYS HUMAN RIGHTS LAW (SECOND DEPT))/MUNICIPAL LAW (EDUCATION-SCHOOL LAW, NOTICE OF CLAIM, EDUCATION LAW REQUIRES THAT PLAINTIFF FILE A NOTICE OF CLAIM AS A CONDITION PRECEDENT FOR AN ACTION AGAINST THE NYC DEPARTMENT OF EDUCATION ALLEGING A VIOLATION OF THE NYS HUMAN RIGHTS LAW (SECOND DEPT))/EMPLOYMENT LAW (EDUCATION-SCHOOL LAW, NOTICE OF CLAIM, HUMAN RIGHTS LAW, EDUCATION LAW REQUIRES THAT PLAINTIFF FILE A NOTICE OF CLAIM AS A CONDITION PRECEDENT FOR AN ACTION AGAINST THE NYC DEPARTMENT OF EDUCATION ALLEGING A VIOLATION OF THE NYS HUMAN RIGHTS LAW (SECOND DEPT))/HUMAN RIGHTS LAW (EDUCATION-SCHOOL LAW, NOTICE OF CLAIM, EDUCATION LAW REQUIRES THAT PLAINTIFF FILE A NOTICE OF CLAIM AS A CONDITION PRECEDENT FOR AN ACTION AGAINST THE NYC DEPARTMENT OF EDUCATION ALLEGING A VIOLATION OF THE NYS HUMAN RIGHTS LAW (SECOND DEPT))

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, NEGLIGENCE.

LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT IN THIS NEGLIGENT SUPERVISION ACTION PROPERLY GRANTED, EVEN IF THE EXCUSE FOR FAILURE TO TIMELY FILE WAS NOT REASONABLE, THE SCHOOL DISTRICT WAS NOT PREJUDICED BY THE DELAY (SECOND DEPT).

The Second Department determined that the petition for leave to file a late notice of claim against the school (District) was properly granted. Petitioner had timely filed a notice of claim against the village, and the school was aware of the essential facts of the claim within the 90-day filing period. Petitioner alleged her son, who had broken his arm, was not supervised or assisted by the school at the time he tripped, fell and further injured his arm:

> Here, the District had actual knowledge of the facts constituting the claim within the statutory period ... . Furthermore, the petitioners made an initial showing that the District would not suffer any substantial prejudice by the delay, and the District failed to rebut the petitioners' showing with particularized indicia of prejudice ... . Even if the petitioners' reason for failing to timely serve the District was not reasonable, the absence of a reasonable excuse is not fatal to the petition where, as here, there was actual notice and the absence of prejudice ... . **Matter of D.D. v Village of Great Neck, 2018 NY Slip Op 03358, Second Dept 5-9-18**

EDUCATION-SCHOOL LAW (NEGLIGENCE, NOTICE OF CLAIM, LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT IN THIS NEGLIGENT SUPERVISION ACTION PROPERLY GRANTED, EVEN IF THE EXCUSE FOR FAILURE TO TIMELY FILE WAS NOT REASONABLE, THE SCHOOL DISTRICT WAS NOT PREJUDICED BY THE DELAY (SECOND DEPT))/NEGLIGENCE (EDUCATION-SCHOOL LAW, LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT IN THIS NEGLIGENT SUPERVISION ACTION PROPERLY GRANTED, EVEN IF THE EXCUSE FOR FAILURE TO TIMELY FILE WAS NOT REASONABLE, THE SCHOOL DISTRICT WAS NOT PREJUDICED BY THE DELAY (SECOND DEPT))/NEGLIGENT SUPERVISION (EDUCATION-SCHOOL LAW, NOTICE OF CLAIM, LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT IN THIS NEGLIGENT SUPERVISION ACTION PROPERLY GRANTED, EVEN IF THE EXCUSE FOR FAILURE TO TIMELY FILE WAS NOT REASONABLE, THE SCHOOL DISTRICT WAS NOT PREJUDICED BY THE DELAY (SECOND DEPT))/NOTICE OF CLAIM (EDUCATION-SCHOOL LAW, LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT IN THIS NEGLIGENT SUPERVISION ACTION PROPERLY GRANTED, EVEN IF THE EXCUSE FOR FAILURE TO TIMELY FILE WAS NOT REASONABLE, THE SCHOOL DISTRICT WAS NOT PREJUDICED BY THE DELAY (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, EDUCATION-SCHOOL LAW, NOTICE OF CLAIM, LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT IN THIS NEGLIGENT SUPERVISION ACTION PROPERLY GRANTED, EVEN IF THE EXCUSE FOR FAILURE TO TIMELY FILE WAS NOT REASONABLE, THE SCHOOL DISTRICT WAS NOT PREJUDICED BY THE DELAY (SECOND DEPT))/STUDENTS (EDUCATION-SCHOOL LAW, NEGLIGENCE, NOTICE OF CLAIM, LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT IN THIS NEGLIGENT SUPERVISION ACTION PROPERLY GRANTED, EVEN IF THE EXCUSE FOR FAILURE TO TIMELY FILE WAS NOT REASONABLE, THE SCHOOL DISTRICT WAS NOT PREJUDICED BY THE DELAY (SECOND DEPT))

EDUCATION LAW-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW, EMPLOYMENT LAW, CIVIL PROCEDURE.

ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department determined defendant school district's motion to set aside the verdict for legal insufficiency should have been granted. Plaintiff assistant principal sued the district after she was injured breaking up a fight between students. She had previously been injured by a student and had complained that more security was needed on the floor where she was hurt. The Second Department explained that plaintiff could not recover unless a special relationship with the school district had been proven:

> On a legal sufficiency challenge, whether made pursuant to CPLR 4401 at the close of the plaintiffs' case or pursuant to CPLR 4404(a) to set aside the jury verdict, the relevant inquiry is whether there is any rational process by which the trier of fact could base a finding in favor of the nonmoving party ... .
>
> Absent the existence of a special relationship between the defendants and the injured plaintiff, liability may not be imposed on the defendants for the breach of a duty owed generally to persons in the school system and members of the public ... . A special relationship can be formed, inter alia, if the defendants voluntarily assumed a special duty to the injured plaintiff upon which she justifiably relied ... . In order to succeed on this theory, the plaintiffs were required to establish four elements: (1) an assumption by the defendants, through promises or actions, of an affirmative duty to act on behalf of the injured plaintiff; (2) knowledge on the part of defendants' agents that inaction could lead to harm; (3) some form of direct contact between the defendants' agents and the injured plaintiff; and (4) the injured plaintiff's justifiable reliance on the defendants' affirmative undertaking ... . **Morgan-Word v New York City Dept. of Educ., 2018 NY Slip Op 03673, Second Dept 5-23-18**

EDUCATION-SCHOOL LAW (ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NEGLIGENCE (EDUCATION-SCHOOL LAW, MUNICIPAL LAW, ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/MUNICIPAL LAW (EDUCATION-SCHOOL LAW, NEGLIGENCE, ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/EMPLOYMENT LAW (EDUCATION-SCHOOL LAW, NEGLIGENCE, ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CIVIL PROCEDURE (SET ASIDE THE VERDICT, ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/VERDICT, MOTION TO SET ASIDE (ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/CPLR 4404 (SET ASIDE VERDICT, ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SPECIAL RELATIONSHIP (MUNICIPAL LAW, EDUCATION-SCHOOL LAW, ASSISTANT PRINCIPAL INJURED BREAKING UP A STUDENT FIGHT DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE SCHOOL DISTRICT, MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY SUFFICIENT EVIDENCE SHOULD HAVE BEEN GRANTED (SECOND DEPT))

EDUCATION-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW.

SUPREME COURT, IN THIS NEGLIGENT SUPERVISION ACTION, HAD USED CRITERIA FOR DETERMINING A MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH HAS SINCE BEEN CHANGED BY THE COURT OF APPEALS, MATTER REMITTED FOR A RULING UNDER THE CURRENT LAW (SECOND DEPT).

The Second Department determined that Supreme Court used the wrong criteria for analyzing whether plaintiffs' motion for leave to file a late notice of claim should have been granted. Plaintiffs' child was seriously injured in a game at school which was supervised by teachers. In 2016 the Court of Appeals (Matter of Newcomb) held that a plaintiff must make an initial showing that the school would not be prejudiced by a late notice, then the school must come forward with evidence it would be prejudiced. Supreme Court had analyzed the criteria under the existing law at the time, which was changed by Matter of Newcomb. The Second Department found, under the Matter of Newcomb criteria, plaintiffs had presented sufficient proof of a lack of prejudice to shift the burden to the school. The matter was remitted for analysis under the current law:

> The plaintiffs submitted an affidavit from the infant plaintiff's father in which he averred that he received a call from school personnel informing him about his child's injury and requesting his presence at the school. When the father arrived at the school minutes later, he observed an assistant principal, two security guards, the school nurse, and New York City Fire Department personnel attending to the situation and the injuries of his daughter. At that time, the infant plaintiff's father was informed that his daughter was playing a game with other children wherein they were jumping on each other's backs. He also learned that this activity occurred under the supervision of three or four teachers, two of whom were named in his affidavit. The infant plaintiff was transported by ambulance from the school to the hospital. The infant plaintiff allegedly fractured the tibia and fibula of her right leg, and underwent surgery as a result of her injuries. Given the evidence of the number of school personnel attending to the situation, the reporting of the incident to the infant plaintiff's father, and the seriousness of the alleged injuries, the plaintiffs argued that a number of reports would likely have been prepared, and that such reports were in the possession of the defendants. Under certain circumstances, this Court has recognized that the "existence of reports in [a defendant's] own files concerning . . . facts and circumstances'"of an incident may be "the functional equivalent of an investigation" ... .
>
> Given that Matter of Newcomb was decided during the pendency of this appeal, and since the Supreme Court relied upon this Court's prior authority, which had placed the sole burden on the plaintiffs to show that the defendants were not substantially prejudiced by the delay in filing, the defendants did not have an opportunity to submit evidence to make their particularized evidentiary showing in the manner set forth in Matter of Newcomb. The court, therefore, did not have the opportunity to weigh such evidence in consideration of the plaintiffs' motion. **N.F. v City of New York, 2018 NY Slip Op 03663, Second Dept 5-23-18**

EDUCATION-SCHOOL LAW (NEGLIGENT SUPERVISION, NOTICE OF CLAIM, SUPREME COURT, IN THIS NEGLIGENT SUPERVISION ACTION, HAD USED CRITERIA FOR DETERMINING A MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH HAS SINCE BEEN CHANGED BY THE COURT OF APPEALS, MATTER REMITTED FOR A RULING UNDER THE CURRENT LAW (SECOND DEPT))/NOTICE OF CLAIM (EDUCATION-SCHOOL LAW, NEGLIGENCE SUPERVISION, SUPREME COURT, IN THIS NEGLIGENT SUPERVISION ACTION, HAD USED CRITERIA FOR DETERMINING A MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH HAS SINCE BEEN CHANGED BY THE COURT OF APPEALS, MATTER REMITTED FOR A RULING UNDER THE CURRENT LAW (SECOND DEPT))/NEGLIGENT SUPERVISION (EDUCATION-SCHOOL LAW, NOTICE OF CLAIM, SUPREME COURT, IN THIS NEGLIGENT SUPERVISION ACTION, HAD USED CRITERIA FOR DETERMINING A MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH HAS SINCE BEEN CHANGED BY THE COURT OF APPEALS, MATTER REMITTED FOR A RULING UNDER THE CURRENT LAW (SECOND DEPT))/NOTICE OF CLAIM (EDUCATION-SCHOOL LAW, NEGLIGENCE SUPERVISION, SUPREME COURT, IN THIS NEGLIGENT SUPERVISION ACTION, HAD USED CRITERIA FOR DETERMINING A MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH HAS SINCE BEEN CHANGED BY THE COURT OF APPEALS, MATTER REMITTED FOR A RULING UNDER THE CURRENT LAW (SECOND DEPT))

EMPLOYMENT LAW

EMPLOYMENT LAW, (NYC) HUMAN RIGHTS LAW, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

BECAUSE PLAINTIFF HAD FILED HIS EMPLOYMENT DISCRIMINATION COMPLAINT WITH THE NYC DIVISION OF HUMAN RIGHTS, HE WAS PRECLUDED UNDER THE ELECTION OF REMEDIES DOCTRINE FROM BRINGING THIS COURT ACTION PURSUANT TO THE NYC HUMAN RIGHTS LAW (SECOND DEPT).

The Second Department determined that because plaintiff had filed his employment discrimination complaint with the NYC Division of Human Rights (Division), he was precluded under the election of remedies doctrine from bringing a court action pursuant to the NYC Human Rights Law (NYCHRL):

> "Pursuant to the election of remedies doctrine, the filing of a complaint with [the Division] precludes the commencement of an action in the Supreme Court asserting the same discriminatory acts"... . The election of remedies doctrine does not implicate the subject matter jurisdiction of the court, but rather deprives a plaintiff of a cause of action ... . Here, the plaintiff's causes of action are based on the same allegedly discriminatory conduct asserted in the proceedings before the Division. Therefore, the plaintiff is barred from asserting those claims under the NYCHRL in this action ... . **Luckie v Northern Adult Day Health Care Ctr., 2018 NY Slip Op 03349, Second Dept 5-9-18**

EMPLOYMENT LAW (DISCRIMINATION, HUMAN RIGHTS LAW, BECAUSE PLAINTIFF HAD FILED HIS EMPLOYMENT DISCRIMINATION COMPLAINT WITH THE NYC DIVISION OF HUMAN RIGHTS, HE WAS PRECLUDED UNDER THE ELECTION OF REMEDIES DOCTRINE FROM BRINGING THIS COURT ACTION PURSUANT TO THE NYC HUMAN RIGHTS LAW (SECOND DEPT))/HUMAN RIGHTS LAW (EMPLOYMENT LAW, DISCRIMINATION, BECAUSE PLAINTIFF HAD FILED HIS EMPLOYMENT DISCRIMINATION COMPLAINT WITH THE NYC DIVISION OF HUMAN RIGHTS, HE WAS PRECLUDED UNDER THE ELECTION OF REMEDIES DOCTRINE FROM BRINGING THIS COURT ACTION PURSUANT TO THE NYC HUMAN RIGHTS LAW (SECOND DEPT))/ADMINISTRATIVE LAW (ELECTION OF REMEDIES, (DISCRIMINATION, HUMAN RIGHTS LAW, BECAUSE PLAINTIFF HAD FILED HIS EMPLOYMENT DISCRIMINATION COMPLAINT WITH THE NYC DIVISION OF HUMAN RIGHTS, HE WAS PRECLUDED UNDER THE ELECTION OF REMEDIES DOCTRINE FROM BRINGING THIS COURT ACTION PURSUANT TO THE NYC HUMAN RIGHTS LAW (SECOND DEPT))/CIVIL PROCEDURE (ELECTION OF REMEDIES, DISCRIMINATION, HUMAN RIGHTS LAW, BECAUSE PLAINTIFF HAD FILED HIS EMPLOYMENT DISCRIMINATION COMPLAINT WITH THE NYC DIVISION OF HUMAN RIGHTS, HE WAS PRECLUDED UNDER THE ELECTION OF REMEDIES DOCTRINE FROM BRINGING THIS COURT ACTION PURSUANT TO THE NYC HUMAN RIGHTS LAW (SECOND DEPT))/ELECTION OF REMEDIES (DISCRIMINATION, HUMAN RIGHTS LAW, BECAUSE PLAINTIFF HAD FILED HIS EMPLOYMENT DISCRIMINATION COMPLAINT WITH THE NYC DIVISION OF HUMAN RIGHTS, HE WAS PRECLUDED UNDER THE ELECTION OF REMEDIES DOCTRINE FROM BRINGING THIS COURT ACTION PURSUANT TO THE NYC HUMAN RIGHTS LAW (SECOND DEPT))

EMPLOYMENT LAW, LABOR LAW.

PLAINTIFF PHYSICIAN SUFFICIENTLY ALLEGED HE WAS TERMINATED IN VIOLATION OF LABOR LAW 741, PLAINTIFF EXPRESSED HIS DISAGREEMENT WITH DEFENDANT HOSPITAL CORPORATION'S POLICY THAT THE RESIDENTIAL DRINKING WATER OF PATIENTS DIAGNOSED WITH LEGIONNAIRE'S DISEASE SHOULD NOT BE TESTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff physician's complaint alleging he was terminated in retaliation for his disagreement with defendant hospital corporation's policy concerning the testing of residential drinking water for patients diagnosed with Legionnaire's disease stated a cause of action pursuant to Labor Law 741:

> [Plaintiff] disagrees with the public position taken by the New York City Department of Health and Mental Hygiene that the bacteria was found only in cooling towers and not in residential drinking water, and reasonably believes that the practice of not testing the residential drinking water of the patients constituted "improper quality of patient care."
>
> Plaintiff has sufficiently pleaded the notice requirement set forth in Labor Law § 741(3). Under that provision, an employee may not bring an action "unless the employee has brought the improper quality of patient care to the attention of a supervisor and has afforded the employer a reasonable opportunity to correct such activity, policy or practice"... . Although the statutory language expressly contemplates an affirmative act of objection to a policy or practice, strict compliance with the requirement here "would not serve the purpose of the statute" ... . In view of the allegations that plaintiff's supervisors had directed him to stop testing residential drinking water of the patients, and to not associate himself with the hospital if he insisted on continuing to do so, any express objections to the practice or policy would have been futile. Further, the fact that plaintiff insisted on testing the water despite directives to stop shows that his supervisors were aware, and therefore had notice, of his objection. **Skelly v New York City Health & Hosps. Corp., 2018 NY Slip Op 03329, First Dept 5-8-18**

EMPLOYMENT LAW (LABOR LAW 741, PLAINTIFF PHYSICIAN SUFFICIENTLY ALLEGED HE WAS TERMINATED IN VIOLATION OF LABOR LAW 741, PLAINTIFF EXPRESSED HIS DISAGREEMENT WITH DEFENDANT HOSPITAL CORPORATION'S POLICY THAT THE RESIDENTIAL DRINKING WATER OF PATIENTS DIAGNOSED WITH LEGIONNAIRE'S DISEASE SHOULD NOT BE TESTED (FIRST DEPT))/LABOR LAW (PATIENT CARE, PLAINTIFF PHYSICIAN SUFFICIENTLY ALLEGED HE WAS TERMINATED IN VIOLATION OF LABOR LAW 741, PLAINTIFF EXPRESSED HIS DISAGREEMENT WITH DEFENDANT HOSPITAL CORPORATION'S POLICY THAT THE RESIDENTIAL DRINKING WATER OF PATIENTS DIAGNOSED WITH LEGIONNAIRE'S DISEASE SHOULD NOT BE TESTED (FIRST DEPT))/PATIENT CARE (LABOR LAW 741, PLAINTIFF PHYSICIAN SUFFICIENTLY ALLEGED HE WAS TERMINATED IN VIOLATION OF LABOR LAW 741, PLAINTIFF EXPRESSED HIS DISAGREEMENT WITH DEFENDANT HOSPITAL CORPORATION'S POLICY THAT THE RESIDENTIAL DRINKING WATER OF PATIENTS DIAGNOSED WITH LEGIONNAIRE'S DISEASE SHOULD NOT BE TESTED (FIRST DEPT))/LABOR LAW 741 (PATIENT CARE, PLAINTIFF PHYSICIAN SUFFICIENTLY ALLEGED HE WAS TERMINATED IN VIOLATION OF LABOR LAW 741, PLAINTIFF EXPRESSED HIS DISAGREEMENT WITH DEFENDANT HOSPITAL CORPORATION'S POLICY THAT THE RESIDENTIAL DRINKING WATER OF PATIENTS DIAGNOSED WITH LEGIONNAIRE'S DISEASE SHOULD NOT BE TESTED (FIRST DEPT))/RETALIATION (EMPLOYMENT LAW, LABOR LAW 741, PLAINTIFF PHYSICIAN SUFFICIENTLY ALLEGED HE WAS TERMINATED IN VIOLATION OF LABOR LAW 741, PLAINTIFF EXPRESSED HIS DISAGREEMENT WITH DEFENDANT HOSPITAL CORPORATION'S POLICY THAT THE RESIDENTIAL DRINKING WATER OF PATIENTS DIAGNOSED WITH LEGIONNAIRE'S DISEASE SHOULD NOT BE TESTED (FIRST DEPT))/DRINKING WATER (LEGIONNAIRE'S DISEASE, PLAINTIFF PHYSICIAN SUFFICIENTLY ALLEGED HE WAS TERMINATED IN VIOLATION OF LABOR LAW 741, PLAINTIFF EXPRESSED HIS DISAGREEMENT WITH DEFENDANT HOSPITAL CORPORATION'S POLICY THAT THE RESIDENTIAL DRINKING WATER OF PATIENTS DIAGNOSED WITH LEGIONNAIRE'S DISEASE SHOULD NOT BE TESTED (FIRST DEPT))/LEGIONNAIRE'S DISEASE (PLAINTIFF PHYSICIAN SUFFICIENTLY ALLEGED HE WAS TERMINATED IN VIOLATION OF LABOR LAW 741, PLAINTIFF EXPRESSED HIS DISAGREEMENT WITH DEFENDANT HOSPITAL CORPORATION'S POLICY THAT THE RESIDENTIAL DRINKING WATER OF PATIENTS DIAGNOSED WITH LEGIONNAIRE'S DISEASE SHOULD NOT BE TESTED (FIRST DEPT))

EMPLOYMENT LAW, LABOR LAW, PRIVILEGE, CIVIL PROCEDURE.

PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT).

The First Department determined plaintiff in this whistleblower action was entitled to discover medical records protected by the Health Insurance Portability and Accountability Act (HIPAA) and the Public Health Law (PHL). Plaintiff alleged he was fired, in violation Labor Law 740, in retaliation for complaining that defendant's employees procured organs without performing tests and from people who still showed signs of life:

> The records concerning these four individuals are material and necessary to plaintiff's claim (see CPLR 3101[a]). To prevail on a claim for retaliatory termination in violation of Labor Law § 740(2), plaintiff must prove that he was fired because he objected to or threatened to disclose a practice that was in violation of a law or regulation ... . The subject medical records will allegedly show that defendant pressured doctors to declare people dead in violation of regulations regarding the making of such determinations ... .
>
> ... [B]ecause the subject disclosure would be made in the course of a judicial proceeding and pursuant to a qualified protective order, it is authorized under HIPAA... .
>
> ... PHL § 4351(8) renders defendant's documents subject to the protections of the physician-patient privilege set forth at CPLR 4504. This privilege is personal to the patient and is not terminated by death ... . It has not been expressly or implicitly waived in this case by the donors' next of kin ... . However, plaintiff demonstrated that the information in the medical records is material and necessary to his claim and that "the circumstances warrant overcoming the privilege and permitting discovery of the records with all identifying patient information appropriately redacted to protect patient confidentiality" ... . Allowing disclosure under these circumstances is consistent with the public policy underlying the whistleblower statute, i.e., to encourage employees to report hazards to supervisors and the public ... . **McMahon v New York Organ Donor Network, 2018 NY Slip Op 03820, First Dept 5-29-18**

EMPLOYMENT LAW (PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT))/LABOR LAW (WHISTLEBLOWERS, PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT))/PRIVILEGE (MEDICAL RECORDS, PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT))/CIVIL PROCEDURE (DISCOVERY, MEDICAL RECORDS, PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT))/HIPAA (PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT))/PUBLIC HEALTH LAW (MEDICAL RECORDS, PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT))/WHISTLEBLOWERS (PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT))/DISCOVERY (MEDICAL RECORDS, PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT))/ORGAN TRANSPLANTS (PLAINTIFF IN THIS WHISTLEBLOWER ACTION ENTITLED TO DISCOVER MEDICAL RECORDS WHICH ARE PROTECTED UNDER THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT AND THE PUBLIC HEALTH LAW (FIRST DEPT))

EMPLOYMENT LAW, MUNICIPAL LAW, CIVIL SERVICE LAW, ARBITRATION.

CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION (SECOND DEPT).

The Second Department, modifying Supreme Court, determined the city's decision to layoff firefighters was not arbitrable under a collective bargaining agreement. The Civil Service Law vests nondelegable discretion to hire and fire in the public corporation:

> ... [A] dispute is nonarbitrable if a court can conclude, without engaging in any extended factfinding or legal analysis, that a law prohibits, in an absolute sense, the particular matters to be decided by arbitration ... . Put differently, a court must stay arbitration where it can conclude, upon the examination of the parties' contract and any implicated statute on their face, "that the granting of any relief would violate public policy" ... .
>
> Addressing the union's claim regarding the layoffs of the firefighters, Civil Service Law § 80(1) provides that a public employer has the nondelegable discretion to determine—for reasons of economy, among others—what its staffing and budgetary needs are in order to effectively deliver uninterrupted services to the public ... . In the absence of bad faith, fraud, or collusion, that discretion "is an undisputed management prerogative" for the public's benefit, and cannot be altered or modified by agreement or otherwise... . Thus, arbitration of the claim regarding the layoffs of the firefighters would violate public policy. **Matter of City of Long Beach v Long Beach Professional Fire Fighters Assn., Local 287, 2018 NY Slip Op 03356, Second Dept 5-9-18**

EMPLOYMENT LAW (CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION (SECOND DEPT))/MUNICIPAL LAW (FIREFIGHTERS, CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION (SECOND DEPT))/CIVIL SERVICE LAW (FIREFIGHTERS, CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION (SECOND DEPT))/ARBITRATION (MUNICIPAL LAW, CIVIL SERVICE LAW, FIREFIGHTERS, CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION (SECOND DEPT))/UNIONS (MUNICIPAL LAW, FIREFIGHTERS, CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION (SECOND DEPT))/COLLECTIVE BARGAINING AGREEMENTS (MUNICIPAL LAW, CIVIL SERVICE LAW, FIREFIGHTERS, CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION (SECOND DEPT))/FIREFIGHTERS (EMPLOYMENT LAW, COLLECTIVE BARGAINING AGREEMENT, ARBITRATION, CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION (SECOND DEPT))/PUBLIC POLICY (MUNICIPAL LAW, ARBITRATION, CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION (SECOND DEPT))

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW, CIVIL PROCEDURE, LAND USE.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) DETERMINATIONS ON THE USE OF SNOWMOBILES IN NEWLY ADDED PORTIONS OF THE ADIRONDACK PARK UPHELD, TWO CHALLENGES NOT RIPE FOR REVIEW (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Rumsey, over a two-justice partial dissent, upheld the Department of Environmental Conservation's (DEC's) determinations regarding snowmobile trails in newly added portions of the Adirondack Park. Because approval of the trails was still subject to permits and variances, two of petitioners' causes of action were deemed not ripe for review. The Third Department determined there was no conflict between the Rivers System Act and the Adirondack Park State Land Master Plan. The Rivers System Act was deemed to control and the act allowed the proposed snowmobile traffic as a continuation of an existing use. And the Third Department held that a 2009 "guidance" document for the siting of snowmobile trails adopted by the DEC did not commit the DEC to a definite course of future action. Concerning the "ripeness" issue, the court wrote:

> ... [P]ermits and variances must be obtained through further administrative action before the proposed uses may be established. Specifically, permits are required to erect a bridge over a scenic river ... or to construct a trail within a scenic river area ... . Moreover, variances are required for the use of motorized vehicles within scenic river areas ... , and for construction of a Class II snowmobile trail, to the extent that it may exceed the maximum trail width of four feet that is permitted by regulation ... . Permit and variance applications are governed by the Uniform Procedures Act ... , which imposes conditions related to the substantive relief sought and provides the opportunity for further public participation. No permit or variance may be granted unless the proposed use is consistent with the purpose of the Rivers System Act ... , and conditions may be imposed as necessary to preserve and protect affected river resources or to assure compliance with the Rivers System Act ... . Moreover, there is an opportunity for public comment on applications for a permit or a variance ... and the granting of a permit or variance may be challenged through a CPLR article 78 proceeding. Thus, inasmuch as the harms upon which the first and second causes of action are based may be prevented or ameliorated by further administrative action, Supreme Court correctly concluded that the first and second causes of action are not ripe for judicial review. **Matter of Adirondack Wild: Friends of The Forest Preserve v New York State Adirondack Park Agency, 2018 NY Slip Op 03193. Third Dept 5-3-18**

ENVIRONMENTAL LAW (DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) DETERMINATIONS ON THE USE OF SNOWMOBILES IN NEWLY ADDED PORTIONS OF THE ADIRONDACK PARK UPHELD, TWO CHALLENGES NOT RIPE FOR REVIEW (THIRD DEPT))/ADIRONDACK PARK (DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) DETERMINATIONS ON THE USE OF SNOWMOBILES IN NEWLY ADDED PORTIONS OF THE ADIRONDACK PARK UPHELD, TWO CHALLENGES NOT RIPE FOR REVIEW (THIRD DEPT))/CIVIL PROCEDURE (RIPENESS, DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) DETERMINATIONS ON THE USE OF SNOWMOBILES IN NEWLY ADDED PORTIONS OF THE ADIRONDACK PARK UPHELD, TWO CHALLENGES NOT RIPE FOR REVIEW (THIRD DEPT))/RIPENESS (CIVIL PROCEDURE, DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) DETERMINATIONS ON THE USE OF SNOWMOBILES IN NEWLY ADDED PORTIONS OF THE ADIRONDACK PARK UPHELD, TWO CHALLENGES NOT RIPE FOR REVIEW (THIRD DEPT))/SNOWMOBILES (ADIRONDACK PARK, DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) DETERMINATIONS ON THE USE OF SNOWMOBILES IN NEWLY ADDED PORTIONS OF THE ADIRONDACK PARK UPHELD, TWO CHALLENGES NOT RIPE FOR REVIEW (THIRD DEPT))/LAND USE (ADIRONDACK PARK, SNOWMOBILES, (DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) DETERMINATIONS ON THE USE OF SNOWMOBILES IN NEWLY ADDED PORTIONS OF THE ADIRONDACK PARK UPHELD, TWO CHALLENGES NOT RIPE FOR REVIEW (THIRD DEPT))

ENVIRONMENTAL LAW, MUNICIPAL LAW.

VILLAGE BOARD DID NOT TAKE THE 'HARD LOOK' REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), REVIEW WAS UNDERTAKEN TO FACILITATE THE CONDEMNATION OF LAND FOR THE CONSTRUCTION OF A PARKING GARAGE, VILLAGE DID NOT ADEQUATELY CONSIDER ADVERSE TRAFFIC IMPLICATIONS (THIRD DEPT).

The Third Department vacated the village board's State Environmental Quality Review Act (SEQRA) findings that the construction of a parking garage would not result in a substantial increase in traffic. The board conducted a SEQRA review in preparation for a condemnation proceeding to acquire the land:

> ... [T]he record fails to establish that the Village Board took the requisite hard look at potential traffic implications associated with the construction of a parking garage on the subject property or to set forth a reasoned elaboration of the basis for its determination that the development of the property would not result in any substantial increase in traffic. Upon review of an eminent domain proceeding, courts are required to determine whether the condemnor's findings and determinations comply with ECL article 8, which is incorporated as part of the required procedures under EDPL [Eminent Domain Procedure Law] article 2 ... . In assessing compliance with the substantive mandates of SEQRA, we are tasked with reviewing the record to determine whether the Village Board, as the lead agency, "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" ... . "Literal compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice" ... .
>
> ... An adverse change in traffic levels is ... a potential area of environmental concern ... .
>
> During both the public hearing and the written comment period, concerns regarding increased traffic congestion and other potential traffic impacts associated with the proposed condemnation were repeatedly voiced. Yet, the record is bereft of any evidence that the Village Board took the requisite hard look at these potential traffic implications. **Matter of Adirondack Historical Assn. v Village of Lake Placid/lake Placid Vil., Inc.,2018 NY Slip Op 03194, Third Dept 5-3-18**

ENVIRONMENTAL LAW (STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA). VILLAGE BOARD DID NOT TAKE THE 'HARD LOOK' REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), REVIEW WAS UNDERTAKEN TO FACILITATE THE CONDEMNATION OF LAND FOR THE CONSTRUCTION OF A PARKING GARAGE, VILLAGE DID NOT ADEQUATELY CONSIDER ADVERSE TRAFFIC IMPLICATIONS (THIRD DEPT))/MUNICIPAL LAW (STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA). VILLAGE BOARD DID NOT TAKE THE 'HARD LOOK' REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), REVIEW WAS UNDERTAKEN TO FACILITATE THE CONDEMNATION OF LAND FOR THE CONSTRUCTION OF A PARKING GARAGE, VILLAGE DID NOT ADEQUATELY CONSIDER ADVERSE TRAFFIC IMPLICATIONS (THIRD DEPT))/TRAFFIC (STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA). VILLAGE BOARD DID NOT TAKE THE 'HARD LOOK' REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), REVIEW WAS UNDERTAKEN TO FACILITATE THE CONDEMNATION OF LAND FOR THE CONSTRUCTION OF A PARKING GARAGE, VILLAGE DID NOT ADEQUATELY CONSIDER ADVERSE TRAFFIC IMPLICATIONS (THIRD DEPT))/STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) (TRAFFIC, VILLAGE BOARD DID NOT TAKE THE 'HARD LOOK' REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), REVIEW WAS UNDERTAKEN TO FACILITATE THE CONDEMNATION OF LAND FOR THE CONSTRUCTION OF A PARKING GARAGE, VILLAGE DID NOT ADEQUATELY CONSIDER ADVERSE TRAFFIC IMPLICATIONS (THIRD DEPT))/CONDEMNATION (MUNICIPAL LAW, STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA). VILLAGE BOARD DID NOT TAKE THE 'HARD LOOK' REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), REVIEW WAS UNDERTAKEN TO FACILITATE THE CONDEMNATION OF LAND FOR THE CONSTRUCTION OF A PARKING GARAGE, VILLAGE DID NOT ADEQUATELY CONSIDER ADVERSE TRAFFIC IMPLICATIONS (THIRD DEPT))/EMINENT DOMAIN (MUNICIPAL LAW, STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA). VILLAGE BOARD DID NOT TAKE THE 'HARD LOOK' REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), REVIEW WAS UNDERTAKEN TO FACILITATE THE CONDEMNATION OF LAND FOR THE CONSTRUCTION OF A PARKING GARAGE, VILLAGE DID NOT ADEQUATELY CONSIDER ADVERSE TRAFFIC IMPLICATIONS (THIRD DEPT))

FAMILY LAW

FAMILY LAW.

FAMILY COURT DID NOT FOLLOW THE PROCEDURE SET OUT IN THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) BEFORE DETERMINING IT DID NOT HAVE JURISDICTION OVER FATHER'S CUSTODY PROCEEDING, MOTHER HAD BROUGHT A CUSTODY PROCEEDING IN PENNSYLVANIA, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined Family Court did not follow the procedures required by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) before determining it did not have jurisdiction over the custody proceeding. Family Court had jurisdiction over father's custody proceeding when it was commenced, and Pennsylvania had jurisdiction over the wife's custody proceeding when she commenced it there:

> Family Court erred in declining to exercise jurisdiction and dismissing the proceeding without following the procedures required by the UCCJEA ... . The court, after determining that another child custody proceeding had been commenced in Pennsylvania, properly communicated with the Pennsylvania court ... . The court erred, however, in failing either to allow the parties to participate in the communication ... , or to give the parties "the opportunity to present facts and legal arguments before a decision on jurisdiction [was] made" ... . The court also violated the requirements of the UCCJEA when it failed to create a record of its communication with the Pennsylvania court ... . The summary and explanation of the court's determination following the telephone conference with the Pennsylvania court did not comply with the statutory mandate to make a record of the communication between courts.
>
> We also agree with the father that there are insufficient facts in the record to make a determination, based upon the eight factors set forth in the statute ... , regarding which state is the more convenient forum to resolve the issue of custody. "Because Family Court did not articulate its consideration of each of the factors relevant to the . . . petition . . . and we are unable to glean the necessary information from the record, the court's [implicit] finding that New York was an inconvenient forum to resolve the [custody] petition is not supported by a sound and substantial basis in the record" ... . **Matter of Beyer v Hofmann, 2018 NY Slip Op 03259, Fourth Dept 5-4-18**

FAMILY LAW (UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA), FAMILY COURT DID NOT FOLLOW THE PROCEDURE SET OUT IN THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) BEFORE DETERMINING IT DID NOT HAVE JURISDICTION OVER FATHER'S CUSTODY PROCEEDING, MOTHER HAD BROUGHT A CUSTODY PROCEEDING IN PENNSYLVANIA, MATTER REMITTED (FOURTH DEPT))/UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) (FAMILY COURT DID NOT FOLLOW THE PROCEDURE SET OUT IN THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) BEFORE DETERMINING IT DID NOT HAVE JURISDICTION OVER FATHER'S CUSTODY PROCEEDING, MOTHER HAD BROUGHT A CUSTODY PROCEEDING IN PENNSYLVANIA, MATTER REMITTED (FOURTH DEPT))/CUSTODY (FAMILY LAW, UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA), FAMILY COURT DID NOT FOLLOW THE PROCEDURE SET OUT IN THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) BEFORE DETERMINING IT DID NOT HAVE JURISDICTION OVER FATHER'S CUSTODY PROCEEDING, MOTHER HAD BROUGHT A CUSTODY PROCEEDING IN PENNSYLVANIA, MATTER REMITTED (FOURTH DEPT))/JURISDICTION (FAMILY LAW, UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA), FAMILY COURT DID NOT FOLLOW THE PROCEDURE SET OUT IN THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) BEFORE DETERMINING IT DID NOT HAVE JURISDICTION OVER FATHER'S CUSTODY PROCEEDING, MOTHER HAD BROUGHT A CUSTODY PROCEEDING IN PENNSYLVANIA, MATTER REMITTED (FOURTH DEPT))

FAMILY LAW.

ISRAELI CUSTODY ORDER WAS REGISTERED IN NEW YORK, FATHER FAILED TO CONTEST THE REGISTRATION OF THE ISRAELI CUSTODY ORDER WITHIN 20 DAYS, FATHER'S PETITION TO REGISTER AND ENFORCE A CALIFORNIA CUSTODY ORDER, WHICH HAD BEEN MODIFIED BY THE ISRAELI ORDER, PROPERLY DENIED (SECOND DEPT).

The Second Department determined Family Court properly denied father's petitions for registration and enforcement of a California custody order. Mother, who was living in Israel, had acquired an Israeli court order modifying the California order. The Israeli order was registered in New York and father was notified of the application for registration. Father had 20 days to contest and failed to do so:

> Domestic Relations Law § 77-d provides for the registering, and contesting, of an out-of-state custody decree. Upon receipt of the child custody determination to be registered, the New York court is obligated to serve notice upon the affected persons and provide them with an opportunity to contest the registration (see Domestic Relations Law § 77-d[2][b]). The statute provides that "[a] person seeking to contest the validity of a registered order must request a hearing within twenty days after service of the notice" (Domestic Relations Law § 77-d[4]). At the hearing, the court "shall confirm the registered order" unless the person contesting registration establishes that (a) the issuing court did not have jurisdiction, (b) the custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so, or (c) the person contesting registration was entitled to, but did not receive, notice in the underlying proceedings before the court that issued the order for which registration is sought (Domestic Relations Law § 77-d[4]). If no timely contest is made, "the registration is confirmed as a matter of law" (Domestic Relations Law § 77-d[5]). "Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration" ... . **Matter of Worsoff v Worsoff, 2018 NY Slip Op 03373, Second Dept 5-9-18**

FAMILY LAW (CUSTODY, OUT OF STATE ORDERS, ISRAELI CUSTODY ORDER WAS REGISTERED IN NEW YORK, FATHER FAILED TO CONTEST THE REGISTRATION OF THE ISRAELI CUSTODY ORDER WITHIN 20 DAYS, FATHER'S PETITION TO REGISTER AND ENFORCE A CALIFORNIA CUSTODY ORDER, WHICH HAD BEEN MODIFIED BY THE ISRAELI ORDER, PROPERLY DENIED (SECOND DEPT))/CUSTODY (FAMILY LAW, OUT OF STATE ORDERS, REGISTRATION, ISRAELI CUSTODY ORDER WAS REGISTERED IN NEW YORK, FATHER FAILED TO CONTEST THE REGISTRATION OF THE ISRAELI CUSTODY ORDER WITHIN 20 DAYS, FATHER'S PETITION TO REGISTER AND ENFORCE A CALIFORNIA CUSTODY ORDER, WHICH HAD BEEN MODIFIED BY THE ISRAELI ORDER, PROPERLY DENIED (SECOND DEPT))

FAMILY LAW.

NO INDICATION MOTHER SUFFERED FROM MENTAL ILLNESS, PSYCHOLOGICAL EXAM SHOULD NOT HAVE BEEN ORDERED PRIOR TO A FACT-FINDING HEARING IN THIS NEGLECT PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined a psychological exam of mother should not have been ordered prior to a fact-finding hearing in this neglect proceeding. The court had no indication mother suffered from mental illness:

> ... [T]he Suffolk County Department of Social Services (hereinafter the petitioner) filed a neglect petition against the mother, alleging, among other things, that she failed to "work cooperatively with the appropriate agencies" to ensure that the subject child, whom the mother reported to have been sexually abused, "would receive appropriate counseling and services." The petitioner also alleged that the mother failed "to take any action to ensure that [the child] was being adequately and appropriately cared for by his father," who was alleged to be abusive toward the child. The mother consented to the temporary removal of the child. Thereafter, prior to a fact-finding hearing, the petitioner requested that the mother be directed to submit to a psychological examination. ...
>
> The determination whether to direct a psychological examination is within the sound discretion of the Family Court ... . Under the circumstances of this case, it was an improvident exercise of discretion for the Family Court to direct the mother to submit to a psychological examination prior to a fact-finding hearing. The record is devoid of any indication that the mother may suffer from a mental illness. Nor did the petition contain any allegations which placed the mother's mental health at issue ... . **Matter of Tyriek J. (Tamika J.), 2018 NY Slip Op 03361, Second Dept 5-9-18**

FAMILY LAW (NO INDICATION MOTHER SUFFERED FROM MENTAL ILLNESS, PSYCHOLOGICAL EXAM SHOULD NOT HAVE BEEN ORDERED PRIOR TO A FACT-FINDING HEARING IN THIS NEGLECT PROCEEDING (SECOND DEPT))/NEGLECT (FAMILY LAW, NO INDICATION MOTHER SUFFERED FROM MENTAL ILLNESS, PSYCHOLOGICAL EXAM SHOULD NOT HAVE BEEN ORDERED PRIOR TO A FACT-FINDING HEARING IN THIS NEGLECT PROCEEDING (SECOND DEPT))/PSYCHOLOGICAL EXAM (FAMILY LAW, NEGLECT, NO INDICATION MOTHER SUFFERED FROM MENTAL ILLNESS, PSYCHOLOGICAL EXAM SHOULD NOT HAVE BEEN ORDERED PRIOR TO A FACT-FINDING HEARING IN THIS NEGLECT PROCEEDING (SECOND DEPT))

FAMILY LAW.

DESPITE TERMINATION OF MOTHER'S PARENTAL RIGHTS, GRANDMOTHER HAD STANDING TO SEEK VISITATION AND VISITATION WITH GRANDMOTHER WAS IN THE BEST INTERESTS OF THE CHILD (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined, despite the termination of mother's parental rights, grandmother had standing to seek visitation with the child and visitation by the grandmother was in the bests interests of the child:

> A biological grandparent may seek visitation with a child even after parental rights have been terminated or the child has been freed for adoption ... . Where a grandparent seeks visitation pursuant to Domestic Relations Law § 72(1), the court must undertake a two-part inquiry ... . First, the court must determine if the grandparent has standing to petition for visitation based on the death of a parent or equitable circumstances . Where the court concludes that the grandparent has established standing, the court must then determine whether visitation with the grandparent is in the best interests of the child ... . In determining whether equitable circumstances confer standing, the court must examine all relevant facts ... . "[A]n essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship" ... . A grandparent must establish an existing relationship or sufficient efforts to establish one that have been unjustifiably frustrated by the parent ... .
>
> Here, the evidence demonstrated that the maternal grandmother developed a relationship with the child early on in her life and thereafter made repeated efforts to continue that relationship ... . Accordingly, the Family Court's determination that the grandmother lacked standing to seek visitation was not supported by a sound and substantial basis in the record. Moreover, visitation with the grandmother would be in the child's best interests. The grandmother had consistent visitation with the child until the DSS ceased allowing such visitation in November 2014. By all accounts, the grandmother's visitations conducted separately from the mother's visitations were positive, and the attorney for the child in the Family Court took the position that the child's best interests would be served by visitation with the grandmother conditioned on the requirement that the mother not be present for the visitation ... . **Matter of Weiss v Weiss, 2018 NY Slip Op 03532, Second Dept 5-16-18**

FAMILY LAW (VISITATION, GRANDMOTHER, DESPITE TERMINATION OF MOTHER'S PARENTAL RIGHTS, GRANDMOTHER HAD STANDING TO SEEK VISITATION AND VISITATION WITH GRANDMOTHER WAS IN THE BEST INTERESTS OF THE CHILD (SECOND DEPT))/VISITATION (FAMILY LAW, GRANDMOTHER, DESPITE TERMINATION OF MOTHER'S PARENTAL RIGHTS, GRANDMOTHER HAD STANDING TO SEEK VISITATION AND VISITATION WITH GRANDMOTHER WAS IN THE BEST INTERESTS OF THE CHILD (SECOND DEPT))/GRANDPARENTS (FAMILY LAW, VISITATION, DESPITE TERMINATION OF MOTHER'S PARENTAL RIGHTS, GRANDMOTHER HAD STANDING TO SEEK VISITATION AND VISITATION WITH GRANDMOTHER WAS IN THE BEST INTERESTS OF THE CHILD (SECOND DEPT))

FAMILY LAW, ATTORNEYS.

FAMILY COURT SHOULD HAVE INFORMED WIFE OF HER RIGHT TO ASSIGNED COUNSEL WHEN IT BECAME CLEAR SHE WAS HAVING TROUBLE RETAINING AN ATTORNEY, NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, ordering a new trial in this divorce-custody action, determined Family Court, given the wife's difficulty in raising money to retain new counsel, should have informed her of her right to assigned counsel pursuant to Family Court Act 262:

> ... [T]he mother appeared in court, explaining that, although she had retained new counsel, he was unable to attend that day and, therefore, she requested the court to "extend" or "hold off" proceeding with the continuation ... . Supreme Court denied the mother's request for an adjournment, indicating that no notice of appearance had been filed by the mother's replacement counsel and that it could not rely solely upon her statement that she may be represented by counsel going forward. Supreme Court then proceeded with the trial, informing the mother that, under the circumstances, she was going to have to proceed pro se.
>
> There is nothing in the record to indicate that Supreme Court ever advised the mother of her rights pursuant to Family Ct Act § 262 (a). While we appreciate that the mother initially appeared with retained counsel and Supreme Court granted her a lengthy adjournment to obtain a new attorney, it was incumbent upon the court — particularly in light of the mother's expressed need for several months to obtain the necessary retainer fee — to advise her of the right to assigned counsel in the event that she could not afford same ... . In the absence of the requisite statutory advisement of her right to counsel (see Family Ct Act § 262 [a] [v]) or a valid waiver of such right ..., we find that the mother was deprived of her fundamental right to counsel... . **DiBella v DiBella, 2018 NY Slip Op 03186, Third Dept 5-3-18**

FAMILY LAW (ATTORNEYS, FAMILY COURT SHOULD HAVE INFORMED WIFE OF HER RIGHT TO ASSIGNED COUNSEL WHEN IT BECAME CLEAR SHE WAS HAVING TROUBLE RETAINING AN ATTORNEY, NEW TRIAL ORDERED (THIRD DEPT))/ATTORNEYS (FAMILY LAW, AMILY COURT SHOULD HAVE INFORMED WIFE OF HER RIGHT TO ASSIGNED COUNSEL WHEN IT BECAME CLEAR SHE WAS HAVING TROUBLE RETAINING AN ATTORNEY, NEW TRIAL ORDERED (THIRD DEPT))

FAMILY LAW, ATTORNEYS.

AWARD OF ATTORNEY'S FEES AND EXPERT WITNESS FEES IN THIS DIVORCE ACTION WAS AN ABUSE OF DISCRETION, ATTORNEY DID NOT COMPLY WITH BILLING RULES AND NO EXPERT AFFIDAVITS WERE SUBMITTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the award of attorney's fees and expert witness fees in this divorce action was an abuse of discretion:

> In a matrimonial action, an award of counsel fees is a matter committed to the sound discretion of the trial court ... . However, court rules impose certain requirements upon attorneys who represent clients in domestic relations matters ... . These rules were designed to address abuses in the practice of matrimonial law and to protect the public, and the failure to substantially comply with the rules will preclude an attorney's recovery of a fee from his or her client ... or from the adversary spouse ... . A showing of substantial compliance must be made on a prima facie basis as part of the moving party's papers ... .
>
> Here, the evidence proffered by the defendant in support of that branch of her motion which was for an award of counsel fees for work performed by Glynn demonstrates that Glynn failed to substantially comply with the rules requiring periodic billing statements at least every 60 days ... . Accordingly, the Supreme Court erred in granting that branch of the defendant's motion which pertains to Glynn's counsel's fees. ...
>
> "The award of expert witness fees in a matrimonial action is left to the sound discretion of the trial court, and should be made upon a detailed showing of the services to be rendered and the estimated time involved"... . "Absent affidavits from the expert witnesses at issue, the Supreme Court lacks a sufficient basis to grant a motion for the award of such fees" ... Here, the defendant failed to submit such expert affidavits. **Greco v Greco, 2018 NY Slip Op 03509, Second Dept 5-16-18**

FAMILY LAW (DIVORCE, ATTORNEY'S FEES, EXPERT WITNESS FEES, AWARD OF ATTORNEY'S FEES AND EXPERT WITNESS FEES IN THIS DIVORCE ACTION WAS AN ABUSE OF DISCRETION, ATTORNEY DID NOT COMPLY WITH BILLING RULES AND NO EXPERT AFFIDAVITS WERE SUBMITTED (SECOND DEPT))/ATTORNEYS (DIVORCE, ATTORNEY'S FEES, EXPERT WITNESS FEES, AWARD OF ATTORNEY'S FEES AND EXPERT WITNESS FEES IN THIS DIVORCE ACTION WAS AN ABUSE OF DISCRETION, ATTORNEY DID NOT COMPLY WITH BILLING RULES AND NO EXPERT AFFIDAVITS WERE SUBMITTED (SECOND DEPT))/ATTORNEYS FEES (DIVORCE, EXPERT WITNESS FEES, AWARD OF ATTORNEY'S FEES AND EXPERT WITNESS FEES IN THIS DIVORCE ACTION WAS AN ABUSE OF DISCRETION, ATTORNEY DID NOT COMPLY WITH BILLING RULES AND NO EXPERT AFFIDAVITS WERE SUBMITTED (SECOND DEPT))/EXPERT WITNESSES (DIVORCE, ATTORNEY'S FEES, AWARD OF ATTORNEY'S FEES AND EXPERT WITNESS FEES IN THIS DIVORCE ACTION WAS AN ABUSE OF DISCRETION, ATTORNEY DID NOT COMPLY WITH BILLING RULES AND NO EXPERT AFFIDAVITS WERE SUBMITTED (SECOND DEPT))

FAMILY LAW, ATTORNEYS.

COURT SHOULD HAVE TAKEN INTO CONSIDERATION THE FUTURE EARNING CAPACITY OF THE PARTIES IN CONNECTION WITH MOTHER'S MOTION FOR ATTORNEY'S FEES, MOTHER ENTITLED TO A HEARING (FIRST DEPT).

The First Department, reversing Family Court, determined mother was entitled to a hearing on her motion for attorney's fees in this divorce action (mother sought $174,000). Family Court had dismissed mother's motion. The First Department held that Family Court should have looked at the future earning capacity of the parties rather than their earning capacity at the time of the decision:

> The purpose of awarding counsel fees is to further the objectives of "litigational parity" and prevent a more affluent spouse from considerably wearing down the opposition ... . In its dismissal of the mother's motion for counsel fees, the court unduly relied upon the financial circumstances of the parties at the time it rendered its decision rather than weighing the historical and future earning capacities of both parties ... . Here, although the father was unemployed at the time the court's decision was rendered, and the mother had secured employment, the father earned considerably more than the mother during the course of their relationship and has significantly more expected earning capacity than the mother. Indeed, the financial and tax documents in the record support such a conclusion. The father, however, is entitled to a hearing so that the relative financial positions of the parties and the value and extent of the counsel fees requested can be examined ... . **Matter of Brookelyn M. v Christopher M., 2018 NY Slip Op 03801, First Dept 5-29-18**

FAMILY LAW (ATTORNEY'S FEES, COURT SHOULD HAVE TAKEN INTO CONSIDERATION THE FUTURE EARNING CAPACITY OF THE PARTIES IN CONNECTION WITH MOTHER'S MOTION FOR ATTORNEY'S FEES, MOTHER ENTITLED TO A HEARING (FIRST DEPT))/ATTORNEY'S FEE (FAMILY LAW, COURT SHOULD HAVE TAKEN INTO CONSIDERATION THE FUTURE EARNING CAPACITY OF THE PARTIES IN CONNECTION WITH MOTHER'S MOTION FOR ATTORNEY'S FEES, MOTHER ENTITLED TO A HEARING (FIRST DEPT))

FAMILY LAW, CRIMINAL LAW.

WIFE NOT ENTITLED TO UNSEAL RECORD OF HUSBAND'S ALLEGED ASSAULT AGAINST HER IN THESE DIVORCE PROCEEDINGS, HUSBAND WAS GRANTED AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL AND DID NOT PLACE THE CRIMINAL MATTER IN ISSUE, THE RECORD WAS SEALED BY OPERATION OF THE CRIMINAL PROCEDURE LAW (THIRD DEPT).

The Third Department determined the wife's request, in this divorce proceeding, to unseal the record of her husband's criminal proceedings was properly denied. The husband had been charged with an assault against the wife, and the proceedings terminated favorably to the husband (he was granted an adjournment in contemplation of dismissal). The record was therefore sealed by operation of statute (Criminal Procedure Law (CPL)160.50):

> By "provid[ing] for the sealing of records in a criminal proceeding which terminates in favor of the accused" ... ,CPL 160.50 "serves the laudable goal of insuring that one who is charged but not convicted of an offense suffers no stigma as a result of his [or her] having once been the object of an unsustained accusation" ... . It is undisputed that the charges against the husband related to the December 2015 incident were "deemed dismissed as a result of an adjournment in contemplation of dismissal and, therefore, the records of that criminal prosecution were sealed" ... . The wife does not claim that any statutory exception entitles her to the records. Her primary contention is instead that the husband, by denying the alleged behavior that led to the charges, waived the statutory bulwark against disclosure by "commenc[ing] a civil action and affirmatively plac[ing] the information protected by CPL 160.50 into issue"... ..
>
> The wife's argument founders upon the fact that it was she, not the husband, who has "place[d] in issue elements that are common or related to the prior criminal action" by alleging the husband's assaultive conduct ... . **Prag v Prag, 2018 NY Slip Op 03414, Third Dept 5-1018**

FAMILY LAW (CRIMINAL LAW, SEALING OF RECORD, WIFE NOT ENTITLED TO UNSEAL RECORD OF HUSBAND'S ALLEGED ASSAULT AGAINST HER IN THESE DIVORCE PROCEEDINGS, HUSBAND WAS GRANTED AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL AND DID NOT PLACE THE CRIMINAL MATTER IN ISSUE, THE RECORD WAS SEALED BY OPERATION OF THE CRIMINAL PROCEDURE LAW (THIRD DEPT))/CRIMINAL LAW (FAMILY LAW, SEALING OF RECORD OF CRIMINAL PROCEEDINGS, WIFE NOT ENTITLED TO UNSEAL RECORD OF HUSBAND'S ALLEGED ASSAULT AGAINST HER IN THESE DIVORCE PROCEEDINGS, HUSBAND WAS GRANTED AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL AND DID NOT PLACE THE CRIMINAL MATTER IN ISSUE, THE RECORD WAS SEALED BY OPERATION OF THE CRIMINAL PROCEDURE LAW (THIRD DEPT))/SEALING (CRIMINAL LAW, WIFE NOT ENTITLED TO UNSEAL RECORD OF HUSBAND'S ALLEGED ASSAULT AGAINST HER IN THESE DIVORCE PROCEEDINGS, HUSBAND WAS GRANTED AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL AND DID NOT PLACE THE CRIMINAL MATTER IN ISSUE, THE RECORD WAS SEALED BY OPERATION OF THE CRIMINAL PROCEDURE LAW (THIRD DEPT))

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE THE FINDINGS NECESSARY FOR PETITIONER MOTHER TO SEEK SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) FOR HER SON (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should have made the findings necessary to allow petitioner-mother to seek special immigrant juvenile status (SIJS) for her son:

> Based upon our independent factual review, we find that the record establishes that the child meets the age and marital status requirements for special immigrant status, and the dependency requirement has been satisfied by the granting of the mother's guardianship petition ... Moreover, the child's father is deceased and, therefore, reunification is not possible ... . We further find that it would not be in the child's best interests to be returned to Honduras, given the hearing evidence establishing that there is no one there who is able to care for him, and that the child was threatened with violence if he returned. **Matter of Denia M. E. C. v Carlos R. M. O., 2018 NY Slip Op 03355, Second Dept 5-9-18**

FAMILY LAW (SPECIAL IMMIGRANT JUVENILE STATUS, FAMILY COURT SHOULD HAVE MADE THE FINDINGS NECESSARY FOR PETITIONER MOTHER TO SEEK SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) FOR HER SON (SECOND DEPT))/SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) (FAMILY COURT SHOULD HAVE MADE THE FINDINGS NECESSARY FOR PETITIONER MOTHER TO SEEK SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) FOR HER SON (SECOND DEPT))/IMMIGRATION LAW (FAMILY LAW, SPECIAL IMMIGRANT JUVENILE STATUS, FAMILY COURT SHOULD HAVE MADE THE FINDINGS NECESSARY FOR PETITIONER MOTHER TO SEEK SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) FOR HER SON (SECOND DEPT))

FAMILY LAW, IMMIGRATION LAW.

MOTHER'S PETITION SEEKING FINDINGS TO ALLOW HER CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUES SHOULD NOT HAVE BEEN DISMISSED, MOTHER WAS NOT REQUIRED TO BE FINGERPRINTED OR TO SUBMIT CERTAIN DOCUMENTATION, JUDGE'S COMMENTS ABOUT THE CHILD'S SPEAKING SPANISH REQUIRED TRANSFER TO A DIFFERENT JUDGE (SECOND DEPT).

The Second Department determined Family Court should not have dismissed mother's petition to have Family Court make the findings necessary for he child to apply for special Immigrant juvenile status (SIJS) and should not have required mother to be fingerprinted and provide unnecessary documentation. The Second Department further held that the petition must be transferred to a different judge because of the judge's comments about the child's speaking Spanish:

> Contrary to the Family Court's determination, in a proceeding such as this pursuant to Family Court Act § 661(a) for "[g]uardianship of the person of a minor or infant," there is no express statutory fingerprinting requirement ... , or any express requirement to submit documentation pertaining to the Office of Children and Family Services ... . Further, under the circumstances of this case, the court erred in dismissing the petition and denying the motion for "failure to prosecute" based upon the mother's failure to submit documentation regarding, inter alia, the child's enrollment in school ... .
>
> Since the Family Court dismissed the guardianship petition and denied the mother's motion without conducting a hearing or considering the child's best interests, we remit the matter to the Family Court, Nassau County, for a hearing and a new determination thereafter of the petition and the motion ... . In addition, in light of certain remarks made by the Family Court Judge during the course of the proceedings, we deem it appropriate that the matter be heard by a different Judge. The remarks included: that the child "should be speaking English a lot better" after having been in the United States for two years; that the child should "make some friends who speak English"; that if the child only spoke Spanish, "what are you gonna do, you're gonna be hanging around just where you are"; and that the child "[c]an't speak English, doesn't go to school, it's wonderful. It's a great country America." These remarks were inappropriate and cannot be countenanced. **Matter of A. v P., 2018 NY Slip Op 03674, Second Dept 5-23-18**

FAMILY LAW (SPECIAL IMMIGRANT JUVENILE STATUS, MOTHER'S PETITION SEEKING FINDINGS TO ALLOW HER CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUES SHOULD NOT HAVE BEEN DISMISSED, MOTHER WAS NOT REQUIRED TO BE FINGERPRINTED OR TO SUBMIT CERTAIN DOCUMENTATION, JUDGE'S COMMENTS ABOUT THE CHILD'S SPEAKING SPANISH REQUIRED TRANSFER TO A DIFFERENT JUDGE (SECOND DEPT))/IMMIGRATION LAW (FAMILY LAW, SPECIAL IMMIGRANT JUVENILE STATUS, MOTHER'S PETITION SEEKING FINDINGS TO ALLOW HER CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUES SHOULD NOT HAVE BEEN DISMISSED, MOTHER WAS NOT REQUIRED TO BE FINGERPRINTED OR TO SUBMIT CERTAIN DOCUMENTATION, JUDGE'S COMMENTS ABOUT THE CHILD'S SPEAKING SPANISH REQUIRED TRANSFER TO A DIFFERENT JUDGE (SECOND DEPT))/SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) (FAMILY LAW, MOTHER'S PETITION SEEKING FINDINGS TO ALLOW HER CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUES SHOULD NOT HAVE BEEN DISMISSED, MOTHER WAS NOT REQUIRED TO BE FINGERPRINTED OR TO SUBMIT CERTAIN DOCUMENTATION, JUDGE'S COMMENTS ABOUT THE CHILD'S SPEAKING SPANISH REQUIRED TRANSFER TO A DIFFERENT JUDGE (SECOND DEPT))/JUDGES (FAMILY LAW, SPECIAL IMMIGRANT JUVENILE STATUS, MOTHER'S PETITION SEEKING FINDINGS TO ALLOW HER CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUES SHOULD NOT HAVE BEEN DISMISSED, MOTHER WAS NOT REQUIRED TO BE FINGERPRINTED OR TO SUBMIT CERTAIN DOCUMENTATION, JUDGE'S COMMENTS ABOUT THE CHILD'S SPEAKING SPANISH REQUIRED TRANSFER TO A DIFFERENT JUDGE (SECOND DEPT))

FAMILY LAW, IMMIGRATION LAW, CIVIL PROCEDURE.

FAMILY COURT DIVESTED OF SUBJECT MATTER JURISDICTION IN THIS GUARDIANSHIP PROCEEDING BECAUSE THE CHILD TURNED 21, MOTION FOR FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) RENDERED ACADEMIC (FIRST DEPT).

The Second Department, dismissing the appeal as academic, determined Family Court was divested of subject matter jurisdiction in this guardianship proceeding because the child had turned 21. Mother had sought appointment as guardian in an effort to procure special immigrant juvenile status (SIJS) for the child:

> "Generally, courts are precluded from considering questions which, although once live, have become moot by passage of time or change in circumstances'" ... . Where, as here, a child who consented to the appointment of a guardian after his or her 18th birthday turns 21, the term of appointment of the guardian "expires on [the child's] twenty-first birthday" (SCPA 1707[2]). Consequently, once the child turns 21, the court "is divested of subject matter jurisdiction, [and] cannot exercise such jurisdiction by virtue of an order nunc pro tunc" ... . Thus, the guardianship petition cannot be granted at this juncture.
>
> Furthermore, since guardianship status, which the Family Court can only grant to individuals under 21, is a condition precedent to a declaration allowing a child to seek SIJS, the petitioner's motion for the issuance of an order declaring that the child is dependent on the court and making the requisite specific findings so as to enable him to petition for SIJS has also been rendered academic ... . **Matter of Vincenta E. V. v Alexander R. G., 2018 NY Slip Op 03849, Second Dept 5-30-18**

FAMILY LAW (FAMILY COURT DIVESTED OF SUBJECT MATTER JURISDICTION IN THIS GUARDIANSHIP PROCEEDING BECAUSE THE CHILD TURNED 21, MOTION FOR FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) RENDERED ACADEMIC (FIRST DEPT))/IMMIGRATION LAW (FAMILY LAW, FAMILY COURT DIVESTED OF SUBJECT MATTER JURISDICTION IN THIS GUARDIANSHIP PROCEEDING BECAUSE THE CHILD TURNED 21, MOTION FOR FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) RENDERED ACADEMIC (FIRST DEPT))/CIVIL PROCEDURE (FAMILY LAW, FAMILY COURT DIVESTED OF SUBJECT MATTER JURISDICTION IN THIS GUARDIANSHIP PROCEEDING BECAUSE THE CHILD TURNED 21, MOTION FOR FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) RENDERED ACADEMIC (FIRST DEPT))/SPECIAL IMMIGRANT JUVENILE STATUS (FAMILY COURT DIVESTED OF SUBJECT MATTER JURISDICTION IN THIS GUARDIANSHIP PROCEEDING BECAUSE THE CHILD TURNED 21, MOTION FOR FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) RENDERED ACADEMIC (FIRST DEPT))/SUBJECT MATTER JURISDICTION (FAMILY COURT DIVESTED OF SUBJECT MATTER JURISDICTION IN THIS GUARDIANSHIP PROCEEDING BECAUSE THE CHILD TURNED 21, MOTION FOR FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) RENDERED ACADEMIC (FIRST DEPT))/JURISDICTION (FAMILY LAW, FAMILY COURT DIVESTED OF SUBJECT MATTER JURISDICTION IN THIS GUARDIANSHIP PROCEEDING BECAUSE THE CHILD TURNED 21, MOTION FOR FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) RENDERED ACADEMIC (FIRST DEPT))

FAMILY LAW, JUDGES.

IN THIS DIVORCE PROCEEDING, THE JUDGE HAD THE POWER TO CORRECT AN INCONSISTENCY BETWEEN THE JUDGMENT AND THE UNDERLYING DECISION BUT DID NOT HAVE THE POWER TO CHANGE THE JUDGMENT BASED UPON NEW EVIDENCE (SECOND DEPT).

The Second department, reversing (modifying) Supreme Court in a divorce action, determined that the judge properly corrected a mistake in the judgment of divorce, but improperly made a change in the judgment based on new evidence:

> ... [T]he Supreme Court, sua sponte, directed the parties to appear ... . [T]he defendant and his counsel appeared, but the plaintiff failed to appear. The court expressed its concern about a letter it had received indicating that the defendant had failed to disclose a variable supplemental pension plan. The court further noted that the third decretal paragraph of the judgment did not reflect the intent expressed in the court's underlying decision, inasmuch as the judgment failed to provide that changes in the value of the retirement assets since the commencement of the action were to be shared equally. An amended judgment was entered thereafter modifying so much of the third decretal paragraph of the original judgment as was necessary to conform the judgment to the underlying decision, and modifying the fourth decretal paragraph of the original judgment to include a reference to the previously undisclosed variable supplemental pension plan. The defendant appeals from the amended judgment.
>
> The Supreme Court had the authority to modify the third decretal paragraph of the original judgment, given the discrepancy between the terms of that decretal paragraph and the underlying decision. "A judgment . . . must conform strictly to the court's decision. Where there is an inconsistency between a judgment . . . and the decision upon which it is based, the decision controls" ...
>
> However, the Supreme Court was without authority, sua sponte, to modify the fourth decretal paragraph of the original judgment to add a reference to the variable supplemental pension plan, as this was a substantive modification based on new evidence that had not previously been submitted to the court. Such a modification goes beyond the court's inherent authority to correct a "mistake, defect or irregularity" in the original judgment "not affecting a substantial right of a party" ... . **Mascia v Mascia, 2018 NY Slip Op 03523, Second Dept 5-16-18**

FAMILY LAW (JUDGMENTS, IN THIS DIVORCE PROCEEDING, THE JUDGE HAD THE POWER TO CORRECT AN INCONSISTENCY BETWEEN THE JUDGMENT AND THE UNDERLYING DECISION BUT DID NOT HAVE THE POWER TO CHANGE THE JUDGMENT BASED UPON NEW EVIDENCE (SECOND DEPT))/JUDGMENTS (IN THIS DIVORCE PROCEEDING, THE JUDGE HAD THE POWER TO CORRECT AN INCONSISTENCY BETWEEN THE JUDGMENT AND THE UNDERLYING DECISION BUT DID NOT HAVE THE POWER TO CHANGE THE JUDGMENT BASED UPON NEW EVIDENCE (SECOND DEPT))/JUDGES (IN THIS DIVORCE PROCEEDING, THE JUDGE HAD THE POWER TO CORRECT AN INCONSISTENCY BETWEEN THE JUDGMENT AND THE UNDERLYING DECISION BUT DID NOT HAVE THE POWER TO CHANGE THE JUDGMENT BASED UPON NEW EVIDENCE (SECOND DEPT))

FORECLOSURE

FORECLOSURE.

ALTHOUGH THE MONTHLY MORTGAGE PAYMENTS STOPPED IN 2008, THE DEBT WAS NEVER ACCELERATED UNTIL THE INSTANT FORECLOSURE ACTION WAS BROUGHT IN 2015, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the foreclosure action was not time barred. The mortgage payments stopped in 2008. But the debt was never accelerated until the foreclosure action was commenced in 2015:

> Where, as here, a loan secured by a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the statute of limitations begins to run on the date that each installment becomes due ... . Thus, unless the entire debt had been accelerated by the mortgage holder, on the date of a default the statute of limitations begins to run only for the installment payment that became due on that date ... .
>
> Here, defendants' own submissions in support of the motion establish that the mortgage is an installment mortgage, the installment payments are due monthly until January 1, 2035, and defendants defaulted on the payment that was due September 1, 2008. Further, defendants failed to establish that plaintiff accelerated the debt by demanding payment of the entire loan or by commencing a prior foreclosure action. Thus, the action was timely commenced inasmuch as the statute of limitations did not begin to run on the entire debt until the instant action was commenced on February 20, 2015. **Wilmington Sav. Fund Socy., FSB v Unknown Heirs at Law of Danny Higdon, 2018 NY Slip Op 03274, Fourth Dept 5-4-18**

FORECLOSURE (ALTHOUGH THE MONTHLY MORTGAGE PAYMENTS STOPPED IN 2008, THE DEBT WAS NEVER ACCELERATED UNTIL THE INSTANT FORECLOSURE ACTION WAS BROUGHT IN 2015, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED (FOURTH DEPT))/STATUTE OF LIMITATIONS, FORECLOSURE, (ALTHOUGH THE MONTHLY MORTGAGE PAYMENTS STOPPED IN 2008, THE DEBT WAS NEVER ACCELERATED UNTIL THE INSTANT FORECLOSURE ACTION WAS BROUGHT IN 2015, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED (FOURTH DEPT))

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FORECLOSURE (ALTHOUGH THE MONTHLY MORTGAGE PAYMENTS STOPPED IN 2008, THE DEBT WAS NEVER ACCELERATED UNTIL THE INSTANT FORECLOSURE ACTION WAS BROUGHT IN 2015, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED (FOURTH DEPT))/STATUTE OF LIMITATIONS, FORECLOSURE, (ALTHOUGH THE MONTHLY MORTGAGE PAYMENTS STOPPED IN 2008, THE DEBT WAS NEVER ACCELERATED UNTIL THE INSTANT FORECLOSURE ACTION WAS BROUGHT IN 2015, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED (FOURTH DEPT))

FORECLOSURE, CIVIL PROCEDURE.

FORECLOSURE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, PLAINTIFF BANK TOOK PRELIMINARY STEPS TOWARD OBTAINING A DEFAULT JUDGMENT WITHIN ONE YEAR OF DEFENDANTS' DEFAULT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure complaint should not have been dismissed on the ground that the bank had not taken proceedings for the entry of a default judgment within a year of defendants' default. It was enough that the bank took preliminary steps toward obtaining a default judgment within the year:

> CPLR 3215(c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed." "It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)" ... . "Rather, it is enough that the plaintiff timely takes the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference' to establish that it initiated proceedings for entry of a judgment within one year of the default' for the purposes of satisfying CPLR 3215(c)" ... . Here, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference ... within one year of the defendants' default and, thus, did not abandon the action ... . **Deutsche Bank Natl. Trust Co. v Delisser, 2018 NY Slip Op 03504, Second Dept 5-16-18**

FORECLOSURE (DEFAULT, FORECLOSURE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, PLAINTIFF BANK TOOK PRELIMINARY STEPS TOWARD OBTAINING A DEFAULT JUDGMENT WITHIN ONE YEAR OF DEFENDANTS' DEFAULT (SECOND DEPT))/CIVIL PROCEDURE (DEFAULT, FORECLOSURE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, PLAINTIFF BANK TOOK PRELIMINARY STEPS TOWARD OBTAINING A DEFAULT JUDGMENT WITHIN ONE YEAR OF DEFENDANTS' DEFAULT (SECOND DEPT))/CPLR 3315 (DEFAULT, FORECLOSURE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, PLAINTIFF BANK TOOK PRELIMINARY STEPS TOWARD OBTAINING A DEFAULT JUDGMENT WITHIN ONE YEAR OF DEFENDANTS' DEFAULT (SECOND DEPT))/DEFAULT (CIVIL PROCEDURE, FORECLOSURE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, PLAINTIFF BANK TOOK PRELIMINARY STEPS TOWARD OBTAINING A DEFAULT JUDGMENT WITHIN ONE YEAR OF DEFENDANTS' DEFAULT (SECOND DEPT))

FORECLOSURE, CIVIL PROCEDURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

COURT SHOULD NOT HAVE CONVERTED THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT, BANK'S LETTER SEEKING TO REVOKE THE ACCELERATION OF THE MORTGAGE BEFORE THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION RAN OUT WAS NOT DOCUMENTARY EVIDENCE UPON WHICH A MOTION TO DISMISS COULD BE BASED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank's (Citimortgage's) motion to dismiss the plaintiff's action to cancel and discharge a mortgage should not have been granted. The bank started a foreclosure action in 2009 and the statute of limitations expired on March 17, 2015. On March 13, 2015, the bank sent a letter to plaintiff purporting to de-accelerate the loan and re-institute the loan as an installment loan. The Second Department determined the motion to dismiss should not have been converted to a motion for summary judgment and the March 13, 2015, letter did not constitute documentary evidence sufficient to dismiss the complaint. There was no proof when the letter was mailed and it could have arrived after the statute of limitations expired:

> Here, the Supreme Court should not have converted Citimortgage's motion pursuant to CPLR 3211(a) to dismiss the complaint to one for summary judgment without providing "adequate notice to the parties" (CPLR 3211[c]...). None of the recognized exceptions to the notice requirement is applicable here. No specific request for summary judgment was made by any party, the parties did not deliberately chart a summary judgment course, and the action did not exclusively involve issues of law which were fully appreciated and argued by the parties ... .
>
> "In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as documentary evidence,' it must be unambiguous, authentic, and undeniable. Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case. However, neither affidavits, deposition testimony, nor letters are considered documentary evidence within the intendment of CPLR 3211(a)(1)" ... . Furthermore, "[a] lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action"... . **Soroush v Citimortgage, Inc., 2018 NY Slip Op 03724, Second Dept 5-23-18**

FORECLOSURE (COURT SHOULD NOT HAVE CONVERTED THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT, BANK'S LETTER SEEKING TO REVOKE THE ACCELERATION OF THE MORTGAGE BEFORE THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION RAN OUT WAS NOT DOCUMENTARY EVIDENCE UPON WHICH A MOTION TO DISMISS COULD BE BASED (SECOND DEPT))/CIVIL PROCEDURE (DISMISS, MOTION TO, COURT SHOULD NOT HAVE CONVERTED THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT, BANK'S LETTER SEEKING TO REVOKE THE ACCELERATION OF THE MORTGAGE BEFORE THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION RAN OUT WAS NOT DOCUMENTARY EVIDENCE UPON WHICH A MOTION TO DISMISS COULD BE BASED (SECOND DEPT))/DISMISS, MOTION TO (CIVIL PROCEDURE, COURT SHOULD NOT HAVE CONVERTED THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT, BANK'S LETTER SEEKING TO REVOKE THE ACCELERATION OF THE MORTGAGE BEFORE THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION RAN OUT WAS NOT DOCUMENTARY EVIDENCE UPON WHICH A MOTION TO DISMISS COULD BE BASED (SECOND DEPT))/DOCUMENTARY EVIDENCE (DISMISS, MOTION TO, COURT SHOULD NOT HAVE CONVERTED THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT, BANK'S LETTER SEEKING TO REVOKE THE ACCELERATION OF THE MORTGAGE BEFORE THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION RAN OUT WAS NOT DOCUMENTARY EVIDENCE UPON WHICH A MOTION TO DISMISS COULD BE BASED (SECOND DEPT))/CPLR 3211 (COURT SHOULD NOT HAVE CONVERTED THE MOTION TO DISMISS TO A MOTION FOR SUMMARY JUDGMENT, BANK'S LETTER SEEKING TO REVOKE THE ACCELERATION OF THE MORTGAGE BEFORE THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION RAN OUT WAS NOT DOCUMENTARY EVIDENCE UPON WHICH A MOTION TO DISMISS COULD BE BASED (SECOND DEPT))

FREEDOM OF INFORMATION LAW (FOIL)

FREEDOM OF INFORMATION LAW (FOIL).

CIVILIAN COMPLAINT REVIEW BOARD'S RECORDS CONCERNING A PARTICULAR POLICE OFFICER EXEMPT FROM DISCLOSURE UNDER THE PUBLIC OFFICERS LAW AND CIVIL RIGHTS LAW (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Civilian Complaint Review Board (CCRB) records concerning a particular police officer were exempt from disclosure under the Public Officers Law and Civil Rights Law:

> Public Officers Law § 87(2)(a) provides, among other exceptions, that an agency may deny access to records that "are specifically exempted from disclosure by state or federal statute." One such statute is Civil Rights Law § 50-a, which, as relevant here, provides: "All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department . . . shall be considered confidential and not subject to inspection or review . . . except as may be mandated by lawful court order" (Civil Rights Law § 50-a[1]). As the Court of Appeals has acknowledged, the Legislature's purpose in enacting Civil Rights Law § 50-a(1) was "to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" ... .
>
> We agree with the Appellate Division, First Department, that records of the CCRB relating to complaints and proceedings against police officers are exempt from disclosure under Civil Rights Law § 50-a(1)... . The records that the petitioner requested are "personnel records used to evaluate performance toward continued employment or promotion." **Matter of Luongo v Records Access Officer, 2018 NY Slip Op 03681, Second Dept 5-23-18**

FREEDOM IN INFORMATION LAW (FOIL) (CIVILIAN COMPLAINT REVIEW BOARD'S RECORDS CONCERNING A PARTICULAR POLICE OFFICER EXEMPT FROM DISCLOSURE UNDER TH PUBLIC OFFICERS LAW AND CIVIL RIGHTS LAW (SECOND DEPT))/POLICE OFFICERS (FREEDOM OF INFORMATION LAW, CIVILIAN COMPLAINT REVIEW BOARD'S RECORDS CONCERNING A PARTICULAR POLICE OFFICER EXEMPT FROM DISCLOSURE UNDER TH PUBLIC OFFICERS LAW AND CIVIL RIGHTS LAW (SECOND DEPT))/CIVILIAN COMPLAINT REVIEW BOARD (POLICE OFFICER, FREEDOM OF INFORMATION LAW, CIVILIAN COMPLAINT REVIEW BOARD'S RECORDS CONCERNING A PARTICULAR POLICE OFFICER EXEMPT FROM DISCLOSURE UNDER TH PUBLIC OFFICERS LAW AND CIVIL RIGHTS LAW (SECOND DEPT))

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

INTRA- OR INTER- AGENCY EXEMPTION TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW (FOIL) DID NOT EXTEND TO COMMUNICATIONS BETWEEN MAYOR DE BLASIO'S OFFICE AND A CONSULTANT RETAINED BY A PRIVATE ORGANIZATION (AS OPPOSED TO A CONSULTANT HIRED BY A GOVERNMENTAL AGENCY), PREVAILING PARTIES ENTITLED TO ATTORNEY'S FEES (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined that the intra- or inter-agency exemption from the Freedom of Information Law (FOIL) could not be stretched to include communications between Mayor de Blasio's office and an outside consultant retained by a private organization (Campaign for One New York or CONY), as opposed to a consultant hired by a government agency. Because the reporters seeking the information had substantially prevailed in seeking disclosure, they were entitled to attorney's fees:

> It is well settled that for communications between a governmental agency and an outside consultant to fall under the agency exemption, the outside consultant must be retained by the governmental agency ... .
>
> Respondents seek to broaden the agency exemption to shield communications between a governmental agency and an outside consultant retained by a private organization and not the agency. This attempt expands the agency exemption and closes the door on government transparency. Requiring an agency to retain an outside consultant to protect its communications comports with the fundamental principle that FOIL exemptions should be "narrowly interpreted so that the public is granted maximum access" to public records ... . **Matter of Rauh v de Blasio, 2018 NY Slip Op 03115, First Dept 5-1-18**

FREEDOM OF INFORMATION LAW (FOIL) (INTRA OR INTER AGENCY EXEMPTION TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW (FOIL) DID NOT EXTEND TO COMMUNICATIONS BETWEEN MAYOR DE BLASIO'S OFFICE AND A CONSULTANT RETAINED BY A PRIVATE ORGANIZATION (AS OPPOSED TO A CONSULTANT HIRED BY A GOVERNMENTAL AGENCY) (FIRST DEPT))/INTER- INTRA- AGENCY EXEMPTION (FREEDOM OF INFORMATION LAW (FOIL) (INTRA OR INTER AGENCY EXEMPTION TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW (FOIL) DID NOT EXTEND TO COMMUNICATIONS BETWEEN MAYOR DE BLASIO'S OFFICE AND A CONSULTANT RETAINED BY A PRIVATE ORGANIZATION (AS OPPOSED TO A CONSULTANT HIRED BY A GOVERNMENTAL AGENCY) (FIRST DEPT))/ATTORNEY'S (FREEDOM OF INFORMATION LAW (FOIL), PREVAILING PARTIES ENTITLED TO ATTORNEY'S FEES (FIRST DEPT)/CONSULTANTS (FREEDOM OF INFORMATION LAW (FOIL), INTRA OR INTER AGENCY EXEMPTION TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW (FOIL) DID NOT EXTEND TO COMMUNICATIONS BETWEEN MAYOR DE BLASIO'S OFFICE AND A CONSULTANT RETAINED BY A PRIVATE ORGANIZATION (AS OPPOSED TO A CONSULTANT HIRED BY A GOVERNMENTAL AGENCY) (FIRST DEPT))

INSURANCE LAW

INSURANCE LAW.

FAILURE TO ATTEND INDEPENDENT MEDICAL EXAMINATIONS SET UP BY NO-FAULT CARRIER IS AN ABSOLUTE DEFENSE TO COVERAGE (FIRST DEPT).

The First Department, reversing Supreme Court, determined no-fault claimants' failure to attend independent medical examinations (IME's) was a absolute defense to coverage:

> When an individual submits a personal injury claim for motor vehicle no-fault benefits, the insurance company may request that the individual submit to an IME, and if the individual fails to appear for that IME, it "constitutes a breach of a condition precedent vitiating coverage" ... . Here, plaintiff established its entitlement to judgment as a matter of law by submitting the letters sent to each claimant notifying them about the date, time, and location of the initially scheduled IME and a second scheduled IME and affidavits of service for these letters. Plaintiff also submitted affidavits from each medical professional assigned to conduct the scheduled IME, with each stating that the medical professional was in his or her office at the date and time of the scheduled IME, the respective claimant failed to appear, the appointment was kept open until the end of the day, and at the end of the day, the medical professional filled out the affidavit acknowledging the nonappearance.
>
> Because Hereford sent the notices scheduling the IMEs prior to the receipt of each of the claims, the notification requirements for verification requests under 11 NYCRR 65-3.5 and 65-3.6 do not apply ... . Furthermore, plaintiff was not required "to demonstrate that the claims were timely disclaimed since the failure to attend medical exams was an absolute coverage defense" ... . **Hereford Ins. Co. v Lida's Med. Supply, Inc., 2018 NY Slip Op 03226, First Dept 5-3-18**

INSURANCE LAW (FAILURE TO ATTEND INDEPENDENT MEDICAL EXAMINATIONS SET UP BY NO-FAULT CARRIER IS AN ABSOLUTE DEFENSE TO COVERAGE (FIRST DEPT))/NO-FAULT INSURANCE (FAILURE TO ATTEND INDEPENDENT MEDICAL EXAMINATIONS SET UP BY NO-FAULT CARRIER IS AN ABSOLUTE DEFENSE TO COVERAGE (FIRST DEPT))/INDEPENDENT MEDICAL EXAMINATIONS (IME) (FAILURE TO ATTEND INDEPENDENT MEDICAL EXAMINATIONS SET UP BY NO-FAULT CARRIER IS AN ABSOLUTE DEFENSE TO COVERAGE (FIRST DEPT))/IME (FAILURE TO ATTEND INDEPENDENT MEDICAL EXAMINATIONS SET UP BY NO-FAULT CARRIER IS AN ABSOLUTE DEFENSE TO COVERAGE (FIRST DEPT))

INSURANCE LAW.

RECOVERY FROM THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR INJURY BY AN UNKNOWN DRIVER DEPENDS ON WHETHER THE INJURY IS THE RESULT OF AN ACCIDENT OR INTENTIONAL CONDUCT, NO RECOVERY FOR INJURY RESULTING FROM INTENTIONAL CONDUCT (SECOND DEPT).

The Second Department determined Supreme Court correctly ordered a framed issue hearing on the issue whether the injury to plaintiff bicyclist was caused by an "accident" or "intentional conduct" within the meaning of Article 52 of the Insurance Law. Plaintiff got into an argument with a driver and was then struck by the driver's car. The driver's identity is not known so plaintiff sought recovery from the Motor Vehicle Accident Indemnification Corporation (MVAIC). The Second Department held that the issue was not controlled by the recent Court of Appeals decision which found that an intentional act by a driver could be seen as an "accident" from the perspective of the injured person. In that Court of Appeals case (State Farm Mut Auto Ins Co v Langan, 16 NY3d 349) the injured person was seeking recovery from the insurer under the injured person's own policy. Here the plaintiff was seeking recovery from the MVAIC and there can be no recovery from the MVAIC for injury resulting from intentional conduct:

> Article 52 of the Insurance Law ("motor vehicle accident indemnification act") seeks to provide "for the payment of loss on account of injury to or death of persons who, through no fault of their own, were involved in motor vehicle accidents caused by" vehicles that, for a variety of reasons, are not covered by insurance (Insurance Law § 5201[b]). Article 52 does not, however, cover incidents that are the result of intentional conduct by a tortfeasor, because those incidents are not caused "by accident" ... .
>
> The Court of Appeals [in Langan] held that where recovery was sought from the insurer under the insured's own policy, the determination of whether the incident constituted an "accident" was to be viewed from the perspective of the innocent insured, rather than of the tortfeasor: "the intentional assault of an innocent insured is an accident within the meaning of his or her own policy. The occurrence at issue was clearly an accident from the insured's point of view" ... . The Court distinguished McCarthy v Motor Veh. Acc. Indem. Corp. (16 AD2d at 41), where recovery was sought from a state fund administered by the MVAIC... . Here, as in McCarthy, the petitioner seeks to recover from the state fund administered by the MVAIC, and not from an insurer under an insurance policy as in Langan. **Castillo v Motor Veh. Acc. Indem. Corp., 2018 NY Slip Op 03502, Second Dept 5-16-18**

INSURANCE LAW (RECOVERY FROM THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR INJURY BY AN UNKNOWN DRIVER DEPENDS ON WHETHER THE INJURY IS THE RESULT OF AN ACCIDENT OR INTENTIONAL CONDUCT, NO RECOVERY FOR INJURY RESULTING FROM INTENTIONAL CONDUCT (SECOND DEPT))/MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (RECOVERY FROM THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR INJURY BY AN UNKNOWN DRIVER DEPENDS ON WHETHER THE INJURY IS THE RESULT OF AN ACCIDENT OR INTENTIONAL CONDUCT, NO RECOVERY FOR INJURY RESULTING FROM INTENTIONAL CONDUCT (SECOND DEPT))/ACCIDENT (INSURANCE LAW, RECOVERY FROM THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR INJURY BY AN UNKNOWN DRIVER DEPENDS ON WHETHER THE INJURY IS THE RESULT OF AN ACCIDENT OR INTENTIONAL CONDUCT, NO RECOVERY FOR INJURY RESULTING FROM INTENTIONAL CONDUCT (SECOND DEPT))/INTENTIONAL CONDUCT (INSURANCE LAW, RECOVERY FROM THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORIPORATION FOR INJURY BY AN UNKNOWN DRIVER DEPENDS ON WHETHER THE INJURY IS THE RESULT OF AN ACCIDENT OR INTENTIONAL CONDUCT, NO RECOVERY FOR INJURY RESULTING FROM INTENTIONAL CONDUCT (SECOND DEPT))/TRAFFIC ACCIDENTS (INSURANCE LAW, RECOVERY FROM THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR INJURY BY AN UNKNOWN DRIVER DEPENDS ON WHETHER THE INJURY IS THE RESULT OF AN ACCIDENT OR INTENTIONAL CONDUCT, NO RECOVERY FOR INJURY RESULTING FROM INTENTIONAL CONDUCT (SECOND DEPT))/BICYCLISTS (TRAFFIC ACCIDENTS, INSURANCE LAW, RECOVERY FROM THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION FOR INJURY BY AN UNKNOWN DRIVER DEPENDS ON WHETHER THE INJURY IS THE RESULT OF AN ACCIDENT OR INTENTIONAL CONDUCT, NO RECOVERY FOR INJURY RESULTING FROM INTENTIONAL CONDUCT (SECOND DEPT))

INSURANCE LAW.

THE CASE INVOLVES A NEW JERSEY INSURANCE POLICY ISSUED TO A NEW JERSEY COMPANY WHICH WAS DOING SUBWAY WORK IN NEW YORK, PURSUANT TO A 2017 COURT OF APPEALS RULING, WHETHER NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER STATUTE APPLIES DEPENDS ON WHETHER THE INSURED HAS A SUBSTANTIAL BUSINESS PRESENCE IN NEW YORK, MATTER REMITTED FOR DEVELOPMENT OF THE RECORD ON THAT ISSUE (FIRST DEPT).

The First Department, over an extensive two-justice dissent, determined the case, which was affected by a 2017 Court of Appeals decision, needed to be sent back for more fact-finding. The Court of Appeals case, Carlson v American Intl. Group, Inc. (30 NY3d 288 [2017]), held that the timely disclaimer provisions of New York Insurance Law 3240 (d)(2) applied to insureds located in New York, which was defined to include insureds with a "substantial business presence" in New York.

> Everest [the insurer successfully argued in Supreme Court that] it had no duty to defend or indemnify because section 3240(d)(2) applies only to insurance policies "issued or delivered" in New York. Everest argued that it is a New Jersey insurer and that it issued the policy to East Coast, a New Jersey company, and that therefore the policy was not "issued or delivered" in New York. ...
>
> Supreme Court, relying upon Carlson v American Intl. Group., Inc., (130 AD3d 1477 [4th Dept 2015]) [reversed by the Court of Appeals], ... granted Everest's cross motion, holding that because the policy was issued and delivered outside of New York State, the timeliness requirements of § 3240(d)(2) did not apply. ...
>
> ... [T]he first prong of [the Court of Appeals decision in] Carlson was satisfied in this case. The risks covered under the Everest policy include the Queensboro Plaza project, which is located in New York State. However, we find that the record is not sufficiently developed for us to decide whether East Coast [the insured company] had a substantial business presence in New York under the Court of Appeals' decision in Carlson. * * *
>
> Because the Carlson Court did not set forth a specific definition of substantial business presence, and because the record is insufficiently developed concerning East Coast's business presence in New York, we remand to allow the parties to develop the record and give Supreme Court an opportunity to meaningfully review the case in light of Carlson. **Vista Eng'g Corp. v Everest Indem. Ins. Co., 2018 NY Slip Op 03730, First Dept 5-24-18**

INSURANCE LAW (THE CASE INVOLVES A NEW JERSEY INSURANCE POLICY ISSUED TO A NEW JERSEY COMPANY WHICH WAS DOING SUBWAY WORK IN NEW YORK, PURSUANT TO A 2017 COURT OF APPEALS RULING, WHETHER NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER STATUTE APPLIES DEPENDS ON WHETHER THE INSURED HAS A SUBSTANTIAL BUSINESS PRESENCE IN NEW YORK, MATTER REMITTED FOR DEVELOPMENT OF THE RECORD ON THAT ISSUE (FIRST DEPT))/DISCLAIMER (INSURANCE LAW, THE CASE INVOLVES A NEW JERSEY INSURANCE POLICY ISSUED TO A NEW JERSEY COMPANY WHICH WAS DOING SUBWAY WORK IN NEW YORK, PURSUANT TO A 2017 COURT OF APPEALS RULING, WHETHER NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER STATUTE APPLIES DEPENDS ON WHETHER THE INSURED HAS A SUBSTANTIAL BUSINESS PRESENCE IN NEW YORK, MATTER REMITTED FOR DEVELOPMENT OF THE RECORD ON THAT ISSUE (FIRST DEPT))

INSURANCE LAW, ARBITRATION, CIVIL PROCEDURE.

ARBITRATOR'S RULING WAS IRRATIONAL AND VIOLATED CPLR 1209 IN THIS NO-FAULT INSURANCE ACTION, HEALTH CARE PROVIDER, AS AN ASSIGNEE, WAS ENTITLED TO ARBITRATE ITS CLAIM FOR CARE PROVIDED TO THE INJURED INFANT (SECOND DEPT).

The Second Department determined the arbitrator's award was irrational and violated CPLR 1209 in this no-fault insurance action. The injured child and his mother had assigned their rights to payment for health care services to the petitioner, Fast Care. Contrary to the arbitrator's finding, arbitration was not sought by the injured child, which would have required a court order under CPLR 1209, but rather was sought by the assignee, Fast Care:

> 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) the arbitrator exceeding his or her power; or (4) the failure to follow the procedures of CPLR article 75 ... . In addition, an arbitration award may be vacated "if it violates strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power"... . An arbitration award may also be vacated where it is in " explicit conflict'" with established laws and "the strong and well-defined policy considerations' embodied therein"... .
>
> We agree with the Supreme Court that the arbitrator's award was irrational and in conflict with CPLR 1209, which applies "only where an infant is a party" to an arbitration proceeding ... . The infant patient was not a party to the arbitration; rather, Fast Care, as the infant's assignee, was the party that brought the arbitration ... . **Matter of Fast Care Med. Diagnostics, PLLC/PV v Government Employees Ins. Co., 2018 NY Slip Op 03831, Second Dept 5-30-18**

INSURANCE LAW (NO-FAULT, ARBITRATOR'S RULING WAS IRRATIONAL AND VIOLATED CPLR 1209 IN THIS NO-FAULT INSURANCE ACTION, HEALTH CARE PROVIDER, AS AN ASSIGNEE, WAS ENTITLED TO ARBITRATE ITS CLAIM FOR CARE PROVIDED TO THE INJURED INFANT (SECOND DEPT))/ARBITRATION (NO-FAULT INSURANCE, ARBITRATOR'S RULING WAS IRRATIONAL AND VIOLATED CPLR 1209 IN THIS NO-FAULT INSURANCE ACTION, HEALTH CARE PROVIDER, AS AN ASSIGNEE, WAS ENTITLED TO ARBITRATE ITS CLAIM FOR CARE PROVIDED TO THE INJURED INFANT (SECOND DEPT))/CIVIL PROCEDURE (NO-FAULT INSURANCE, ARBITRATION, ARBITRATOR'S RULING WAS IRRATIONAL AND VIOLATED CPLR 1209 IN THIS NO-FAULT INSURANCE ACTION, HEALTH CARE PROVIDER, AS AN ASSIGNEE, WAS ENTITLED TO ARBITRATE ITS CLAIM FOR CARE PROVIDED TO THE INJURED INFANT (SECOND DEPT))/CPLR 1209 (NO-FAULT INSURANCE, ARBITRATION, ARBITRATOR'S RULING WAS IRRATIONAL AND VIOLATED CPLR 1209 IN THIS NO-FAULT INSURANCE ACTION, HEALTH CARE PROVIDER, AS AN ASSIGNEE, WAS ENTITLED TO ARBITRATE ITS CLAIM FOR CARE PROVIDED TO THE INJURED INFANT (SECOND DEPT))

INSURANCE LAW, CIVIL PROCEDURE.

FEDERAL RISK RETENTION GROUP (RRG) LAW PREEMPTS NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER OF COVERAGE PROVISION, THEREFORE DEFENDANT FOREIGN RRG DID NOT NEED TO COMPLY WITH NEW YORK'S STATUTORY TIMELY DISCLAIMER REQUIREMENT (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, in a matter of first impression, determined that federal law, the Liability Risk Retention Act (LRRA), preempted New York's Insurance Law section 3420(d)(2). Therefore defendant foreign risk retention group (RRG) [Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC)], did not need to comply with the timely notice of disclaimer requirement of Insurance Law 3420(d)(2). Plaintiff general contractor, Nadkos, sued PCIC because PCIC claimed it had no duty to defend Nadkos in a construction-accident personal injury case brought by a subcontractor and PCIC had not provided the timely notice of disclaimer required by New York's Insurance Law. The legal argument is complex and no attempt to fairly summarize it is made here:

> Application of Insurance Law § 3420(d)(2) to PCIC or to any other RRG would directly or indirectly regulate these groups in violation of 15 USC § 3902(a)(1). Section 3420(d)(2) alters the rights and obligations of the carrier and insured under the policy by creating additional rights for the injured party, that is not contemplated by the LRRA and not required by all other states. ...
>
> This heightened standard requirement in New York impairs an RRG's ability to operate on a nationwide basis "without being compelled to tailor their policies to the specific requirements of every state in which they do business"... . As Congress has chosen to limit the power of nondomiciliary states to regulate RRGs, the LRRA clearly preempts Insurance Law § 3420(d)(2). **Nadkos, Inc. v Preferred Contrs. Ins. Co. Risk Retention Group LLC, 2018 NY Slip Op 03242, First Dept 5-3-18**

INSURANCE LAW (FEDERAL RISK RETENTION GROUP (RRG) LAW PREEMPTS NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER OF COVERAGE PROVISION, THEREFORE DEFENDANT FOREIGN RRG DID NOT NEED TO COMPLY WITH NEW YORK'S STATUTORY TIMELY DISCLAIMER REQUIREMENT (FIRST DEPT))/DISCLAIMER (INSURANCE LAW, FEDERAL RISK RETENTION GROUP (RRG) LAW PREEMPTS NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER OF COVERAGE PROVISION, THEREFORE DEFENDANT FOREIGN RRG DID NOT NEED TO COMPLY WITH NEW YORK'S STATUTORY TIMELY DISCLAIMER REQUIREMENT (FIRST DEPT))/PREEMPTION (INSURANCE LAW, FEDERAL RISK RETENTION GROUP (RRG) LAW PREEMPTS NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER OF COVERAGE PROVISION, THEREFORE DEFENDANT FOREIGN RRG DID NOT NEED TO COMPLY WITH NEW YORK'S STATUTORY TIMELY DISCLAIMER REQUIREMENT (FIRST DEPT))/RISK RETENTION GROUP (RRG) (INSURANCE LAW, FEDERAL RISK RETENTION GROUP (RRG) LAW PREEMPTS NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER OF COVERAGE PROVISION, THEREFORE DEFENDANT FOREIGN RRG DID NOT NEED TO COMPLY WITH NEW YORK'S STATUTORY TIMELY DISCLAIMER REQUIREMENT (FIRST DEPT))

INSURANCE LAW, CIVIL PROCEDURE.

THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) CANNOT DEMAND A RELEASE FROM THE PLAINTIFF ONCE THE MVAIC'S OBLIGATION TO PAY HAS BEEN REDUCED TO A JUDGMENT (SECOND DEPT).

The Second Department modified the judgment in this uninsured driver traffic accident case. Although the Motor Vehicle Accident indemnification Corporation (MVAIC) can withhold payment until it receives a release from the plaintiff pursuant to a settlement agreement, the MVAIC cannot demand a release where, as here, a court has issued a judgment:

> "Where judgment has been entered against an uninsured defendant in favor of a qualified person, Insurance Law § 5210 provides that a qualified person may petition the court to compel MVAIC to pay the amount of a judgment against that uninsured defendant that remains unpaid, subject to the limitations contained therein" ... . Here, the petitioner demonstrated that she obtained the underlying judgment ... , which remained unpaid. However, the sum sought by the petitioner, and the amount the Supreme Court directed MVAIC to pay, exceeded MVAIC's statutory limit of liability.
>
> The maximum limit of MVAIC's liability under the Insurance Law is $25,000 (see Insurance Law § 5210[a][1]). MVAIC's contention that the petitioner is not entitled to interest because the delay in payment was caused by the plaintiff's failure to execute a release in the proper amount is without merit. While MVAIC has the right to a release upon the settlement of a claim (see Insurance Law § 5213[b]; CPLR 5003-a), MVAIC is not entitled to such a release when ordered to pay on a judgment. **Matter of Baker v Motor Veh. Acc. Indem. Corp., 2018 NY Slip Op 03676, Second Dept 5-23-18**

INSURANCE LAW (TRAFFIC ACCIDENTS, UNINSURED MOTORIST, THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) CANNOT DEMAND A RELEASE FROM THE PLAINTIFF ONCE THE MVAIC'S OBLIGATION TO PAY HAS BEEN REDUCED TO A JUDGMENT (SECOND DEPT))/TRAFFIC ACCIDENTS (INSURANCE LAW, UNINSURED MOTORIST, THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) CANNOT DEMAND A RELEASE FROM THE PLAINTIFF ONCE THE MVAIC'S OBLIGATION TO PAY HAS BEEN REDUCED TO A JUDGMENT (SECOND DEPT))/MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (TRAFFIC ACCIDENTS, UNINSURED MOTORIST, THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) CANNOT DEMAND A RELEASE FROM THE PLAINTIFF ONCE THE MVAIC'S OBLIGATION TO PAY HAS BEEN REDUCED TO A JUDGMENT (SECOND DEPT))/UNINSURED DRIVERS (TRAFFIC ACCIDENTS, UNINSURED MOTORIST, THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) CANNOT DEMAND A RELEASE FROM THE PLAINTIFF ONCE THE MVAIC'S OBLIGATION TO PAY HAS BEEN REDUCED TO A JUDGMENT (SECOND DEPT))/CIVIL PROCEDURE (MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION, UNINSURED MOTORIST, THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) CANNOT DEMAND A RELEASE FROM THE PLAINTIFF ONCE THE MVAIC'S OBLIGATION TO PAY HAS BEEN REDUCED TO A JUDGMENT (SECOND DEPT))/RELEASES (TRAFFIC ACCIDENTS, UNINSURED MOTORIST, THE MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION (MVAIC) CANNOT DEMAND A RELEASE FROM THE PLAINTIFF ONCE THE MVAIC'S OBLIGATION TO PAY HAS BEEN REDUCED TO A JUDGMENT (SECOND DEPT))

INSURANCE LAW, LANDLORD-TENANT.

TENANT'S INSURANCE POLICY NAMED THE OWNER OF THE BUILDING AS AN ADDITIONAL INSURED, PLAINTIFF FELL ON A STAIRCASE IN AN AREA NOT LEASED TO THE TENANT, PLAINTIFF COULD NOT RECOVER UNDER THE ADDITIONAL INSURED PROVISION OF THE TENANT'S POLICY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's injury from a fall on a staircase was not covered by the "additional insured" provision of the subject policy. Yeshiva leased property in a building owned by Beth Medrash. Beth Medrash was listed as an additional insured in Yeshiva's insurance policy. The staircase where plaintiff fell was not leased by Yeshiva:

> The additional insured provision named Beth Medrash as an additional insured "only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to [the Yeshiva]." The phrase "arising out of" requires "only that there be some causal relationship between the injury and the risk for which coverage is provided" ... . "An insurer does not wish to be liable for losses arising from risks associated with . . . premises for which the insurer has not evaluated the risk and received a premium" ... . Moreover, "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning"... . The interpretation of policy language is a question of law for the court ... .
>
> On his motion for summary judgment, the plaintiff failed to establish, prima facie, that the policy provided coverage to Beth Medrash as an additional insured for his injury. It is undisputed that the Yeshiva did not lease the staircase the plaintiff was descending when he fell, and that the plaintiff was not a student or invitee of the Yeshiva at the time of the accident. Therefore, there was no causal relationship between the plaintiff's injury and the risk for which coverage was provided ... . Consequently, the plaintiff's injury was not a bargained-for risK ... . **Lissauer v GuideOne Specialty Mut. Ins., 2018 NY Slip Op 03522, Second Dept 5-16-18**

INSURANCE LAW (TENANT'S INSURANCE POLICY NAMED THE OWNER OF THE BUILDING AS AN ADDITIONAL INSURED, PLAINTIFF FELL ON A STAIRCASE IN AN AREA NOT LEASED TO THE TENANT, PLAINTIFF COULD NOT RECOVER UNDER THE ADDITIONAL INSURED PROVISION OF THE TENANT'S POLICY (SECOND DEPT))/LANDLORD-TENANT (INSURANCE LAW, TENANT'S INSURANCE POLICY NAMED THE OWNER OF THE BUILDING AS AN ADDITIONAL INSURED, PLAINTIFF FELL ON A STAIRCASE IN AN AREA NOT LEASED TO THE TENANT, PLAINTIFF COULD NOT RECOVER UNDER THE ADDITIONAL INSURED PROVISION OF THE TENANT'S POLICY (SECOND DEPT))/ADDITIONAL INSURED (LANDLORD-TENANT, TENANT'S INSURANCE POLICY NAMED THE OWNER OF THE BUILDING AS AN ADDITIONAL INSURED, PLAINTIFF FELL ON A STAIRCASE IN AN AREA NOT LEASED TO THE TENANT, PLAINTIFF COULD NOT RECOVER UNDER THE ADDITIONAL INSURED PROVISION OF THE TENANT'S POLICY (SECOND DEPT))/SLIP AND FALL (LANDLORD-TENANT, INSURANCE LAW, TENANT'S INSURANCE POLICY NAMED THE OWNER OF THE BUILDING AS AN ADDITIONAL INSURED, PLAINTIFF FELL ON A STAIRCASE IN AN AREA NOT LEASED TO THE TENANT, PLAINTIFF COULD NOT RECOVER UNDER THE ADDITIONAL INSURED PROVISION OF THE TENANT'S POLICY (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW.

THE MERE FACT THAT PLAINTIFF FELL FROM AN A-FRAME LADDER IS NOT ENOUGH TO WARRANT SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF ON A LABOR LAW 240(1) CAUSE OF ACTION, PLAINTIFF'S MOTION PROPERLY DENIED BUT DEFENDANT'S MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department determined defendant's motion for summary judgment on plaintiff's Labor Law 240 (1) cause of action in this ladder-fall case should not have been granted. Plaintiff testified the A-frame ladder, which he had used before, shook and leaned before he fell. He also testified he did not notice any defects in the ladder. The Second Department held that plaintiff's motion for summary judgment was properly denied (but defendant's motion should not have been granted):

> "Under Labor Law § 240(1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" ... . "To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" ... . The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided, and whether a particular safety device provided proper protection is generally a question of fact for a jury ... . Here, the plaintiff's own submissions demonstrated that there are triable issues of fact as to how this accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide the plaintiff with proper protection proximately caused his injuries ... . Accordingly, we agree with the Supreme Court's denial of the plaintiff's motion without regard to the sufficiency of the opposing papers... .
>
> In light of the inconsistencies as to how this accident occurred, we disagree with the Supreme Court's determination to grant that branch of the defendants' motion which was for summary judgment dismissing the Labor Law § 240(1) cause of action. On this record, the defendants failed to demonstrate as a matter of law that the ladder provided proper protection, or that the plaintiff was the sole proximate cause of his injuries ... . **Yao Zong Wu v Zhen Jia Yang, 2018 NY Slip Op 03169, Second Dept 5-2-18**

LABOR LAW-CONSTRUCTION LAW (THE MERE FACT THAT PLAINTIFF FELL FROM AN A-FRAME LADDER IS NOT ENOUGH TO WARRANT SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF ON A LABOR LAW 240(1) CAUSE OF ACTION, PLAINTIFF'S MOTION PROPERLY DENIED BUT DEFENDANT'S MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))/LADDERS (LABOR LAW-CONSTRUCTION LAW, THE MERE FACT THAT PLAINTIFF FELL FROM AN A-FRAME LADDER IS NOT ENOUGH TO WARRANT SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF ON A LABOR LAW 240(1) CAUSE OF ACTION, PLAINTIFF'S MOTION PROPERLY DENIED BUT DEFENDANT'S MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF, WHO WAS WORKING AT GROUND LEVEL, WAS STRUCK ON THE HEAD BY A TIRE RIM WHICH WAS BLOWN OFF THE ROOF IN HEAVY WINDS, THE TIRE RIM REQUIRED SECURING AND NO SAFETY DEVICE WAS EMPLOYED, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (THIRD DEPT).

The Third Department, reversing Supreme Court, determined plaintiff (Wellington) was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff, who was working at ground level, was struck on his head by a 25 to 30 pound tire rim that blew off the roof of the building in strong winds. No one was working on the roof due to the wind. The roofing contractor was defendant Tower. With respect to the applicability of Labor Law 240 (1), the court explained:

> The statutory protections arise when "the falling of an object is related to a significant risk inherent in the relative elevation at which materials or loads must be positioned or secured" ... . The object must have been "material being hoisted or a load that required securing for the purposes of the undertaking," and it must have fallen "because of the absence or inadequacy of a safety device of the kind enumerated in the statute"... . Here, a significant elevation-related risk was inherent in the placement of the tire rim on a roof several stories above an area where others were working, particularly in windy conditions. The tire rim, as part of a safety system mandated by federal regulations, was an integral part of Tower's undertaking in renovating the roof, and, because of the hazard created by the elevation differential, it plainly "required securing for the purposes of [that] undertaking" ... .
>
> As for the absence or inadequacy of a safety device, several witnesses testified that tire rims were commonly used in the industry as supports for safety warning systems like the one at issue here, and that cinder blocks and sandbags were sometimes used to secure them by adding additional weight. Tower's president testified, however, that it was not Tower's practice to use such securing devices because a tire rim's weight was enough to keep it from falling. In effect, Tower relied upon the tire rim's heaviness as a substitute for a safety device — a method that "clearly failed in its core objective of preventing the [tire rim] from falling because [it], in fact, fell, injuring [Wellington]" ... . **Wellington v Christa Constr. LLC, 2018 NY Slip Op 03199, Second Dept 5-3-18**

LABOR LAW-CONSTRUCTION LAW (FALLING OBJECTS, PLAINTIFF, WHO WAS WORKING AT GROUND LEVEL, WAS STRUCK ON THE HEAD BY A TIRE RIM WHICH WAS BLOWN OFF THE ROOF IN HEAVY WINDS, THE TIRE RIM REQUIRED SECURING AND NO SAFETY DEVICE WAS EMPLOYED, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (THIRD DEPT))/FALLING OBJECTS (LABOR LAW-CONSTRUCTION LAW, PLAINTIFF, WHO WAS WORKING AT GROUND LEVEL, WAS STRUCK ON THE HEAD BY A TIRE RIM WHICH WAS BLOWN OFF THE ROOF IN HEAVY WINDS, THE TIRE RIM REQUIRED SECURING AND NO SAFETY DEVICE WAS EMPLOYED, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION (THIRD DEPT))

LABOR LAW-CONSTRUCTION LAW.

INJURY FROM A SAFETY BAR IN A BOBCAT WHICH FELL AFTER PLAINTIFF RAISED IT TO STEP OUT OF THE MACHINE DID NOT RESULT FROM A SIGNIFICANT ELEVATION DIFFERENTIAL WITHIN THE MEANING OF LABOR LAW 240 (1), LABOR LAW 241 (6) CAUSES OF ACTION WERE VIABLE HOWEVER (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment on plaintiff's Labor Law 240 (1) cause of action should have been granted, but the Labor Law 241 (6) causes of action were viable. Plaintiff was injured when a safety bar in a Bobcat fell and struck him. The safety bar lowers onto the operator's lap when the Bobcat is used. The bar fell after plaintiff raised it to step out of the machine:

> ... [T]he court properly granted defendants' motion with respect to the Labor Law § 240 (1) claim because plaintiff was not injured as the result of any " physically significant elevation differential' " ... . We further conclude that, contrary to defendants' contention on their appeal, the court properly denied their motion with respect to the section 241 (6) claim insofar as it alleged a violation of 12 NYCRR 23-9.2 (a) because there are triable issues of fact whether plaintiff's employer had actual notice of a structural defect or unsafe condition regarding the safety bar ... . Finally, we agree with plaintiffs on their cross appeal that the court erred in granting defendants' motion with respect to the section 241 (6) claim insofar as it alleges a violation of 12 NYCRR 23-1.5 (c) (3) because that regulation is sufficiently specific to support a claim under section 241 (6) ... . **Salerno v Diocese of Buffalo, N.Y., 2018 NY Slip Op 03251, Fourth Dept 5-4-18**

LABOR LAW-CONSTRUCTION LAW (INJURY FROM A SAFETY BAR IN A BOBCAT WHICH FELL AFTER PLAINTIFF RAISED IT TO STEP OUT OF THE MACHINE DID NOT RESULT FROM A SIGNIFICANT ELEVATION DIFFERENTIAL WITHIN THE MEANING OF LABOR LAW 240 (1), LABOR LAW 241 (6) CAUSES OF ACTION WERE VIABLE HOWEVER (FOURTH DEPT))/BOBCATS (LABOR LAW-CONSTRUCTION LAW, INJURY FROM A SAFETY BAR IN A BOBCAT WHICH FELL AFTER PLAINTIFF RAISED IT TO STEP OUT OF THE MACHINE DID NOT RESULT FROM A SIGNIFICANT ELEVATION DIFFERENTIAL WITHIN THE MEANING OF LABOR LAW 240 (1), LABOR LAW 241 (6) CAUSES OF ACTION WERE VIABLE HOWEVER (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

WHILE WORKING ON A SIGN AT EYE LEVEL PLAINTIFF SLIPPED OFF A LANDSCAPING ROCK WHICH HE DID NOT NEED TO STAND ON TO DO THE WORK, PLAINTIFF'S LABOR LAW 240 (1) AND 241 (6) CAUSES OF ACTION PROPERLY DISMISSED (FOURTH DEPT).

The Fourth Department determined plaintiff's Labor Law 240 (1) and 241 (6) causes of action were properly dismissed. Plaintiff slipped off a landscaping rock while working on a business sign. Plaintiff did not need to stand on the rock to do the work, which involved removing letters from the sign. The Labor Law 241 (6) causes of action were not viable because plaintiff did not alleged the rock was slippery or that he tripped over the rock, plaintiff was not engaged in demolition work, and the rock could not be considered debris:

> ... [T]he court properly denied that part of his motion and granted those parts of defendants' motions with respect to the Labor Law § 240 (1) cause of action. The record establishes that plaintiff was not "obliged to work at an elevation"... , which is a necessary element for recovery under section 240 (1). Indeed, plaintiff's own deposition testimony submitted in support of his motion established that the work he was performing was at eye level and that he could have reached the sign from the ground. Thus, inasmuch as it was not necessary for plaintiff to stand on the rock to perform his work, he was not exposed to an elevation-related hazard of the type contemplated by section 240 (1) ... . Even assuming, arguendo, that a safety device was required to protect plaintiff from such a hazard, we note that plaintiff further testified during his deposition that either of the A-frame ladders that had been provided for his use probably could have straddled the rock, but he thought that a ladder was not necessary ... . **Maracle v Autoplace Infiniti, Inc., 2018 NY Slip Op 03252, Fourth Dept 5-4-18**

LABOR LAW-CONSTRUCTION LAW (WHILE WORKING ON A SIGN AT EYE LEVEL PLAINTIFF SLIPPED OFF A LANDSCAPING ROCK WHICH HE DID NOT NEED TO STAND ON TO DO THE WORK, PLAINTIFF'S LABOR LAW 240 (1) AND 241 (6) CAUSES OF ACTION PROPERLY DISMISSED (FOURTH DEPT))

LABOR LAW-CONSTRUCTION LAW.

FALL THOUGH AN UNGUARDED FLOOR OPENING AT A CONSTRUCTION SITE IS COVERED UNDER LABOR LAW 240 (1), THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF WAS ABLE TO TIE OFF HIS HARNESS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, noted that, although the fall through an unguarded floor opening at a construction site was covered under Labor Law 240 (1), there was a question of fact whether plaintiff was able to tie off his harness. Therefore, plaintiff's motion for summary judgment shouldn't have been granted:

> "[A] fall through an unguarded opening in the floor of a construction site constitutes a violation of Labor Law § 240(1) only where a safety device adequate to prevent such a fall was not provided. A safety line and harness may be an adequate safety device for a person working over an open area or near an elevated edge" ... . Here, the record demonstrates that although plaintiff was wearing a harness and lanyard at the time of the accident, triable issues exist as to whether static lines were in place for him to safely tie off. **Maman v Marx Realty & Improvement Co., Inc., 2018 NY Slip Op 03614, First Dept 5-17-18**

LABOR LAW-CONSTRUCTION LAW (FALL THOUGH AN UNGUARDED FLOOR OPENING AT A CONSTRUCTION SITE IS COVERED UNDER LABOR LAW 240 (1), THERE WAS A QUESTION OF FACT WHETHER PLAINTIFF WAS ABLE TO TIE OFF HIS HARNESS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER A SAFETY DEVICE WAS REQUIRED UNDER LABOR LAW 240 (1) IN THIS FALLING OBJECT CASE, QUESTION OF FACT WHETHER A HARD HAT THAT COULD BE WORN WITH A WELDING SHIELD WAS REQUIRED UNDER LABOR LAW 241 (6) (SECOND DEPT).

The Second Department determined there was a question of fact whether a safety device was necessary in this falling object case (Labor Law 240 (1)), and there was a question of fact whether plaintiff should have been supplied with a hard hat that could be worn with a welding shield (Labor Law 241 (6)). Plaintiff had used a scissors lift to raise a part up 16 feet to where it was welded just enough to hold it in place so further welding could be done (tack welds). The scissors lift was lowered, the tack welds broke and the part fell and struck plaintiff:

> ... [N]either the plaintiffs nor the defendants established their prima facie entitlement to judgment as a matter of law with respect to the Labor Law § 240(1) cause of action. The parties' submissions raised triable issues of fact as to whether the defendants were obligated to provide appropriate safety devices of the kind enumerated in Labor Law § 240(1) to secure the flange and whether the flange fell due to the absence or inadequacy of an enumerated safety device... . ... [A]safety manager ... testified ... that "[d]epending on . . . what the operation is," "[s]lings, chokers [can be] used to . . . hold [a flange] in place" until it is permanently welded to the pipe. While it is true that no safety device such as a sling was provided, the injured plaintiff testified at his deposition that two tack welds should have been sufficient to secure the flange. Significantly, the plaintiffs' expert ... opined that "the two tack welds should have been sufficient to hold the flange until the job was completed, unless the tack welds were defective." Under these circumstances, a triable issue of fact exists as to whether "[t]his was . . . a situation where a hoisting or securing device of the kind enumerated in [Labor Law § 240(1)] would have been necessary or even expected" ... . Contrary to the defendants' contention, the tack welds do not constitute a safety device within the meaning of Labor Law § 240(1) ... . **Carlton v City of New York, 2018 NY Slip Op 03500, Second Dept 5-16-18**

LABOR LAW-CONSTRUCTION LAW (QUESTION OF FACT WHETHER A SAFETY DEVICE WAS REQUIRED UNDER LABOR LAW 240 (1) IN THIS FALLING OBJECT CASE, QUESTION OF FACT WHETHER A HARD HAT THAT COULD BE WORN WITH A WELDING SHIELD WAS REQUIRED UNDER LABOR LAW 241 (6) (SECOND DEPT))/FALLING OBJECTS (LABOR LAW-CONSTRUCTION LAW, QUESTION OF FACT WHETHER A SAFETY DEVICE WAS REQUIRED UNDER LABOR LAW 240 (1) IN THIS FALLING OBJECT CASE, QUESTION OF FACT WHETHER A HARD HAT THAT COULD BE WORN WITH A WELDING SHIELD WAS REQUIRED UNDER LABOR LAW 241 (6) (SECOND DEPT))

LABOR LAW-CONSTRUCTION LAW.

ACCIDENT DID NOT INVOLVE AN ELEVATION-RELATED RISK, DEFENDANT SUBCONTRACTORS DID NOT EXERCISE CONTROL OF THE PLAINTIFF, THE AREA OR THE WORK, DEFENDANTS' SUMMARY JUDGMENT MOTIONS ON THE LABOR LAW 240 (1), 241 (6) AND 200 CAUSES OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Labor Law 240 (1) cause of action should have been dismissed because the accident, tripping over a pile of sand on ground level, did not involve an elevation-related risk. The Labor Law 241 (6) and 200 causes of action should have been dismissed because the defendants (subcontractors USRC and A-Deck) did not exercise control over the plaintiff, the area or the work:

> ... [T]he Labor Law § 241(6) claim should be dismissed because neither USRC nor A-Deck may be held liable under that statute. "Labor Law § 241(6) does not automatically apply to all subcontractors on a site or in the chain of command'" ... . "Rather, for liability under the statute to attach to a defendant, a plaintiff must show that the defendant exercised control either over the plaintiff, the specific work area involved or the work that gave rise to the injury" ... . Here, there is no evidence that either USRC or A-Deck exercised any control over the plaintiff, the specific work area involved or the work that gave rise to plaintiff's injury.
>
> The Labor Law § 200 claim should also be dismissed as neither USRC nor A-Deck may be held liable under that statute. "Section 200 of the Labor Law merely codified the common-law duty imposed upon an owner or general contractor to provide construction site workmen with a safe place to work" ... . "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" ... . Here, there is no evidence that either USRC or A-Deck had the authority to control the activity that brought about plaintiff's injury. **Adagio v New York State Urban Dev. Corp., 2018 NY Slip Op 03744, First Dept 5-24-18**

LABOR LAW-CONSTRUCTION LAW (ACCIDENT DID NOT INVOLVE AN ELEVATION-RELATED RISK, DEFENDANT SUBCONTRACTORS DID NOT EXERCISE CONTROL OF THE PLAINTIFF, THE AREA OR THE WORK, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT))/SUBCONTRACTORS (LABOR LAW-CONSTRUCTION LAW, ACCIDENT DID NOT INVOLVE AN ELEVATION-RELATED RISK, DEFENDANT SUBCONTRACTORS DID NOT EXERCISE CONTROL OF THE PLAINTIFF, THE AREA OR THE WORK, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF LOST HIS BALANCE CARRYING A PIPE ON A RAMP, INCIDENT NOT COVERED BY LABOR LAW 240 (1) (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff's Labor Law 240 (1) cause of action should have been dismissed. Plaintiff, while carrying a heavy pipe on a ramp, lost his balance and was struck by the pipe:

> Plaintiff's testimony established that he was not exposed to the type of elevation-related hazard contemplated by the statute. The height differential of 6 to 10 inches mediated by the ramp did not constitute a physically significant elevation differential covered by the statute ... . Also, as the ramp was serving as a passageway, as opposed to the "functional equivalent" of a safety device enumerated under the statute, it did not fall within the purview of the statute ... . Further, the impetus for the pipe's descent was plaintiff's loss of balance, rather than the direct consequence of the force of gravity ... . **Jackson v Hunter Roberts Constr. Group, LLC, 2018 NY Slip Op 03805, First Dept 5-29-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF LOST HIS BALANCE CARRYING A PIPE ON A RAMP, INCIDENT NOT COVERED BY LABOR LAW 240 (1) (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

QUESTION OF FACT WHETHER DEFENDANT WHICH COULD STOP WORK FOR UNSAFE PRACTICES WAS A STATUTORY AGENT OF THE OWNER OR CONSTRUCTION MANAGER FOR PURPOSES OF LIABILITY UNDER LABOR LAW 240 (1) AND 241 (6) (FIRST DEPT).

The First Department, over a dissent, affirmed the denial of summary judgment to plaintiff on his Labor Law 240 (1) and 241 (6) causes of action. The court discussed the concept of a "statutory agent" of an owner or general contractor:

> Labor Law §§ 240(1) and 241(6) impose absolute liability on "contractors and owners and their agents" for worker injuries on construction sites... . CRSG, as site safety consultant, was neither an owner nor general contractor on the project. Thus, whether CRSG is subject to the Labor Law is dependent on whether it was an "agent" of the owners or [construction manager] at the site.
>
> To hold a defendant liable under the Labor Law as a "statutory agent" of either the owner or the general contractor, it must be shown that the defendant had the " authority to supervise and control'" the injury-producing work ... . The determinative factor is whether the defendant had the right to exercise control over the work, not whether it actually exercised that right ... . Where the owner or general contractor delegates to a third party the duty to conform to the requirements of the Labor Law, that third party becomes the statutory agent ... .
>
> The authority of DeSimone, as an employee of CRSG, to stop work in the event of unsafe practices raises an issue of fact as to whether CRSG is a "statutory agent" for purposes of the Labor Law ... . **Santos v Condo 124 LLC, 2018 NY Slip Op 03799, First Dept 5-29-18**

LABOR LAW-CONSTRUCTION LAW (QUESTION OF FACT WHETHER DEFENDANT WHICH COULD STOP WORK FOR UNSAFE PRACTICES WAS A STATUTORY AGENT OF THE OWNER OR CONSTRUCTION MANAGER FOR PURPOSES OF LIABILITY UNDER LABOR LAW 240 (1) AND 241 (6) (FIRST DEPT))/STATUTORY AGENT (LABOR LAW-CONSTRUCTION LAW, QUESTION OF FACT WHETHER DEFENDANT WHICH COULD STOP WORK FOR UNSAFE PRACTICES WAS A STATUTORY AGENT OF THE OWNER OR CONSTRUCTION MANAGER FOR PURPOSES OF LIABILITY UNDER LABOR LAW 240 (1) AND 241 (6) (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF FELL THROUGH AN OPENING COVERED BY A PIECE OF PARTICLE BOARD (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action should have been granted. Plaintiff fell through an opening covered by a piece of particle board:

> There is no issue of fact as to whether it was foreseeable that the particle board covering an escape hatch on top of the elevator car where plaintiff was required to work would collapse when traversed by him ... . It is not dispositive that the escape hatch covering was not intended to serve as a safety device protecting workers from elevation-related risks. Rather, since plaintiff's work exposed him to such risks, he was required to be provided with adequate safety devices in compliance with Labor Law § 240(1) ... . **Giancola v Yale Club of N.Y. City, 2018 NY Slip Op 03901, First Dept 5-31-18**

LABOR LAW-CONSTRUCTION LAW (PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, PLAINTIFF FELL THROUGH AN OPENING COVERED BY A PIECE OF PARTICLE BOARD (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

MOTORIZED SCAFFOLD BECAME STUCK AND PLAINTIFF WAS INJURED PUSHING IT FREE, THE INJURY FELL WITHIN THE GRAVITY-RELATED PROTECTIONS OF LABOR LAW 240 (1), PLAINTIFF'S MOTION TO AMEND HIS BILL OF PARTICULARS TO ADD AN ALLEGED VIOLATION OF THE INDUSTRIAL CODE SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment in this scaffold-related Labor Law 240 (1) action should not have been granted. The plaintiff was on a motorized scaffold when it was prevented from elevating further by a horizontal beam (spandrel). Plaintiff pushed against the beam with his back to move the scaffold free of the beam and injured his back in the process. The First Department held that the injury fell within the gravity-related protections of Labor Law 24 0 (1). The court further found that plaintiff's motion to amend his bill of particulars to add an alleged violation of the Industrial Code should have granted:

> ... [T]he incident in which plaintiff was injured falls within the ambit of Labor Law § 240(1), because the scaffold proved inadequate to shield plaintiff from " harm directly flowing from the application of the force of gravity to an object or person'" ... . The force of gravity caused the scaffold to swing into the recessed areas between the spandrels, necessitating that plaintiff and his coworker use their backs to exert force to swing the scaffold out again. Nevertheless, neither side is entitled to summary judgment, because an issue of fact exists as to whether plaintiff's negligence was the sole proximate cause of his injuries... . The testimony of plaintiff and his foreman conflict as to whether plaintiff had been instructed to push off the scaffold in the manner described. ...
>
> The court improvidently exercised its discretion in denying plaintiff's motion for leave to amend his bill of particulars to add allegations that 2008 Building Code of New York City (Administrative Code of City of NY) § 3314.10.1 was violated ... . Although plaintiff did not provide an excuse for his delay in seeking leave, the delay was relatively short, and defendants demonstrated no prejudice. The allegation that section 3314.10.1 was violated is consistent with plaintiff's original theory that the scaffold, as installed, was deficient and inadequate. That section mandated that suspended scaffolds "be erected and operated in such a manner that suspension elements are vertical and in a plane parallel to the wall at all times." Further, the evidence required to support this new allegation is contained in the record. **Galvez v Columbus 95th St. LLC, 2018 NY Slip Op 03484, First Dept 5-15-18**

LABOR LAW-CONSTRUCTION LAW (MOTORIZED SCAFFOLD BECAME STUCK AND PLAINTIFF WAS INJURED PUSHING IT FREE, THE INJURY FELL WITHIN THE GRAVITY-RELATED PROTECTIONS OF LABOR LAW 240 (1), PLAINTIFF'S MOTION TO AMEND HIS BILL OF PARTICULARS TO ADD AN ALLEGED VIOLATION OF THE INDUSTRIAL CODE SHOULD HAVE BEEN GRANTED (FIRST DEPT))/CIVIL PROCEDURE (AMEND BILL OF PARTICULARS, LABOR LAW-CONSTRUCTION LAW, MOTORIZED SCAFFOLD BECAME STUCK AND PLAINTIFF WAS INJURED PUSHING IT FREE, THE INJURY FELL WITHIN THE GRAVITY-RELATED PROTECTIONS OF LABOR LAW 240 (1), PLAINTIFF'S MOTION TO AMEND HIS BILL OF PARTICULARS TO ADD AN ALLEGED VIOLATION OF THE INDUSTRIAL CODE SHOULD HAVE BEEN GRANTED (FIRST DEPT))/BILL OF PARTICULARS (MOTION TO AMEND, LABOR LAW-CONSTRUCTION LAW, MOTORIZED SCAFFOLD BECAME STUCK AND PLAINTIFF WAS INJURED PUSHING IT FREE, THE INJURY FELL WITHIN THE GRAVITY-RELATED PROTECTIONS OF LABOR LAW 240 (1), PLAINTIFF'S MOTION TO AMEND HIS BILL OF PARTICULARS TO ADD AN ALLEGED VIOLATION OF THE INDUSTRIAL CODE SHOULD HAVE BEEN GRANTED (FIRST DEPT))/SCAFFOLDS (LABOR LAW-CONSTRUCTION LAW, MOTORIZED SCAFFOLD BECAME STUCK AND PLAINTIFF WAS INJURED PUSHING IT FREE, THE INJURY FELL WITHIN THE GRAVITY-RELATED PROTECTIONS OF LABOR LAW 240 (1), PLAINTIFF'S MOTION TO AMEND HIS BILL OF PARTICULARS TO ADD AN ALLEGED VIOLATION OF THE INDUSTRIAL CODE SHOULD HAVE BEEN GRANTED (FIRST DEPT))

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, UNTIMELY CROSS MOTION CAN BE CONSIDERED ONLY TO THE EXTENT THE ISSUES RAISED ARE THE SAME AS THE ISSUES RAISED IN PLAINTIFF'S SUMMARY JUDGMENT MOTION (FIRST DEPT).

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action. Plaintiff was standing on a scaffold when a masonry stone fell on the scaffold and the planks collapsed. The court noted that defendants' untimely cross motion for summary judgment was properly considered only to the extent the issues were identical to the issues raised in plaintiff's motion for summary judgment:

> This Court may consider the merits of defendants' untimely cross motion for summary judgment dismissing the complaint to the extent it sought dismissal of the Labor Law § 240(1) claim, because it is based on the same issues raised in plaintiff's motion ... However, the remainder of the motion, seeking dismissal of Labor Law § 241(6), Labor Law § 200 and common law negligence claims cannot be considered because it does not address issues nearly identical to those raised in the timely motion and defendants did not demonstrate good cause for the delay ... .
>
> Plaintiff is entitled to summary judgment as to liability on his Labor Law § 240(1) claim. He established, prima facie, that he was engaged in an activity falling within the statute, and that defendants failed to provide him proper safety equipment, either in the form of a scaffold that could withstand the force of a falling masonry stone ... , or any other appropriate safety device. Plaintiff further demonstrated that defendants' failure to provide an appropriate safety device was the proximate cause of the accident, and defendants have failed to raise an issue of fact. **Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp., 2018 NY Slip Op 03897, First Dept 5-31-18**

LABOR LAW -CONSTRUCTION LAW (PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION, UNTIMELY CROSS MOTION CAN BE CONSIDERED ONLY TO THE EXTENT THE ISSUES RAISED ARE THE SAME AS THE ISSUES RAISED IN PLAINTIFF'S SUMMARY JUDGMENT MOTION (FIRST DEPT))/CIVIL PROCEDURE (SUMMARY JUDGMENT, UNTIMELY CROSS MOTION CAN BE CONSIDERED ONLY TO THE EXTENT THE ISSUES RAISED ARE THE SAME AS THE ISSUES RAISED IN PLAINTIFF'S SUMMARY JUDGMENT MOTION (FIRST DEPT))/SUMMARY JUDGMENT (UNTIMELY CROSS MOTION CAN BE CONSIDERED ONLY TO THE EXTENT THE ISSUES RAISED ARE THE SAME AS THE ISSUES RAISED IN PLAINTIFF'S SUMMARY JUDGMENT MOTION (FIRST DEPT))

LANDLORD-TENANT

LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD WITH RIGHT OF ENTRY TO INSPECT OR REPAIR DID NOT HAVE A DUTY TO REPAIR THE DEFECT AT ISSUE, DEFECT WAS NOT STRUCTURAL AND DID NOT VIOLATE A STATUTORY SAFETY PROVISION (FIRST DEPT).

The First Department determined repair of the type of defect at issue was not the responsibility of the out-of-possession landlord:

> Plaintiff seeks damages for injuries he sustained when one of the cellar doors he had opened to take garbage up to the sidewalk from the restaurant where he was employed snapped back and struck him on the back of the head. ...
>
> Although defendant Foreign Development Service, Ltd. was an out-of-possession landlord with the right to reenter the leased premises to inspect or repair, the alleged defect in the cellar doors, i.e., rusty hinges and no device, such as a bar, to hold the doors open, was not a structural defect contrary to a specific statutory safety provision ... . **Cuthbert v Foreign Dev. Serv., Ltd., 2018 NY Slip Op 03812, First Dept 5-29-18**

LANDLORD-TENANT (OUT OF POSSESSION LANDLORD, DUTY TO REPAIR, OUT-OF-POSSESSION LANDLORD WITH RIGHT OF ENTRY TO INSPECT OR REPAIR DID NOT HAVE A DUTY TO REPAIR THE DEFENDANT AT ISSUE, DEFECT WAS NOT STRUCTURAL AND DID NOT VIOLATE A STATUTORY SAFETY PROVISION (FIRST DEPT))/PREMISES LIABILITY (OUT OF POSSESSION LANDLORD, DUTY TO REPAIR, OUT-OF-POSSESSION LANDLORD WITH RIGHT OF ENTRY TO INSPECT OR REPAIR DID NOT HAVE A DUTY TO REPAIR THE DEFENDANT AT ISSUE, DEFECT WAS NOT STRUCTURAL AND DID NOT VIOLATE A STATUTORY SAFETY PROVISION (FIRST DEPT))

LANDLORD-TENANT, ADMINISTRATIVE LAW.

NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT RULED THE MAXIMUM COLLECTIBLE RENT FOR AN APARTMENT WAS $125 PER MONTH, THE RENT HAD REMAINED LOW FOR DECADES BECAUSE THE APARTMENT HOUSE HAD BEEN OWNED AND RESIDED IN BY FAMILY MEMBERS (SECOND DEPT).

The Second Department, over an extensive dissent, determined the New York State Division of Housing and Community Renewal (DHCR) acted arbitrarily and capriciously when it held that the current maximum collectible rent for the subject apartment is $125 per month. The apartment house had been owned and resided in by family members since 1941. The petitioner bought property in 2000:

> ... [E]ven assuming that the petitioner was aware or should have been aware of the subject apartment's rent-controlled status at the time he purchased the building, this factor is not determinative. While an owner's lack of such awareness may be considered in determining the maximum rent ... , there is no requirement in 9 NYCRR 2202.7 that an owner lack prior knowledge of the regulated status of its premises in order to receive an increase in the maximum rent. Rather, ... that provision solely requires "the presence of unique or peculiar circumstances" ... , which are present in this case. Those circumstances have resulted in the same monthly rent of $125 being paid for the subject two-bedroom apartment since 1961, which is clearly substantially lower than rents generally prevailing in the same area for substantially similar housing accommodations ... , and "there are issues of fairness and equity" that must be considered in setting an appropriate present day rent for the subject apartment ... . **Matter of Migliaccio v New York State Div. of Hous. & Community Renewal, 2018 NY Slip Op 03132, Second Dept 5-2-18**

LANDLORD-TENANT (NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT RULED THE MAXIMUM COLLECTIBLE RENT FOR AN APARTMENT WAS $125 PER MONTH, THE RENT HAD REMAINED LOW FOR DECADES BECAUSE THE APARTMENT HOUSE HAD BEEN OWNED AND RESIDED IN BY FAMILY MEMBERS (SECOND DEPT))/ADMINISTRATIVE LAW (LANDLORD-TENANT, NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT RULED THE MAXIMUM COLLECTIBLE RENT FOR AN APARTMENT WAS $125 PER MONTH, THE RENT HAD REMAINED LOW FOR DECADES BECAUSE THE APARTMENT HOUSE HAD BEEN OWNED AND RESIDED IN BY FAMILY MEMBERS (SECOND DEPT))/RENT CONTROL (NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT RULED THE MAXIMUM COLLECTIBLE RENT FOR AN APARTMENT WAS $125 PER MONTH, THE RENT HAD REMAINED LOW FOR DECADES BECAUSE THE APARTMENT HOUSE HAD BEEN OWNED AND RESIDED IN BY FAMILY MEMBERS (SECOND DEPT))

LIEN LAW

LIEN LAW.

NOTICE SENT TO THE OWNER AND LIENHOLDER OF A CAR BY THE TOW SERVICE WHICH WAS STORING THE CAR DID NOT MEET THE REQUIREMENTS OF THE LIEN LAW, THEREFORE THE STORAGE FEES COULD NOT BE COLLECTED BY THE TOW SERVICE (THIRD DEPT).

The Third Department determined the tow service's notice to the owner and lienholder of a car that was towed and then stored did not comply with the Lien Law and, therefore, no storage fees were due to the tow service:

> ... [R]espondent's purported lien for storage was invalid. Pursuant to Lien Law § 184 (5), where an entity seeks to assert a lien for the storage of a motor vehicle that it has towed and stored at the direction of a law enforcement agency, such entity must "mail by certified mail, return receipt requested, a notice . . . to every person who has perfected a security interest in such motor vehicle or who is listed as a lienholder upon the certificate of title . . . within [20] days of the first day of storage." Under the statute, which must be strictly construed ... , the "notice shall include the name of the [entity] providing storage of the motor vehicle, the amount being claimed for such storage, and [the] address and times at which the motor vehicle may be recovered"... . In addition, "[t]he notice shall also state that the [entity] providing such notice claims a lien on the motor vehicle and that such motor vehicle shall be released upon full payment of all storage charges accrued on the date the motor vehicle is released"... .
>
> Here, the notice — which was mailed to petitioner by certified mail, return receipt requested — included respondent's name, address and regular business hours, as well as the total amount being claimed for storage. The notice further stated that the vehicle would "be released to the owner thereof, or his or her lawfully designed [sic] representative upon full payment of all charges accrued to the date that the said motor vehicle is released." Fatally, however, the notice did not state, as required, that respondent "claim[ed] a lien" on the vehicle ... . The word "lien" does not appear in the notice at all. Moreover, we are not persuaded by respondent's contention that the requirement was satisfied by the language indicating that the vehicle would be released "upon full payment of all charges." Strictly construed, Lien Law § 184 (5) requires that the notice state both that respondent "claims a lien on the motor vehicle and that such motor vehicle shall be released upon full payment of all storage charges accrued on the date the motor vehicle is released" ... . **Matter of Nissan Motor Acceptance Corp v All County Towing, 2018 NY Slip Op 03583, Third Dept 5-17-18**

LIEN LAW (NOTICE SENT TO THE OWNER AND LIENHOLDER OF A CAR BY THE TOW SERVICE WHICH WAS STORING THE CAR DID NOT MEET THE REQUIREMENTS OF THE LIEN LAW, THEREFORE THE STORAGE FEES COULD NOT BE COLLECTED BY THE TOW SERVICE (THIRD DEPT))/TOWING SERVICE (LIEN LAW, NOTICE SENT TO THE OWNER AND LIENHOLDER OF A CAR BY THE TOW SERVICE WHICH WAS STORING THE CAR DID NOT MEET THE REQUIREMENTS OF THE LIEN LAW, THEREFORE THE STORAGE FEES COULD NOT BE COLLECTED BY THE TOW SERVICE (THIRD DEPT))/STORAGE FEES (TOWING SERVICE, LIEN LAW, NOTICE SENT TO THE OWNER AND LIENHOLDER OF A CAR BY THE TOW SERVICE WHICH WAS STORING THE CAR DID NOT MEET THE REQUIREMENTS OF THE LIEN LAW, THEREFORE THE STORAGE FEES COULD NOT BE COLLECTED BY THE TOW SERVICE (THIRD DEPT))

MEDICAID

MEDICAID, MENTAL HYGIENE LAW.

PETITIONER DEMONSTRATED AN INTELLECTUAL DISABILITY QUALIFYING HER FOR MEDICAID-REIMBURSED HOME AND COMMUNITY BASED SERVICES, CONTRARY FINDING BY THE NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES ANNULLED (FIRST DEPT).

The First Department, annulling the determination of the NYS Office for People with Developmental Disabilities, held that the petitioner demonstrated an intellectual disability qualifying her for Medicaid-reimbursed home and community based services:

> In order to obtain Medicaid-reimbursed home and community based services, an applicant must demonstrate that he or she suffers from a "developmental disability." An "intellectual disability" that originated before age 22, is expected to continue indefinitely, and constitutes a "substantial handicap" to the person's ability to function normally in society, is a qualifying condition (Mental Hygiene Law § 1.03[22] [a][1], [b], [c] and [d]). The American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders (5th ed 2013) (Manual) defines "intellectual disability" as a disorder characterized by, inter alia, (1) general deficits in areas such as reasoning, problem solving and abstract thinking and (2) deficits in adaptive functioning, such as how well the person meets community standards of personal independence and social responsibility as compared to others of similar age and social responsibility. The term "intellectual disability" replaced the term "mental retardation."
>
> Here, respondent's determination is not supported by substantial evidence ... . Rather, the record demonstrates that petitioner met the qualifications as all of the evaluations that were performed before petitioner was 22 years old demonstrated an I.Q. below 70, which was the rough cut off for normal intellectual function. Deficits in her adaptive functioning were also noted repeatedly over the years. Moreover, it was entirely speculative to opine that petitioner's I.Q. would have been higher but for co-occurring conditions. **Matter of Spencer-Cedeno v Zucker, 2018 NY Slip Op 03488, First Dept 5-15-18**

MEDICAID (INTELLECTUAL DISABILITY, PETITIONER DEMONSTRATED AN INTELLECTUAL DISABILITY QUALIFYING HER FOR MEDICAID REIMBURSED HOME AND COMMUNITY BASED SERVICES, CONTRARY FINDING BY THE NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES ANNULLED (FIRST DEPT))/MENTAL HYGIENE LAW (INTELLECTUAL DISABILITY, PETITIONER DEMONSTRATED AN INTELLECTUAL DISABILITY QUALIFYING HER FOR MEDICAID REIMBURSED HOME AND COMMUNITY BASED SERVICES, CONTRARY FINDING BY THE NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES ANNULLED (FIRST DEPT))/INTELLECTUAL DISABILITY (MEDICAID, PETITIONER DEMONSTRATED AN INTELLECTUAL DISABILITY QUALIFYING HER FOR MEDICAID REIMBURSED HOME AND COMMUNITY BASED SERVICES, CONTRARY FINDING BY THE NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES ANNULLED (FIRST DEPT))/DEVELOPMENTAL DISABILITY, MEDICAID, PETITIONER DEMONSTRATED AN INTELLECTUAL DISABILITY QUALIFYING HER FOR MEDICAID REIMBURSED HOME AND COMMUNITY BASED SERVICES, CONTRARY FINDING BY THE NYS OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES ANNULLED (FIRST DEPT))

MENTAL HYGIENE LAW

MENTAL HYGIENE LAW, CONSTITUTIONAL LAW, APPEALS.

LETTER WRITTEN BY PETITIONER UPON INVOLUNTARY ADMISSION TO A HOSPITAL SHOULD HAVE BEEN SEEN AS A DEMAND FOR AN EXPEDITED CHALLENGE TO THE CONFINEMENT UNDER THE MENTAL HYGIENE LAW (HABEAS CORPUS), ALTHOUGH THE ISSUE IS MOOT IN THIS CASE, THE ISSUE WAS HEARD ON APPEAL BECAUSE IT IS LIKELY TO RECUR (FIRST DEPT).

The First Department, as an exception to the mootness doctrine, determined a letter written by petitioner should have been interpreted as a demand to contest his involuntary confinement pursuant to the Mental Hygiene Law:

> In light of petitioner's release from involuntary confinement pursuant to Mental Hygiene Law (MHL) article 9, this appeal is moot, as petitioner concedes. However, we reach the merits because the appeal raises a substantial and novel issue that is likely to recur yet typically evades review ... .We reject respondent's argument that the issue raised in this proceeding is unlikely to recur ... .
>
> As respondent now concedes, the letter submitted by petitioner on the day he was involuntary admitted to Lincoln Hospital reasonably conveyed that he sought a "hearing on the question of need for involuntary care and treatment" (MHL § 9.31[a]), and should have been forwarded to the appropriate court "forthwith"... . The handwritten letter says, "I am falsely imprisoned and deprived of liberty," in violation of certain United States Supreme Court decisions, "I demand a jury trial immediately," and "I demand my lawyer." To the extent the court found the request in this letter insufficiently clear or formal, because there were other, unrelated complaints raised in the letter or for any other reason, this was error. The letter should have been interpreted reasonably to effectuate the statute's purpose of allowing patients to challenge their involuntary confinement on an expedited basis, as required by MHL § 9.31. **Matter of State of N.Y. ex rel. Giffen v Hoffman, 2018 NY Slip Op 03462, First Dept 5-10-18**

MENTAL HYGIENE LAW (INVOLUNTARY CONFINEMENT, LETTER WRITTEN BY PETITIONER UPON INVOLUNTARY ADMISSION TO A HOSPITAL SHOULD HAVE BEEN SEEN AS A DEMAND FOR AN EXPEDITED CHALLENGE TO THE CONFINEMENT UNDER THE MENTAL HYGIENE LAW (HABEAS CORPUS), ALTHOUGH THE ISSUE IS MOOT IN THIS CASE, THE ISSUE WAS HEARD ON APPEAL BECAUSE IT IS LIKELY TO RECUR (FIRST DEPT))/INVOLUNTARY CONFINEMENT (MENTAL HYGIENE LAW, LETTER WRITTEN BY PETITIONER UPON INVOLUNTARY ADMISSION TO A HOSPITAL SHOULD HAVE BEEN SEEN AS A DEMAND FOR AN EXPEDITED CHALLENGE TO THE CONFINEMENT UNDER THE MENTAL HYGIENE LAW (HABEAS CORPUS), ALTHOUGH THE ISSUE IS MOOT IN THIS CASE, THE ISSUE WAS HEARD ON APPEAL BECAUSE IT IS LIKELY TO RECUR (FIRST DEPT))/APPEALS (MOOTNESS, EXCEPTION TO, MENTAL HYGIENE LAW, (INVOLUNTARY CONFINEMENT, LETTER WRITTEN BY PETITIONER UPON INVOLUNTARY ADMISSION TO A HOSPITAL SHOULD HAVE BEEN SEEN AS A DEMAND FOR AN EXPEDITED CHALLENGE TO THE CONFINEMENT UNDER THE MENTAL HYGIENE LAW (HABEAS CORPUS), ALTHOUGH THE ISSUE IS MOOT IN THIS CASE, THE ISSUE WAS HEARD ON APPEAL BECAUSE IT IS LIKELY TO RECUR (FIRST DEPT))/MOOTNESS (APPEALS, MENTAL HYGIENE LAW, (INVOLUNTARY CONFINEMENT, LETTER WRITTEN BY PETITIONER UPON INVOLUNTARY ADMISSION TO A HOSPITAL SHOULD HAVE BEEN SEEN AS A DEMAND FOR AN EXPEDITED CHALLENGE TO THE CONFINEMENT UNDER THE MENTAL HYGIENE LAW (HABEAS CORPUS), ALTHOUGH THE ISSUE IS MOOT IN THIS CASE, THE ISSUE WAS HEARD ON APPEAL BECAUSE IT IS LIKELY TO RECUR (FIRST DEPT))/CONSTITUTIONAL LAW (HABEAS CORPUS, MENTAL HYGIENE LAW, (INVOLUNTARY CONFINEMENT, LETTER WRITTEN BY PETITIONER UPON INVOLUNTARY ADMISSION TO A HOSPITAL SHOULD HAVE BEEN SEEN AS A DEMAND FOR AN EXPEDITED CHALLENGE TO THE CONFINEMENT UNDER THE MENTAL HYGIENE LAW (HABEAS CORPUS), ALTHOUGH THE ISSUE IS MOOT IN THIS CASE, THE ISSUE WAS HEARD ON APPEAL BECAUSE IT IS LIKELY TO RECUR (FIRST DEPT))/HABEAS CORPUS (MENTAL HYGIENE LAW, INVOLUNTARY CONFINEMENT, LETTER WRITTEN BY PETITIONER UPON INVOLUNTARY ADMISSION TO A HOSPITAL SHOULD HAVE BEEN SEEN AS A DEMAND FOR AN EXPEDITED CHALLENGE TO THE CONFINEMENT UNDER THE MENTAL HYGIENE LAW (HABEAS CORPUS), ALTHOUGH THE ISSUE IS MOOT IN THIS CASE, THE ISSUE WAS HEARD ON APPEAL BECAUSE IT IS LIKELY TO RECUR (FIRST DEPT))

MUNICIPAL LAW

MUNICIPAL LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

THE NYC LANDMARK PRESERVATION COMMISSION'S DESIGNATION OF TWO BUILDINGS AS PART OF A PROTECTED LANDMARK HAD A RATIONAL BASIS AND WAS NOT AN UNCONSTITUTIONAL TAKING, PETITIONER SOUGHT TO DEMOLISH THE TWO BUILDINGS AND CONSTRUCT CONDOMINIUMS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Kahn, determined that the NYC Landmark Preservation Commission (LPC) acted rationally when it included two buildings among 13 others designated as a landmark, called the First Avenue Estate or FAE historic landmark. The petitioner wanted to destroy the two buildings and construct condominiums, an action prohibited by the landmark designation. The First Department further held that the landmark designation was not an unconstitutional taking. The opinion is extensive and detailed and cannot be fairly summarized here. **Matter of Stahl York Ave. Co., LLC v City of New York, 2018 NY Slip Op 03653, First Dept 5-22-18**

MUNICIPAL LAW (NYC, LANDMARKS, THE NYC LANDMARK PRESERVATION COMMISSION'S DESIGNATION OF TWO BUILDINGS AS PART OF A PROTECTED LANDMARK HAD A RATIONAL BASIS AND WAS NOT AN UNCONSTITUTIONAL TAKING, PETITIONER SOUGHT TO DEMOLISH THE TWO BUILDINGS AND CONSTRUCT CONDOMINIUMS (FIRST DEPT))/LANDMARKS (THE NYC LANDMARK PRESERVATION COMMISSION'S DESIGNATION OF TWO BUILDINGS AS PART OF A PROTECTED LANDMARK HAD A RATIONAL BASIS AND WAS NOT AN UNCONSTITUTIONAL TAKING, PETITIONER SOUGHT TO DEMOLISH THE TWO BUILDINGS AND CONSTRUCT CONDOMINIUMS (FIRST DEPT))/ADMINISTRATIVE LAW (THE NYC LANDMARK PRESERVATION COMMISSION'S DESIGNATION OF TWO BUILDINGS AS PART OF A PROTECTED LANDMARK HAD A RATIONAL BASIS AND WAS NOT AN UNCONSTITUTIONAL TAKING, PETITIONER SOUGHT TO DEMOLISH THE TWO BUILDINGS AND CONSTRUCT CONDOMINIUMS (FIRST DEPT))/CONSTITUTIONAL LAW (LANDMARKS, THE NYC LANDMARK PRESERVATION COMMISSION'S DESIGNATION OF TWO BUILDINGS AS PART OF A PROTECTED LANDMARK HAD A RATIONAL BASIS AND WAS NOT AN UNCONSTITUTIONAL TAKING, PETITIONER SOUGHT TO DEMOLISH THE TWO BUILDINGS AND CONSTRUCT CONDOMINIUMS (FIRST DEPT))

MUNICIPAL LAW, CIVIL PROCEDURE.

INMATE-PETITIONER'S INITIAL PRO SE ATTEMPT TO FILE A LATE NOTICE OF CLAIM REGARDING AN INCIDENT IN THE COUNTY JAIL BY SENDING THE PAPERS TO THE COURT CLERK, NOT THE COUNTY COURT, WAS A NULLITY, PETITIONER'S SECOND ATTEMPT TO FILE A LATE NOTICE AFTER THE STATUTE OF LIMITATIONS HAD RUN COULD NOT, THEREFORE, RELATE BACK TO THE INITIAL ATTEMPT (THIRD DEPT).

The Third Department determined that the inmate-petitioner's motion for leave to file a late notice of claim, based upon an incident in the county jail, could not relate back to petitioner's first (pro se) attempt to file a late notice of claim. Petitioner's first attempt was sent to the court clerk as opposed to the county clerk. The court clerk returned the papers and instructed the petitioner to send them to the county clerk. Nothing further was done by the petitioner until an attorney was assigned and the statute of limitations had passed. The relation-back doctrine could not be applied because the failure to file the original papers with the county clerk was a jurisdictional defect:

> ... [W]here an action to enforce a claim has not yet been commenced, a party seeking to make an application for leave to serve a late notice of claim should commence a special proceeding in the Supreme Court or the County Court in a county where the action may be properly brought to trial (see General Municipal Law § 50-e [7]...). A special proceeding is commenced by the filing of initiatory papers with the County Clerk in the county in which the special proceeding is brought or with any other person designated by the County Clerk to accept filing... . While the Supreme Court or the County Court may convert an improperly brought motion for leave to serve a late notice of claim into a special proceeding ... , the failure to file the application with the appropriate clerk — the County Clerk — is a fatal defect that may not be overlooked or corrected by the court pursuant to CPLR 2001... . Indeed, the filing of initiatory papers with the Clerk of the Supreme and County Courts, rather than the County Clerk, "has been equated to a nonfiling and, thus, 'a nonwaivable jurisdictional defect rendering the proceeding a nullity'" ... . **Matter of Dougherty v County of Greene, 2018 NY Slip Op 03192, Third Dept 5-3-18**

MUNICIPAL LAW (NOTICE OF CLAIM, INMATE-PETITIONER'S INITIAL PRO SE ATTEMPT TO FILE A LATE NOTICE OF CLAIM REGARDING AN INCIDENT IN THE COUNTY JAIL BY SENDING THE PAPERS TO THE COURT CLERK, NOT THE COUNTY COURT, WAS A NULLITY, PETITIONER'S SECOND ATTEMPT TO FILE A LATE NOTICE AFTER THE STATUTE OF LIMITATIONS HAD RUN COULD NOT, THEREFORE, RELATE BACK TO THE INITIAL ATTEMPT (THIRD DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, INMATE-PETITIONER'S INITIAL PRO SE ATTEMPT TO FILE A LATE NOTICE OF CLAIM REGARDING AN INCIDENT IN THE COUNTY JAIL BY SENDING THE PAPERS TO THE COURT CLERK, NOT THE COUNTY COURT, WAS A NULLITY, PETITIONER'S SECOND ATTEMPT TO FILE A LATE NOTICE AFTER THE STATUTE OF LIMITATIONS HAD RUN COULD NOT, THEREFORE, RELATE BACK TO THE INITIAL ATTEMPT (THIRD DEPT))/CIVIL PROCEDURE (NOTICE OF CLAIM, RELATION BACK, INMATE-PETITIONER'S INITIAL PRO SE ATTEMPT TO FILE A LATE NOTICE OF CLAIM REGARDING AN INCIDENT IN THE COUNTY JAIL BY SENDING THE PAPERS TO THE COURT CLERK, NOT THE COUNTY COURT, WAS A NULLITY, PETITIONER'S SECOND ATTEMPT TO FILE A LATE NOTICE AFTER THE STATUTE OF LIMITATIONS HAD RUN COULD NOT, THEREFORE, RELATE BACK TO THE INITIAL ATTEMPT (THIRD DEPT))/STATUTE OF LIMITATIONS (NOTICE OF CLAIM, INMATE-PETITIONER'S INITIAL PRO SE ATTEMPT TO FILE A LATE NOTICE OF CLAIM REGARDING AN INCIDENT IN THE COUNTY JAIL BY SENDING THE PAPERS TO THE COURT CLERK, NOT THE COUNTY COURT, WAS A NULLITY, PETITIONER'S SECOND ATTEMPT TO FILE A LATE NOTICE AFTER THE STATUTE OF LIMITATIONS HAD RUN COULD NOT, THEREFORE, RELATE BACK TO THE INITIAL ATTEMPT (THIRD DEPT))/COUNTY CLERK (FILING LATE NOTICE OF CLAIM, INMATE-PETITIONER'S INITIAL PRO SE ATTEMPT TO FILE A LATE NOTICE OF CLAIM REGARDING AN INCIDENT IN THE COUNTY JAIL BY SENDING THE PAPERS TO THE COURT CLERK, NOT THE COUNTY COURT, WAS A NULLITY, PETITIONER'S SECOND ATTEMPT TO FILE A LATE NOTICE AFTER THE STATUTE OF LIMITATIONS HAD RUN COULD NOT, THEREFORE, RELATE BACK TO THE INITIAL ATTEMPT (THIRD DEPT))

MUNICIPAL LAW, EMPLOYMENT LAW.

DEFENDANT COUNTY CORONER TOOK PLAINTIFF'S SON'S BRAIN MATTER FOR USE IN TRAINING CADAVER DOGS AND FATHER SUED, QUESTION OF FACT WHETHER COUNTY OBLIGATED UNDER THE PUBLIC OFFICERS LAW TO DEFEND AND INDEMNIFY THE CORONER (I.E., WAS THE CORONER ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT?) (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment on his cross claim against the county (seeking a determination that the county is obligated to defend and indemnify him) should not have been granted. Plaintiff's son was killed in a car accident. Defendant, who was then a county coroner, without permission, took plaintiff's son's brain matter for use in training cadaver dogs. There was a question of fact whether the county was obligated to defend the coroner pursuant to the Public Officers Law, which applies to actions within the scope of employment:

> A county's duty to defend an employee "turns on whether [the employee was] acting within the scope of [his or her] employment," and whether the obligation to defend the employee "was formally adopted by a local governing body" ... . In order to establish its prima facie entitlement to judgment as a matter of law under Public Officers Law § 18, it was incumbent on defendant to establish the applicability of that section ... . Here, the court erred in granting summary judgment to defendant while still finding that there are issues of fact that bear on the applicability of Public Officers Law § 18 to defendant's claims ... . **Dunn v County of Niagara, 2018 NY Slip Op 03271, Fourth Dept 5-4-18**

MUNICIPAL LAW (PUBLIC OFFICERS LAW, DEFENDANT COUNTY CORONER TOOK PLAINTIFF'S SON'S BRAIN MATTER FOR USE IN TRAINING CADAVER DOGS, QUESTION OF FACT WHETHER COUNTY OBLIGATED UNDER THE PUBLIC OFFICERS LAW TO DEFEND AND INDEMNIFY THE CORONER (I.E., WAS THE CORONER ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT?) (FOURTH DEPT))/EMPLOYMENT LAW (MUNICIPAL LAW, PUBLIC OFFICERS LAW, DEFENDANT COUNTY CORONER TOOK PLAINTIFF'S SON'S BRAIN MATTER FOR USE IN TRAINING CADAVER DOGS, QUESTION OF FACT WHETHER COUNTY OBLIGATED UNDER THE PUBLIC OFFICERS LAW TO DEFEND AND INDEMNIFY THE CORONER (I.E., WAS THE CORONER ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT?) (FOURTH DEPT))/PUBLIC OFFICERS LAW (DEFEND AND INDEMNIFY, DEFENDANT COUNTY CORONER TOOK PLAINTIFF'S SON'S BRAIN MATTER FOR USE IN TRAINING CADAVER DOGS, QUESTION OF FACT WHETHER COUNTY OBLIGATED UNDER THE PUBLIC OFFICERS LAW TO DEFEND AND INDEMNIFY THE CORONER (I.E., WAS THE CORONER ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT?) (FOURTH DEPT))

MUNICIPAL LAW, NEGLIGENCE.

CITY WAS NOTIFIED OF THE ESSENTIAL FACTS OF PETITIONER'S CLAIM BY A TIMELY NOTICE OF CLAIM FILED BY THE OTHER PARTY IN THIS TRAFFIC ACCIDENT CASE, PETITIONER'S REQUEST TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined petitioner's request for leave to file a late notice of claim should have been granted. Petitioner's car collided with a car, driven by Cedeno, when Cedeno crossed into on-coming traffic after running over a half-open manhole and losing control. Cedeno had served a timely notice of claim upon the city. The Second Department determined the city had timely notice of the essential facts of the petitioner's claim:

> While the presence or the absence of any one of the factors is not necessarily determinative ... , whether the public corporation had actual knowledge of the essential facts constituting the claim is of great importance ... . The public corporation must have "knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim," and not merely some general knowledge that a wrong has been committed ... . A petitioner's lack of a reasonable excuse for the delay in serving a timely notice of claim is not necessarily fatal when weighed against other relevant factors ... .
>
> The petitioner ... demonstrated that the City acquired timely, actual knowledge of the essential facts constituting her claim by way of the timely notice of claim served upon it by Cedeno ... . Cedeno's notice of claim specifically described the nature of the accident between Cedeno and the petitioner. Inasmuch as the City acquired timely, actual knowledge of the essential facts of the petitioner's claim, the petitioner made an initial showing that the City was not prejudiced by her delay in serving a notice of claim ... . **Matter of Tejada v City of New York, 2018 NY Slip Op 03370, Second Dept 5-9-18**

MUNICIPAL LAW (NEGLIGENCE, NOTICE OF CLAIM, CITY WAS NOTIFIED OF THE ESSENTIAL FACTS OF PETITIONER'S CLAIM BY A TIMELY NOTICE OF CLAIM FILED BY THE OTHER PARTY IN THIS TRAFFIC ACCIDENT CASE, PETITIONER'S REQUEST TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NEGLIGENCE (MUNICIPAL LAW, NOTICE OF CLAIM, CITY WAS NOTIFIED OF THE ESSENTIAL FACTS OF PETITIONER'S CLAIM BY A TIMELY NOTICE OF CLAIM FILED BY THE OTHER PARTY IN THIS TRAFFIC ACCIDENT CASE, PETITIONER'S REQUEST TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT))/NOTICE OF CLAIM (NEGLIGENCE, MUNICIPAL LAW, CITY WAS NOTIFIED OF THE ESSENTIAL FACTS OF PETITIONER'S CLAIM BY A TIMELY NOTICE OF CLAIM FILED BY THE OTHER PARTY IN THIS TRAFFIC ACCIDENT CASE, PETITIONER'S REQUEST TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (MUNICIPAL LAW, NOTICE OF CLAIM, CITY WAS NOTIFIED OF THE ESSENTIAL FACTS OF PETITIONER'S CLAIM BY A TIMELY NOTICE OF CLAIM FILED BY THE OTHER PARTY IN THIS TRAFFIC ACCIDENT CASE, PETITIONER'S REQUEST TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED (SECOND DEPT))

NEGLIGENCE

NEGLIGENCE.

STORE'S MOTION FOR SUMMARY JUDGMENT IN THIS ESCALATOR SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED BASED UPON PROOF OF REGULAR MAINTENANCE AND INSPECTIONS AND NO REPORTS OF ACCIDENTS OR PROBLEMS (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant retail store's (Macy's) motion for summary judgment in this escalator slip and fall case should have been granted. Proof that the escalator was regularly maintained and inspected and there were no reports of accidents or problems warranted summary judgment and the plaintiff's claims that the escalator was wet and the rubber handrail pulled up did not raise a question of fact:

> Macy's submitted, inter alia, deposition testimony of two of its employees, as well as the records of maintenance and inspections of the escalator by defendant Thyssenkrupp Corp. and the New York City Department of Buildings. Such evidence showed that the escalator was regularly maintained and inspected during the years prior to plaintiff's accident, and there were never any reports of accidents or other problems with the escalator... .
>
> In opposition, plaintiff failed to raise a triable of fact. Plaintiff's wife's hearsay statement that the stairs were wet does not indicate that they were wet long enough for Macy's to have notice of the condition. Similarly, plaintiff's testimony that the rubber handrail pulled up when he grasped at it as he slipped, does not raise an issue of fact that any such defect existed long enough for Macy's to have notice, particularly since there were no prior complaints and in light of the evidence of regular maintenance and City inspections showing no problems .. . Furthermore, the opinion of plaintiff's expert engineer that the wooden escalator treads were more slippery than industry safety standards permit does not raise an issue of fact. **Ahmed v Macy's Inc., 2018 NY Slip Op 03231, First Dept 5-3-18**

NEGLIGENCE (SLIP AND FALL, STORE'S MOTION FOR SUMMARY JUDGMENT IN THIS ESCALATOR SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED BASED UPON PROOF OF REGULAR MAINTENANCE AND INSPECTIONS AND NO REPORTS OF ACCIDENTS OR PROBLEMS (FIRST DEPT))/SLIP AND FALL (ESCALATORS, STORE'S MOTION FOR SUMMARY JUDGMENT IN THIS ESCALATOR SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED BASED UPON PROOF OF REGULAR MAINTENANCE AND INSPECTIONS AND NO REPORTS OF ACCIDENTS OR PROBLEMS (FIRST DEPT))/ESCALATORS (SLIP AND FALL, STORE'S MOTION FOR SUMMARY JUDGMENT IN THIS ESCALATOR SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED BASED UPON PROOF OF REGULAR MAINTENANCE AND INSPECTIONS AND NO REPORTS OF ACCIDENTS OR PROBLEMS (FIRST DEPT))

NEGLIGENCE.

PLAINTIFF BASKETBALL PLAYER WAS AWARE OF THE CRACK IN THE BASKETBALL COURT OVER WHICH HE TRIPPED AND FELL, SUIT WAS PRECLUDED BY THE DOCTRINE OF ASSUMPTION OF THE RISK, CONCURRING JUSTICE ARGUED THAT THE CRACK WAS NOT A RISK INHERENT IN THE SPORT, BUT WAS CONSTRAINED TO AGREE WITH THE MAJORITY BASED ON PRECEDENT (SECOND DEPT).

The Second Department, with an extensive two-justice concurrence not summarized here, reversing Supreme Court, determined that plaintiff assumed the risk of injury from playing basketball with knowledge of a crack on the court which caused him to trip and fall:

> The plaintiff, who was 19 years old at the time of the accident and an experienced basketball player, testified that he "grew [up] playing on [the subject] court," and that he was aware of the presence of cracks in the surface of the court prior to his accident. The plaintiff also indicated that he was previously aware of the particular crack over which he tripped. When the plaintiff was asked ... if he ever saw "what [his] foot got caught in before this happened," he responded, "[w]e knew where it was before when it happened." ...
>
> Thus, [defendant] demonstrated that it did not violate its duty to exercise ordinary reasonable care to protect the plaintiff from unassumed, concealed, or unreasonably increased risks, and that the plaintiff assumed the risk of injury by voluntarily participating in a basketball game on the outdoor court despite his knowledge that doing so could bring him into contact with an open and obvious crack in the playing surface ... . We note that this Court has consistently applied the primary assumption of risk doctrine in cases involving similar known or open and obvious conditions in the playing surfaces of various types of courts ... .
>
> **From the concurrence:**
>
> While the plaintiff was casually performing a pre-game layup, his foot allegedly got caught in a deep crack, causing his foot to turn and fracture. The cracked condition of the basketball court was not a risk inherent in the sport of basketball and, in my view, under these circumstances, the doctrine of primary assumption of risk is not applicable.
>
> However, this Court's precedent compels dismissal of the complaint, since the plaintiff was aware of the cracks on the court and voluntarily chose to play basketball at this location ... . **Philius v City of New York, 2018 NY Slip Op 03161, Second Dept 5-2-18**

NEGLIGENCE (ASSUMPTION OF RISK, PLAINTIFF BASKETBALL PLAYER WAS AWARE OF THE CRACK IN THE BASKETBALL COURT OVER WHICH HE TRIPPED AND FELL, SUIT WAS PRECLUDED BY THE DOCTRINE OF ASSUMPTION OF THE RISK, CONCURRENCE ARGUED THAT THE CRACK WAS NOT A RISK INHERENT IN THE SPORT, BUT WAS CONSTRAINED TO AGREE WITH THE MAJORITY BASED ON PRECEDENT (SECOND DEPT))/ASSUMPTION OF RISK (PLAINTIFF BASKETBALL PLAYER WAS AWARE OF THE CRACK IN THE BASKETBALL COURT OVER WHICH HE TRIPPED AND FELL, SUIT WAS PRECLUDED BY THE DOCTRINE OF ASSUMPTION OF THE RISK, CONCURRENCE ARGUED THAT THE CRACK WAS NOT A RISK INHERENT IN THE SPORT, BUT WAS CONSTRAINED TO AGREE WITH THE MAJORITY BASED ON PRECEDENT (SECOND DEPT))

NEGLIGENCE.

PERSON SENDING TEXT MESSAGES TO A DRIVER DOES NOT OWE A DUTY OF CARE TO A PERSON INJURED BY THE DRIVER, OSTENSIBLY BECAUSE THE DRIVER WAS DISTRACTED BY THE TEXTS (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Troutman, determined a person who sends text messages to someone who is driving does not owe a duty of care to a person injured by the driver, ostensibly because the driver was distracted by the texts:

> ... [I]t is the duty of the driver to see what should be seen and to exercise reasonable care in the operation of his or her vehicle to avoid a collision with another vehicle ... If a person were to be held liable for communicating a text message to another person whom he or she knows or reasonably should know is operating a vehicle, such a holding could logically be expanded to encompass all manner of heretofore innocuous activities. A billboard, a sign outside a church, or a child's lemonade stand could all become a potential source of liability in a negligence action. Each of the foregoing examples is a communication directed specifically at passing motorists and intended to divert their attention from the highway.
>
> To be sure, cellular telephones and other electronic devices present unique distractions to motorists. For that reason, the legislature passed laws specifically to regulate the use of cellular telephones and other electronic devices by those operating motor vehicles ... . The legislature did not create a duty to refrain from communicating with persons known to be operating a vehicle. To the contrary, those laws place the responsibility of managing or avoiding the distractions caused by electronic devices squarely with the driver. The driver has various means available for managing or avoiding such distractions, such as a hands-free device to handle incoming calls... or a setting for temporarily disabling sounds or alerts. Or, the driver can simply pull over to the side of the highway to engage in any communications deemed too urgent to wait. The remote sender of a text message is not in a good position to know how the driver will or should handle incoming text messages. **Vega v Crane, 2018 NY Slip Op 03262, Fourth Dept 5-4-18**

NEGLIGENCE (TEXT MESSAGES, PERSON SENDING TEXT MESSAGES TO A DRIVER DOES NOT OWE A DUTY OF CARE TO A PERSON INJURED BY THE DRIVER, OSTENSIBLY BECAUSE THE DRIVER WAS DISTRACTED BY THE TEXTS (FOURTH DEPT))/DUTY OF CARE (TEXT MESSAGES, DRIVERS, PERSON SENDING TEXT MESSAGES TO A DRIVER DOES NOT OWE A DUTY OF CARE TO A PERSON INJURED BY THE DRIVER, OSTENSIBLY BECAUSE THE DRIVER WAS DISTRACTED BY THE TEXTS (FOURTH DEPT))/TEXT MESSAGES (NEGLIGENCE, DRIVERS, PERSON SENDING TEXT MESSAGES TO A DRIVER DOES NOT OWE A DUTY OF CARE TO A PERSON INJURED BY THE DRIVER, OSTENSIBLY BECAUSE THE DRIVER WAS DISTRACTED BY THE TEXTS (FOURTH DEPT))/TRAFFIC ACCIDENTS (TEXT MESSAGES, DRIVERS, PERSON SENDING TEXT MESSAGES TO A DRIVER DOES NOT OWE A DUTY OF CARE TO A PERSON INJURED BY THE DRIVER, OSTENSIBLY BECAUSE THE DRIVER WAS DISTRACTED BY THE TEXTS (FOURTH DEPT))/DRIVERS (TEXT MESSAGES, NEGLIGENCE, PERSON SENDING TEXT MESSAGES TO A DRIVER DOES NOT OWE A DUTY OF CARE TO A PERSON INJURED BY THE DRIVER, OSTENSIBLY BECAUSE THE DRIVER WAS DISTRACTED BY THE TEXTS (FOURTH DEPT))

NEGLIGENCE.

EVIDENCE THAT DEFENDANT'S EMPLOYEE SLIPPED ON ICE AND SNOW SEVERAL HOURS BEFORE PLAINTIFF SLIPPED AND FELL IN THE SAME PARKING LOT RAISED A QUESTION OF FACT ABOUT DEFENDANT'S CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION (FOURTH DEPT).

The Fourth Department determined defendant's motion for summary judgment in this parking-lot snow-ice slip and fall case was properly denied. Defendant's submissions included evidence one of plaintiff's employee had slipped and fallen on ice in the parking lot several hours before plaintiff fell. That evidence raised a question of fact whether defendant had constructive knowledge of the condition:

> "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" ... . Although "an owner's general awareness' that a dangerous condition may exist is insufficient to support a finding that the owner had constructive notice of the specific condition that caused the plaintiff to slip and fall" ... , evidence that another person had fallen in the "same general vicinity" a few hours before the plaintiff's fall raises triable issues of fact whether the condition existed for a sufficient length of time to discover and remedy it ... . Inasmuch as defendant submitted evidence that its employee slipped in the same parking lot as plaintiff several hours before plaintiff's fall and thereafter observed the icy condition as he rendered aid to plaintiff, there are triable issues of fact "whether the icy condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendant[] to discover it and take corrective action' " ... . **Cosgrove v River Oaks Rests., LLC, 2018 NY Slip Op 03286, Fourth Dept 5-4-18**

NEGLIGENCE (SLIP AND FALL, EVIDENCE THAT DEFENDANT'S EMPLOYEE SLIPPED ON ICE AND SNOW SEVERAL HOURS BEFORE PLAINTIFF SLIPPED AND FELL IN THE SAME PARKING LOT RAISED A QUESTION OF FACT ABOUT DEFENDANT'S CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION (FOURTH DEPT))/SLIP AND FALL (EVIDENCE THAT DEFENDANT'S EMPLOYEE SLIPPED ON ICE AND SNOW SEVERAL HOURS BEFORE PLAINTIFF SLIPPED AND FELL IN THE SAME PARKING LOT RAISED A QUESTION OF FACT ABOUT DEFENDANT'S CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION (FOURTH DEPT))/CONSTRUCTIVE NOTICE (SLIP AND FALL, EVIDENCE THAT DEFENDANT'S EMPLOYEE SLIPPED ON ICE AND SNOW SEVERAL HOURS BEFORE PLAINTIFF SLIPPED AND FELL IN THE SAME PARKING LOT RAISED A QUESTION OF FACT ABOUT DEFENDANT'S CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION (FOURTH DEPT))

NEGLIGENCE.

RAISED METAL PLATE IN SIDEWALK DEEMED A NONACTIONABLE TRIVIAL DEFECT IN THIS SLIP AND FALL CASE (FOURTH DEPT).

The Fourth Department determined the negligence claim against the state in this slip and fall case was properly dismissed after trial. The raised metal plate in the sidewalk was deemed a trivial defect, not a dangerous condition:

> The evidence at trial established that the incident occurred on a clear, sunny day, that claimant saw the readily apparent steel plate, and that the height differential between the steel plate and the sidewalk was small. **Graham v State of New York, 2018 NY Slip Op 03294, Fourth Dept 5-4-18**

NEGLIGENCE (SLIP AND FALL, RAISED METAL PLATE IN SIDEWALK DEEMED A NONACTIONABLE TRIVIAL DEFECT IN THIS SLIP AND FALL CASE (FOURTH DEPT))/SLIP AND FALL (RAISED METAL PLATE IN SIDEWALK DEEMED A NONACTIONABLE TRIVIAL DEFECT IN THIS SLIP AND FALL CASE (FOURTH DEPT))/SIDEWALKS (SLIP AND FALL, RAISED METAL PLATE IN SIDEWALK DEEMED A NONACTIONABLE TRIVIAL DEFECT IN THIS SLIP AND FALL CASE (FOURTH DEPT))/TRIVIAL DEFECT (SLIP AND FALL, RAISED METAL PLATE IN SIDEWALK DEEMED A NONACTIONABLE TRIVIAL DEFECT IN THIS SLIP AND FALL CASE (FOURTH DEPT))

NEGLIGENCE.

QUESTION OF FACT WHETHER ALLOWING TANDEM RIDING AND SPINNING THE TUBES IN ICY CONDITIONS UNREASONABLY INCREASED THE RISK IN THIS SNOW-TUBING INJURY CASE (THIRD DEPT).

The Third Department determined the defendant's motion for summary judgment, asserting assumption of the risk, was properly denied in this snow-tubing injury case. Apparently plaintiff went over a berm and collided with a padded pole. There was a triable issue of fact whether allowing plaintiff and her daughters to ride tandem and spinning their tubes, under icy conditions, unreasonably increased the risk:

> ... [P]laintiff primarily relied on the deposition testimony of her companion and the project manager to argue that the weather and the condition of the lanes and snow berms on the day in question were such that spinning and in tandem tubing were contraindicated and, therefore, should not have been allowed. In particular, plaintiff's companion testified that she walked from plaintiff's lane to the pole with which plaintiff collided and found the terrain to be "[i]cy" and "hard." Additionally, based on his examination of the glare and shadows in the photographs taken on the day of the accident, the project manager testified that the lanes and snow berms appeared "icy" and that the lanes were "probably getting a bit frozen over" and "fast." He stated that when the lanes "iced up" and became too fast, the lane safety attendants at the bottom of the hill were supposed to either cut down the number of tubers that were permitted to ride together or prohibit tandem riding altogether. He further stated that he had previously observed snow tubers leave their lanes as a result of being spun. In our view, the foregoing proof, considered in the light most favorable to plaintiff ... , raises a factual issue as to whether the risk of injury was unreasonably increased by the actions of the lane attendants — namely, allowing plaintiff and her daughters to ride tandem and spinning their tubes prior to their descent — under the particular weather and terrain conditions at the time of plaintiff's injury ... . **Thompson v Windham Mtn. Partners, LLC, 2018 NY Slip Op 03415, Third Dept 5-10-18**

NEGLIGENCE (ASSUMPTION OF THE RISK, SNOW TUBING, QUESTION OF FACT WHETHER ALLOWING TANDEM RIDING AND SPINNING THE TUBES IN ICY CONDITIONS UNREASONABLY INCREASED THE RISK IN THIS SNOW-TUBING INJURY CASE (THIRD DEPT))/ASSUMPTION OF THE RISK (SNOW TUBING, ASSUMPTION OF THE RISK, SNOW TUBING, QUESTION OF FACT WHETHER ALLOWING TANDEM RIDING AND SPINNING THE TUBES IN ICY CONDITIONS UNREASONABLY INCREASED THE RISK IN THIS SNOW-TUBING INJURY CASE (THIRD DEPT))/SNOW TUBING (ASSUMPTION OF THE RISK, SNOW TUBING, QUESTION OF FACT WHETHER ALLOWING TANDEM RIDING AND SPINNING THE TUBES IN ICY CONDITIONS UNREASONABLY INCREASED THE RISK IN THIS SNOW-TUBING INJURY CASE (THIRD DEPT))

NEGLIGENCE.

CITY DEMONSTRATED IT DID NOT CREATE, EXACERBATE OR HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE BLACK ICE IN THE CROSSWALK WHERE PLAINTIFF SLIPPED AND FELL, DECISION ILLUSTRATES THE LEVEL OF PROOF REQUIRED OF A SLIP AND FALL DEFENDANT TO WIN SUMMARY JUDGMENT (FIRST DEPT).

The First Department determined the defendant city demonstrated that it did not create or have actual or constructive notice of the black ice in the crosswalk where plaintiff slipped and fell. The decision illustrates the level of proof necessary for a defendant's successful summary judgment motion in a slip and fall case:

> The City established entitlement to judgment as a matter of law in this action for personal injuries sustained when plaintiff slipped and fell on "black ice," while crossing a cleared crosswalk, eight days after there was a snowfall of about 20 inches. The City submitted evidence showing it neither created nor had actual or constructive notice of the black ice that allegedly caused plaintiff's fall, including deposition testimony from a Department of Sanitation supervisor detailing the City's extensive snow and ice removal efforts in the area of the accident in the days preceding the accident. The City also submitted climatological records showing temperature fluctuations above and below freezing in the two days before the date of the accident, and freezing temperatures in the hours immediately preceding plaintiff's fall. Thus, the City demonstrated that it would be speculative to conclude that it caused or had sufficient time to remedy the subject icy condition... . The City further showed lack of constructive notice by submitting plaintiff's deposition testimony that the crosswalk appeared to have been cleared for safe crossing and that she did not observe the black ice until after she fell ... .
>
> In opposition, plaintiff failed to raise an issue of fact. She provided no evidence of actual or constructive notice of the black ice in the crosswalk, which she admittedly did not see. Plaintiff also failed to provide any nonspeculative basis for finding that the City's snow clearing efforts were negligent or that they exacerbated the dangerous conditions that were created by the blizzard... . The opinion of plaintiff's expert that the City should have checked the crosswalk twice daily for possible "thaw and refreeze," was unsupported by reference to any authority, standard, or other corroborating evidence ... . **Pena v City of New York, 2018 NY Slip Op 03477, First Dept 5-15-18**

NEGLIGENCE (SLIP AND FALL, CITY DEMONSTRATED IT DID NOT CREATE, EXACERBATE OR HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE BLACK ICE IN THE CROSSWALK WHERE PLAINTIFF SLIPPED AND FELL, DECISION ILLUSTRATES THE LEVEL OF PROOF REQUIRED OF A SLIP AND FALL DEFENDANT TO WIN SUMMARY JUDGMENT (FIRST DEPT))/MUNICIPAL LAW (SLIP AND FALL, CITY DEMONSTRATED IT DID NOT CREATE, EXACERBATE OR HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE BLACK ICE IN THE CROSSWALK WHERE PLAINTIFF SLIPPED AND FELL, DECISION ILLUSTRATES THE LEVEL OF PROOF REQUIRED OF A SLIP AND FALL DEFENDANT TO WIN SUMMARY JUDGMENT (FIRST DEPT))/SLIP AND FALL (CITY DEMONSTRATED IT DID NOT CREATE, EXACERBATE OR HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE BLACK ICE IN THE CROSSWALK WHERE PLAINTIFF SLIPPED AND FELL, DECISION ILLUSTRATES THE LEVEL OF PROOF REQUIRED OF A SLIP AND FALL DEFENDANT TO WIN SUMMARY JUDGMENT (FIRST DEPT))

NEGLIGENCE.

BACKING INTO A PARKED CAR IS PRIMA FACIE EVIDENCE OF NEGLIGENCE, PLAINTIFF, WHO WAS INJURED WHEN THE PARKED CAR WAS PUSHED INTO HIM, ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department, in a case remitted after reversal by the Court of Appeals, determined plaintiff was entitled to summary judgment in this vehicle accident case. Plaintiff was injured when a sanitation truck, which was backing up, slid on ice and hit a parked car. which in turn struck plaintiff. Initially the plaintiff's motion for summary judgment was denied because the plaintiff did not demonstrate freedom from comparative fault. The Court of Appeals reversed, holding that plaintiffs do not need to demonstrate freedom from comparative fault to be entitled to summary judgment. On remittal the First Department held that striking a parked vehicle is prima facie evidence of negligence and plaintiff's summary judgment motion was granted:

> It was Ramos's [the driver] and Carter's [the employee guiding the driver] responsibility to take into account weather and road conditions and to tailor their actions accordingly to avoid collisions ... . The record demonstrates that the truck hit the parked car either because Ramos reacted to an abrupt hand signal from Carter and hit the brakes while he was driving on ice, causing a skid he could not abate, or because Ramos failed to adequately respond to Carter's directives. Whether there were chains on the tires or not, defendant's employees were obligated to maintain control of the truck and to avoid collisions with parked cars while backing up, and were negligent in failing to do so ... . **Rodriguez v City of New York, 2018 NY Slip Op 03634, First Dept 5-22-18**

NEGLIGENCE (BACKING INTO A PARKED CAR IS PRIMA FACIE EVIDENCE OF NEGLIGENCE, PLAINTIFF, WHO WAS INJURED WHEN THE PARKED CAR WAS PUSHED INTO HIM, ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT))/TRAFFIC ACCIDENTS (BACKING INTO A PARKED CAR IS PRIMA FACIE EVIDENCE OF NEGLIGENCE, PLAINTIFF, WHO WAS INJURED WHEN THE PARKED CAR WAS PUSHED INTO HIM, ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT))/PARKED CARS (NEGLIGENCE, BACKING INTO A PARKED CAR IS PRIMA FACIE EVIDENCE OF NEGLIGENCE, PLAINTIFF, WHO WAS INJURED WHEN THE PARKED CAR WAS PUSHED INTO HIM, ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT))

NEGLIGENCE.

BUILDING INSPECTION REPORT STATED STAIRWAY WHERE PLAINTIFF FELL WAS IN NEED OF REPAIR, DEFENDANT SUBMITTED EVIDENCE OF GENERAL CLEANING PRACTICES, THEREFORE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE OR ACTUAL NOTICE OF THE ALLEGED CRACK IN THE STAIRWAY (FIRST DEPT).

The First Department determined defendant property owner's motion for summary judgment in this stairway slip and fall case was properly denied. Plaintiff alleged she tripped and fell on a crack in the stairway. A 2012 building inspection report stated that the stairway needed repair. And the defendant submitted only the building's general cleaning routine:

> The record shows that defendant failed to demonstrate that it lacked actual notice of the stairway defect, since an April 2012 building inspection report states that the property's ramps, steps and railing required repair. Defendant also failed to demonstrate that it did not have constructive notice of the alleged defect, because it submitted evidence only as to the building's general cleaning routine, and failed to show when the stairway had last been inspected prior to the accident ... .
>
> In light of defendant's failure to meet its initial burden to establish that it lacked actual or constructive notice of the defective condition of the stairway, the burden never shifted to plaintiff to establish how long the condition was in existence ... . **Javier v New York City Hous. Auth., 2018 NY Slip Op 03736, First Dept 5-24-18**

NEGLIGENCE (BUILDING INSPECTION REPORT STATED STAIRWAY WHERE PLAINTIFF FELL WAS IN NEED OF REPAIR, DEFENDANT SUBMITTED EVIDENCE OF GENERAL CLEANING PRACTICES, THEREFORE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE OR ACTUAL NOTICE OF THE ALLEGED CRACK IN THE STAIRWAY (FIRST DEPT))/SLIP AND FALL (BUILDING INSPECTION REPORT STATED STAIRWAY WHERE PLAINTIFF FELL WAS IN NEED OF REPAIR, DEFENDANT SUBMITTED EVIDENCE OF GENERAL CLEANING PRACTICES, THEREFORE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE OR ACTUAL NOTICE OF THE ALLEGED CRACK IN THE STAIRWAY (FIRST DEPT))/CONSTRUCTIVE NOTICE (SLIP AND FALL, (BUILDING INSPECTION REPORT STATED STAIRWAY WHERE PLAINTIFF FELL WAS IN NEED OF REPAIR, DEFENDANT SUBMITTED EVIDENCE OF GENERAL CLEANING PRACTICES, THEREFORE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE OR ACTUAL NOTICE OF THE ALLEGED CRACK IN THE STAIRWAY (FIRST DEPT))/ACTUAL NOTICE (BUILDING INSPECTION REPORT STATED STAIRWAY WHERE PLAINTIFF FELL WAS IN NEED OF REPAIR, DEFENDANT SUBMITTED EVIDENCE OF GENERAL CLEANING PRACTICES, THEREFORE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE OR ACTUAL NOTICE OF THE ALLEGED CRACK IN THE STAIRWAY (FIRST DEPT))/STAIRWAY (SLIP AND FALL, BUILDING INSPECTION REPORT STATED STAIRWAY WHERE PLAINTIFF FELL WAS IN NEED OF REPAIR, DEFENDANT SUBMITTED EVIDENCE OF GENERAL CLEANING PRACTICES, THEREFORE DEFENDANT DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE OR ACTUAL NOTICE OF THE ALLEGED CRACK IN THE STAIRWAY (FIRST DEPT))

NEGLIGENCE.

CONFLICTING ASSERTIONS ABOUT THE PRESENCE OF LIQUID ON A STAIRWAY PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (FIRST DEPT).

The First Department determined conflicting evidence about the presence of liquid on a stairway precluded summary judgment in this slip and fall case:

> Plaintiff testified that on the day of the accident (Thanksgiving) she took the stairs down from the third floor and they were dry. This was sometime between 11:30am and noon that day. When she returned some twenty minutes later, sometime between 11:50 a.m. and 12:20 p.m., plaintiff walked up the same flight of stairs. On her way up, she noticed there was some liquid or water on the steps and she sidestepped the puddle. Later that day, at 3 p.m., plaintiff took the same flight of stairs a third time, this time with her son. Plaintiff testified that as she walked down the stairs at 3 p.m. she slipped and fell. Her testimony is that she slipped on water or some liquid substance that had no smell and that it was in the same location on the stairs where she had previously observed a puddle earlier that afternoon.
>
> Defendant denies that it had actual notice of the condition alleged. Defendant's building caretaker testified that she inspected the staircase twice that day, following an established schedule. Her first inspection was at approximately 8:20 a.m. and her second inspection was at 12:30 p.m.. The caretaker denied having seen any liquid or water on the steps either time and defendant also contends no one made any complaints about a wet condition on the stairs that day.
>
> The conflicting testimony as to whether or not there was water on the steps at the time the caretaker's second inspection implicates issues of credibility. If, as plaintiff claims, there was water on the steps at or shortly before 12:30 p.m., when the caretaker did her second inspection, then defendant knew, or in the exercise of reasonable care, should have known that a dangerous condition existed but, nevertheless, failed to remedy the situation ... . The evidence submitted by defendant was not sufficient to demonstrate, prima facie, that defendant did not have actual notice of the allegedly hazardous condition prior to plaintiff's fall ... . **Capers v New York City Hous. Auth., 2018 NY Slip Op 03749, First Dept 5-24-18**

NEGLIGENCE (SLIP AND FALL, CONFLICTING ASSERTIONS ABOUT THE PRESENCE OF LIQUID ON A STAIRWAY PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (FIRST DEPT))/SLIP AND FALL (CONFLICTING ASSERTIONS ABOUT THE PRESENCE OF LIQUID ON A STAIRWAY PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (FIRST DEPT))/CONSTRUCTIVE NOTICE (SLIP AND FALL, CONFLICTING ASSERTIONS ABOUT THE PRESENCE OF LIQUID ON A STAIRWAY PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (FIRST DEPT))/ACTUAL NOTICE (SLIP AND FALL, CONFLICTING ASSERTIONS ABOUT THE PRESENCE OF LIQUID ON A STAIRWAY PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (FIRST DEPT))/STAIRWAY (SLIP AND FALL, CONFLICTING ASSERTIONS ABOUT THE PRESENCE OF LIQUID ON A STAIRWAY PRECLUDED SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (FIRST DEPT))

NEGLIGENCE.

QUESTIONS OF FACT ABOUT THE CAUSE OF PLAINTIFF'S FALL AND DEFENDANT'S CONSTRUCTIVE NOTICE PRECLUDED THE AWARD OF SUMMARY JUDGMENT TO THE DEFENDANT IN THIS STAIRWAY SLIP AND FALL CASE (FIRST DEPT).

The First Department, reversing Supreme Court, determined an issue of fact whether the defendant property owner had constructive notice of inconsistently worn and slippery steps precluded the award of summary judgment to the defendant. The First Department also found that the cause of the fall was sufficiently identified by plaintiff's expert opinion, despite the difficulty in discerning the defect from the photographs:

> Plaintiff identified the cause of his fall on stairs in a building owned and managed by defendants sufficiently to withstand summary judgment. He was not required to identify at the time of the accident "exactly where [he] fell and the precise condition that caused [him] to fall" ... . He identified the location of his fall at his deposition. Plaintiff also explained that it was the "concave" shape of the steps that caused him to slip. This testimony was corroborated by plaintiff's expert, who opined that the stairs were dangerously slippery and were disproportionately worn in the middle, creating an unsafe "inward sloping condition" ... . Plaintiff's expert's opinion was properly considered, although it was not timely disclosed, since there was no showing of prejudice to defendants ... .
>
> Plaintiff's evidence of the cause of his fall is also sufficient to raise issues of fact as to the existence of a defective condition. While it is difficult to discern a concave or sloping condition in the photographs in the record, the photographs are not sufficiently clear to be conclusive.
>
> The record also presents issues of fact as to defendants' notice of the alleged defects. Inconsistently worn and slippery steps are not latent defects and do not appear overnight. In addition, defendants submitted evidence showing that they had an opportunity to observe the defects. The building superintendent informally inspected the stairs at least three times a week during cleaning. Thus, if the defects are found to exist, it will be reasonable to infer that defendants had constructive notice of them ... . **Johnson v 675 Coster St. Hous. Dev. Fund, 2018 NY Slip Op 03756, First Dept 5-24-18**

NEGLIGENCE (SLIP AND FALL, QUESTIONS OF FACT ABOUT THE CAUSE OF PLAINTIFF'S FALL AND DEFENDANT'S CONSTRUCTIVE NOTICE PRECLUDED THE AWARD OF SUMMARY JUDGMENT TO THE DEFENDANT IN THIS STAIRWAY SLIP AND FALL CASE (FIRST DEPT))/SLIP AND FALL (QUESTIONS OF FACT ABOUT THE CAUSE OF PLAINTIFF'S FALL AND DEFENDANT'S CONSTRUCTIVE NOTICE PRECLUDED THE AWARD OF SUMMARY JUDGMENT TO THE DEFENDANT IN THIS STAIRWAY SLIP AND FALL CASE (FIRST DEPT))/ CONSTRUCTIVE NOTICE (SLIP AND FALL, QUESTIONS OF FACT ABOUT THE CAUSE OF PLAINTIFF'S FALL AND DEFENDANT'S CONSTRUCTIVE NOTICE PRECLUDED THE AWARD OF SUMMARY JUDGMENT TO THE DEFENDANT IN THIS STAIRWAY SLIP AND FALL CASE (FIRST DEPT))/STAIRWAY (SLIP AND FALL, QUESTIONS OF FACT ABOUT THE CAUSE OF PLAINTIFF'S FALL AND DEFENDANT'S CONSTRUCTIVE NOTICE PRECLUDED THE AWARD OF SUMMARY JUDGMENT TO THE DEFENDANT IN THIS STAIRWAY SLIP AND FALL CASE (FIRST DEPT))

NEGLIGENCE.

MERCHANDISE RACK IN THE AISLE OF DEFENDANT STORE WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS (SECOND DEPT)

The Second Department determined a merchandise rack in the aisle of defendant store was open and obvious and not inherently dangerous:

> [Plaintiff] commenced this action ... to recover damages for personal injuries she allegedly sustained when she fell at the defendants' department store in Yonkers, while attempting to walk past a merchandise rack situated in one of the aisles. ...
>
> "A landowner has a duty to maintain his or her premises in a reasonably safe manner"... . "However, there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous" ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence, including the decedent's deposition testimony, demonstrating that the merchandise rack in the aisle was both open and obvious and that it was not inherently dangerous ... . **Nannariello v Kohl's Dept. Stores, Inc., 2018 NY Slip Op 03689, Second Dept 5-23-18**

NEGLIGENCE (SLIP AND FALL, MERCHANDISE RACK IN THE AISLE OF DEFENDANT STORE WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS (SECOND DEPT))/SLIP AND FALL (MERCHANDISE RACK IN THE AISLE OF DEFENDANT STORE WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS (SECOND DEPT))/OPEN AND OBVIOUS (SLIP AND FALL, MERCHANDISE RACK IN THE AISLE OF DEFENDANT STORE WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS (SECOND DEPT))

NEGLIGENCE.

PLAINTIFF INJURED IN A SLAM DUNK COMPETITION AT BASKETBALL CAMP, DEFENDANT ENTITLED TO SUMMARY JUDGMENT UNDER THE ASSUMPTION OF THE RISK DOCTRINE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff assumed the risk of injury in a slam dunk competition at basketball camp:

> Under the doctrine of primary assumption of risk, "[i]f the risks [of a sporting activity] are known by or perfectly obvious to [a voluntary participant], he or she has consented to them and the [defendant] has discharged its duty of care by making the conditions as safe as they appear to be" ... . Risks inherent in a sporting activity are those which are known, apparent, natural, or reasonably foreseeable consequences of the participation ... . Participants are not deemed to have assumed the risks of reckless or intentional conduct, or concealed or unreasonably increased risks ... . **Osmond v Hofstra Univ., 2018 NY Slip Op 03693, Second Dept 5-23-18**

NEGLIGENCE (ASSUMPTION OF THE RISK, PLAINTIFF INJURED IN A SLAM DUNK COMPETITION AT BASKETBALL CAMP, DEFENDANT ENTITLED TO SUMMARY JUDGMENT UNDER THE ASSUMPTION OF THE RISK DOCTRINE (SECOND DEPT))/ASSUMPTION OF THE RISK (PLAINTIFF INJURED IN A SLAM DUNK COMPETITION AT BASKETBALL CAMP, DEFENDANT ENTITLED TO SUMMARY JUDGMENT UNDER THE ASSUMPTION OF THE RISK DOCTRINE (SECOND DEPT))/BASKETBALL (NEGLIGENCE, ASSUMPTION OF THE RISK, PLAINTIFF INJURED IN A SLAM DUNK COMPETITION AT BASKETBALL CAMP, DEFENDANT ENTITLED TO SUMMARY JUDGMENT UNDER THE ASSUMPTION OF THE RISK DOCTRINE (SECOND DEPT))

NEGLIGENCE.

SMALL DEFECT THAT WAS UNDER THE HANDRAIL AND NOT IN THE WALKING SURFACE OF THE STAIRWAY WAS TRIVIAL AND NOT ACTIONABLE (SECOND DEPT).

The Second Department, reversing Supreme Court in this slip and fall case, determined the defect in the stairway, which was small and was not located in the walking surface of the stairway, was trivial and not actionable:

> ... [T]he defendant's expert reviewed the transcript of the plaintiff's examination pursuant to General Municipal Law § 50-h, together with color photographs identified and marked by the plaintiff during that examination, which depicted the exact location of the alleged defect. The expert also conducted an inspection of the accident location. Based on his review and inspection, the expert averred that the alleged defect was located three inches from the left stairway wall, directly underneath the handrail. Moreover, the height differential between the nosing and the stair measured one-half inch at its greatest depth. Considering the location of the alleged defect, which was not on a walking surface of the stairway ... , together with all other relevant surrounding circumstances, the defendant established, prima facie, that the alleged defect was trivial ... . **Stanley v New York City Hous. Auth., 2018 NY Slip Op 03726, Second Dept 5-23-18**

NEGLIGENCE (SLIP AND FALL, STAIRWAYS, SMALL DEFECT THAT WAS UNDER THE HANDRAIL AND NOT IN THE WALKING SURFACE OF THE STAIRWAY WAS TRIVIAL AND NOT ACTIONABLE (SECOND DEPT))/SLIP AND FALL (STAIRWAYS, SMALL DEFECT THAT WAS UNDER THE HANDRAIL AND NOT IN THE WALKING SURFACE OF THE STAIRWAY WAS TRIVIAL AND NOT ACTIONABLE (SECOND DEPT))/STAIRWAYS (SLIP AND FALL, SMALL DEFECT THAT WAS UNDER THE HANDRAIL AND NOT IN THE WALKING SURFACE OF THE STAIRWAY WAS TRIVIAL AND NOT ACTIONABLE (SECOND DEPT))/TRIVIAL DEFECTS (SLIP AND FALL, STAIRWAYS, SMALL DEFECT THAT WAS UNDER THE HANDRAIL AND NOT IN THE WALKING SURFACE OF THE STAIRWAY WAS TRIVIAL AND NOT ACTIONABLE (SECOND DEPT))

NEGLIGENCE.

PLAINTIFF'S DEPOSITION TESTIMONY, SUBMITTED BY THE DEFENDANT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS STAIRWAY SLIP AND FALL CASE, CONFLICTED WITH THE DEFENDANT'S EVIDENCE, SUMMARY JUDGMENT WAS NECESSARILY DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS (SECOND DEPT).

The Second Department determined defendant property owner's motion for summary judgment in this stairway slip and fall case was properly denied. There was a conflict between the plaintiff's description of the defect and the area where she fell (included in the deposition testimony submitted by the defendant) and the defendant's evidence of the location of the defect:

> In moving for summary judgment, the defendant was obligated to come forward with evidence establishing its prima facie entitlement to judgment as a matter of law by eliminating all material issues of fact as to its potential liability... . However, in view of the conflicting accounts submitted by the defendant as to the location of the defect which allegedly caused the plaintiff's fall, the defendant failed to sustain its prima facie burden on the motion. Accordingly, denial of the motion was required, without regard to the adequacy of the plaintiff's submissions in opposition ... . **Tavarez v Pistilli Assoc. III, LLC, 2018 NY Slip Op 03727, Second Dept 5-23-18**

NEGLIGENCE (SLIP AND FALL, STAIRWAYS, PLAINTIFF'S DEPOSITION TESTIMONY, SUBMITTED BY THE DEFENDANT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS STAIRWAY SLIP AND FALL CASE, CONFLICTED WITH THE DEFENDANT'S EVIDENCE, SUMMARY JUDGMENT WAS NECESSARILY DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS (SECOND DEPT))/SLIP AND FALL (STAIRWAYS, PLAINTIFF'S DEPOSITION TESTIMONY, SUBMITTED BY THE DEFENDANT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS STAIRWAY SLIP AND FALL CASE, CONFLICTED WITH THE DEFENDANT'S EVIDENCE, SUMMARY JUDGMENT WAS NECESSARILY DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS (SECOND DEPT))/STAIRWAYS (SLIP AND FALL, PLAINTIFF'S DEPOSITION TESTIMONY, SUBMITTED BY THE DEFENDANT IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS STAIRWAY SLIP AND FALL CASE, CONFLICTED WITH THE DEFENDANT'S EVIDENCE, SUMMARY JUDGMENT WAS NECESSARILY DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS (SECOND DEPT))

NEGLIGENCE.

UNDER PENNSYLVANIA LAW PLAINTIFF ASSUMED THE RISK OF INJURY ON A TRAMPOLINE WITH MULTIPLE JUMPERS (FIRST DEPT).

The First Department determined defendant's motion for summary judgment in this Pennsylvania trampoline injury case was properly granted. Under Pennsylvania law, plaintiff assumed the risk of injury on the trampoline:

> The record demonstrates conclusively that defendant cannot be held liable under Pennsylvania law for the injuries that plaintiff alleges she sustained while a guest at his Pennsylvania home when another guest jumping on a trampoline lost control and fell on her. A property owner may be held liable to "social guests," as opposed to "business visitors" ... , only if he "knows or has reason to know of the [dangerous] condition and should realize that it involves an unreasonable risk of harm" and "fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved," and the guests "do not know or have reason to know of the condition and the risk involved" ... . Plaintiff's deposition testimony and affidavit demonstrate that she understood the risks involved in using the trampoline, including the risks of using it with multiple jumpers. **Ramos v Hamelburg, 2018 NY Slip Op 03913, First Dept 5-31-18**

NEGLIGENCE (ASSUMPTION OF THE RISK, UNDER PENNSYLVANIA LAW PLAINTIFF ASSUMED THE RISK OF INJURY ON A TRAMPOLINE WITH MULTIPLE JUMPERS (FIRST DEPT))/ASSUMPTION OF THE RISK (TRAMPOLINES, UNDER PENNSYLVANIA LAW PLAINTIFF ASSUMED THE RISK OF INJURY ON A TRAMPOLINE WITH MULTIPLE JUMPERS (FIRST DEPT))/TRAMPOLINES (ASSUMPTION OF THE RISK, UNDER PENNSYLVANIA LAW PLAINTIFF ASSUMED THE RISK OF INJURY ON A TRAMPOLINE WITH MULTIPLE JUMPERS (FIRST DEPT))

NEGLIGENCE.

DEFENDANT RESTAURANT-BAR DEMONSTRATED ITS EMPLOYEE DID NOT KNOW THE DRIVER WAS UNDER 21, RESTAURANT-BAR ENTITLED TO SUMMARY JUDGMENT IN THIS DRAM SHOP ACT ACTION (SECOND DEPT).

The Second Department determined the restaurant/bar's (Hacienda's) motion for summary judgment in this Dram Shop Act action was properly granted. Plaintiff, a passenger in a car driven by Behler, was injured when the driver struck a guardrail. The driver, who was under 21, had been served alcohol at Hacienda. General Obligations Law (GOL) 11-101 (the Dram Shop Act) prohibits serving alcohol to persons under 21. The Second Department held there is a knowledge element of GOL 11-101 and Hacienda demonstrated it's employee did not know the driver was under 21:

> In 1983, the Legislature supplemented the Dram Shop Act by adding General Obligation Law § 11-100, which applies to any provider unlawfully furnishing alcoholic beverages to or unlawfully assisting in procuring alcoholic beverages for minors. Pursuant to Alcoholic Beverage Control Law § 65(1), it is unlawful to furnish an alcoholic beverage to any "person, actually or apparently, under the age of twenty-one years" ... . "[L]iability under General Obligations Law § 11-100 may be imposed only on a person who knowingly causes intoxication by furnishing alcohol to (or assisting in the procurement of alcohol for) persons known or reasonably believed to be underage. While [General Obligations Law §] 11-101 does not explicitly refer to knowledge, that same requirement must be inferred because the legislative history makes plain that section 11-100 was intended to parallel the Dram Shop Act" ... .
>
> Hacienda established through the submission of the deposition testimony of its bartender that it did not have knowledge or reason to believe that the driver was under 21 years of age when it served alcoholic beverages to him. **Ferber v Olde Erie Brew Pub & Grill, LLC, 2018 NY Slip Op 03827, Second Dept 5-30-18**

NEGLIGENCE (DRAM SHOP ACT, DEFENDANT RESTAURANT-BAR DEMONSTRATED ITS EMPLOYEE DID NOT KNOW THE DRIVER WAS UNDER 21, RESTAURANT-BAR ENTITLED TO SUMMARY JUDGMENT IN THIS DRAM SHOP ACT ACTION (SECOND DEPT))/DRAM SHOP ACT (DEFENDANT RESTAURANT-BAR DEMONSTRATED ITS EMPLOYEE DID NOT KNOW THE DRIVER WAS UNDER 21, RESTAURANT-BAR ENTITLED TO SUMMARY JUDGMENT IN THIS DRAM SHOP ACT ACTION (SECOND DEPT))/TRAFFIC ACCIDENTS (DRAM SHOP ACT, DEFENDANT RESTAURANT-BAR DEMONSTRATED ITS EMPLOYEE DID NOT KNOW THE DRIVER WAS UNDER 21, RESTAURANT-BAR ENTITLED TO SUMMARY JUDGMENT IN THIS DRAM SHOP ACT ACTION (SECOND DEPT))

NEGLIGENCE.

DRAINAGE GRATE NEAR SOCCER FIELD DEEMED OPEN AND OBVIOUS, PLAINTIFF SOCCER PLAYER ASSUMED THE RISK OF INJURY RESULTING FROM HIS CLEAT GETTING STUCK IN THE GRATE (SECOND DEPT).

The Second Department determined plaintiff soccer player had assumed the risk of injury resulting from a cleat on his shoe getting stuck in a drainage grate near the soccer field. The drainage grate was deemed open and obvious:

> "Pursuant to the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation'" ... . "This principle extends to those risks associated with the construction of the playing field and any open and obvious condition thereon"... .
>
> Here, the defendants established their prima facie entitlement to judgment as a matter of law on the ground that the doctrine of primary assumption of risk barred the injured plaintiff's recovery. The evidence submitted by the defendants included, inter alia, the pretrial testimony of the infant plaintiff that his accident occurred when he ran onto the drainage grate only a few feet from the edge of the field while he was retrieving a ball that had traveled out of bounds during the game. He further conceded that in order to gain access to the field, he had to walk over the silver-colored drainage grate that surrounded the perimeter of the field. Moreover, the photographs submitted in support of the motion confirmed the open and obvious nature of the grate, and there was no evidence that the grate was concealed or defective in any manner. **O'Toole v Long Is. Jr. Soccer League, Inc., 2018 NY Slip Op 03853, Second Dept 5-30-18**

NEGLIGENCE (ASSUMPTION OF THE RISK , DRAINAGE GRATE NEAR SOCCER FIELD DEEMED OPEN AND OBVIOUS, PLAINTIFF SOCCER PLAYER ASSUMED THE RISK OF INJURY RESULTING FROM HIS CLEAT GETTING STUCK IN THE GRATE (SECOND DEPT))/ASSUMPTION OF THE RISK (SOCCER, DRAINAGE GRATE NEAR SOCCER FIELD DEEMED OPEN AND OBVIOUS, PLAINTIFF SOCCER PLAYER ASSUMED THE RISK OF INJURY RESULTING FROM HIS CLEAT GETTING STUCK IN THE GRATE (SECOND DEPT))/SOCCER (ASSUMPTION OF THE RISK, DRAINAGE GRATE NEAR SOCCER FIELD DEEMED OPEN AND OBVIOUS, PLAINTIFF SOCCER PLAYER ASSUMED THE RISK OF INJURY RESULTING FROM HIS CLEAT GETTING STUCK IN THE GRATE (SECOND DEPT))/SPORTS (ASSUMPTION OF THE RISK, DRAINAGE GRATE NEAR SOCCER FIELD DEEMED OPEN AND OBVIOUS, PLAINTIFF SOCCER PLAYER ASSUMED THE RISK OF INJURY RESULTING FROM HIS CLEAT GETTING STUCK IN THE GRATE (SECOND DEPT))

NEGLIGENCE, ANIMAL LAW.

PLAINTIFF FELL FROM A HORSE DURING A RIDING LESSON, NEITHER THE ASSUMPTION OF THE RISK DOCTRINE NOR THE SIGNED RELEASED WARRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT HORSE FARM, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a dissent, determined that the assumption of the risk doctrine and the signed release did not warrant summary judgment in favor of defendant in this horseback-riding injury case. Plaintiff fell from a horse during a riding lesson:

> ... [I]t is undisputed that plaintiff was a beginner and had never before attempted to mount or ride a horse, and the deposition testimony relied upon by defendants raises questions of fact whether defendants unreasonably increased the risks associated with mounting the horse by failing to give plaintiff adequate instructions and assistance based on her size, athleticism, and obvious struggles in attempting to mount the horse, and whether there were concealed risks of mounting the horse, i.e., whether the horse was "tacked" properly ... . For the same reasons, we reject defendants' contention, as an alternative ground for affirmance, that the written release established as a matter of law that, as per the language of the release, plaintiff expressly assumed "the unavoidable risks inherent in all horse-related activities" ... . **Jones v Smoke Tree Farm, 2018 NY Slip Op 03299, Fourth Dept 5-4-18**

NEGLIGENCE (HORSES, PLAINTIFF FELL FROM A HORSE DURING A RIDING LESSON, NEITHER THE ASSUMPTION OF THE RISK DOCTRINE NOR THE SIGNED RELEASED WARRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT HORSE FARM, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))/ANIMAL LAW (HORSES, PLAINTIFF FELL FROM A HORSE DURING A RIDING LESSON, NEITHER THE ASSUMPTION OF THE RISK DOCTRINE NOR THE SIGNED RELEASED WARRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT HORSE FARM, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))/HORSES (PLAINTIFF FELL FROM A HORSE DURING A RIDING LESSON, NEITHER THE ASSUMPTION OF THE RISK DOCTRINE NOR THE SIGNED RELEASED WARRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT HORSE FARM, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))/ASSUMPTION OF RISK (HORSES, PLAINTIFF FELL FROM A HORSE DURING A RIDING LESSON, NEITHER THE ASSUMPTION OF THE RISK DOCTRINE NOR THE SIGNED RELEASED WARRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT HORSE FARM, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))/RELEASE (HORSE RIDING LESSONS, PLAINTIFF FELL FROM A HORSE DURING A RIDING LESSON, NEITHER THE ASSUMPTION OF THE RISK DOCTRINE NOR THE SIGNED RELEASED WARRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT HORSE FARM, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (FOURTH DEPT))

NEGLIGENCE, AGENCY.

RESPONDEAT SUPERIOR DOCTRINE MAY BE APPLIED BASED UPON A PRINCIPAL-AGENT RELATIONSHIP INVOLVING VOLUNTEERS, HERE PLAINTIFF WAS INJURED BY A LADDER WHEN VOLUNTEERS WERE PAINTING THE BUILDING OWNED BY THE DEFENDANT, POINTING TO GAPS IN THE OPPOSING PARTY'S PROOF WILL NOT SUPPORT SUMMARY JUDGMENT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the fact that the people engaged by defendant to paint the property were volunteers did not preclude the application of the doctrine of respondeat superior based upon a principal-agent relationship. Plaintiff was injured by a ladder when she left the building. Defendants' motion for summary judgment should not have been granted. The court noted that pointing gaps in the opposing party's proof will not support summary judgment:

> "Under the doctrine of respondeat superior, a principal is liable for the negligent acts committed by its agent within the scope of the agency"... , and "[a] principal-agent relationship can include a volunteer when the requisite conditions, including control and acting on another's behalf, are shown" ... . Here, defendants each failed to establish as a matter of law that the volunteers at the residence where plaintiff was injured may not be considered their servants for purposes of respondeat superior liability ... , or that the duty to ensure that the work was performed safely may not fairly be imposed upon them ... .
>
> In addition, defendants cannot meet their burden on their respective summary judgment motions and cross motion based upon plaintiff's failure to identify the volunteer(s) who caused the ladder to strike her ... . "[I]n seeking summary judgment, [a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof' "... . Defendants' failure to meet their burden requires denial of the motions and cross motion, "regardless of the sufficiency of the opposing papers" ... . **Rozmus v Wesleyan Church of Hamburg, 2018 NY Slip Op 03261, Fourth Dept 5-4-18**

NEGLIGENCE (VICARIOUS LIABILITY, RESPONDEAT SUPERIOR DOCTRINE MAY BE APPLIED BASED UPON A PRINCIPAL-AGENT RELATIONSHIP INVOLVING VOLUNTEERS, HERE PLAINTIFF WAS INJURED BY A LADDER WHEN VOLUNTEERS WERE PAINTING THE BUILDING OWNED BY THE DEFENDANT (FOURTH DEPT))/RESPONDEAT SUPERIOR (NEGLIGENCE, VOLUNTEERS, RESPONDEAT SUPERIOR DOCTRINE MAY BE APPLIED BASED UPON A PRINCIPAL-AGENT RELATIONSHIP INVOLVING VOLUNTEERS, HERE PLAINTIFF WAS INJURED BY A LADDER WHEN VOLUNTEERS WERE PAINTING THE BUILDING OWNED BY THE DEFENDANT (FOURTH DEPT))/VICARIOUS LIABILITY (RESPONDEAT SUPERIOR DOCTRINE MAY BE APPLIED BASED UPON A PRINCIPAL-AGENT RELATIONSHIP INVOLVING VOLUNTEERS, HERE PLAINTIFF WAS INJURED BY A LADDER WHEN VOLUNTEERS WERE PAINTING THE BUILDING OWNED BY THE DEFENDANT (FOURTH DEPT))/AGENCY (NEGLIGENCE, RESPONDEAT SUPERIOR, VOLUNTEERS, RESPONDEAT SUPERIOR DOCTRINE MAY BE APPLIED BASED UPON A PRINCIPAL-AGENT RELATIONSHIP INVOLVING VOLUNTEERS, HERE PLAINTIFF WAS INJURED BY A LADDER WHEN VOLUNTEERS WERE PAINTING THE BUILDING OWNED BY THE DEFENDANT (FOURTH DEPT))/SUMMARY JUDGMENT (POINTING TO GAPS IN THE OPPOSING PARTY'S PROOF WILL NOT SUPPORT SUMMARY JUDGMENT (FOURTH DEPT))

NEGLIGENCE, APPEALS.

ALTHOUGH THE APPELLATE COURT TOOK JUDICIAL NOTICE OF A REGULATION ALLOWING CITY SANITATION TRUCKS TO DOUBLE PARK RAISED FOR THE FIRST TIME ON APPEAL, THERE WERE DISPUTED FACTS ABOUT WHETHER THE DOUBLE PARKED SANITATION TRUCK COULD HAVE BEEN PULLED TO THE CURB, THE CITY'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the defendant city was not entitled to summary judgment based upon the van in which the plaintiff was a passenger striking the rear of a sanitation truck that was double parked. On appeal the city cited a regulation which allows sanitation trucks to double park. The existence of the regulation was raised for the first time on appeal. Although the regulation could have been considered on appeal if it raised a pure question of law, disputed facts about the possibility that the truck could have moved over to the curb foreclosed an appellate ruling:

> While, as a matter of common sense, a City sanitation truck may under certain circumstances need to double park in order to perform its job of removing refuse, the City did not point to any regulation exempting sanitation trucks from City traffic rules, and therefore did not establish prima facie their lack of liability. On appeal, the City defendants bring to the Court's attention a City traffic regulation, applicable at the time of the accident, that excepts City refuse trucks from double parking rules under certain conditions, and we take judicial notice of that regulation ... . The regulation provides that the "operator of a refuse collection vehicle working on behalf of the City" is allowed to "temporarily stand on the roadway side of a vehicle parked at the curb, provided that no curb space is available within fifteen feet, while loading refuse . . ." ... .
>
> It is well-settled that "[w]here a party . . . raises [for the first time on appeal] a new legal argument which appeared upon the face of the record and which could not have been avoided . . . [s]o long as the issue is determinative and the record on appeal is sufficient to permit our review, [this Court may consider the argument]"... . Here, however, the City's argument that the regulation allowed their operator to double park is not a pure question of law, but depends on disputed facts in the record concerning whether there was a parking space available within fifteen feet of the pick up location. While the two sanitation employees assigned to the truck testified that there was no curb space available to park when they arrived, one of them acknowledged that a post-accident photograph, which is in the record, appears to show an open space between the double-parked truck and the curb. The testimony of one of the employees that it would have been unsafe to attempt to parallel park the truck under the existing traffic conditions also presents an issue of fact to be resolved by a fact-finder. We therefore decline to consider the City defendants' newly-raised argument for the first time on appeal ... . **Nadella v City of New York, 2018 NY Slip Op 03103, First Dept 5-1-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, ALTHOUGH THE APPELLATE COURT TOOK JUDICIAL NOTICE OF A REGULATION ALLOWING CITY SANITATION TRUCKS TO DOUBLE PARK RAISED FOR THE FIRST TIME ON APPEAL, THERE WERE DISPUTED FACTS ABOUT WHETHER THE DOUBLE PARKED SANITATION TRUCK COULD HAVE BEEN PULLED TO THE CURB, THE CITY'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/APPEALS (NEGLIGENCE, ALTHOUGH THE APPELLATE COURT TOOK JUDICIAL NOTICE OF A REGULATION ALLOWING CITY SANITATION TRUCKS TO DOUBLE PARK RAISED FOR THE FIRST TIME ON APPEAL, THERE WERE DISPUTED FACTS ABOUT WHETHER THE DOUBLE PARKED SANITATION TRUCK COULD HAVE BEEN PULLED TO THE CURB, THE CITY'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/TRAFFIC ACCIDENTS (ALTHOUGH THE APPELLATE COURT TOOK JUDICIAL NOTICE OF A REGULATION ALLOWING CITY SANITATION TRUCKS TO DOUBLE PARK RAISED FOR THE FIRST TIME ON APPEAL, THERE WERE DISPUTED FACTS ABOUT WHETHER THE DOUBLE PARKED SANITATION TRUCK COULD HAVE BEEN PULLED TO THE CURB, THE CITY'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/REAR END COLLISIONS (ACCIDENTS, ALTHOUGH THE APPELLATE COURT TOOK JUDICIAL NOTICE OF A REGULATION ALLOWING CITY SANITATION TRUCKS TO DOUBLE PARK RAISED FOR THE FIRST TIME ON APPEAL, THERE WERE DISPUTED FACTS ABOUT WHETHER THE DOUBLE PARKED SANITATION TRUCK COULD HAVE BEEN

PULLED TO THE CURB, THE CITY'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))

NEGLIGENCE, CIVIL PROCEDURE, INSURANCE LAW, ENVIRONMENTAL LAW.

GROSS NEGLIGENCE CAUSE OF ACTION AND DEMAND FOR PUNITIVE DAMAGES IN THIS OIL-CONTAMINATION-REMEDIATION ACTION SHOULD NOT HAVE BEEN DISMISSED, CAUSES OF ACTION IN AMENDED COMPLAINT RELATED BACK TO THE ALLEGATIONS IN THE ORIGINAL COMPLAINT AND WERE NOT TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiffs' gross negligence cause of action and demand for punitive damages should not have been dismissed. Plaintiffs alleged the defendant insurer (State Farm) and the defendant engineering firm (H2M) were grossly negligent in supervising the remediation of oil contamination on plaintiffs' property. The Second Department noted that the causes of action in the amended complaint related back to the allegations in the original complaint and were not, therefore time-barred:

> The Supreme Court should not have granted those branches of State Farm's and H2M's motions which were to dismiss the cause of action alleging gross negligence insofar as asserted against each of them. As the original complaint gave notice of the transactions or occurrences to be proven as to the gross negligence causes of action, those causes of action related back to the date of timely filing of the original complaint ... .
>
> The amended complaint stated a viable gross negligence cause of action as against State Farm and H2M. Gross negligence "differs in kind, not only degree, from claims of ordinary negligence" ... . "To constitute gross negligence, a party's conduct must smack[ ] of intentional wrongdoing' or evince[ ] a reckless indifference to the rights of others'"... .. Generally, the question of gross negligence is a matter to be determined by the trier of fact... .
>
> The allegations, inter alia, that State Farm and H2M greatly exacerbated the existing damage to the property by causing the spread of the existing contamination and by directing the backfilling of areas of the property after leaving in place significant existing contamination are sufficient to support a gross negligence cause of action ... . **Bennett v State Farm Fire & Cas. Co., 2018 NY Slip Op 03499, Second Dept 5-16-18**

NEGLIGENCE (GROSS NEGLIGENCE CAUSE OF ACTION AND DEMAND FOR PUNITIVE DAMAGES IN THIS OIL-CONTAMINATION-REMEDIATION ACTION SHOULD NOT HAVE BEEN DISMISSED, CAUSES OF ACTION IN AMENDED COMPLAINT RELATED BACK TO THE ALLEGATIONS IN THE ORIGINAL COMPLAINT AND WERE NOT TIME-BARRED (SECOND DEPT))/CIVIL PROCEDURE (RELATION BACK, GROSS NEGLIGENCE CAUSE OF ACTION AND DEMAND FOR PUNITIVE DAMAGES IN THIS OIL-CONTAMINATION-REMEDIATION ACTION SHOULD NOT HAVE BEEN DISMISSED, CAUSES OF ACTION IN AMENDED COMPLAINT RELATED BACK TO THE ALLEGATIONS IN THE ORIGINAL COMPLAINT AND WERE NOT TIME-BARRED (SECOND DEPT))/INSURANCE LAW (GROSS NEGLIGENCE CAUSE OF ACTION AND DEMAND FOR PUNITIVE DAMAGES IN THIS OIL-CONTAMINATION-REMEDIATION ACTION SHOULD NOT HAVE BEEN DISMISSED, CAUSES OF ACTION IN AMENDED COMPLAINT RELATED BACK TO THE ALLEGATIONS IN THE ORIGINAL COMPLAINT AND WERE NOT TIME-BARRED (SECOND DEPT))/ENVIRONMENTAL LAW (GROSS NEGLIGENCE CAUSE OF ACTION AND DEMAND FOR PUNITIVE DAMAGES IN THIS OIL-CONTAMINATION-REMEDIATION ACTION SHOULD NOT HAVE BEEN DISMISSED, CAUSES OF ACTION IN AMENDED COMPLAINT RELATED BACK TO THE ALLEGATIONS IN THE ORIGINAL COMPLAINT AND WERE NOT TIME-BARRED (SECOND DEPT))/RELATION BACK (AMENDED COMPLAINT, GROSS NEGLIGENCE CAUSE OF ACTION AND DEMAND FOR PUNITIVE DAMAGES IN THIS OIL-CONTAMINATION-REMEDIATION ACTION SHOULD NOT HAVE BEEN DISMISSED, CAUSES OF ACTION IN AMENDED COMPLAINT RELATED BACK TO THE ALLEGATIONS IN THE ORIGINAL COMPLAINT AND WERE NOT TIME-BARRED (SECOND DEPT))

NEGLIGENCE, CRIMINAL LAW.

DEFENDANT WHO ALLOWED 16-YEAR-OLD NEIGHBOR TO WATCH PLAINTIFF'S FIVE-YEAR-OLD DAUGHTER WAS NOT LIABLE FOR THE MURDER OF PLAINTIFF'S DAUGHTER BY THE NEIGHBOR, THE CRIMINAL ACT SEVERED THE LIABILITY OF THE DEFENDANT, NEIGHBOR HAD WATCHED THE CHILD BEFORE WITHOUT INCIDENT, NO RED FLAGS (FOURTH DEPT).

The Fourth Department determined defendant great-grandmother's motion for summary judgment in this negligent supervision action was properly granted. Defendant was care for plaintiff's five-year-old daughter, Isabella. When defendant went to bed she left Isabella with 16-year old Freeman, a neighbor who had watched Isabella more than 10 times in the past without incident. Freeman killed plaintiff's daughter while defendant was asleep:

> It is well established that " an intervening intentional or criminal act will generally sever the liability of the original tort-feasor' " ... . "The test to be applied is whether under all the circumstances the chain of events that followed [an allegedly] negligent act or omission was a normal or foreseeable consequence of the situation created by the [alleged] negligence" ... . Thus, an intervening criminal act by a third party that is " extraordinary under the circumstances' " or " not foreseeable in the normal course of events' " breaks the causal chain and exonerates the original tortfeasor of liability ... .
>
> Here, even assuming, arguendo, that defendant was negligent to some extent in supervising Isabella on the night in question, we nevertheless conclude, as a matter of law, that Freeman's intentional murder of Isabella severed the chain of causation and eliminated any liability on defendant's part (see id.). The record contains numerous undisputed facts supporting that conclusion. Freeman had previously watched Isabella on more than 10 occasions, all without incident, and they had even colored together before. Freeman and Isabella got along well for years before the murder, and defendant never observed any "red flags" or troubling indicia about Freeman generally, or his interactions with Isabella in particular. Defendant was unaware of any mental problems with Freeman. Indeed, there is no suggestion that Freeman had ever exhibited any questionable behavior or tendencies in the past, whether or not known to defendant. **Tennant v Lascelle, 2018 NY Slip Op 03279, Fourth Dept 5-4-18**

NEGLIGENCE (NEGLIGENT SUPERVISION, DEFENDANT WHO ALLOWED 16-YEAR-OLD NEIGHBOR TO WATCH PLAINTIFF'S FIVE-YEAR-OLD DAUGHTER WAS NOT LIABLE FOR THE MURDER OF PLAINTIFF'S DAUGHTER BY THE NEIGHBOR, THE CRIMINAL ACT SEVERED THE LIABILITY OF THE DEFENDANT, NEIGHBOR HAD WATCH EDTHE CHILD BEFORE WITHOUT INCIDENT, NO RED FLAGS (FOURTH DEPT))/NEGLIGENT SUPERVISION (DEFENDANT WHO ALLOWED 16-YEAR-OLD NEIGHBOR TO WATCH PLAINTIFF'S FIVE-YEAR-OLD DAUGHTER WAS NOT LIABLE FOR THE MURDER OF PLAINTIFF'S DAUGHTER BY THE NEIGHBOR, THE CRIMINAL ACT SEVERED THE LIABILITY OF THE DEFENDANT, NEIGHBOR HAD WATCH EDTHE CHILD BEFORE WITHOUT INCIDENT, NO RED FLAGS (FOURTH DEPT))/CRIMINAL ACT (NEGLIGENCE, SEVERS LIABILITY, DEFENDANT WHO ALLOWED 16-YEAR-OLD NEIGHBOR TO WATCH PLAINTIFF'S FIVE-YEAR-OLD DAUGHTER WAS NOT LIABLE FOR THE MURDER OF PLAINTIFF'S DAUGHTER BY THE NEIGHBOR, THE CRIMINAL ACT SEVERED THE LIABILITY OF THE DEFENDANT, NEIGHBOR HAD WATCH EDTHE CHILD BEFORE WITHOUT INCIDENT, NO RED FLAGS (FOURTH DEPT))

NEGLIGENCE, EVIDENCE.

ALTHOUGH DEFENDANT DID NOT, UNDER THE ADMINISTRATIVE CODE, HAVE A DUTY TO REMOVE ICE AND SNOW FROM THE AREA OF THE SLIP AND FALL, SINCE DEFENDANT UNDERTOOK TO DO SO IT MUST DEMONSTRATE IT DID NOT CREATE OR EXACERBATE THE DANGEROUS CONDITION TO BE ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT).

The First Department determined defendant's motion for summary judgment in this ice and snow slip and fall case was properly denied. Although the defendant, under the administrative code of NYC, did not have a duty to remove ice and snow from the site of the fall, it did undertake to do so. Therefore, to be entitled to summary judgment, the defendant must present proof it did not create or exacerbate the dangerous condition:

> ... [Defendant] failed to demonstrate, as a matter of law, that it did not cause, create, or exacerbate the icy condition after it undertook to clean the sidewalk during the winter storm. Neither the testimony of the property's caretaker nor the affidavit of the supervisor of caretakers's indicates that they inspected the location before the accident and saw that it was properly treated with salt or sand ... . **Maynard-Keeler v New York City Hous. Auth., 2018 NY Slip Op 03322, First Dept 5-8-18**

NEGLIGENCE (SLIP AND FALL, ALTHOUGH DEFENDANT DID NOT, UNDER THE ADMINISTRATIVE CODE, HAVE A DUTY TO REMOVE ICE AND SNOW FROM THE AREA OF THE SLIP AND FALL, SINCE DEFENDANT UNDERTOOK TO DO SO IT MUST DEMONSTRATE IT DID NOT CREATE OR EXACERBATE THE DANGEROUS CONDITION TO BE ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT))/SLIP AND FALL (ALTHOUGH DEFENDANT DID NOT, UNDER THE ADMINISTRATIVE CODE, HAVE A DUTY TO REMOVE ICE AND SNOW FROM THE AREA OF THE SLIP AND FALL, SINCE DEFENDANT UNDERTOOK TO DO SO IT MUST DEMONSTRATE IT DID NOT CREATE OR EXACERBATE THE DANGEROUS CONDITION TO BE ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT))/EVIDENCE (SLIP AND FALL, ICE AND SNOW, ALTHOUGH DEFENDANT DID NOT, UNDER THE ADMINISTRATIVE CODE, HAVE A DUTY TO REMOVE ICE AND SNOW FROM THE AREA OF THE SLIP AND FALL, SINCE DEFENDANT UNDERTOOK TO DO SO IT MUST DEMONSTRATE IT DID NOT CREATE OR EXACERBATE THE DANGEROUS CONDITION TO BE ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT))/ICE AND SNOW (SLIP AND FALL, ALTHOUGH DEFENDANT DID NOT, UNDER THE ADMINISTRATIVE CODE, HAVE A DUTY TO REMOVE ICE AND SNOW FROM THE AREA OF THE SLIP AND FALL, SINCE DEFENDANT UNDERTOOK TO DO SO IT MUST DEMONSTRATE IT DID NOT CREATE OR EXACERBATE THE DANGEROUS CONDITION TO BE ENTITLED TO SUMMARY JUDGMENT (FIRST DEPT))

NEGLIGENCE, EVIDENCE.

DEFENDANT DRIVER ADMITTED IN THE ACCIDENT REPORT HE WAS AWARE THE ROADS WERE WET AND SLIPPERY AT THE TIME THE DEFENDANT'S BUS SKIDDED INTO PLAINTIFF'S BUS AFTER HITTING A PUDDLE, PLAINTIFF ALLEGED DEFENDANT DRIVER WAS GOING TOO FAST FOR CONDITIONS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, DESPITE DEFENDANT'S DENIAL OF HIS ADMISSION IN HIS AFFIDAVIT OPPOSING THE MOTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this traffic accident case should have been granted. The plaintiff's affidavit and the accident report indicated that, after traveling through a puddle of water, the defendant's bus slid, hit a wall and then rolled into the middle lane, striking plaintiff's bus. The complaint alleged the driver of defendant's bus was travelling too fast for the conditions. The court noted that a plaintiff no longer needs to demonstrate the absence of comparative negligence to be awarded summary judgment on liability. The court rejected the emergency defense because defendant driver had acknowledged in the accident report he was aware the roads were wet and slippery. The court further found that the defendant's affidavit, in which he stated he did not observe any wet or slippery conditions before the accident ,"appears to have been submitted to avoid the consequences of his prior admission . . . and, thus, is insufficient to defeat plaintiff's motion for partial summary judgment:

> ... [P]laintiff submitted an affidavit in which he swore that the road was wet and slippery, that puddles had formed, and that the driver of defendants' bus was traveling at too fast a rate of speed under these circumstances, lost control, and struck plaintiff's bus in the neighboring lane. In defendants' accident report, relied on by plaintiff before the motion court and by defendants in their appellate brief, the driver of defendants' bus stated that, as he drove over a puddle of water, the back wheels "beg[a]n to slide and the bus hit the wall and rolled into the middle lane," striking plaintiff's bus. Together, plaintiff's affidavit, and defendants' accident report, the authenticity and accuracy of which are not disputed, established plaintiff's prima facie entitlement to judgment as a matter of law on the issue of liability ... .
>
> In opposition, defendants failed to raise a triable issue of fact. Defendant driver submitted an affidavit in which he claimed that he was operating his bus at a reasonable speed "considering the conditions then existing." At the same time, he did not deny that the roads were wet and slippery, but claimed that he did not "observe any accumulation of water or other slippery roadway condition," even though in his accident report he admitted to having driven over a puddle. **Martinez v WE Transp. Inc., 2018 NY Slip Op 03311, First Dept 5-8-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, DEFENDANT DRIVER ADMITTED IN THE ACCIDENT REPORT HE WAS AWARE THE ROADS WERE WET AND SLIPPERY AT THE TIME THE DEFENDANT'S BUS SKIDDED INTO PLAINTIFF'S BUS AFTER HITTING A PUDDLE, PLAINTIFF ALLEGED DEFENDANT DRIVER WAS GOING TOO FAST FOR CONDITIONS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, DESPITE DEFENDANT'S DENIAL OF HIS ADMISSION IN HIS AFFIDAVIT OPPOSING THE MOTION (FIRST DEPT))/TRAFFIC ACCIDENTS DEFENDANT DRIVER ADMITTED IN THE ACCIDENT REPORT HE WAS AWARE THE ROADS WERE WET AND SLIPPERY AT THE TIME THE DEFENDANT'S BUS SKIDDED INTO PLAINTIFF'S BUS AFTER HITTING A PUDDLE, PLAINTIFF ALLEGED DEFENDANT DRIVER WAS GOING TOO FAST FOR CONDITIONS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, DESPITE DEFENDANT'S DENIAL OF HIS ADMISSION IN HIS AFFIDAVIT OPPOSING THE MOTION (FIRST DEPT))/EVIDENCE (TRAFFIC ACCIDENTS, SUMMARY JUDGMENT, DEFENDANT DRIVER ADMITTED IN THE ACCIDENT REPORT HE WAS AWARE THE ROADS WERE WET AND SLIPPERY AT THE TIME THE DEFENDANT'S BUS SKIDDED INTO PLAINTIFF'S BUS AFTER HITTING A PUDDLE, PLAINTIFF ALLEGED DEFENDANT DRIVER WAS GOING TOO FAST FOR CONDITIONS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, DESPITE DEFENDANT'S DENIAL OF HIS ADMISSION IN HIS AFFIDAVIT OPPOSING THE MOTION (FIRST DEPT))/SUMMARY JUDGMENT (EVIDENCE, TRAFFIC ACCIDENTS, DEFENDANT DRIVER ADMITTED IN THE ACCIDENT REPORT HE WAS AWARE THE ROADS WERE WET AND SLIPPERY AT THE TIME THE DEFENDANT'S BUS SKIDDED INTO PLAINTIFF'S BUS AFTER HITTING A PUDDLE, PLAINTIFF ALLEGED DEFENDANT DRIVER WAS GOING TOO FAST FOR CONDITIONS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, DESPITE DEFENDANT'S DENIAL OF HIS ADMISSION IN HIS AFFIDAVIT OPPOSING THE MOTION (FIRST DEPT))/ACCIDENT REPORTS (TRAFFIC ACCIDENTS, DEFENDANT DRIVER ADMITTED IN THE ACCIDENT REPORT HE WAS AWARE THE ROADS WERE WET AND SLIPPERY AT THE TIME THE DEFENDANT'S BUS SKIDDED INTO PLAINTIFF'S BUS

AFTER HITTING A PUDDLE, PLAINTIFF ALLEGED DEFENDANT DRIVER WAS GOING TOO FAST FOR CONDITIONS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, DESPITE DEFENDANT'S DENIAL OF HIS ADMISSION IN HIS AFFIDAVIT OPPOSING THE MOTION (FIRST DEPT))

NEGLIGENCE, EVIDENCE.

RES IPSA LOQUITUR DOCTRINE APPLIES IN THIS ELEVATOR-DOOR INJURY CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that the defendant's motion for summary judgment in this elevator-door injury case should not have been granted. The doctrine of res ipsa loquitur applied and the plaintiff presented evidence the elevators doors had been malfunctioning for months;

> ... [P]laintiff was injured when the elevator door in defendant's building unexpectedly closed on him as he attempted to enter the elevator. Contrary to the finding of the motion court, the evidentiary doctrine of res ipsa loquitur is applicable under the circumstances presented since plaintiff testified that the elevator door, which was closed by electronic sensors and did not have rubber safety bumpers, suddenly and unexpectedly closed ... .
>
> In addition, plaintiff testified that the elevator door was malfunctioning for several months and proferred an affidavit by a tenant who averred to the elevator doors malfunctioning. This is sufficient evidence of constructive notice to defeat defendant's showing that the elevator was regularly maintained ... . **Lilly v City of New York, 2018 NY Slip Op 03314, First Dept 5-8-18**

NEGLIGENCE (ELEVATORS, RES IPSA LOQUITUR DOCTRINE APPLIES IN THIS ELEVATOR-DOOR INJURY CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/ELEVATORS (NEGLIGENCE, RES IPSA LOQUITUR DOCTRINE APPLIES IN THIS ELEVATOR-DOOR INJURY CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))/RES IPSA LOQUITUR (NEGLIGENCE, ELEVATORS, RES IPSA LOQUITUR DOCTRINE APPLIES IN THIS ELEVATOR-DOOR INJURY CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT))

NEGLIGENCE, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department determined the out-of-possession landlord (Bagga) was properly granted summary judgment in this slip and fall case:

> The plaintiff commenced this action to recover damages for personal injuries she allegedly sustained when she tripped and fell at the entrance of a grocery store operated by the defendant 63-28 99th St. Farm Ltd., located on premises owned by the defendant Dasshan S. Bagga. ...
>
> "An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct'" ... . Here, where the complaint sounds in common-law negligence and the plaintiff does not allege the violation of a statute, Bagga demonstrated his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him by establishing that he was an out-of-possession landlord who was not bound by contract or course of conduct to maintain the premises... . The mere reservation of a right to reenter the premises to make repairs does not impose an obligation on the landlord to maintain the premises ... . **Fuzaylova v 63-28 99th St. Farm Ltd., 2018 NY Slip Op 03506, Second Dept 5-16-18**

NEGLIGENCE (LANDLORD-TENANT, SLIP AND FALL, OUT-OF-POSSESSION LANDLORD ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (SECOND DEPT))/LANDLORD-TENANT (SLIP AND FALL, OUT-OF-POSSESSION LANDLORD ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (SECOND DEPT))/OUT-OF-POSSESSION LANDLORD (SLIP AND FALL, OUT-OF-POSSESSION LANDLORD ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (SECOND DEPT))/SLIP AND FALL (LANDLORD-TENANT, OUT-OF-POSSESSION LANDLORD ENTITLED TO SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE (SECOND DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE.

PLAINTIFFS' EXPERT DID NOT SPECIALIZE IN THE RELEVANT AREA OF MEDICINE, HIS AFFIDAVIT THEREFORE DID NOT RAISE A QUESTION OF FACT, THERE WAS A QUESTION OF FACT WHETHER THE EMERGENCY EXCEPTION APPLIED TO THE GENERAL RULE A HOSPITAL IS NOT LIABLE FOR THE TREATMENT PROVIDED BY PRIVATE ATTENDING PHYSICIANS (SECOND DEPT).

The Second Department, modifying Supreme Court, determined (1) the plaintiff's expert did not raise a question of fact about the quality of care provided by two of the defendants because he did not specialize in emergency medicine and didn't indicate he had familiarized himself with the standard of care in that specialty, and (2) there was a question of fact whether the emergency exception applied to the general rule that a hospital is not vicariously liable for the treatment provided by private attending physicians:

> " ... [W]here a physician opines outside his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered" ... . Here, the plaintiffs' expert, who was board-certified in internal medicine and infectious disease, did not indicate in his affirmation that he had training in emergency medicine, or what, if anything, he did to familiarize himself with the standard of care for this specialty. ...
>
> "As a general rule, a hospital is not vicariously liable for the malpractice of a private attending physician who is not its employee" ... . However, "an exception to the general rule exists where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing" ... . Here, the hospital established its prima facie entitlement to judgment as a matter of law by its submission of the deposition testimony of the doctors and physician's assistant involved in the plaintiff's care, which indicated that they were not employees of the hospital ... .
>
> In opposition, however, the plaintiffs raised a triable issue of fact as to whether the hospital could be held vicariously liable for the medical malpractice of the individuals involved in the plaintiff's care as independent contractors, based upon the emergency room exception ... . **Galluccio v Grossman, 2018 NY Slip Op 03664, Second Dept 5-23-18**

NEGLIGENCE (MEDICAL MALPRACTICE, PLAINTIFFS' EXPERT DID NOT SPECIALIZE IN THE RELEVANT AREA OF MEDICINE, HIS AFFIDAVIT THEREFORE DID NOT RAISE A QUESTION OF FACT, THERE WAS QUESTION OF FACT WHETHER THE EMERGENCY EXCEPTION APPLIED TO THE GENERAL RULE A HOSPITAL IS NOT LIABLE FOR THE TREATMENT PROVIDED BY PRIVATE ATTENDING PHYSICIANS (SECOND DEPT))/MEDICAL MALPRACTICE (PLAINTIFFS' EXPERT DID NOT SPECIALIZE IN THE RELEVANT AREA OF MEDICINE, HIS AFFIDAVIT THEREFORE DID NOT RAISE A QUESTION OF FACT, THERE WAS QUESTION OF FACT WHETHER THE EMERGENCY EXCEPTION APPLIED TO THE GENERAL RULE A HOSPITAL IS NOT LIABLE FOR THE TREATMENT PROVIDED BY PRIVATE ATTENDING PHYSICIANS (SECOND DEPT))/EXPERT OPINION (MEDICAL MALPRACTICE, PLAINTIFFS' EXPERT DID NOT SPECIALIZE IN THE RELEVANT AREA OF MEDICINE, HIS AFFIDAVIT THEREFORE DID NOT RAISE A QUESTION OF FACT, THERE WAS QUESTION OF FACT WHETHER THE EMERGENCY EXCEPTION APPLIED TO THE GENERAL RULE A HOSPITAL IS NOT LIABLE FOR THE TREATMENT PROVIDED BY PRIVATE ATTENDING PHYSICIANS (SECOND DEPT))/EMERGENCY EXCEPTION (MEDICAL MALPRACTICE, PLAINTIFFS' EXPERT DID NOT SPECIALIZE IN THE RELEVANT AREA OF MEDICINE, HIS AFFIDAVIT THEREFORE DID NOT RAISE A QUESTION OF FACT, THERE WAS QUESTION OF FACT WHETHER THE EMERGENCY EXCEPTION APPLIED TO THE GENERAL RULE A HOSPITAL IS NOT LIABLE FOR THE TREATMENT PROVIDED BY PRIVATE ATTENDING PHYSICIANS (SECOND DEPT))/HOSPITAL (MEDICAL MALPRACTICE, EMERGENCY EXCEPTION, PLAINTIFFS' EXPERT DID NOT SPECIALIZE IN THE RELEVANT AREA OF MEDICINE, HIS AFFIDAVIT THEREFORE DID NOT RAISE A QUESTION OF FACT, THERE WAS QUESTION OF FACT WHETHER THE EMERGENCY EXCEPTION APPLIED TO THE GENERAL RULE A HOSPITAL IS NOT LIABLE FOR THE TREATMENT PROVIDED BY PRIVATE ATTENDING PHYSICIANS (SECOND DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE, EVIDENCE.

MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW 6527 (FOURTH DEPT).

The Fourth Department determined a power point presentation made by a defendant in a medical malpractice action was discoverable, even though the power point presentation was created for a quality assurance review meeting (usually off limits for discovery pursuant to Executive Law 6527):

> We ... conclude that the disputed materials are discoverable under the exception to the privilege for "statements made by any person in attendance at . . . a [medical or quality assurance review] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting" (Education Law § 6527 [3]). Disclosure under that exception may be obtained where: (1) the statements were made during a quality assurance review meeting; (2) that review meeting concerned the same subject matter as the malpractice action; and (3) the statements were made by a defendant in the action ... . "Statements" include written statements, such as letters... , and the PowerPoint slide show at issue here. **Drum v Collure, 2018 NY Slip Op 03244, Fourth Dept 5-4-18**

NEGLIGENCE (MEDICAL MALPRACTICE, MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW 6527 (FOURTH DEPT))/MEDICAL MALPRACTICE (EDUCATION LAW, MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW 6527 (FOURTH DEPT))/EDUCATION LAW (MEDICAL MALPRACTICE, MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW 6527 (FOURTH DEPT))/EVIDENCE (MEDICAL MALPRACTICE, EDUCATION LAW, MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW 6527 (FOURTH DEPT))/HOSPITALS (QUALITY ASSURANCE REVIEW, MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW 6527 (FOURTH DEPT))/QUALITY ASSURANCE REVIEW (HOSPITALS, MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW 6527 (FOURTH DEPT))/CIVIL PROCEDURE (MEDICAL MALPRACTICE, DISCOVERY, EDUCATION LAW, QUALITY ASSURANCE REVIEW, MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW 6527 (FOURTH DEPT))/DISCOVERY (MEDICAL MALPRACTICE, EDUCATION LAW, MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW 6527 (FOURTH DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFF SUFFERED AN EYE INJURY AT SOME POINT IN HIP REPLACEMENT SURGERY OR IN THE RECOVERY ROOM AND SUED SEVERAL DEFENDANTS RELYING ON THE RES IPSA LOQUITUR DOCTRINE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THAT ASPECT OF PLAINTIFF'S CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment should have been granted to the extent plaintiff relied on the doctrine of res ipsa loquitur. Plaintiff, who underwent hip replacement surgery, suffered an eye injury either in the operating room or the recovery room:

> Plaintiff commenced this medical malpractice action seeking damages for injuries he sustained to his left eye during hip replacement surgery performed at defendant St. Joseph's Hospital (Hospital). Defendants Brett Greenky, M.D. and Syracuse Orthopedic Specialists, P.C. (SOS) were retained by plaintiff to perform the surgery, and defendants Mehtab Singh Bajwa, M.D., Tracie O'Shea, C.R.N.A., and the Anesthesia Group of Onondaga, P.C. (collectively, anesthesia defendants) were responsible for, inter alia, administering the anesthesia to plaintiff prior to the surgery. * * *
>
> "Ordinarily, a plaintiff asserting a medical malpractice claim must demonstrate that the doctor deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury"... . "Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it" ... ."In a multiple defendant action in which a plaintiff relies on the theory of res ipsa loquitur, a plaintiff is not required to identify the negligent actor . . . That rule is particularly appropriate in a medical malpractice case such as this in which the plaintiff has been anesthetized" ... . Here, plaintiff was under the care and control of Greenky, SOS and the anesthesia defendants during the surgery, and the Hospital immediately after the surgery. During that time, plaintiff was either under anesthesia and/or not fully awake or oriented to his surroundings. While O'Shea testified that there was no indication of an eye injury when she delivered plaintiff to the recovery room, hospital staff testified that plaintiff's eye was noticeably irritated at that time. Consequently, there is an issue of fact whether plaintiff sustained the eye injury in the operating room or in the recovery room. " Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment . . . [, and] it is manifestly unreasonable for [the defendants] to insist that [he] identify any one of them as the person who did the alleged negligent act' " ... . **White v Bajwa, 2018 NY Slip Op 03246, Fourth Dept 5-4-18**

NEGLIGENCE (MEDICAL MALPRACTICE, PLAINTIFF SUFFERED AN EYE INJURY AT SOME POINT IN HIP REPLACEMENT SURGERY OR IN THE RECOVERY ROOM AND SUED SEVERAL DEFENDANTS RELYING ON THE RES IPSA LOQUITUR DOCTRINE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THAT ASPECT OF PLAINTIFF'S CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/MEDICAL MALPRACTICE (RES IPSA LOQUITUR, PLAINTIFF SUFFERED AN EYE INJURY AT SOME POINT IN HIP REPLACEMENT SURGERY OR IN THE RECOVERY ROOM AND SUED SEVERAL DEFENDANTS RELYING ON THE RES IPSA LOQUITUR DOCTRINE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THAT ASPECT OF PLAINTIFF'S CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/EVIDENCE (MEDICAL MALPRACTICE, RES IPSA LOQUITUR, PLAINTIFF SUFFERED AN EYE INJURY AT SOME POINT IN HIP REPLACEMENT SURGERY OR IN THE RECOVERY ROOM AND SUED SEVERAL DEFENDANTS RELYING ON THE RES IPSA LOQUITUR DOCTRINE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THAT ASPECT OF PLAINTIFF'S CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))/RES IPSA LOQUITUR (MEDICAL MALPRACTICE, PLAINTIFF SUFFERED AN EYE INJURY AT SOME POINT IN HIP REPLACEMENT SURGERY OR IN THE RECOVERY ROOM AND SUED SEVERAL DEFENDANTS RELYING ON THE RES IPSA LOQUITUR DOCTRINE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THAT ASPECT OF PLAINTIFF'S CASE SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, MEDICAL MALPRACTICE.

RESIDENT PHYSICIANS DID NOT EXERCISE INDEPENDENT JUDGMENT AND WERE NOT REQUIRED TO INTERVENE IN THE TREATMENT BY THE ATTENDING PHYSICIAN, THE RESIDENTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined the defendant resident physicians' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's bowel was perforated during an emergency caesrean section. The residents did not exercise any independent judgment during the surgery and were not required to intervene in the treatment by the attending physician (Dr. Balaya):

> Dr. Bayala's affidavit also addressed the care provided by the three resident physicians. Dr. Balaya averred that the resident physicians were all under his supervision and direction and, thus, they never exercised independent judgment or made an independent decision with respect to plaintiff's care or treatment ... . In addition, Dr. Balaya averred that none of the resident physicians could be held liable for failure to intervene in plaintiff's care and treatment on the ground that his alleged deviations from normal medical practice were so great that such intervention was warranted ... .
>
> Plaintiffs' submissions in opposition to the motion failed to raise an issue of fact whether any of the resident physicians exercised independent medical judgment in plaintiff's care or treatment, or neglected to intervene in plaintiff's care or treatment where the attending physician's directions greatly deviated from normal medical practice ... . **Groff v Kaleida Health, 2018 NY Slip Op 03249, Fourth Dept 5-4-18**

NEGLIGENCE (RESIDENT PHYSICIANS DID NOT EXERCISE INDEPENDENT JUDGMENT AND WERE NOT REQUIRED TO INTERVENE IN THE TREATMENT BY THE ATTENDING PHYSICIAN, THE RESIDENTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/MEDICAL MALPRACTICE (RESIDENT PHYSICIANS DID NOT EXERCISE INDEPENDENT JUDGMENT AND WERE NOT REQUIRED TO INTERVENE IN THE TREATMENT BY THE ATTENDING PHYSICIAN, THE RESIDENTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/RESIDENT PHYSICIANS (MEDICAL MALPRACTICE, RESIDENT PHYSICIANS DID NOT EXERCISE INDEPENDENT JUDGMENT AND WERE NOT REQUIRED TO INTERVENE IN THE TREATMENT BY THE ATTENDING PHYSICIAN, THE RESIDENTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, MUNICIPAL LAW.

ABUTTING PROPERTY OWNER ENTITLED TO SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE, ALTHOUGH THE LOCAL CODE REQUIRED THE PROPERTY OWNER TO KEEP SIDEWALKS IN GOOD REPAIR, IT DID NOT IMPOSE TORT LIABILITY ON THE PROPERTY OWNER (SECOND DEPT).

The Second Department determined the defendant abutting property owner's motion for summary judgment in this sidewalk slip and fall case was properly granted. The property owner proved it did not create the sidewalk defect and the local code which required abutting property owners to keep sidewalks in good repair did not explicitly impose tort liability on the property owner:

> "Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous [or] defective conditions to public sidewalks is placed on the municipality and not the abutting landowner" ... . "An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty" ... .
>
> Here, Water View established, prima facie, that it did not create the alleged condition or cause the condition through a special use of the sidewalk. Additionally, although ... the Code of the Village of Freeport requires an abutting landowner to keep a sidewalk in good and safe repair, it does not specifically impose tort liability for a breach of that duty ... . **Bousquet v Water View Realty Corp., 2018 NY Slip Op 03119, Second Dept 5-2-18**

NEGLIGENCE (SLIP AND FALL, SIDEWALKS, ABUTTING PROPERTY OWNER ENTITLED TO SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE, ALTHOUGH THE LOCAL CODE REQUIRED THE PROPERTY OWNER TO KEEP SIDEWALKS IN GOOD REPAIR, IT Did NOT IMPOSE TORT LIABILITY ON THE PROPERTY OWNER (SECOND DEPT))/MUNICIPAL LAW (SLIP AND FALL, SIDEWALKS, ABUTTING PROPERTY OWNER ENTITLED TO SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE, ALTHOUGH THE LOCAL CODE REQUIRED THE PROPERTY OWNER TO KEEP SIDEWALKS IN GOOD REPAIR, IT Did NOT IMPOSE TORT LIABILITY ON THE PROPERTY OWNER (SECOND DEPT))/SIDEWALKS (SLIP AND FALL, ABUTTING PROPERTY OWNER ENTITLED TO SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE, ALTHOUGH THE LOCAL CODE REQUIRED THE PROPERTY OWNER TO KEEP SIDEWALKS IN GOOD REPAIR, IT Did NOT IMPOSE TORT LIABILITY ON THE PROPERTY OWNER (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

ALTHOUGH THE VILLAGE DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE ICE AND SNOW CONDITION IN THE AREA WHERE PLAINTIFF FELL, IT FAILED TO DEMONSTRATE IT DID NOT CREATE THE CONDITION BY PILING SNOW IN THE AREA, VILLAGE'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT).

The Second Department determined the defendant village's motion for summary judgment in this parking lot ice and snow slip and fall case was properly denied. The village demonstrated that it did not have written notice of the dangerous condition, but did not demonstrate it did not created the dangerous condition, which plaintiff alleged resulted from the piling of snow in the area:

> In the complaint and bill of particulars, the plaintiffs alleged that the Village created the ice condition on which Seegers fell by plowing snow into large piles directly adjacent to parking areas and walkways, thereby blocking drains and allowing the snow to thaw and refreeze, and by failing to properly salt or sand the area ... . Accordingly, the Village was required to demonstrate both that it did not have prior written notice of the ice condition in the subject parking lot and that it did not create that condition... .
>
> Although the Village demonstrated that it did not receive written notice of an ice condition in the subject parking lot prior to the accident, it failed to demonstrate, prima facie, that it did not create the ice condition that allegedly caused Seegers to fall ... . **Seegers v Village of Mineola, 2018 NY Slip Op 03387, Second Dept 5-9-18**

NEGLIGENCE (SLIP AND FALL, MUNICIPAL LAW, ALTHOUGH THE VILLAGE DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE ICE AND SNOW CONDITION IN THE AREA WHERE PLAINTIFF FELL, IT DID NOT DEMONSTRATE IT DID NOT CREATE THE CONDITION BY PILING SNOW IN THE AREA, VILLAGE'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, SLIP AND FALL, ALTHOUGH THE VILLAGE DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE ICE AND SNOW CONDITION IN THE AREA WHERE PLAINTIFF FELL, IT DID NOT DEMONSTRATE IT DID NOT CREATE THE CONDITION BY PILING SNOW IN THE AREA, VILLAGE'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))/SLIP AND FALL (MUNICIPAL LAW, ALTHOUGH THE VILLAGE DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE ICE AND SNOW CONDITION IN THE AREA WHERE PLAINTIFF FELL, IT DID NOT DEMONSTRATE IT DID NOT CREATE THE CONDITION BY PILING SNOW IN THE AREA, VILLAGE'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

ACCIDENT REPORT DID NOT ALERT CITY TO THE ESSENTIAL ELEMENTS OF THE CLAIM IN THIS FIRE TRUCK TRAFFIC ACCIDENT CASE, AND THE EXCUSE FOR THE DELAY IN SEEKING TO FILE A LATE NOTICE OF CLAIM, LAW OFFICE FAILURE, WAS INSUFFICIENT, PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (SECOND DEPT).

The Second Department determined the petition for leave to file a late notice of claim in this fire truck traffic accident case was properly denied. The accident report did not alert the city to the essential facts of the action, the motion was not timely made, and the excuse, law office failure, was insufficient:

> The police accident report and the letter from petitioner's counsel ... were inadequate to provide the City with actual knowledge of the facts constituting the claim against it. These documents failed to alert the City to the petitioner's claim that she had been seriously injured as a result of the motor vehicle accident ... . Furthermore, the notice of claim, served upon the City almost 2 months after the 90-day statutory period had expired, was served too late to provide the City with actual knowledge of the essential facts constituting the claim within a reasonable time after the 90-day statutory period had expired ... .
>
> The petitioner's delay in serving the notice of claim upon the City was the result of law office failure, which is not a sufficient excuse ... . The petitioner proffered no excuse for the delay between the time the City disallowed the claim and the commencement of this proceeding ... . In addition, the petitioner presented no "evidence or plausible argument" that her delay in serving a notice of claim did not substantially prejudice the City in defending against the petitioner's claim on the merits ... . **Matter of Naar v City of New York, 2018 NY Slip Op 03683, Second Dept 5-23-18**

NEGLIGENCE (MUNICIPAL LAW, NOTICE OF CLAIM, ACCIDENT REPORT DID NOT ALERT CITY TO THE ESSENTIAL ELEMENTS OF THE CLAIM IN THIS FIRE TRUCK TRAFFIC ACCIDENT CASE, AND THE EXCUSE FOR THE DELAY IN SEEKING TO FILE A LATE NOTICE OF CLAIM, LAW OFFICE FAILURE, WAS INSUFFICIENT, PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (SECOND DEPT))/MUNICIPAL LAW (NEGLIGENCE, NOTICE OF CLAIM, ACCIDENT REPORT DID NOT ALERT CITY TO THE ESSENTIAL ELEMENTS OF THE CLAIM IN THIS FIRE TRUCK TRAFFIC ACCIDENT CASE, AND THE EXCUSE FOR THE DELAY IN SEEKING TO FILE A LATE NOTICE OF CLAIM, LAW OFFICE FAILURE, WAS INSUFFICIENT, PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (SECOND DEPT))/NOTICE OF CLAIM (MUNICIPAL LAW, NEGLIGENCE, ACCIDENT REPORT DID NOT ALERT CITY TO THE ESSENTIAL ELEMENTS OF THE CLAIM IN THIS FIRE TRUCK TRAFFIC ACCIDENT CASE, AND THE EXCUSE FOR THE DELAY IN SEEKING TO FILE A LATE NOTICE OF CLAIM, LAW OFFICE FAILURE, WAS INSUFFICIENT, PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW.

CITY NOT LIABLE FOR SLIP AND FALL IN CROSSWALK DURING STORM, ALLEGED FAILURE TO COMPLY WITH SNOW REMOVAL PROTOCOLS AND FAILURE TO APPLY SALT BEFORE THE STORM ARE NOT GROUNDS FOR LIABILITY (FIRST DEPT).

The First Department determined the city could not be held liable for a slip and fall in a crosswalk while a storm was in progress:

> The certified expert report [plaintiff] submitted does not address how the City created or exacerbated the icy condition of the crosswalk and only states that it was created during the heavy snow falling when the accident happened ... . Plaintiff's claim that the City may be held liable for failing to adhere to its snow removal protocols is unpersuasive, because liability "cannot be based on the violation of an internal rule imposing a higher standard of care than the law, at least where there is no showing of detrimental reliance by the plaintiff" ... . Nor can the City be held liable for failing to salt the roadway before the storm, because such alleged inaction does not constitute an affirmative act of negligence that caused, created or exacerbated the icy condition ... . **Mimikos v City of New York, 2018 NY Slip Op 03813, First Dept 5-29-18**

NEGLIGENCE (MUNICIPAL LAW, SLIP AND FALL, CITY NOT LIABLE FOR SLIP AND FALL IN CROSSWALK DURING STORM, ALLEGED FAILURE TO COMPLY WITH SNOW REMOVAL PROTOCOLS AND FAILURE TO APPLY SALT BEFORE THE STORM ARE NOT GROUNDS FOR LIABILITY (FIRST DEPT))/SLIP AND FALL (MUNICIPAL LAW, CITY NOT LIABLE FOR SLIP AND FALL IN CROSSWALK DURING STORM, ALLEGED FAILURE TO COMPLY WITH SNOW REMOVAL PROTOCOLS AND FAILURE TO APPLY SALT BEFORE THE STORM ARE NOT GROUNDS FOR LIABILITY (FIRST DEPT))/MUNICIPAL LAW (SLIP AND FALL, CITY NOT LIABLE FOR SLIP AND FALL IN CROSSWALK DURING STORM, ALLEGED FAILURE TO COMPLY WITH SNOW REMOVAL PROTOCOLS AND FAILURE TO APPLY SALT BEFORE THE STORM ARE NOT GROUNDS FOR LIABILITY (FIRST DEPT))/INTERNAL RULES (STANDARD OF CARE, SLIP AND FALL, CITY NOT LIABLE FOR SLIP AND FALL IN CROSSWALK DURING STORM, ALLEGED FAILURE TO COMPLY WITH SNOW REMOVAL PROTOCOLS AND FAILURE TO APPLY SALT BEFORE THE STORM ARE NOT GROUNDS FOR LIABILITY (FIRST DEPT))

NEGLIGENCE, MUNICIPAL LAW, IMMUNITY.

DEFENDANT CITY PAVED A DRIVEWAY CONNECTING A ROAD TO A PAVED PARK PATH, DEFENDANT DRIVER DROVE UP THE DRIVEWAY TO THE PAVED PATH WHERE PLAINTIFFS HAD BEEN WALKING THEIR DOGS, MAINTENANCE OF A PARK IS A PROPRIETARY NOT GOVERNMENTAL FUNCTION, NO GOVERNMENTAL IMMUNITY, CITY'S MOTION FOR SUMMARY JUDGMENT RELIED SOLELY ON GAPS IN PLAINTIFFS' PROOF AND SHOULD HAVE BEEN DENIED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the defendant city's motion for summary judgment in this car-pedestrian injury case should not have been granted. The city had paved a driveway which connected a road to a pave walking path in a park. Defendant driver, who was intoxicated, drove his car to the park path where plaintiffs had been walking their dogs. There were no barriers or warning signs. The city was not immune because maintenance of a park is a proprietary, not a governmental function:

> ... [W]e note that, while the City has a duty to maintain its roads in a reasonably safe condition ... , plaintiffs' claims also implicate the City's "duty to maintain its park and playground facilities in a reasonably safe condition"... . We thus reject the City's contention that it is immune from liability because plaintiffs' claims arise from its performance of a governmental function. "It is well settled that regardless of whether or not it is a source of income the operation of a public park by a municipality is a quasi-private or corporate and not a governmental function" ... . Furthermore, a "municipality may not ignore the foreseeable dangers [it created], continue to extend an invitation to the public to use the area and not be held accountable for resultant injuries" ... . Similarly, where, as here, it is undisputed that the City did not consider and render a determination regarding any potential danger prior to paving the driveway, the City's maintenance of the intersection in question is also a proprietary function ... .
>
> The City never disputed in its motion papers that it paved the driveway during its development of the park, thereby creating the condition of which plaintiffs now complain, but it instead argued that "[p]laintiffs have offered no evidence" that the City failed to adhere to applicable design standards or that the driveway created or enhanced a risk to park patrons. It is well established that "a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof" ... . Similarly, because the City relied exclusively on its argument, unsupported by any evidence, that a defective or dangerous condition did not exist for which a warning was required, it also failed to establish as a matter of law that it had no duty to warn of the foreseeable danger of collision created by this driveway access ... . **Brady v City of N. Tonawanda, 2018 NY Slip Op 03253, Fourth Dept 5-4-18**

NEGLIGENCE DEFENDANT (CITY PAVED A DRIVEWAY CONNECTING A ROAD TO A PAVED PARK PATH, DEFENDANT DRIVER DROVE UP THE DRIVEWAY TO THE PAVED PATH WHERE PLAINTIFFS HAD BEEN WALKING THEIR DOGS, MAINTENANCE OF A PARK IS A PROPRIETARY NOT GOVERNMENTAL FUNCTION, NO GOVERNMENTAL IMMUNITY, CITY'S MOTION FOR SUMMARY JUDGMENT RELIED SOLELY ON GAPS IN PLAINTIFFS' PROOF AND SHOULD HAVE BEEN DENIED (FOURTH DEPT))/MUNICIPAL LAW (NEGLIGENCE, IMMUNITY, CITY PAVED A DRIVEWAY CONNECTING A ROAD TO A PAVED PARK PATH, DEFENDANT DRIVER DROVE UP THE DRIVEWAY TO THE PAVED PATH WHERE PLAINTIFFS HAD BEEN WALKING THEIR DOGS, MAINTENANCE OF A PARK IS A PROPRIETARY NOT GOVERNMENTAL FUNCTION, NO GOVERNMENTAL IMMUNITY, CITY'S MOTION FOR SUMMARY JUDGMENT RELIED SOLELY ON GAPS IN PLAINTIFFS' PROOF AND SHOULD HAVE BEEN DENIED (FOURTH DEPT))/IMMUNITY (CITY PAVED A DRIVEWAY CONNECTING A ROAD TO A PAVED PARK PATH, DEFENDANT DRIVER DROVE UP THE DRIVEWAY TO THE PAVED PATH WHERE PLAINTIFFS HAD BEEN WALKING THEIR DOGS, MAINTENANCE OF A PARK IS A PROPRIETARY NOT GOVERNMENTAL FUNCTION, NO GOVERNMENTAL IMMUNITY, CITY'S MOTION FOR SUMMARY JUDGMENT RELIED SOLELY ON GAPS IN PLAINTIFFS' PROOF AND SHOULD HAVE BEEN DENIED (FOURTH DEPT))/PARKS (NEGLIGENCE, MUNICIPAL LAW, IMMUNITY, CITY PAVED A DRIVEWAY CONNECTING A ROAD TO A PAVED PARK PATH, DEFENDANT DRIVER DROVE UP THE DRIVEWAY TO THE PAVED PATH WHERE PLAINTIFFS HAD BEEN WALKING THEIR DOGS, MAINTENANCE OF A PARK IS A PROPRIETARY NOT GOVERNMENTAL FUNCTION, NO GOVERNMENTAL IMMUNITY, CITY'S MOTION FOR SUMMARY JUDGMENT RELIED SOLELY ON GAPS IN PLAINTIFFS' PROOF AND SHOULD HAVE BEEN DENIED (FOURTH DEPT))/PROPRIETARY FUNCTION (NEGLIGENCE, MUNICIPAL LAW, CITY PAVED A DRIVEWAY CONNECTING A ROAD TO A PAVED PARK PATH, DEFENDANT DRIVER DROVE UP THE DRIVEWAY TO THE PAVED PATH WHERE PLAINTIFFS HAD BEEN WALKING THEIR DOGS, MAINTENANCE OF A PARK IS A PROPRIETARY NOT GOVERNMENTAL FUNCTION, NO GOVERNMENTAL IMMUNITY, CITY'S

MOTION FOR SUMMARY JUDGMENT RELIED SOLELY ON GAPS IN PLAINTIFFS' PROOF AND SHOULD HAVE BEEN DENIED (FOURTH DEPT))/SUMMARY JUDGMENT (GAPS IN PROOF, CITY PAVED A DRIVEWAY CONNECTING A ROAD TO A PAVED PARK PATH, DEFENDANT DRIVER DROVE UP THE DRIVEWAY TO THE PAVED PATH WHERE PLAINTIFFS HAD BEEN WALKING THEIR DOGS, MAINTENANCE OF A PARK IS A PROPRIETARY NOT GOVERNMENTAL FUNCTION, NO GOVERNMENTAL IMMUNITY, CITY'S MOTION FOR SUMMARY JUDGMENT RELIED SOLELY ON GAPS IN PLAINTIFFS' PROOF AND SHOULD HAVE BEEN DENIED (FOURTH DEPT))

NEGLIGENCE, MUNICIPAL LAW, IMMUNTY.

PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT).

The First Department, reversing Supreme Court, determined the city could not be held liable for a "trespass activity" motorcycle accident in the parking lot at Yankee Stadium. Trespassers have used the parking for motorcycles, dirt bikes and all-terrain vehicles for recreation for years. Plaintiff's decedent was killed in a collision in the parking lot. Under the General Obligations Law the city could not be liable unless its conduct was willful or malicious:

> The decedent, who trespassed onto a Yankee Stadium parking lot in the off season together with other trespassers who similarly rode motorcycles, dirt bikes and all-terrain vehicles, suffered fatal injuries in a collision with an all-terrain vehicle operated by defendant Pena. The record shows that the nature of the trespass activity involved was commonplace for the parking lot in question, for at least two years, and that drag racing would sometimes be involved. Plaintiff alleged that the City (as lot owner) and Kinney (as lessee) were negligent for not repairing and/or securing the lot's perimeter fence, and in not employing proper security or supervision to keep trespassers off the premises.
>
> Here, the subject property was physically conducive to the motorcycle activity taking place thereon, and was appropriate for public use in pursuing the activity as recreation (see General Obligations Law § 9-103). As such, the City is immune from liability for any ordinary negligence on its part that may have given rise to the cause of the decedent's accident, and plaintiff has not otherwise demonstrated that the City's challenged conduct was willful or malicious as might preclude the City's reliance on the defense afforded under General Obligations Law § 9-103 ... .
>
> Furthermore, although Kinney has not relied upon General Obligation Law § 9-103 as a potential defense to the action against it, the statute's defense is available to lessees as well as property owners ... . Inasmuch as the issue appears on the face of the record, involves no new facts and could not have been avoided if it were timely raised ... . **Rodriguez v City of New York, 2018 NY Slip Op 03821, First Dept 5-29-18**

NEGLIGENCE (MUNICIPAL LAW, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))/MUNICIPAL LAW (NEGLIGENCE, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))/IMMUNITY (MUNICIPAL LAW, NEGLIGENCE, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))/TRESPASS ACTIVITY (MUNICIPAL LAW, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))/GENERAL OBLIGATIONS LAW (MUNICIPAL LAW, IMMUNITY, PLAINTIFF'S DECEDENT WAS KILLED IN A MOTORCYCLE ACCIDENT DURING RECREATIONAL USE OF A CITY PARKING LOT, CITY NOT LIABLE PURSUANT TO THE GENERAL OBLIGATIONS LAW (FIRST DEPT))

NEGLIGENCE, MUNICIPAL LAW, LABOR LAW.

PLAINTIFF FIREFIGHTER'S MOTION FOR SUMMARY JUDGMENT IN THIS GENERAL MUNICIPAL LAW 205-a, LABOR LAW 27-a, SLIP AND FALL CASE WAS PROPERLY DENIED, PLAINTIFF'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE ALLEGED DANGEROUS CONDITION (SECOND DEPT).

The Second Department determined that plaintiff firefighter's motion for summary judgment in this General Municipal Law 205-a, Labor Law 27-a slip and fall case was properly denied. Plaintiff alleged he was injured when he fell because of a gap in a grate at the Homeport Pier. The court noted that the plaintiff's own submissions raised triable issues of fact about whether the gap was the result of defendant's (the city's) negligence:

> General Municipal Law § 205-a(1) provides a right of action for firefighters who are injured "as a result of any neglect, omission, willful or culpable negligence" of a defendant "in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments." To make out a valid claim under General Municipal Law § 205-a, a plaintiff must " [1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the firefighter was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter'" ... .
>
> ,,, [T]he only statute, ordinance, or rule identified by the plaintiff which could support the imposition of liability pursuant to General Municipal Law § 205-a under the facts of this case was Labor Law § 27-a .... Labor Law § 27-a(3)(a)(1) provides that every employer shall furnish employment and a place of employment that are "free from recognized hazards" that cause or are likely to cause death or serious physical harm to employees. This statute may serve as a predicate for a cause of action alleging a violation of General Municipal Law § 205-a ... .
>
> ... [T]he plaintiff's submissions failed to establish, prima facie, that the gap in the grates was a result of negligence by the City. His submissions included evidence that (1) the Homeport Pier was inspected regularly, (2) gaps in the grates were sometimes caused by expansion and contraction of the metal and shifting due to vehicles driving over them, (3) any gaps over an inch were rectified when discovered during regular inspections, and (4) the Homeport Pier and the grates were inspected within two days prior to the plaintiff's accident. **Shea v New York City Economic Dev. Corp., 2018 NY Slip Op 03164, Second Dept 5-2-18**

NEGLIGENCE (PLAINTIFF FIREFIGHTER'S MOTION FOR SUMMARY JUDGMENT IN THIS GENERAL MUNICIPAL LAW 205-a, LABOR LAW 27-a, SLIP AND FALL CASE WAS PROPERLY DENIED, PLAINTIFF'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE ALLEGED DANGEROUS CONDITION (SECOND DEPT))/MUNICIPAL LAW (PLAINTIFF FIREFIGHTER'S MOTION FOR SUMMARY JUDGMENT IN THIS GENERAL MUNICIPAL LAW 205-a, LABOR LAW 27-a, SLIP AND FALL CASE WAS PROPERLY DENIED, PLAINTIFF'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE ALLEGED DANGEROUS CONDITION (SECOND DEPT))/LABOR LAW (PLAINTIFF FIREFIGHTER'S MOTION FOR SUMMARY JUDGMENT IN THIS GENERAL MUNICIPAL LAW 205-a, LABOR LAW 27-a, SLIP AND FALL CASE WAS PROPERLY DENIED, PLAINTIFF'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE ALLEGED DANGEROUS CONDITION (SECOND DEPT))/FIREFIGHTERS (GENERAL MUNICIPAL LAW 205-a, PLAINTIFF FIREFIGHTER'S MOTION FOR SUMMARY JUDGMENT IN THIS GENERAL MUNICIPAL LAW 205-a, LABOR LAW 27-a, SLIP AND FALL CASE WAS PROPERLY DENIED, PLAINTIFF'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE ALLEGED DANGEROUS CONDITION (SECOND DEPT))/SLIP AND FALL (GENERAL MUNICIPAL LAW 205-a, PLAINTIFF FIREFIGHTER'S MOTION FOR SUMMARY JUDGMENT IN THIS GENERAL MUNICIPAL LAW 205-a, LABOR LAW 27-a, SLIP AND FALL CASE WAS PROPERLY DENIED, PLAINTIFF'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE ALLEGED DANGEROUS CONDITION (SECOND DEPT))

NEGLIGENCE, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

RECKLESS DISREGARD STANDARD APPLIED TO DRIVER OF TOWN SNOWPLOW AND THE DRIVER DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that the town's motion for summary judgment in this snowplow-car accident case should have been granted. Even though the plow was up at the time of the accident, the Vehicle and Traffic Law "reckless disregard" standard applied, and the snowplow driver's (Hanssen's) actions did not amount to "reckless disregard:"

> ... [D]efendants established as a matter of law that the reckless disregard standard of care, and not negligence, is applicable to this case pursuant to Vehicle and Traffic Law § 1103 (b), and plaintiffs failed to raise a triable issue of fact. Defendants submitted the deposition testimony of Hanssen, who testified that he was plowing snow and salting the roads on his assigned route at the time of the accident, and section 1103 (b) applies where, as here, a snowplow truck is "actually engaged in work on a highway" ... . Contrary to plaintiffs' contention, although defendants also submitted the deposition testimony of plaintiffs that the plow blade was up at the time of the accident, that is not enough to raise an issue of fact inasmuch as it was uncontroverted that Hanssen was salting the road and was "working his run' or beat' at the time of the accident" ... .
>
> Hanssen testified at his deposition that he slowed down as he approached the stop sign and was moving at a speed of five miles per hour just prior to the intersection. He looked both ways for traffic, but did not see plaintiffs' approaching vehicle. That evidence, which was not controverted by the deposition testimony of plaintiffs, established that Hanssen did not act with reckless disregard for the safety of others ... . **Harris v Hanssen, 2018 NY Slip Op 03257, Fourth Dept 5-4-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, RECKLESS DISREGARD STANDARD APPLIED TO DRIVER OF TOWN SNOWPLOW AND THE DRIVER DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/MUNICIPAL LAW (TRAFFIC ACCIDENTS, RECKLESS DISREGARD STANDARD APPLIED TO DRIVER OF TOWN SNOWPLOW AND THE DRIVER DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/VEHICLE AND TRAFFIC LAW RECKLESS DISREGARD STANDARD APPLIED TO DRIVER OF TOWN SNOWPLOW AND THE DRIVER DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/TRAFFIC ACCIDENTS (MUNICIPAL LAW, RECKLESS DISREGARD STANDARD APPLIED TO DRIVER OF TOWN SNOWPLOW AND THE DRIVER DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/RECKLESS DISREGARD (TRAFFIC ACCIDENTS, MUNICIPAL LAW, RECKLESS DISREGARD STANDARD APPLIED TO DRIVER OF TOWN SNOWPLOW AND THE DRIVER DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))/SNOWPLOWS (TRAFFIC ACCIDENTS, RECKLESS DISREGARD STANDARD APPLIED TO DRIVER OF TOWN SNOWPLOW AND THE DRIVER DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FOURTH DEPT))

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

ALTHOUGH THE DRIVER'S MOTHER HAD PURCHASED AND INSURED THE CAR AT THE TIME OF THE ACCIDENT, THE SELLER'S REGISTRATION PLATES WERE STILL ON THE CAR, THE SELLER WAS ESTOPPED FROM DENYING OWNERSHIP (FOURTH DEPT).

The Fourth Department determined defendant Buffalo Auto Rental (BAR) was estopped from denying ownership of the vehicle in which plaintiff, a passenger, was injured. Although the driver's (Mayfield's) mother (Julie Robertson) had purchased the car and had insured it, it was still had BAR's registration plates on it at the time of the accident. The court noted that BAR's summary judgment motion papers included Mayfield's deposition testimony in which Mayfield claimed he was driving fast to escape another driver who was acting aggressively. The testimony raised a question of fact about the availability of the emergency defense, precluding summary judgment on the issue of Mayfield's negligence without the need to consider the opposing papers:

> ... [T]he court properly determined that BAR was estopped from denying ownership of the vehicle as a matter of law. Even assuming, arguendo, that it was the intention of BAR and Robertson that Robertson was to be the legalowner of the vehicle after she executed the bill of sale and took physical possession of the vehicle ... , we conclude that the issue of legal ownership is not determinative. "Whether or not [BAR] was still the owner of the motor vehicle at the time of the accident need not be determined; [BAR], having left [its] registration plates on the motor vehicle, is estopped to deny [its] ownership" as against plaintiff ... . Contrary to BAR's contention, the fact that Robertson had obtained insurance for the vehicle does not mandate a different result inasmuch as the public policy reasons for the estoppel doctrine are not limited to issues of insurance coverage ... . **White v Mayfield, 2018 NY Slip Op 03270, Fourth Dept 5-4-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, ALTHOUGH THE DRIVER'S MOTHER HAD PURCHASED AND INSURED THE CAR AT THE TIME OF THE ACCIDENT, THE SELLER'S REGISTRATION PLATES WERE STILL ON THE CAR, THE SELLER WAS ESTOPPED FROM DENYING OWNERSHIP (FOURTH DEPT))/TRAFFIC ACCIDENTS (TRAFFIC ACCIDENTS, ALTHOUGH THE DRIVER'S MOTHER HAD PURCHASED AND INSURED THE CAR AT THE TIME OF THE ACCIDENT, THE SELLER'S REGISTRATION PLATES WERE STILL ON THE CAR, THE SELLER WAS ESTOPPED FROM DENYING OWNERSHIP (FOURTH DEPT)/VEHICLE AND TRAFFIC LAW (TRAFFIC ACCIDENTS, REGISTRATION PLATES, ALTHOUGH THE DRIVER'S MOTHER HAD PURCHASED AND INSURED THE CAR AT THE TIME OF THE ACCIDENT, THE SELLER'S REGISTRATION PLATES WERE STILL ON THE CAR, THE SELLER WAS ESTOPPED FROM DENYING OWNERSHIP (FOURTH DEPT))/REGISTRATION PLATES (TRAFFIC ACCIDENTS, ALTHOUGH THE DRIVER'S MOTHER HAD PURCHASED AND INSURED THE CAR AT THE TIME OF THE ACCIDENT, THE SELLER'S REGISTRATION PLATES WERE STILL ON THE CAR, THE SELLER WAS ESTOPPED FROM DENYING OWNERSHIP (FOURTH DEPT))/VEHICLES (OWNERSHIP, TRAFFIC ACCIDENTS, ALTHOUGH THE DRIVER'S MOTHER HAD PURCHASED AND INSURED THE CAR AT THE TIME OF THE ACCIDENT, THE SELLER'S REGISTRATION PLATES WERE STILL ON THE CAR, THE SELLER WAS ESTOPPED FROM DENYING OWNERSHIP (FOURTH DEPT))

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

ALTHOUGH DEFENDANT GOULD DEMONSTRATED THE OTHER DRIVER, DEFENDANT PAPPAS, FAILED TO YIELD THE RIGHT-OF-WAY, DEFENDANT GOULD DID NOT DEMONSTRATE THE VEHICLE AND TRAFFIC LAW VIOLATION WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, THEREFORE DEFENDANT GOULD WAS NOT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT).

The Second Department determined the defendant driver (Gould) who collided with another defendant driver (Pappas) who had failed to yield the right-of-way was not entitled to summary judgment, noting that there can be more than one proximate cause of an 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" ... .
>
> While the driver with the right-of-way is entitled to assume that other drivers will obey the traffic laws requiring them to yield ... , the driver with the right-of-way also has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles ... .
>
> The Gould defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cross claims asserted against them. While they submitted evidence that the Pappas vehicle failed to yield the right-of-way to their vehicle, in violation of Vehicle and Traffic Law § 1142(a), the submissions in support of their motion failed to establish the Gould defendants' freedom from fault and that the Pappas vehicle's failure to yield the right-of-way was the sole proximate cause of the accident ... . Based on their submissions, which included the deposition transcripts of the respective parties, the Gould defendants failed to eliminate all triable issues of fact as to whether Gould took reasonable care to avoid the collision ... . **Miron v Pappas, 2018 NY Slip Op 03672, Second Dept 5-23-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, ALTHOUGH DEFENDANT GOULD DEMONSTRATED THE OTHER DRIVER, DEFENDANT PAPPAS, FAILED TO YIELD THE RIGHT-OF-WAY, DEFENDANT GOULD DID NOT DEMONSTRATE THE VEHICLE AND TRAFFIC LAW VIOLATION WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, THEREFORE DEFENDANT GOULD WAS NOT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT))/TRAFFIC ACCIDENTS (ALTHOUGH DEFENDANT GOULD DEMONSTRATED THE OTHER DRIVER, DEFENDANT PAPPAS, FAILED TO YIELD THE RIGHT-OF-WAY, DEFENDANT GOULD DID NOT DEMONSTRATE THE VEHICLE AND TRAFFIC LAW VIOLATION WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, THEREFORE DEFENDANT GOULD WAS NOT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT))/VEHICLE AND TRAFFIC LAW TRAFFIC ACCIDENTS, ALTHOUGH DEFENDANT GOULD DEMONSTRATED THE OTHER DRIVER, DEFENDANT PAPPAS, FAILED TO YIELD THE RIGHT-OF-WAY, DEFENDANT GOULD DID NOT DEMONSTRATE THE VEHICLE AND TRAFFIC LAW VIOLATION WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, THEREFORE DEFENDANT GOULD WAS NOT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT))/PROXIMATE CAUSE (TRAFFIC ACCIDENTS, ALTHOUGH DEFENDANT GOULD DEMONSTRATED THE OTHER DRIVER, DEFENDANT PAPPAS, FAILED TO YIELD THE RIGHT-OF-WAY, DEFENDANT GOULD DID NOT DEMONSTRATE THE VEHICLE AND TRAFFIC LAW VIOLATION WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, THEREFORE DEFENDANT GOULD WAS NOT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT))/VEHICLE AND TRAFFIC LAW (TRAFFIC ACCIDENTS, ALTHOUGH DEFENDANT GOULD DEMONSTRATED THE OTHER DRIVER, DEFENDANT PAPPAS, FAILED TO YIELD THE RIGHT-OF-WAY, DEFENDANT GOULD DID NOT DEMONSTRATE THE VEHICLE AND TRAFFIC LAW VIOLATION WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT, THEREFORE DEFENDANT GOULD WAS NOT ENTITLED TO SUMMARY JUDGMENT (SECOND DEPT))

NEGLIGENCE, VEHICLE AND TRAFFIC LAW, EVIDENCE.

DEFENDANT DRIVER'S DEPOSITION TESTIMONY, WHICH CONTRADICTED THE ACCIDENT REPORT AND MV-104 FORM, DID NOT RAISE A QUESTION OF FACT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant driver's testimony in a deposition, which contradicted the accident report and the MV-104 form, did not create a question of fact and plaintiff's motion for summary judgment in this traffic accident case should have been granted. The accident report and MV-104 form indicated defendant driver was in the process of making a left turn when plaintiff, who was in the oncoming lane, collided with defendant. In the deposition, defendant testified he had not yet started to turn when the accident happened:

> Pursuant to Vehicle and Traffic Law § 1141, the operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle which is within the intersection or so close to it as to constitute an immediate hazard ... . A violation of this statute constitutes negligence per se ... . The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law ... .
>
> Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that the defendant driver violated Vehicle and Traffic Law § 1141 when he made a left turn directly into the path of the plaintiff's scooter when it was not reasonably safe to do so, and that this violation was the sole proximate cause of the accident ... . In opposition to the motion, the defendants failed to raise a triable issue of fact. The defendant driver testified at his deposition that, at the time of the occurrence, his taxi had not entered the intersection, was stopped, and was facing straight ahead. This testimony reflects a belated attempt to avoid the consequences of his earlier admissions in the police accident report and the MV-104 accident report that he was in the process of making a left turn, by raising a feigned issue of fact which was insufficient to defeat the motion ... . In particular, the MV-104 form, which was prepared and signed by the defendant, expressly stated that the defendant was proceeding to make a left turn onto eastbound Park Avenue when the collision occurred. **Lebron v Mensah, 2018 NY Slip Op 03521, Second Dept 5-16-18**

NEGLIGENCE (TRAFFIC ACCIDENTS, DEFENDANT DRIVER'S DEPOSITION TESTIMONY, WHICH CONTRADICTED THE ACCIDENT REPORT AND MV-104 FORM, DID NOT RAISE A QUESTION OF FACT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/TRAFFIC ACCIDENTS (DEFENDANT DRIVER'S DEPOSITION TESTIMONY, WHICH CONTRADICTED THE ACCIDENT REPORT AND MV-104 FORM, DID NOT RAISE A QUESTION OF FACT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/VEHICLE AND TRAFFIC LAW (ILLEGAL LEFT TURN, DEFENDANT DRIVER'S DEPOSITION TESTIMONY, WHICH CONTRADICTED THE ACCIDENT REPORT AND MV-104 FORM, DID NOT RAISE A QUESTION OF FACT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/EVIDENCE (TRAFFIC ACCIDENTS, SUMMARY JUDGMENT, DEFENDANT DRIVER'S DEPOSITION TESTIMONY, WHICH CONTRADICTED THE ACCIDENT REPORT AND MV-104 FORM, DID NOT RAISE A QUESTION OF FACT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))/SUMMARY JUDGMENT (TRAFFIC ACCIDENTS, DEFENDANT DRIVER'S DEPOSITION TESTIMONY, WHICH CONTRADICTED THE ACCIDENT REPORT AND MV-104 FORM, DID NOT RAISE A QUESTION OF FACT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED (SECOND DEPT))

REAL ESTATE

REAL ESTATE.

LAW REGARDING SALE OF PROPERTY OWNED BY TENANTS BY THE ENTIRETY WHERE ONLY ONE SPOUSE SIGNS THE CONTRACT EXPLAINED (SECOND DEPT).

In an action involving two contracts for the sale of property owned by tenants by the entirety, one contract with plaintiff and one with defendant, the Second Department determined questions of fact precluded defendant's motion for summary judgment. The court explained the law applicable to the sale of property owned by tenants by the entirety by only one of the spouses:

> Where spouses own property as tenants by the entirety, a conveyance by one spouse, to which the other has not consented, cannot bind the entire fee or impair the nonconsenting spouse's survivorship interest ... . Thus, generally, where property is held by spouses as tenants by the entirety, an agreement of sale signed by only one spouse is ineffective to constitute an agreement to convey full title, unless it is shown, inter alia, that the nonsigning spouse had complete knowledge of and actively participated in the transaction, that he or she ratified the purchase option after the fact, or that the signing spouse was authorized in writing to act as the nonsigning spouse's agent in the matter ... . However, each spouse may sell, mortgage, or otherwise encumber his or her rights in the property, subject to the continuing rights of the other ... . **Carpenter v Crespo, 2018 NY Slip Op 03501, Second Dept 5-16-18**

REAL ESTATE (LAW REGARDING SALE OF PROPERTY OWNED BY TENANTS BY THE ENTIRETY WHERE ONLY ONE SPOUSE SIGNS THE CONTRACT EXPLAINED (SECOND DEPT))/TENANTS BY THE ENTIRETY (LAW REGARDING SALE OF PROPERTY OWNED BY TENANTS BY THE ENTIRETY WHERE ONLY ONE SPOUSE SIGNS THE CONTRACT EXPLAINED (SECOND DEPT))

REAL ESTATE.

DEFENDANTS DID NOT DEMONSTRATE PLAINTIFF COULD NOT PROVE IT WAS READY, WILLING AND ABLE TO CLOSE IN THIS ACTION FOR SPECIFIC PERFORMANCE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT CONSIDERING THE OPPOSING PAPERS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants were unable to demonstrate that plaintiff was not able to prove whether plaintiff was ready, willing, and able to close in the action for specific performance:

> To prevail on a cause of action for specific performance of a contract for the sale of real property, a plaintiff purchaser must establish that it substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the vendor was able to convey the property, and that there was no adequate remedy at law ... . Here, on that branch of their motion which was for summary judgment dismissing the cause of action for specific performance, the defendants failed to meet their prima facie burden of establishing that the plaintiff was unable to prove one or more of the elements of its cause of action. The defendants failed to demonstrate the absence of triable issues of fact as to whether the plaintiff purchaser was ready, willing, and able to close on Contract One ... . The defendants also failed to eliminate triable issues of fact with respect to whether they validly cancelled the contracts.
>
> Similarly, since the defendants did not establish that they validly cancelled the contracts, they did not demonstrate their prima facie entitlement to a judgment declaring that the contracts are not binding and are unenforceable.
>
> Since the defendants failed to establish their prima facie entitlement to judgment as a matter of law dismissing the cause of action for specific performance and declaring that the contracts are not binding and are unenforceable, the Supreme Court should have denied the defendants' motion regardless of the sufficiency of the opposing papers ... . **Chester Green Estates, LLC v Arlington Chester, LLC, 2018 NY Slip Op 03657, Second Dept 5-23-18**

REAL ESTATE (SPECIFIC PERFORMANCE, DEFENDANTS DID NOT DEMONSTRATE PLAINTIFF COULD NOT PROVE IT WAS READY, WILLING AND ABLE TO CLOSE IN THIS ACTION FOR SPECIFIC PERFORMANCE, DEFENDANTS MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT CONSIDERING THE OPPOSING PAPERS (SECOND DEPT))/SPECIFIC PERFORMANCE (DEFENDANTS DID NOT DEMONSTRATE PLAINTIFF COULD NOT PROVE IT WAS READY, WILLING AND ABLE TO CLOSE IN THIS ACTION FOR SPECIFIC PERFORMANCE, DEFENDANTS MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT CONSIDERING THE OPPOSING PAPERS (SECOND DEPT))/SUMMARY JUDGMENT (REAL ESTATE, SPECIFIC PERFORMANCE, DEFENDANTS DID NOT DEMONSTRATE PLAINTIFF COULD NOT PROVE IT WAS READY, WILLING AND ABLE TO CLOSE IN THIS ACTION FOR SPECIFIC PERFORMANCE, DEFENDANTS MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED WITHOUT CONSIDERING THE OPPOSING PAPERS (SECOND DEPT))

REAL ESTATE, REAL PROPERTY LAW, AGENCY, CORPORATION LAW.

FORMER PRESIDENT OF THE CORPORATION WHICH OWNED AN APARTMENT BUILDING HAD THE APPARENT AUTHORITY TO SELL THE BUILDING, BUYER WAS A BONA FIDE PURCHASER (SECOND DEPT).

The Second Department determined that the ostensible president the corporation (Lowbet) which owned an apartment building, Liu, had the apparent authority to sell the building, and the buyer, 44th Street Realty, was a bona fide purchaser. Although Liu had been removed as president and replaced by petitioner, that information was not provided to the Department of State Division of Corporations:

> The petitioner and Liu married in 1985 and then separated in 1995, after which the petitioner moved to China. Since 1995, Liu has run the day-to-day business of Lowbet, with the petitioner's knowledge and consent. In August 2006, Liu was removed as president of Lowbet and the petitioner and his son were named president and vice president, respectively. However, the petitioner did not update this information with the Department of State Division of Corporations.
>
> 44th Street Realty established, prima facie, that the subject deed was only voidable, not void ab initio, since the petitioner alleged that Liu's signature and authority to convey were acquired by fraudulent means, but did not allege that Liu's signature was forged ... .
>
> 44th Street Realty also established, prima facie, that Liu was cloaked with apparent authority to sign the deed on behalf of Lowbet. The petitioner had condoned Liu's unfettered control and operation of the day-to-day business of Lowbet, which gave rise to the appearance that Liu possessed authority to enter into a real estate transaction on behalf of Lowbet ... . Under the circumstances, 44th Street Realty's reliance upon the appearance of Liu's authority was reasonable ... .
>
> Further, 44th Street Realty made a prima facie showing that it was a bona fide purchaser by demonstrating that it had paid valuable consideration for the property, in good faith and without knowledge of any alleged fraud by Liu ... . Real Property Law §§ 266 and 291 protect the title of a bona fide purchaser for value who lacks knowledge of fraud by the grantor or affecting the grantor's title ... . 44th Street Realty's submissions established that it had no knowledge of facts that would lead a reasonably prudent purchaser to inquire about possible fraud ... . **Matter of Shau Chung Hu v Lowbet Realty Corp., 2018 NY Slip Op 03529, Second Dept 5-16-18**

REAL ESTATE (APPARENT AUTHORITY, FORMER PRESIDENT OF THE CORPORATION WHICH OWNED AN APARTMENT BUILDING HAD THE APPARENT AUTHORITY TO SELL THE BUILDING, BUYER WAS A BONA FIDE PURCHASER (SECOND DEPT))/REAL PROPERTY LAW (BONA FIDE PURCHASER, APPARENT AUTHORITY, FORMER PRESIDENT OF THE CORPORATION WHICH OWNED AN APARTMENT BUILDING HAD THE APPARENT AUTHORITY TO SELL THE BUILDING, BUYER WAS A BONA FIDE PURCHASER (SECOND DEPT))/AGENCY (APPARENT AUTHORITY, FORMER PRESIDENT OF THE CORPORATION WHICH OWNED AN APARTMENT BUILDING HAD THE APPARENT AUTHORITY TO SELL THE BUILDING, BUYER WAS A BONA FIDE PURCHASER (SECOND DEPT))/CORPORATION LAW (APPARENT AUTHORITY, FORMER PRESIDENT OF THE CORPORATION WHICH OWNED AN APARTMENT BUILDING HAD THE APPARENT AUTHORITY TO SELL THE BUILDING, BUYER WAS A BONA FIDE PURCHASER (SECOND DEPT))/APPARENT AUTHORITY (REAL ESTATE, FORMER PRESIDENT OF THE CORPORATION WHICH OWNED AN APARTMENT BUILDING HAD THE APPARENT AUTHORITY TO SELL THE BUILDING, BUYER WAS A BONA FIDE PURCHASER (SECOND DEPT))/BONA FIDE PURCHASER (REAL ESTATE, FORMER PRESIDENT OF THE CORPORATION WHICH OWNED AN APARTMENT BUILDING HAD THE APPARENT AUTHORITY TO SELL THE BUILDING, BUYER WAS A BONA FIDE PURCHASER (SECOND DEPT))

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

DISMISSAL OF DEFENDANT'S COUNTERCLAIM FOR ADVERSE POSSESSION PROPERLY GRANTED, ELEMENTS OF PRE-AMENDMENT PROOF OF A CLAIM OF RIGHT APPLIED TO THE DISPUTED PROPERTY (SECOND DEPT).

The Second Department, after explaining the current law of adverse possession and finding that the prior (pre-amendment) law applied in this case, determined the defendant's (Dominici's) counterclaim seeking adverse possession of disputed property was properly dismissed:

> ... [T]he 2008 amendments to the adverse possession statutes contained in RPAPL article 5 (see id.) are not applicable where, as here, the alleged adverse possessor's property right, as alleged, vested prior to the enactment of those amendments ... .
>
> On October 1, 2012, the plaintiff became the titled owner of the property located at 541 Middle Country Road in Coram (hereinafter the 541 Property), which is adjacent to the property located at 543 Middle Country Road in Coram (hereinafter the 543 Property). The plaintiff had a survey taken on January 7, 2014, which showed that the owner of the 543 Property had encroached on a certain area of the 541 Property by paving, installing a fence, and putting a shed on the area. The president of the defendant, Michael Dominici, asserted in an affidavit that when he became the titled owner of the 543 Property in 1985, the paving and fence were already present, leading him to believe the disputed portion of the property belonged to the defendant. Dominici admitted that on August 18, 1990, he received a letter dated August 15, 1990, from the lawyer for the plaintiff's predecessor-in-interest confirming a telephone call on August 13, 1990 (hereinafter together the 1990 letter and call), in which the lawyer notified Dominici of the encroachment and demanded that he vacate the disputed portion of the property or agree to a lease. Dominici further stated in his affidavit that he awaited further communication with proof of the claims. No further actions were taken with regard to the encroachment until 2014, when the plaintiff's counsel sent Dominici a letter notifying him of the encroachment and warning of the commencement of an action to recover the disputed portion of the property if an agreement could not be reached. ...
>
> Under the pre-amendment law, in order to establish a claim to property by adverse possession, a claimant must prove, by clear and convincing evidence, that possession of the property was (1) hostile and under a claim of right, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the required period ... . While adverse possession is not a favored method of procuring title to real property, it is both a necessary and recognized method of acquiring title... . Further, under the law existing at the time the adverse possession by the defendant occurred, in order to defeat the claim of right, actual knowledge by the possessor as to who was the true owner was insufficient; an overt acknowledgment during the statutory period that ownership rested with another party was required ... . Here, there was no "overt acknowledgment" by Dominici that ownership rested with another party. **SLC Coram, LLC v 543 Middle Country Rd. Realty, LLC, 2018 NY Slip Op 03723, Second Dept 5-23-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (ADVERSE POSSESSION, DISMISSAL OF DEFENDANT'S COUNTERCLAIM FOR ADVERSE POSSESSION PROPERLY GRANTED, ELEMENTS OF PRE-AMENDMENT PROOF OF A CLAIM OF RIGHT APPLIED TO THE DISPUTED PROPERTY (SECOND DEPT))/ADVERSE POSSESSION (DISMISSAL OF DEFENDANT'S COUNTERCLAIM FOR ADVERSE POSSESSION PROPERLY GRANTED, ELEMENTS OF PRE-AMENDMENT PROOF OF A CLAIM OF RIGHT APPLIED TO THE DISPUTED PROPERTY (SECOND DEPT))

REAL PROPERTY LAW

REAL PROPERTY LAW.

1941 AND 1953 DEEDS CREATED THE POSSIBILITY OF REVERTER WHICH COULD BE ASSIGNED (SECOND DEPT).

The Second Department determined the deeds in question included the possibility of reverter and that right was assignable:

> ... [T]he 1941 deed and the 1953 deed created possibilities of reverter. " [E]very instrument creating [or] transferring . . . an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law'" ... . No precise language is necessary to create a possibility of reverter, but "[a] characteristic of the type of expression which works automatic expiration of the grantee's fee seems to be one in which time is an important factor," such as use of the words "until," "so long as," or "during" ... . Here, the 1941 deed and the 1953 deed unequivocally called for automatic forfeiture of the estate upon breach and thereby created for their respective grantors possibilities of reverter.
>
> ... Although no statute in effect in 1964 explicitly provided the grantor of the 1953 deed with a right to convey her possibility of reverter ... , under the applicable rules of the common law, "a possibility of reverter could be freely assigned and alienated" ... . **Njcb Spec-1, LLC v Budnik, 2018 NY Slip Op 03376, Second Dept 5-9-18**

REAL PROPERTY LAW (DEEDS, REVERTER, 1941 AND 1953 DEEDS CREATED THE POSSIBILITY OF REVERTER WHICH COULD BE ASSIGNED (SECOND DEPT))/DEEDS (REVERTER, 1941 AND 1953 DEEDS CREATED THE POSSIBILITY OF REVERTER WHICH COULD BE ASSIGNED (SECOND DEPT)).REVERTER, POSSIBILITY OF (1941 AND 1953 DEEDS CREATED THE POSSIBILITY OF REVERTER WHICH COULD BE ASSIGNED (SECOND DEPT))

REAL PROPERTY LAW.

OWNERS OF PROPERTY ABUTTING A ROADWAY CANNOT PROHIBIT PARKING ALONG THE ROADWAY UNLESS PARKED CARS IMPEDE ACCESS TO THE OWNERS' PROPERTY (THIRD DEPT).

The Third Department determined that plaintiffs, who owned property abutting a road, could not prohibit defendants from parking along the road unless plaintiffs' access to the property was blocked by the defendants:

> Supreme Court properly ruled that plaintiffs cannot prevent others from parking their vehicles within the highway easement on the road front property along the shoulder of Route 34, unless those individuals unreasonably interfere with plaintiffs' right of ingress and egress ... . **Augusta v Kwortnik, 2018 NY Slip Op 03574, Third Dept. 5-17-18**

REAL PROPERTY (OWNERS OF PROPERTY ABUTTING A ROADWAY CANNOT PROHIBIT PARKING ALONG THE ROADWAY UNLESS PARKED CARS IMPEDE ACCESS TO THE OWNERS' PROPERTY (THIRD DEPT))/PARKING (HIGHWAYS AND ROADS, REAL PROPERTY, OWNERS OF PROPERTY ABUTTING A ROADWAY CANNOT PROHIBIT PARKING ALONG THE ROADWAY UNLESS PARKED CARS IMPEDE ACCESS TO THE OWNERS' PROPERTY (THIRD DEPT))/HIGHWAYS AND ROADS (PARKING, OWNERS OF PROPERTY ABUTTING A ROADWAY CANNOT PROHIBIT PARKING ALONG THE ROADWAY UNLESS PARKED CARS IMPEDE ACCESS TO THE OWNERS' PROPERTY (THIRD DEPT))

RETIREMENT AND SOCIAL SECURITY LAW

RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER POLICE OFFICER SLIPPED ON WATER FROM A LEAKING WATER COOLER, THE HEARING OFFICER RULED THE INCIDENT WAS NOT A COMPENSABLE ACCIDENT BECAUSE THE WATER WAS READILY OBSERVABLE, THE COURT OF APPEALS RECENTLY HELD A PETITIONER IS NO LONGER REQUIRED TO DEMONSTRATE A CONDITION WAS NOT READILY OBSERVABLE, DETERMINATION ANNULLED (THIRD DEPT).

The Third Department annulled the finding that petitioner police officer, who slipped and fell on water which had leaked from a water cooler, was not entitled to accidental disability retirement benefits. The hearing officer had found that the incident constituted an accident within the meaning of the Retirement and Social Security Law, but the officer was not entitled to benefits because the water was readily observable. The Court of Appeals has recently ruled that a petitioner need not demonstrate a condition was not readily observable in order to demonstrate the incident was an accident:

> Respondent [comptroller] adopted the findings and conclusions of the Hearing Officer, who found that slipping on the water "was a sudden, fortuitous mischance and undoubtably unexpected and out of the ordinary." The Hearing Officer denied benefits, however, based solely upon petitioner's failure to demonstrate that the water she had slipped on was not readily observable. In its recent decision in Matter of Kelly v DiNapoli (30 NY3d 674 [2018]), the Court of Appeals stated that "the requirement that a petitioner demonstrate that a condition was not readily observable in order to demonstrate an 'accident' is inconsistent with our prior case law" ... . Inasmuch as respondent concluded that — but for the lack of proof that the water was readily observable — the incident satisfied the criteria to constitute an accident within the meaning of the Retirement and Social Security Law, substantial evidence does not support the determination that the incident was not an accident and it must be annulled ... . **Matter of Daquino v DiNapoli, 2018 NY Slip Op 03201, Third Dept 5-3-18**

RETIREMENT AND SOCIAL SECURITY LAW (ACCIDENTAL DISABILITY RETIREMENT BENEFITS, PETITIONER POLICE OFFICER SLIPPED ON WATER FROM A LEAKING WATER COOLER, THE HEARING OFFICER RULED THE INCIDENT WAS NOT A COMPENSABLE ACCIDENT BECAUSE THE WATER WAS READILY OBSERVABLE, THE COURT OF APPEALS RECENTLY HELD A PETITIONER IS NO LONGER REQUIRED TO DEMONSTRATE A CONDITION WAS NOT READILY OBSERVABLE, DETERMINATION ANNULLED (THIRD DEPT))/POLICE OFFICERS (RETIREMENT AND SOCIAL SECURITY LAW, ACCIDENTAL DISABILITY RETIREMENT BENEFITS, PETITIONER POLICE OFFICER SLIPPED ON WATER FROM A LEAKING WATER COOLER, THE HEARING OFFICER RULED THE INCIDENT WAS NOT A COMPENSABLE ACCIDENT BECAUSE THE WATER WAS READILY OBSERVABLE, THE COURT OF APPEALS RECENTLY HELD A PETITIONER IS NO LONGER REQUIRED TO DEMONSTRATE A CONDITION WAS NOT READILY OBSERVABLE, DETERMINATION ANNULLED (THIRD DEPT))/ACCIDENTAL DISABILITY RETIREMENT BENEFITS (RETIREMENT AND SOCIAL SECURITY LAW , PETITIONER POLICE OFFICER SLIPPED ON WATER FROM A LEAKING WATER COOLER, THE HEARING OFFICER RULED THE INCIDENT WAS NOT A COMPENSABLE ACCIDENT BECAUSE THE WATER WAS READILY OBSERVABLE, THE COURT OF APPEALS RECENTLY HELD A PETITIONER IS NO LONGER REQUIRED TO DEMONSTRATE A CONDITION WAS NOT READILY OBSERVABLE, DETERMINATION ANNULLED (THIRD DEPT))/ACCIDENTS (POLICE OFFICERS, ACCIDENTAL DISABILITY RETIREMENT BENEFITS, PETITIONER POLICE OFFICER SLIPPED ON WATER FROM A LEAKING WATER COOLER, THE HEARING OFFICER RULED THE INCIDENT WAS NOT A COMPENSABLE ACCIDENT BECAUSE THE WATER WAS READILY OBSERVABLE, THE COURT OF APPEALS RECENTLY HELD A PETITIONER IS NO LONGER REQUIRED TO DEMONSTRATE A CONDITION WAS NOT READILY OBSERVABLE, DETERMINATION ANNULLED (THIRD DEPT))/READILY OBSERVABLE CONDITION (ACCIDENTS, RETIREMENT AND SOCIAL SECURITY LAW (ACCIDENTAL DISABILITY RETIREMENT BENEFITS, PETITIONER POLICE OFFICER SLIPPED ON WATER FROM A LEAKING WATER COOLER, THE HEARING OFFICER RULED THE INCIDENT WAS NOT A COMPENSABLE ACCIDENT BECAUSE THE WATER WAS READILY OBSERVABLE, THE COURT OF APPEALS RECENTLY HELD A PETITIONER IS NO LONGER REQUIRED TO DEMONSTRATE A CONDITION WAS NOT READILY OBSERVABLE, DETERMINATION ANNULLED (THIRD DEPT))

SOCIAL SERVICES LAW

OCIAL SERVICES LAW.

PETITIONER, AN EMPLOYEE OF THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, COMMITTED NEGLECT WITHIN THE MEANING OF THE SOCIAL SERVICES LAW WHEN SHE USED THE TERM 'RETARDED' IN A CONVERSATION OVERHEARD BY SERVICE RECIPIENTS (THIRD DEPT).

The Third Department determined petitioner, an employee of the Office for People with Developmental Disabilities at the Brooklyn Developmental Disabilities Service Office, "committed acts of neglect [within the meaning of the Social Services Law] when [she] breached [her] duty towards multiple service recipients by failing to use appropriate and professional language in their presence." Petitioner had used the work "retarded" in conversations overheard by two service recipients:

> ... [N]eglect is defined as an action "that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient" (Social Services Law § 488 [1] [h]). Here, it is undisputed that petitioner used the word "retarded" while in a classroom when she was discussing mandated overtime work with the staff. Petitioner's statement was overheard by two of the service recipients, who were, not surprisingly, offended by the word as evidenced by one service recipient running away from the classroom to report the incident and the other still being upset several days after the incident. Both of these service recipients were diagnosed with mild developmental disabilities, as well as a legion of other diagnoses. Petitioner, who had worked at the Brooklyn Developmental Disabilities Service Office for 10 years, worked directly with the service recipients and was familiar with their emotional and psychological conditions. Further, petitioner is charged with caring for these service recipients, who of course develop trust for their aides. Given this context, it is foreseeable that the word used by the trusted caregiver would be likely to seriously impair the service recipients' already fragile emotional and psychological condition and there is no need for expert testimony to establish same ... . As such, substantial evidence supports respondent's final determination that petitioner committed a category three act of neglect ... . **Matter of Kelly v New York State Justice Ctr. for The Protection of People With Special Needs, 2018 NY Slip Op 03407, Third Dept 5-10-18**

SOCIAL SERVICES LAW (PEOPLE WITH DEVELOPMENTAL DISABILITIES, NEGLECT, PETITIONER, AN EMPLOYEE OF THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, COMMITTED NEGLECT WITHIN THE MEANING OF THE SOCIAL SERVICES LAW WHEN SHE USED THE TERM 'RETARDED' IN A CONVERSATION OVERHEARD BY SERVICE RECIPIENTS (THIRD DEPT))/DEVELOPMENTALLY DISABLED PERSONS (NEGLECT, PETITIONER, AN EMPLOYEE OF THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, COMMITTED NEGLECT WITHIN THE MEANING OF THE SOCIAL SERVICES LAW WHEN SHE USED THE TERM 'RETARDED' IN A CONVERSATION OVERHEARD BY SERVICE RECIPIENTS (THIRD DEPT))/NEGLECT (DEVELOPMENTALLY DISABLED PERSONS, SOCIAL SERVICES LAW, PETITIONER, AN EMPLOYEE OF THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, COMMITTED NEGLECT WITHIN THE MEANING OF THE SOCIAL SERVICES LAW WHEN SHE USED THE TERM 'RETARDED' IN A CONVERSATION OVERHEARD BY SERVICE RECIPIENTS (THIRD DEPT))/RETARDED'(PEOPLE WITH DEVELOPMENTAL DISABILITIES, NEGLECT, PETITIONER, AN EMPLOYEE OF THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, COMMITTED NEGLECT WITHIN THE MEANING OF THE SOCIAL SERVICES LAW WHEN SHE USED THE TERM 'RETARDED' IN A CONVERSATION OVERHEARD BY SERVICE RECIPIENTS (THIRD DEPT))

TRUSTS AND ESTATES

TRUSTS AND ESTATES.

WILL THAT CANNOT BE FOUND IS PRESUMED REVOKED, HERE PETITIONER DID NOT REBUT THE PRESUMPTION OF REVOCATION, CRITERIA EXPLAINED (FOURTH DEPT).

The Fourth Department determined Surrogate's Court properly determined the presumption the will had been revoked had not been rebutted. Petitioner had attempted to probate a photocopy of the will which could not be found upon the death of the testator:

> "A lost or destroyed will may be admitted to probate only if . . . [i]t is established that the will has not been revoked" (SCPA 1407 [1]).
>
> " When a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator' " ... . That "strong presumption of revocation by the testator . . . stands in the place of positive proof when a will previously executed cannot be found after a testator's death"... . Respondent was thus entitled to rely on the presumption to meet his burden on the motion ... . In addition, petitioner's own submissions established that decedent asked to retain the original will in her possession, and the attorney who drafted the will had the original delivered to decedent shortly after its execution ... .
>
> In opposition to the motion, petitioner failed to present evidence sufficient to raise a question of fact whether the presumption of revocation may be overcome ... . The presumption is unaffected by evidence that decedent's attorney retained a copy of the will at his office and that decedent never advised him that she intended to revoke the will ... . Nor may the presumption be overcome with hearsay accounts of decedent's statements concerning her testamentary intentions ... . Finally, while the presumption of revocation may be overcome with circumstantial evidence ... , "[p]etitioner[] cannot succeed on mere speculation and suspicion" ... . Rather, petitioner must present "facts and circumstances which show that the will was fraudulently destroyed during the testator's lifetime" ... . **Matter of Scollan, 2018 NY Slip Op 03287, Fourth Dept 5-4-18**

TRUSTS AND ESTATES (WILL THAT CANNOT BE FOUND IS PRESUMED REVOKED, HERE PETITIONER DID NOT REBUT THE PRESUMPTION OF REVOCATION, CRITERIA EXPLAINED (FOURTH DEPT))/WILLS (REVOKED, WILL THAT CANNOT BE FOUND IS PRESUMED REVOKED, HERE PETITIONER DID NOT REBUT THE PRESUMPTION OF REVOCATION, CRITERIA EXPLAINED (FOURTH DEPT))/REVOCATION, PRESUMPTION OF (WILLS, WILL THAT CANNOT BE FOUND IS PRESUMED REVOKED, HERE PETITIONER DID NOT REBUT THE PRESUMPTION OF REVOCATION, CRITERIA EXPLAINED (FOURTH DEPT))/LOST WILLS (WILL THAT CANNOT BE FOUND IS PRESUMED REVOKED, HERE PETITIONER DID NOT REBUT THE PRESUMPTION OF REVOCATION, CRITERIA EXPLAINED (FOURTH DEPT))

TRUSTS AND ESTATES.

DATE OF WOMAN'S DISAPPEARANCE, NOT THE STATUTORY DEFAULT DATE FIVE YEARS LATER, WAS THE CORRECT DATE OF DEATH (FIRST DEPT).

The First Department, reversing Surrogate's Court, determined the date of the disappearance of Kathleen (January 31, 1982) , not the statutory default date (January 31, 1987) was the date of the Kathleen's death:

> Petitioner submitted evidence that Kathleen disappeared without explanation, and without her car and personal effects, on January 31, 1982. Kathleen has not been seen or heard from since that date. Kathleen's sisters submit affidavits in which they recite that they were close with her, and communicated with her several times a month, prior to her disappearance. They state that it is inconceivable that Kathleen would abruptly cease all communication with family and friends. Kathleen was also a medical student at Mt. Sinai Medical School at the time of her disappearance. She was two months away from graduation. According to her family it was Kathleen's dream to become a doctor and it would be incomprehensible that she would walk away from her studies when she was so close to her goal. Respondent ... has not submitted an affidavit refuting or explaining this evidence.
>
> We find that this evidence is sufficient to establish a "high[] probab[ility]" that Kathleen died on the date of her disappearance ... . **Matter of McCormack, 2018 NY Slip Op 03733, First Dept 5-24-18**

TRUSTS AND ESTATES (DATE OF WOMAN'S DISAPPEARANCE, NOT THE STATUTORY DEFAULT DATE FIVE YEARS LATER, WAS THE CORRECT DATE OF DEATH (FIRST DEPT))/DISAPPEARANCE (DATE OF WOMAN'S DISAPPEARANCE, NOT THE STATUTORY DEFAULT DATE FIVE YEARS LATER, WAS THE CORRECT DATE OF DEATH (FIRST DEPT))/DEATH, DATE OF (DATE OF WOMAN'S DISAPPEARANCE, NOT THE STATUTORY DEFAULT DATE FIVE YEARS LATER, WAS THE CORRECT DATE OF DEATH (FIRST DEPT))

TRUSTS AND ESTATES, CIVIL PROCEDURE.

MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED, THE EVIDENCE DID NOT ALLOW THE CONCLUSION THAT THE WILL, WRITTEN BY DECEDENT'S CARETAKER THREE DAYS BEFORE DEATH, WAS DULY EXECUTED (THIRD DEPT).

The Third Department determined the jury verdict finding the will offered by petitioner had been duly executed was not supported by legally sufficient evidence and was against the weight of the evidence. The will was handwritten by petitioner, not decedent, three days before his death. The decedent, who was terminally ill, had moved to petitioner's family-type adult home only three weeks before his death. One attesting witness had worked at the home for 28 years. The other attesting witness had lived at the home for seven years and was petitioner's friend:

> A verdict may be set aside as unsupported by legally sufficient evidence where "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" ... .. A jury verdict may be found to be against the weight of the evidence "where the proof so preponderated in favor of the unsuccessful party that the verdict could not have been reached on any fair interpretation of the evidence" ... . * * *
>
> Upon this record, we cannot find legally sufficient evidence to support the jury's verdict finding that the will had been duly executed ... . Further, the jury's verdict is against the weight of the evidence, as it could not have been reached on a fair interpretation of the evidence ... . **Matter of Fraccaro, 2018 NY Slip Op 03198, Third Dept 5-3-18**

TRUSTS AND ESTATES (MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED, THE EVIDENCE DID NOT ALLOW THE CONCLUSION THAT THE WILL, WRITTEN BY DECEDENT'S CARETAKER THREE DAYS BEFORE DEATH, WAS DULY EXECUTED (THIRD DEPT))/WILLS (MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED, THE EVIDENCE DID NOT ALLOW THE CONCLUSION THAT THE WILL, WRITTEN BY DECEDENT'S CARETAKER THREE DAYS BEFORE DEATH, WAS DULY EXECUTED (THIRD DEPT))/VERDICT, MOTION TO SET ASIDE (MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED, THE EVIDENCE DID NOT ALLOW THE CONCLUSION THAT THE WILL, WRITTEN BY DECEDENT'S CARETAKER THREE DAYS BEFORE DEATH, WAS DULY EXECUTED (THIRD DEPT))

UNEMPLOYMENT INSURANCE

UNEMPLOYMENT INSURANCE.

TENDER AGE PT (TAPT), WHICH PROVIDED SUPPLEMENTAL EDUCATION SERVICES TO THE DEPARTMENT OF EDUCATION, WAS NOT THE EMPLOYER OF CLAIMANT, A BEHAVIORAL ANALYST THERAPIST WHO RECEIVED WORK ASSIGNMENTS FROM TAPT (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined a that Tender Age PT (TAPT), which provided supplemental education services to the Department of Education, was not required to make additional unemployment insurance contributions based on remuneration paid to claimant, a behavior analyst therapist who received assignments from TAPT:

> TAPT's overall control over important aspects of the service professionals' work is lacking largely because the policies and procedures related thereto are "dictated by statutes and regulations governing the provision of supplemental educational and related services"... . Indeed, although TAPT collected resumes and interviewed candidates wishing to be placed on its registry, this was primarily for the purpose of insuring that they met the requirements imposed by the Department of Health with regard to certification and licensing. Once candidates became approved service professionals, TAPT offered assignments based upon availability and other criteria, but the service professionals were free to reject an assignment or work for other agencies. If an assignment was accepted, TAPT supplied the service professionals with documentation furnished by the client, including the child's treatment plan and a prescription for the service, as well as other legally mandated documents. The service professionals then worked directly with the child and his or her parent, providing all necessary equipment and materials, and scheduling appointments without any involvement or oversight by TAPT, usually at the child's home, school or day care center.
>
> The compensation paid to the service professionals was negotiable, but was limited by the amount that TAPT received from its clients. Although the service professionals prepared daily work logs, as well as periodic status reports, on preprinted forms that they submitted to TAPT, this was done in order to comply with the requirements of TAPT's clients. In accordance with such requirements, they also submitted monthly invoices containing treatment information that TAPT compared with the daily logs. They would not, however, get paid until TAPT received payment from its clients. **Matter of Giordano (Commissioner of Labor), 2018 NY Slip Op 03573, Third Dept 5-17-18**

UNEMPLOYMENT INSURANCE (TENDER AGE PT (TAPT), WHICH PROVIDED SUPPLEMENTAL EDUCATION SERVICES TO THE DEPARTMENT OF EDUCATION, WAS NOT THE EMPLOYER OF CLAIMANT, A BEHAVIORAL ANALYST THERAPIST WHO RECEIVED WORK ASSIGNMENTS FROM TAPT (THIRD DEPT))/EDUCATIONAL SERVICES (UNEMPLOYMENT INSURANCE, TENDER AGE PT (TAPT), WHICH PROVIDED SUPPLEMENTAL EDUCATION SERVICES TO THE DEPARTMENT OF EDUCATION, WAS NOT THE EMPLOYER OF CLAIMANT, A BEHAVIORAL ANALYST THERAPIST WHO RECEIVED WORK ASSIGNMENTS FROM TAPT (THIRD DEPT))

UNEMPLOYMENT INSURANCE, LABOR LAW.

CLAIMANT, A SUBSTITUTE TEACHER, RECEIVED REASONABLE ASSURANCE OF EMPLOYMENT IN THE FOLLOWING SCHOOL YEAR (LABOR LAW 590), SHE WAS THEREFORE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, determined that the New York City Department of Education had demonstrated it had provided claimant, a substitute teacher, with reasonable assurance she would continue to be employed in the following school year. Her application for unemployment insurance benefits over the summer should, therefore, have been denied:

> ... [W]e find that the Board's decision is not supported by substantial evidence. Initially, in reaching its conclusion, the Board essentially imposed a requirement that a reasonable assurance be a guarantee of earnings during the following school year, an interpretation that finds no support in the statute or case law. ... Here, the 153 assignments that claimant obtained directly through school administrators during the 2015-2016 school year exceeded the 145 needed to satisfy the 90% threshold and should have been counted in determining whether she received a reasonable assurance of continued employment.
>
> In addition to the June 2016 letter setting forth the basic terms of claimant's continued employment during the 2016-2017 school year, the NYCDOE's witness testified that no changes were anticipated with respect to the budget, salary or number of students and paraprofessionals needed for the upcoming school year. He further stated that 14% of jobs go unfilled, providing ample opportunity for substitutes to find openings. In view of the foregoing, the record establishes that the NYCDOE provided claimant a reasonable assurance of continued employment under Labor Law § 590 (11), thereby precluding her from receiving benefits ... . **Matter of Enman (New York City Dept. of Educ.--Commissioner of Labor), 2018 NY Slip Op 03416, Third Dept 5-10-18**

UNEMPLOYMENT INSURANCE (SUBSTITUTE TEACHERS, CLAIMANT, A SUBSTITUTE TEACHER, RECEIVED REASONABLE ASSURANCE OF EMPLOYMENT IN THE FOLLOWING SCHOOL YEAR (LABOR LAW 590), SHE WAS THEREFORE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT))/LABOR LAW (SUBSTITUTE TEACHERS, UNEMPLOYMENT INSURANCE, CLAIMANT, A SUBSTITUTE TEACHER, RECEIVED REASONABLE ASSURANCE OF EMPLOYMENT IN THE FOLLOWING SCHOOL YEAR (LABOR LAW 590), SHE WAS THEREFORE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT))/SUBSTITUTE TEACHERS (UNEMPLOYMENT INSURANCE, CLAIMANT, A SUBSTITUTE TEACHER, RECEIVED REASONABLE ASSURANCE OF EMPLOYMENT IN THE FOLLOWING SCHOOL YEAR (LABOR LAW 590), SHE WAS THEREFORE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS (THIRD DEPT))

WORKERS' COMPENSATION LAW

WORKERS' COMPENSATION LAW.

CLAIMANT WAS ASSAULTED ON TRANSIT AUTHORITY PROPERTY WHILE WEARING HER TRANSIT AUTHORITY UNIFORM, ALTHOUGH SHE WAS COMMUTING TO WORK, HER COMMUTE HAD NOTHING TO DO WITH HER WORK, WORKERS' COMPENSATION BENEFITS PROPERLY DENIED (THIRD DEPT).

The Third Department determined claimant, who worked for the NYC Transit Authority, was not entitled to Workers' Compensation benefits for injuries suffered in an assault on the way to work. Although she was wearing her uniform and was on Transit Authority property when she was assaulted, her commute to her work station was deemed to have no connection to her work for the Transit Authority:

> "An injury is only compensable under the Workers' Compensation Law if it arose out of and in the course of a worker's employment and, in general, injuries sustained in the course of travel to and from the place of employment do not come within the statute" ... . Injuries incurred while commuting to work are generally not covered because "the risks inherent in traveling to and from work relate to the employment only in the most marginal sense" ... . There are recognized exceptions but, here, substantial evidence supports the Board's determination that claimant's injuries sustained while commuting are not compensable, as none of the relevant exceptions to this rule applies ... .
>
> According to claimant, the assault occurred almost an hour before the start of her shift, on her way to work, before signing in at her assigned station as required at the start of her shift. The employer neither encouraged nor benefitted from her commute route. Thus, at the time of the assault, claimant was not yet on duty or at her assigned station and was not performing any duties of her employment or undertaking an errand for the employer ... . Although claimant had opted to wear her work uniform on her commute, she was not required to do so, nor was she required to use public transportation to get to work. The employer provided a transportation pass, but there was no evidence that it was contractually bound to provide free transit, and the use of the pass did not make claimant's commute a part of her employment... . Rather, at the relevant time, claimant was a commuter using the subways like the general public and, while she was on property owned and operated by the employer, substantial evidence supports the Board's determination that this did not establish a casual connection between her employment and the assault ... . **Matter of Rodriguez v New York City Tr. Auth., 2018 NY Slip Op 03887, Third Dept 5-31-18**

WORKERS' COMPENSATION LAW (CLAIMANT WAS ASSAULTED ON TRANSIT AUTHORITY PROPERTY WHILE WEARING HER TRANSIT AUTHORITY UNIFORM, ALTHOUGH SHE WAS COMMUTING TO WORK, HER COMMUTE HAD NOTHING TO DO WITH HER WORK, WORKERS' COMPENSATION BENEFITS PROPERLY DENIED (THIRD DEPT))/COMMUTE (WORKERS' COMPENSATION LAW, CLAIMANT WAS ASSAULTED ON TRANSIT AUTHORITY PROPERTY WHILE WEARING HER TRANSIT AUTHORITY UNIFORM, ALTHOUGH SHE WAS COMMUTING TO WORK, HER COMMUTE HAD NOTHING TO DO WITH HER WORK, WORKERS' COMPENSATION BENEFITS PROPERLY DENIED (THIRD DEPT))

COURT OF APPEALS

ADMINISTRATIVE LAW (COA)

ADMINISTRATIVE LAW, EVIDENCE, APPEALS.

BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE NYC COMMISSION ON HUMAN RIGHTS' RULING THAT CONSTRUCTION OF A HANDICAPPED ACCESSIBLE ENTRANCE WOULD NOT CAUSE UNDUE HARDSHIP TO THE PROPERTY OWNERS APPELLATE REVIEW CAN GO NO FURTHER, EXTENSIVE TWO-JUDGE DISSENT (CT APP).

The Court of Appeals, over a two-judge dissenting opinion, determined that substantial evidence supported the NYC Commission on Human Rights' ruling that the conversion of a window to a handicapped-accessible entrance for a tenant in petitioners' building would not cause petitioners undue hardship. The dissent argued petitioners had carried their burden of proof on that issue by presenting evidence the conversion presented many structural issues which might necessitate evacuation of the building. The majority simply decided there was sufficient evidence to support the Commission's ruling and an appellate court's review power stops there:

> In light of the Commission's ruling in favor of respondents and because petitioners have the burden of demonstrating undue hardship ... , the issue is whether there is substantial evidence to support the Commission's conclusion that petitioners failed to carry that burden.
>
> "Quite often there is substantial evidence on both sides" of an issue disputed before an administrative agency ... , and the substantial evidence test "demands only that a given inference is reasonable and plausible, not necessarily the most probable" ... . Applying this standard, "[c]ourts may not weigh the evidence or reject [a] determination where the evidence is conflicting and room for choice exists" ... . Instead, "when a rational basis for the conclusion adopted by the [agency] is found, the judicial function is exhausted. The question, thus, is not whether [the reviewing court] find[s] the proof . . . convincing, but whether the [agency] could do so" ... . **Matter of Marine Holdings, LLC v New York City Commn. on Human Rights, 2018 NY Slip Op 03303, CtApp 5-8-18**

ADMINISTRATIVE LAW (EVIDENCE, BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE NYC COMMISSION ON HUMAN RIGHTS'S RULING THAT CONSTRUCTION OF A HANDICAPPED ACCESSIBLE ENTRANCE WOULD NOT CAUSE UNDUE HARDSHIP TO THE PROPERTY OWNERS APPELLATE REVIEW CAN GO NO FURTHER, EXTENSIVE TWO-JUDGE DISSENT (CT APP))/EVIDENCE (ADMINISTRATIVE LAW, WOULD NOT CAUSE UNDUE HARDSHIP TO THE PROPERTY OWNERS APPELLATE REVIEW CAN GO NO FURTHER, EXTENSIVE TWO-JUDGE DISSENT (CT APP))/APPEALS (ADMINISTRATIVE LAW, BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE NYC COMMISSION ON HUMAN RIGHTS'S RULING THAT CONSTRUCTION OF A HANDICAPPED ACCESSIBLE ENTRANCE WOULD NOT CAUSE UNDUE HARDSHIP TO THE PROPERTY OWNERS APPELLATE REVIEW CAN GO NO FURTHER, EXTENSIVE TWO-JUDGE DISSENT (CT APP))

ANIMAL LAW (COA)

ANIMAL LAW, APPEALS.

LEAVE TO APPEAL DENIAL OF HABEAS CORPUS RELIEF FOR TWO CHIMPANZEES DENIED, THOUGHTFUL CONCURRING OPINION QUESTIONS THE ANALYSIS USED BY THE APPELLATE DIVISION AND SUGGESTS RECOGNIZING THE CHIMPANZEES' RIGHT TO LIBERTY (CT APP).

The Court of Appeals denied the motion for leave to appeal in a case seeking habeas corpus relief for two chimpanzees alleged to be confined by their owners to small cages in a warehouse and a cement storefront in a crowded residential area ... . Judge Fahey wrote a thoughtful concurring opinion questioning the rationale used by the Appellate Division to deny relief:

> The Appellate Division's conclusion that a chimpanzee cannot be considered a "person" and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species ... .
>
> The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. Moreover, the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species. ...
>
> Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention. To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect ... . **Matter of Nonhuman Rights Project, Inc. v Lavery, 2018 NY Slip Op 03309, CtApp 5-8-18**

ANIMAL LAW (LEAVE TO APPEAL DENIAL OF HABEAS CORPUS RELIEF FOR TWO CHIMPANZEES DENIED, THOUGHTFUL CONCURRING OPINION QUESTIONS THE ANALYSIS USED BY THE APPELLATE DIVISION AND SUGGESTS RECOGNIZING THE CHIMPANZEES' RIGHT TO LIBERTY (CT APP))/APPEALS (ANIMAL RIGHTS, LEAVE TO APPEAL DENIAL OF HABEAS CORPUS RELIEF FOR TWO CHIMPANZEES DENIED, THOUGHTFUL CONCURRING OPINION QUESTIONS THE ANALYSIS USED BY THE APPELLATE DIVISION AND SUGGESTS RECOGNIZING THE CHIMPANZEES' RIGHT TO LIBERTY (CT APP))//HABEAS CORPUS (ANIMAL RIGHTS, LEAVE TO APPEAL DENIAL OF HABEAS CORPUS RELIEF FOR TWO CHIMPANZEES DENIED, THOUGHTFUL CONCURRING OPINION QUESTIONS THE ANALYSIS USED BY THE APPELLATE DIVISION AND SUGGESTS RECOGNIZING THE CHIMPANZEES' RIGHT TO LIBERTY (CT APP))

CORPORATION LAW (COA)

CORPORATION LAW, INTELLECTUAL PROPERTY.

IN THIS MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT ACTION, DAMAGES CANNOT BE MEASURED BY THE DEVELOPMENT COSTS AVOIDED BY THE COMPANY WHICH MISAPPROPRIATED THE TRADE SECRETS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over an extensive three-judge dissenting opinion, determined that the "cost avoidance" measure of damages should not be applied in this misappropriation of trade secrets, unfair competition and unjust enrichment action. Plaintiff proved at trial that former employees defected to defendant rival company, bringing trade secrets with them. Plaintiff's only proof of damages was its expert's opinion about how much it would have cost the rival company to develop the product without the misappropriated trade secrets ("avoided costs"):

> ... [T]he measure of damages in a trade secret action must be designed, as nearly as possible, to restore the plaintiff to the position it would have been in but for the infringement. Whether those losses are measured by the defendant's profits, revenues, cost savings or any other measure of unjust gain, there is "no presumption of law or of fact" that such a figure will adequately approximate the losses incurred by the plaintiff ... . A plaintiff therefore may not elect to measure its damages by the defendant's avoided costs in lieu of its own losses. * * *
>
> ... [D]amages in trade secret actions must be measured by the losses incurred by the plaintiff, and ... damages may not be based on the infringer's avoided development costs. * * *
>
> .. .[W]here a defendant saves, through its unlawful activities, costs and expenses that otherwise would have been payable to third parties, those avoided third-party payments do not constitute funds held by the defendant "at the expense of" the plaintiff. Therefore, a plaintiff bringing an unjust enrichment action may not recover as compensatory damages the costs that the defendant avoided due to its unlawful activity in lieu of the plaintiff's own losses. **E.J. Brooks Co. v Cambridge Sec. Seals, 2018 NY Slip Op 03171, CtApp 5-3-18**

CORPORATION LAW (MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT, IN THIS MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT ACTION, DAMAGES CANNOT BE MEASURED BY THE DEVELOPMENT COSTS AVOIDED BY THE COMPANY WHICH MISAPPROPRIATED THE TRADE SECRETS (CT APP))/TRADE SECRETS (MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT, IN THIS MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT ACTION, DAMAGES CANNOT BE MEASURED BY THE DEVELOPMENT COSTS AVOIDED BY THE COMPANY WHICH MISAPPROPRIATED THE TRADE SECRETS (CT APP))/UNFAIR COMPETITION (MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT, IN THIS MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT ACTION, DAMAGES CANNOT BE MEASURED BY THE DEVELOPMENT COSTS AVOIDED BY THE COMPANY WHICH MISAPPROPRIATED THE TRADE SECRETS (CT APP))/UNJUST ENRICHMENT (MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT, IN THIS MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT ACTION, DAMAGES CANNOT BE MEASURED BY THE DEVELOPMENT COSTS AVOIDED BY THE COMPANY WHICH MISAPPROPRIATED THE TRADE SECRETS (CT APP))/DAMAGES (AVOIDED COSTS, (MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT, IN THIS MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT ACTION, DAMAGES CANNOT BE MEASURED BY THE DEVELOPMENT COSTS AVOIDED BY THE COMPANY WHICH MISAPPROPRIATED THE TRADE SECRETS (CT APP))/AVOIDED COSTS (DAMAGES, MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT, IN THIS MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT ACTION, DAMAGES CANNOT BE MEASURED BY THE DEVELOPMENT COSTS AVOIDED BY THE COMPANY WHICH MISAPPROPRIATED THE TRADE SECRETS (CT APP))/INTELLECTUAL PROPERTY (MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT, IN THIS MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT ACTION,

DAMAGES CANNOT BE MEASURED BY THE DEVELOPMENT COSTS AVOIDED BY THE COMPANY WHICH MISAPPROPRIATED THE TRADE SECRETS (CT APP))

CRIMINAL LAW (COA)

CRIMINAL LAW.

MERE USE OF ANOTHER'S PERSONAL IDENTIFYING INFORMATION, LIKE A CREDIT CARD NUMBER, ESTABLISHES A VIOLATION OF NEW YORK'S IDENTITY THEFT STATUTE, THERE IS NO NEED TO PROVE THE DEFENDANT ASSUMED THE VICTIM'S IDENTITY IN SOME ADDITIONAL WAY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissent, determined that New York's identity theft statute is violated by the use of personal identifying information, like a credit card number, without more. The First Department case, which was reversed, had held the mere use of personal identifying information is insufficient, and the People must establish a defendant both used the victim's personal identifying information and assumed the victim's identity. The First Department concluded the proof had established that defendant used the personal identifying information of the victim but not that he assumed her identity. (The defendant in the First Department case had assumed the identity of a fictitious person.) The Fourth Department case, which was affirmed, concluded defendant's use of the victim's name and bank account number established she assumed his identity within the meaning of the statute, and the phrase "assumes the identity of another person" is not a discrete element of the identity theft statute:

> The common issue presented in these appeals is whether the People may establish that a defendant "assumes the identity of another," within the meaning of New York's identity theft statute, by proof that the defendant used another's personal identifying information, such as that person's name, bank account, or credit card number. Defendants ... argue that the use of personal identifying information does not automatically establish that a defendant assumes another's identity, and thus the People bear the burden of establishing independently both a defendant's use of protected information and assumptive conduct. The Appellate Division departments have split on the proper interpretation of the disputed statutory text. The First Department adopted the construction advanced here by defendants, leading to its conclusion that [the] conviction of identity theft was unsupported by sufficient evidence. By contrast, the Fourth Department concluded that the statute applies when a defendant uses the personal identifying information of another, upholding [the] conviction. We now reject defendants' decontextualized interpretation of the statutory language and conclude that the law defines the use of personal identifying information of another as one of the express means by which a defendant assumes that person's identity. **People v Roberts, 2018 NY Slip Op 03172, CtApp 5-3-18**

CRIMINAL LAW (IDENTITY THEFT, MERE USE OF ANOTHER'S PERSONAL IDENTIFYING INFORMATION, LIKE A CREDIT CARD NUMBER, ESTABLISHES A VIOLATION OF NEW YORK'S IDENTITY THEFT STATUTE, THERE IS NO NEED TO PROVE THE DEFENDANT ASSUMED THE VICTIM'S IDENTITY IN SOME ADDITIONAL WAY (CT APP))/IDENTITY THEFT (MERE USE OF ANOTHER'S PERSONAL IDENTIFYING INFORMATION, LIKE A CREDIT CARD NUMBER, ESTABLISHES A VIOLATION OF NEW YORK'S IDENTITY THEFT STATUTE, THERE IS NO NEED TO PROVE THE DEFENDANT ASSUMED THE VICTIM'S IDENTITY IN SOME ADDITIONAL WAY (CT APP))

CRIMINAL LAW.

PLACE OF BUSINESS EXCEPTION TO THE STATUTE CRIMINALIZING POSSESSION OF A FIREARM AS A FELONY DID NOT APPLY TO A MANAGER OF A MCDONALD'S RESTAURANT, AS OPPOSED TO A MERCHANT, STOREKEEPER OR PRINCIPAL OPERATOR (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurring opinion, determined that the "place of business" exception the the stature criminalizing possession of an unlicensed firearm as a felony did not apply to defendant, who was a swing manager at a McDonald's restaurant. While working at the restaurant the defendant's firearm discharged accidentally and wounded him:

> The question presented on this appeal is whether the "place of business" exception to Penal Law § 265.03 (3) applies to an employee who possessed an unlicensed firearm at work. Defendant contends that "place of business" simply means one's place of employment, and therefore the exception applies. We read the exception to narrowly encompass a person's "place of business," when such person is a merchant, storekeeper, or principal operator of a like establishment. **People v Wallace, 2018 NY Slip Op 03305, CtApp 5-8-18**

CRIMINAL LAW (POSSESSION OF A WEAPON, PLACE OF BUSINESS EXCEPTION TO THE STATUTE CRIMINALIZING POSSESSION OF A FIREARM AS A FELONY DID NOT APPLY TO A MANAGER OF A MCDONALD'S RESTAURANT, AS OPPOSED TO A MERCHANT, STOREKEEPER OR PRINCIPAL OPERATOR (CT APP))/PLACE OF BUSINESS (POSSESSION OF A WEAPON, PLACE OF BUSINESS EXCEPTION TO THE STATUTE CRIMINALIZING POSSESSION OF A FIREARM AS A FELONY DID NOT APPLY TO A MANAGER OF A MCDONALD'S RESTAURANT, AS OPPOSED TO A MERCHANT, STOREKEEPER OR PRINCIPAL OPERATOR (CT APP))/WEAPON, POSSESSION OF (PLACE OF BUSINESS EXCEPTION TO THE STATUTE CRIMINALIZING POSSESSION OF A FIREARM AS A FELONY DID NOT APPLY TO A MANAGER OF A MCDONALD'S RESTAURANT, AS OPPOSED TO A MERCHANT, STOREKEEPER OR PRINCIPAL OPERATOR (CT APP))

CRIMINAL LAW, APPEALS.

APPEAL FROM LOCAL CRIMINAL COURT NOT PROPERLY TAKEN, THE PROCEEDINGS WERE NOT TRANSCRIBED AND NO AFFIDAVIT OF ERRORS WAS SERVED OR FILED (CT APP).

The Court of Appeals reversed the Appellate Term, noting that the appeal from a local court was not properly taken. The proceedings were not transcribed by a court stenographer and no affidavit of errors had been filed or served:

> On review of submissions pursuant to section 500.11 of the Rules, order reversed, and case remitted to the Appellate Term, Second Department, Ninth and Tenth Judicial Districts, for further proceedings. Because the case originated in a local criminal court and the proceedings were not transcribed by a court stenographer, the appeal was not properly taken due to the failure to serve or file an affidavit of errors (see CPL 460.10[3]). **People v Epakchi, 2018 NY Slip Op 03095, CtApp 5-1-18**

CRIMINAL LAW (APPEALS, APPEAL FROM LOCAL CRIMINAL COURT NOT PROPERLY TAKEN, THE PROCEEDINGS WERE NOT TRANSCRIBED AND NO AFFIDAVIT OF ERRORS WAS SERVED OR FILED (CT APP))/APPEALS (CRIMINAL LAW,

AFFIDAVIT OF ERRORS, APPEAL FROM LOCAL CRIMINAL COURT NOT PROPERLY TAKEN, THE PROCEEDINGS WERE NOT TRANSCRIBED AND NO AFFIDAVIT OF ERRORS WAS SERVED OR FILED (CT APP))/AFFIDAVIT OF ERRORS (CRIMINAL LAW, APPEALS, APPEAL FROM LOCAL CRIMINAL COURT NOT PROPERLY TAKEN, THE PROCEEDINGS WERE NOT TRANSCRIBED AND NO AFFIDAVIT OF ERRORS WAS SERVED OR FILED (CT APP))

CRIMINAL LAW, EVIDENCE.

BEFORE CONSENTING TO A BREATHALYZER BLOOD-ALCOHOL TEST IN THIS DWI CASE, MORE THAN TWO HOURS AFTER DEFENDANT'S ARREST, DEFENDANT WAS INACCURATELY TOLD A TEST REFUSAL WOULD BE ADMISSIBLE AT TRIAL, DEFENDANT'S CONSENT TO THE TEST WAS THEREFORE NOT VOLUNTARY, EVIDENCE PROPERLY SUPPRESSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurrence and a three-judge extensive dissent, determined that the warnings given defendant driver about the consequences of refusing to take the breathalyzer blood-alcohol test were inaccurate, rendering the defendant's consent to the test involuntary and requiring the suppression of all evidence. The warnings, which were given more than two hours after defendant's DWI arrest, inaccurately stated that evidence of defendant's test refusal would be admissible at trial:

> ... [B]ecause the breathalyzer test was not performed within two hours of defendant's arrest, and the requirements necessary to obtain a court order pursuant to Vehicle and Traffic Law § 1194 (3) were not met, the test results were not admissible under the statutory scheme (see Vehicle and Traffic Law § 1195 [1]; see also Smith, 18 NY3d at 550-551 [holding that, absent compliance with the statute, even evidence of a refusal must be suppressed]). Nevertheless, ... the test results may still be admissible if defendant voluntarily consented to take the test because "the two-hour limitation . . . has no application" when the "defendant [has] expressly and voluntarily consented to administration of the [breath] test" ... . The issue before us, then, is whether defendant gave his voluntary consent to the administration of the test, which generally presents a mixed question of law and fact ... . However, it is undisputed that defendant expressly consented only after the expiration of the two-hour period and after being warned about the consequences of failing to do so; the parties' dispute here turns on whether the warnings were legally accurate and, consequently, whether his consent was voluntary ... .We conclude that, because more than two hours had passed since defendant's arrest, the warning that evidence of his refusal to take the breathalyzer test would be admissible at trial was inaccurate as a matter of law and, therefore, the record supports the conclusion of the courts below that his consent to the test was involuntary. **People v Odum, 2018 NY Slip Op 03173, CtApp 5-3-18**

CRIMINAL LAW (DWI, BEFORE CONSENTING TO A BREATHALYZER BLOOD-ALCOHOL TEST IN THIS DWI CASE, MORE THAN TWO HOURS AFTER DEFENDANT'S ARREST, DEFENDANT WAS INACCURATELY TOLD A TEST REFUSAL WOULD BE ADMISSIBLE AT TRIAL, DEFENDANT'S CONSENT TO THE TEST WAS THEREFORE NOT VOLUNTARY, EVIDENCE PROPERLY SUPPRESSED (CT APP))/EVIDENCE (CRIMINAL LAW, DWI, BREATHALYZER, BEFORE CONSENTING TO A BREATHALYZER BLOOD-ALCOHOL TEST IN THIS DWI CASE, MORE THAN TWO HOURS AFTER DEFENDANT'S ARREST, DEFENDANT WAS INACCURATELY TOLD A TEST REFUSAL WOULD BE ADMISSIBLE AT TRIAL, DEFENDANT'S CONSENT TO THE TEST WAS THEREFORE NOT VOLUNTARY, EVIDENCE PROPERLY SUPPRESSED (CT APP))/BREATHALYZER (BEFORE CONSENTING TO A BREATHALYZER BLOOD-ALCOHOL TEST IN THIS DWI CASE, MORE THAN TWO HOURS AFTER DEFENDANT'S ARREST, DEFENDANT WAS INACCURATELY TOLD A TEST REFUSAL WOULD BE ADMISSIBLE AT TRIAL, DEFENDANT'S CONSENT TO THE TEST WAS THEREFORE NOT VOLUNTARY, EVIDENCE PROPERLY SUPPRESSED (CT APP))/DRIVING WHILE INTOXICATED (DWI) (BREATHALYZER, BEFORE CONSENTING TO A BREATHALYZER BLOOD-ALCOHOL TEST IN THIS DWI CASE, MORE THAN TWO HOURS AFTER DEFENDANT'S ARREST, DEFENDANT WAS INACCURATELY TOLD A TEST REFUSAL WOULD BE ADMISSIBLE AT TRIAL, DEFENDANT'S CONSENT TO THE TEST WAS THEREFORE NOT VOLUNTARY, EVIDENCE PROPERLY SUPPRESSED (CT APP))

CRIMINAL LAW, EVIDENCE.

EVIDENTIARY RULING BY A TRIAL JUDGE WAS NOT THE LAW OF THE CASE AND WAS PROPERLY RECONSIDERED PRIOR TO TRIAL BY A NEW TRIAL JUDGE, STATEMENT HEARD IN THE BACKGROUND OF A 911 CALL IDENTIFYING DEFENDANT AS THE SHOOTER SHOULD NOT HAVE BEEN ADMITTED AS AN EXCITED UTTERANCE, NO EVIDENCE THE DECLARANT SAW THE SHOOTING (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a concurring opinion, reversing defendant's conviction, determined that a statement heard in the background of a 911 call should not have been admitted as an excited utterance. The statement ostensibly identified the defendant as the man who had just shot three people. Other than the defendant's fingerprint found on the van the shooter got into, there was no evidence identifying the defendant as the shooter. Two trial judges had ruled the 911 statement inadmissible before a third trial judge allowed it to come in. The Court of Appeals held that the law of the case doctrine did not prohibit the third judge from ruling on the admissibility of the statement, but the statement was inadmissible because there was no evidence the declarant observed the shooting:

> The decision to admit hearsay as an excited utterance is an evidentiary decision, "left to the sound judgment of the trial court"... , and thus may be reconsidered on retrial ... . There is no reason to apply a different rule to a successor judge within the same trial and we, therefore, have no basis to adopt a per se rule prohibiting a substitute judge from exercising independent discretion concerning an evidentiary trial ruling. * **
>
> A "spontaneous declaration or excited utterance — made contemporaneously or immediately after a startling event — which asserts the circumstances of that occasion as observed by the declarant" is an exception to the prohibition on hearsay ... . "The admission of a hearsay statement under any exception deprives the defendant of the right to test the accuracy and trustworthiness of the statement by cross-examination"... . Although hearsay, excited utterances may be admissible because, "as the impulsive and unreflecting responses of the declarant to the injury or other startling event, they possess a high degree of trustworthiness, and, as thus expressing the real tenor of said declarant's belief as to the facts just observed by him, may be received as testimony of those facts"... . ... "[I]t must be inferable that the declarant had an opportunity to observe personally the event described in the [spontaneous] declaration" ... . Direct observation by the person making the excited utterance ensures that the declarant is in fact reacting to and "assert[ing] the circumstances of" the event causing the excitement ... . **People v Cummings, 2018 NY Slip Op 03306, CtApp 5-8-18**

CRIMINAL LAW (EVIDENTIARY RULING BY A TRIAL JUDGE WAS NOT THE LAW OF THE CASE AND WAS PROPERLY RECONSIDERED PRIOR TO TRIAL BY A NEW TRIAL JUDGE, STATEMENT HEARD IN THE BACKGROUND OF A 911 CALL IDENTIFYING DEFENDANT AS THE SHOOTER SHOULD NOT HAVE BEEN ADMITTED AS AN EXCITED UTTERANCE, NO EVIDENCE THE DECLARANT SAW THE SHOOTING (CT APP))/EVIDENCE (CRIMINAL LAW, EVIDENTIARY RULING BY A TRIAL JUDGE WAS NOT THE LAW OF THE CASE AND WAS PROPERLY RECONSIDERED PRIOR TO TRIAL BY A NEW TRIAL JUDGE, STATEMENT HEARD IN THE BACKGROUND OF A 911 CALL IDENTIFYING DEFENDANT AS THE SHOOTER SHOULD NOT HAVE BEEN ADMITTED AS AN EXCITED UTTERANCE, NO EVIDENCE THE DECLARANT SAW THE SHOOTING (CT APP))/HEARSAY (CRIMINAL LAW, EXCITED UTTERANCE, EVIDENTIARY RULING BY A TRIAL JUDGE WAS NOT THE LAW OF THE CASE AND WAS PROPERLY RECONSIDERED PRIOR TO TRIAL BY A NEW TRIAL JUDGE, STATEMENT HEARD IN THE BACKGROUND OF A 911 CALL IDENTIFYING DEFENDANT AS THE SHOOTER SHOULD NOT HAVE BEEN ADMITTED AS AN EXCITED UTTERANCE, NO EVIDENCE THE DECLARANT SAW THE SHOOTING (CT APP))/EXCITED UTTERANCE (CRIMINAL LAW, EVIDENTIARY RULING BY A TRIAL JUDGE WAS NOT THE LAW OF THE CASE AND WAS PROPERLY RECONSIDERED PRIOR TO TRIAL BY A NEW TRIAL JUDGE, STATEMENT HEARD IN THE BACKGROUND OF A 911 CALL IDENTIFYING DEFENDANT AS THE SHOOTER SHOULD NOT HAVE BEEN ADMITTED AS AN EXCITED UTTERANCE, NO EVIDENCE THE DECLARANT SAW THE SHOOTING (CT APP))/LAW OF THE CASE (CRIMINAL LAW, EVIDENTIARY RULING BY A TRIAL JUDGE WAS NOT THE LAW OF THE CASE AND WAS PROPERLY RECONSIDERED PRIOR TO TRIAL BY A NEW TRIAL

JUDGE, STATEMENT HEARD IN THE BACKGROUND OF A 911 CALL IDENTIFYING DEFENDANT AS THE SHOOTER SHOULD NOT HAVE BEEN ADMITTED AS AN EXCITED UTTERANCE, NO EVIDENCE THE DECLARANT SAW THE SHOOTING (CT APP))

CRIMINAL LAW, EVIDENCE, APPEALS.

AFTER A SPECTATOR ALERTED THE COURT JURORS HAD BEEN OVERHEARD REFERRING TO THE DEFENDANT IN DEROGATORY TERMS THE TRIAL JUDGE QUESTIONED THE SPECTATOR BUT TOOK NO FURTHER ACTION, MATTER REMITTED TO THE APPELLATE DIVISION FOR A DETERMINATION WHETHER THE TRIAL JUDGE'S ASSESSMENT OF THE CREDIBILITY OF THE SPECTATOR WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion and a dissenting opinion, reversed the Appellate Division and sent the matter back to the Appellate Division for a factual determination whether the trial judge's credibility assessment of a spectator who claimed to have overheard jurors speaking about the defendant in derogatory terms was supported by the weight of the evidence. After questioning the spectator the trial judge determined no further inquiry was required. The Appellate Division reversed defendant's conviction over a dissent:

> ... [W]e are asked to determine whether the trial court abused its discretion when it chose not to conduct an inquiry of two sworn jurors pursuant to People v Buford (69 NY2d 290 [1987]). Alerted to a complaint by a courtroom spectator that during a break in the trial the spectator allegedly overheard the jurors refer to defendant by a derogatory term, the trial court immediately called the spectator to the stand and elicited sworn testimony regarding her allegation. At the conclusion of the examination, the judge determined that a Buford inquiry was not required based on the testimony provided. We conclude on this record that the trial court made an implied credibility finding that the spectator was not worthy of belief and therefore a Buford inquiry was not warranted. This determination by the trial court was not reviewed by the Appellate Division. It was error for the Appellate Division to opine as to what remedy was warranted in response to the content of the spectator's allegation, without determining whether the allegation was credible in the first instance. Accordingly, we reverse the Appellate Division order and remit the case to that Court to exercise its own fact-finding power to consider and determine whether the trial court's finding as to the spectator's credibility was supported by the weight of the evidence. * * *
>
> If, on remittal, the Appellate Division finds, upon its own factual review, that the record supports the trial court's determination that the spectator lacked credibility, no further action was required. If the Appellate Division finds that the credibility determination was not supported, it must determine whether the trial court abused its discretion in not taking further action ... . [A] credible allegation that a juror is grossly unqualified to serve or engaged in substantial misconduct within the meaning of CPL 270.35 cannot be ignored by the trial court, and failure to appropriately remedy the matter is reversible error. **People v Kuzdzal, 2018 NY Slip Op 03304, CtApp 5-8-18**

CRIMINAL LAW (JURORS, AFTER A SPECTATOR ALERTED THE COURT JURORS HAD BEEN OVERHEARD REFERRING TO THE DEFENDANT IN DEROGATORY TERMS THE TRIAL JUDGE QUESTIONED THE SPECTATOR BUT TOOK NO FURTHER ACTION, MATTER REMITTED TO THE APPELLATE DIVISION FOR A DETERMINATION WHETHER THE TRIAL JUDGE'S ASSESSMENT OF THE CREDIBILITY OF THE SPECTATOR WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE (CT APP))/JURORS (CRIMINAL LAW, BIAS, AFTER A SPECTATOR ALERTED THE COURT JURORS HAD BEEN OVERHEARD REFERRING TO THE DEFENDANT IN DEROGATORY TERMS THE TRIAL JUDGE QUESTIONED THE SPECTATOR BUT TOOK NO FURTHER ACTION, MATTER REMITTED TO THE APPELLATE DIVISION FOR A DETERMINATION WHETHER THE TRIAL JUDGE'S ASSESSMENT OF THE CREDIBILITY OF THE SPECTATOR WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE (CT APP))/APPEALS (CRIMINAL LAW, AFTER A SPECTATOR ALERTED THE COURT JURORS HAD BEEN OVERHEARD REFERRING TO THE DEFENDANT IN DEROGATORY TERMS THE TRIAL JUDGE QUESTIONED THE SPECTATOR BUT TOOK NO FURTHER ACTION, MATTER REMITTED TO THE APPELLATE DIVISION FOR A DETERMINATION WHETHER THE TRIAL JUDGE'S ASSESSMENT OF THE CREDIBILITY OF THE SPECTATOR WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE (CT APP))

CRIMINAL LAW, INTELLECTUAL PROPERTY, EVIDENCE.

CONVICTION FOR UNLAWFUL USE OF SECRET SCIENTIFIC MATERIAL, STEMMING FROM DEFENDANT'S UPLOADING OF HIGH FREQUENCY TRADING SOURCE CODE OWNED BY GOLDMAN SACHS, AFFIRMED, SOURCE CODE HAD A PHYSICAL FORM AND WAS APPROPRIATED WITHIN THE MEANING OF THE STATUTE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, affirming the Appellate Division, determined the evidence was sufficient to convict the defendant of violating Penal Law 165.07 (unlawful use of secret scientific material). Just before leaving the employ of Goldman Sachs to begin work at another company, the defendant had uploaded (copied) to a German server source code used by Goldman Sachs for high frequency trading. There was no evidence anyone other than the defendant had access to the uploaded source code. The major issues were whether the source code had a "physical form" or was "appropriated" within the mean of the statute:

> ... [W]e conclude that viewing the facts in the light most favorable to the People, a rational jury could have found that the "reproduction or representation" that defendant made of Goldman's source code, when he uploaded it to the German server, was tangible in the sense of "material" or "having physical form." The jury heard testimony that the representation of source code has physical form. ... [T]he computer engineer ... testified that while source code, as abstract intellectual property, does not have physical form, the "[r]epresentation of it" is material. He explained that when computer files are stored on a hard drive or CD, they are physically present on that hard drive or disc, and further stated that data is visible "in aggregate" when stored on such a medium. The jury also heard testimony that source code that is stored on a computer "takes up physical space in a computer hard drive." Given that a reproduction of computer code takes up space on a drive, it is clear that it is physical in nature. In short, the changes that are made to the hard drive or disc, when code or other information is stored, are physical. * * *
>
> We conclude that there is legally sufficient evidence that defendant created a tangible copy of the source code on the German server in violation of Penal Law § 165.07. * * *
>
> ... [W]e must decide is whether there is legally sufficient evidence that [defendant] had the necessary mens rea of "intent to appropriate . . . the use of secret scientific material" (Penal Law § 165.07). * * *
>
> Appropriation does not imply depriving another of property. In fact, larceny in general is defined as involving either intent to appropriate or intent to deprive, with the clear implication that the two terms refer to separate concepts. * * * ... [D]efendant may have intended to "appropriate" the source code without intending to deprive Goldman of all possession or use. **People v Aleynikov, 2018 NY Slip Op 03174, CtApp 5-3-18**

CRIMINAL LAW (CONVICTION FOR UNLAWFUL USE OF SECRET SCIENTIFIC MATERIAL, STEMMING FROM DEFENDANT'S UPLOADING OF HIGH FREQUENCY TRADING SOURCE CODE OWNED BY GOLDMAN SACHS, AFFIRMED, SOURCE CODE HAD A PHYSICAL FORM AND WAS APPROPRIATED WITHIN THE MEANING OF THE STATUTE (CT APP))/SECRET SCIENTIFIC MATERIAL (CRIMINAL LAW, CONVICTION FOR UNLAWFUL USE OF SECRET SCIENTIFIC MATERIAL, STEMMING FROM DEFENDANT'S UPLOADING OF HIGH FREQUENCY TRADING SOURCE CODE OWNED BY GOLDMAN SACHS, AFFIRMED, SOURCE CODE HAD A PHYSICAL FORM AND WAS APPROPRIATED WITHIN THE MEANING OF THE STATUTE (CT APP))/EVIDENCE (CRIMINAL LAW, CONVICTION FOR UNLAWFUL USE OF SECRET SCIENTIFIC MATERIAL, STEMMING FROM DEFENDANT'S UPLOADING OF HIGH FREQUENCY TRADING SOURCE CODE OWNED BY GOLDMAN SACHS, AFFIRMED, SOURCE CODE HAD A PHYSICAL FORM AND WAS APPROPRIATED WITHIN THE MEANING OF THE STATUTE (CT APP))/SOURCE CODE (CONVICTION FOR UNLAWFUL USE OF SECRET SCIENTIFIC MATERIAL, STEMMING FROM DEFENDANT'S UPLOADING OF HIGH FREQUENCY TRADING SOURCE CODE OWNED BY GOLDMAN SACHS, AFFIRMED, SOURCE CODE HAD A PHYSICAL FORM AND WAS APPROPRIATED WITHIN THE MEANING OF THE STATUTE (CT

APP))/INTELLECTUAL PROPERTY (CONVICTION FOR UNLAWFUL USE OF SECRET SCIENTIFIC MATERIAL, STEMMING FROM DEFENDANT'S UPLOADING OF HIGH FREQUENCY TRADING SOURCE CODE OWNED BY GOLDMAN SACHS, AFFIRMED, SOURCE CODE HAD A PHYSICAL FORM AND WAS APPROPRIATED WITHIN THE MEANING OF THE STATUTE (CT APP))

CRIMINAL LAW, EVIDENCE, APPEALS.

SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE DEBOUR STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE (CT APP).

The Court of Appeals affirmed the Appellate Division's determination that suppression of all evidence was required in this traffic stop case. Judge Garcia wrote an extensive dissenting opinion questioning the continued viability of the *DeBour* criteria for the analysis of encounters with the police. The dissenting opinion is well-worth reading but is not summarized here. The majority noted that a suppression ruling that is not reduced to writing is appealable:

> The Appellate Division did not err in rejecting the People's argument that defendant could not challenge on appeal a suppression ruling that was not reduced to writing. Record evidence supports the Appellate Division's suppression determination and, accordingly, that determination is beyond this Court's further review. To the extent the dissent questions the continued utility of the DeBour paradigm for analyzing encounters between police and members of the public (People v DeBour, 40 NY2d 210 [1976]) and suggests that People v Garcia (20 NY3d 317 [2012]) was wrongly decided, those questions are not presented here where the parties litigated this case within the framework of our existing precedent. **People v Gates, 2018 NY Slip Op 03096, CtApp 5-1-18**

CRIMINAL LAW (TRAFFIC STOP, SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE DEBOUR STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE (CT APP))/EVIDENCE (CRIMINAL LAW, SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE DEBOUR STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE (CT APP))/STREET STOPS (CRIMINAL LAW, SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE DEBOUR STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE (CT APP))/STREET STOPS (CRIMINAL LAW, SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE DEBOUR STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE (CT APP))/APPEALS (CRIMINAL LAW, ORAL RULINGS, SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE DEBOUR STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE (CT APP))/SUPPRESSION (TRAFFIC STOP, SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE DEBOUR STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE (CT APP))/SEARCH AND SEIZURE (TRAFFIC STOP, SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE DEBOUR STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE (CT APP))/DE BOUR (TRAFFIC STOP, SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE DEBOUR STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE (CT APP))

ENVIRONMENTAL LAW (COA)

ENVIRONMENTAL LAW.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAS THE POWER TO UNILATERALLY UNDERTAKE THE REMEDIATION OF A HAZARDOUS WASTE SITE, WITHOUT THE PARTICIPATION OF THE CORPORATION WHICH RELEASED THE WASTE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined the Department of Environmental Conservation (DEC) had the power to unilaterally undertake the remediation of a hazardous waste site, without the participation of the corporation (FMC) which released the waste. The fact that FMC had been operating under an interim permit (for 38 years) did not insulate FMC from the consequences of violating the permit.

> The only reasonable interpretation consistent with the statutory scheme and legislative purpose is that permittees and prospective permittees who exceed the terms of their permit or violate the performance standards required of those operating under interim status violate [Environmental Conservation Law (ECL) section 27—0914. * * *
>
> ,,, [T]itle 13 [of the ECL] provides an avenue for DEC to use the state superfund to unilaterally remediate the relevant properties ... .[T]hat statute requires DEC, absent exigent circumstances, to have first made "all reasonable efforts to secure voluntary agreement to pay the costs of necessary remedial actions from owners" ... . Here, DEC's conducting a year of negotiations only to be told that FMC cannot see any mutually-agreed upon path forward is more than the statute requires. The statute's other requirement—that DEC later make "all reasonable efforts to recover the full amount of any funds expended" ... —will be fulfilled in a CERCLA cost recovery action in federal district court. That action will provide FMC with an opportunity for a hearing to dispute its liability, as DEC has repeatedly acknowledged throughout the course of this proceeding. **Matter of FMC Corp. v New York State Dept. of Envtl. Conservation, 2018 NY Slip Op 03094, CtApp 5-1-18**

ENVIRONMENTAL LAW (HAZARDOUS WASTE, DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAS THE POWER TO UNILATERALLY UNDERTAKE THE REMEDIATION OF A HAZARDOUS WASTE SITE, WITHOUT THE PARTICIPATION OF THE CORPORATION WHICH RELEASED THE WASTE (CT APP))/HAZARDOUS WASTE (ENVIRONMENTAL LAW, DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAS THE POWER TO UNILATERALLY UNDERTAKE THE REMEDIATION OF A HAZARDOUS WASTE SITE, WITHOUT THE PARTICIPATION OF THE CORPORATION WHICH RELEASED THE WASTE (CT APP))/REMEDIATION (HAZARDOUS WASTE, ENVIRONMENTAL LAW, DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAS THE POWER TO UNILATERALLY UNDERTAKE THE REMEDIATION OF A HAZARDOUS WASTE SITE, WITHOUT THE PARTICIPATION OF THE CORPORATION WHICH RELEASED THE WASTE (CT APP))

INSURANCE LAW (COA)

INSURANCE LAW, CIVIL PROCEDURE.

BECAUSE NO-FAULT BENEFITS PROVIDED BY A SELF-INSURER ARE A CREATURE STATUTE, NOT AN INSURANCE CONTRACT, THE THREE-YEAR (NOT SIX-YEAR) STATUTE OF LIMITATIONS APPLIES TO NO-FAULT CLAIMS AGAINST A SELF-INSURER (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a concurrence and a three-judge dissent, reversing the Appellate Division, determined the three-year statute of limitations applies to no-fault claims against a self-insurer. The court reasoned that the self-insurance option is a creature of statute, not a contract:

> We conclude that the three-year statute of limitations as set forth in CPLR 214 (2), which governs disputes with respect to penalties created by statute, should control this case. There is no dispute "that it is the gravamen or essence of the cause of action that determines the applicable Statute of Limitations" ... , or that a three-year limitations period applies to "an action to recover upon a liability. . . created or imposed by statute" ... . Moreover, although the three-year period of limitation in "CPLR 214 (2) does not automatically apply to all causes of action in which a statutory remedy is sought" ... , that condition does attach to instances in which "liability would not exist but for a statute" (id.).
>
> The no-fault benefits in dispute are not provided by a contract with a private insurer. Instead defendant has met its statutory obligation by self-insuring. No-fault is a creature of statute ... . **Contact Chiropractic, P.C. v New York City Tr. Auth., 2018 NY Slip Op 03093, CtApp 5-1-18**

INSURANCE LAW (NO-FAULT, BECAUSE NO-FAULT BENEFITS PROVIDED BY A SELF-INSURER ARE A CREATURE STATUTE, NOT AN INSURANCE CONTRACT, THE THREE-YEAR (NOT SIX-YEAR) STATUTE OF LIMITATIONS APPLIES TO NO-FAULT CLAIMS AGAINST A SELF-INSURER (CT APP))/CIVIL PROCEDURE (INSURANCE LAW, NO-FAULT, STATUTE OF LIMITATIONS, BECAUSE NO-FAULT BENEFITS PROVIDED BY A SELF-INSURER ARE A CREATURE STATUTE, NOT AN INSURANCE CONTRACT, THE THREE-YEAR (NOT SIX-YEAR) STATUTE OF LIMITATIONS APPLIES TO NO-FAULT CLAIMS AGAINST A SELF-INSURER (CT APP))/CPLR 214 (INSURANCE LAW, NO-FAULT, STATUTE OF LIMITATIONS, BECAUSE NO-FAULT BENEFITS PROVIDED BY A SELF-INSURER ARE A CREATURE STATUTE, NOT AN INSURANCE CONTRACT, THE THREE-YEAR (NOT SIX-YEAR) STATUTE OF LIMITATIONS APPLIES TO NO-FAULT CLAIMS AGAINST A SELF-INSURER (CT APP))/NO-FAULT (BECAUSE NO-FAULT BENEFITS PROVIDED BY A SELF-INSURER ARE A CREATURE STATUTE, NOT AN INSURANCE CONTRACT, THE THREE-YEAR (NOT SIX-YEAR) STATUTE OF LIMITATIONS APPLIES TO NO-FAULT CLAIMS AGAINST A SELF-INSURER (CT APP))/STATUTE OF LIMITATIONS (INSURANCE LAW, NO-FAULT, BECAUSE NO-FAULT BENEFITS PROVIDED BY A SELF-INSURER ARE A CREATURE STATUTE, NOT AN INSURANCE CONTRACT, THE THREE-YEAR (NOT SIX-YEAR) STATUTE OF LIMITATIONS APPLIES TO NO-FAULT CLAIMS AGAINST A SELF-INSURER (CT APP))/SELF-INSURER (INSURANCE LAW, NO-FAULT, STATUTE OF LIMITATIONS, BECAUSE NO-FAULT BENEFITS PROVIDED BY A SELF-INSURER ARE A CREATURE STATUTE, NOT AN INSURANCE CONTRACT, THE THREE-YEAR (NOT SIX-YEAR) STATUTE OF LIMITATIONS APPLIES TO NO-FAULT CLAIMS AGAINST A SELF-INSURER (CT APP))

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