LABOR LAW 200 CAUSE OF ACTION BASED UPON A DANGEROUS CONDITION PROPERLY SURVIVED SUMMARY JUDGMENT, APPELLANTS DID NOT DEMONSTRATE A LACK OF ACTUAL OR CONSTRUCTIVE NOTICE OF THE CONDITION; JUDGE SHOULD NOT HAVE, SUA SPONTE, DENIED A MOTION ON A GROUND NOT RAISED BY A PARTY (SECOND DEPT).

The Second Department determined the Labor Law 200 and common-law negligence causes of action properly survived summary judgment. The Second Department noted the court should not have, sua sponte, denied appellants' motion on the ground the deposition transcripts were inadmissible because that issue was not raised. Plaintiff was working in the bottom of a hole which was muddy from heavy rain and littered with boulders and rocks. Plaintiff was injured when he allegedly slipped and fell because of the mud. The Second Department held that the causes of action were based upon a dangerous condition, not the method and manner of work, and the appellants did not demonstrate they lacked actual or constructive notice of the condition:

> Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work … . There are "two broad categories of actions that implicate the provisions of Labor Law § 200" … . The first category involves worker injuries arising out of alleged dangerous or defective conditions on the premises where the work is performed … . In those circumstances, "[f]or liability to be imposed on the property owner, there must be evidence showing that the property owner either created a dangerous or defective condition, or had actual or constructive notice of it without remedying it within a reasonable time" … . The second category of actions under Labor Law § 200 involves injuries arising from the method and manner of the work … . A property owner will be held liable under this category only if it possessed the authority to supervise or control the means and methods of the work … .
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> Contrary to the appellants' contention, the plaintiff's accident arose from a dangerous premises condition, not from the method and manner of the work. Where a plaintiff alleges that he or she was injured at a work site as a result of a dangerous premises condition, a property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition … . Modugno v Bovis Lend Lease Interiors, Inc., 2020 NY Slip Op 03508, Second Dept 6-24-20

TRIAL JUDGE ASSUMED THE ROLE OF THE PROSECUTOR AND ELICITED CRUCIAL IDENTIFICATION TESTIMONY, NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, ordering a new trial, determined the trial judge assumed the role of the prosecutor in eliciting crucial identification testimony:

> "While neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process,' the court's discretion in this area is not unfettered" … . The principle restraining the court's discretion is that a trial judge's "function is to protect the record, not to make it" … . Accordingly, while a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on "the function or appearance of an advocate" … .
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> Here, the record demonstrates that after the two complainants, in response to questions by the prosecutor, were unable to positively identify the defendant as the perpetrator of the robbery, the Supreme Court improperly assumed the appearance or the function of an advocate by questioning the complainants until it elicited a positive in-court identification of the defendant from each of them … . Under these circumstances, the court's decision to elicit such testimony was an improper exercise of discretion and deprived the defendant of a fair trial. People v Mitchell, 2020 NY Slip Op 03541, Second Dept 6-24-20

PLAINTIFF SOUGHT ONLY CANCELLATION OF A MORTGAGE; THE JUDGE SHOULD NOT HAVE, SUA SPONTE, CANCELLED THE NOTE AS WELL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, granted relief that was not asked for by the plaintiff. Plaintiff sought cancellation and discharge of a mortgage pursuant to Real Property Actions and Proceedings Law (RPAPL) 1501(4). The judge cancelled the mortgage and the note:

> "The court may grant relief that is warranted pursuant to a general prayer for relief contained in a notice of motion if the relief

granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" … . Here, the plaintiff only sought cancellation and discharge of the subject mortgage, not cancellation of the note. The Supreme Court should not have granted additional relief sua sponte … . We note that the plaintiff lacked standing to seek cancellation of the note, as it was not a party to it. Trenton Capital, LLC v Bank of N.Y. Mellon, 2020 NY Slip Op 03416, Second Dept 6-17-20

EXCULPATORY (BRADY) EVIDENCE IN THE COMPLAINANT'S MENTAL HEALTH RECORDS WAS REDACTED BY THE JUDGE; TWO INDICTMENT COUNTS WERE MULTIPLICITOUS; NEW TRIAL ORDERED IN THIS SEXUAL ABUSE CASE (SECOND DEPT).

The Second Department, reversing defendant's sexual abuse convictions, determined the defendant was entitled to exculpatory (Brady) evidence in the complainant's mental health records which was redacted by the judge. The Second Department noted that, upon retrial, two counts of sexual abuse related to a continuous incident were multiplicitous and one of the counts must be dismissed:

The complainant and the defendant each testified and presented sharply divergent accounts of the events that were alleged to have occurred during the summer of 2009. The record shows that a determination of credibility was key to the jury's consideration of this case, as the jury acquitted the defendant of the charge of rape in the first degree but convicted him of the charges alleging sexual abuse in the first degree. Thus, the redacted portion of the complainant's mental health records which contains the statement "[s]exual abuse denied" and the portion of the checklist reflecting that "[s]exual abuse (lifetime)" was not checked off could be viewed by the jury as exculpatory and materially relevant to the matter … . Since the jury had to weigh the credibility of the complainant and the defendant, this evidence, if disclosed, may have changed the result of the proceeding. Accordingly, the judgment must be reversed and the matter remitted for a new trial. People v Butler, 2020 NY Slip Op 03374, Second Dept 6-17-20

SUPREME COURT SHOULD NOT HAVE GRANTED SOLE CUSTODY TO FATHER, SHOULD NOT HAVE SANCTIONED MOTHER FOR PERJURY ALLEGEDLY COMMITTED IN A DIFFERENT COURT PROCEEDING, AND SHOULD NOT HAVE ORDERED RELIEF NOT REQUESTED BY A PARTY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined: (1) father should not have been awarded sole custody of the children for 60 days because no change of circumstances was alleged or demonstrated; (2) the court should not have, sua sponte, directed a child be deprived of cell phone and other electronic devices and be barred from outside-the-home activities; (3) the court should not have have directed mother to pay a fine to father for perjury; (4) the court did not have the authority to sanction mother for frivolous conduct (perjury); (5) the court should not have awarded attorney's fees to father:

… [T]he court summarily punished the mother by sanctioning her after it determined that she committed perjury during her testimony before a Judicial Hearing Officer in Family Court with respect to the temporary order of protection and during her testimony at the hearing on the petition before Supreme Court. Assuming, arguendo, that perjury would support a finding of contempt, we conclude that the court could not properly find the mother in criminal contempt based on her testimony in Family Court, nor could the court summarily punish the mother for civil or criminal contempt based on that testimony, inasmuch as it occurred out of the court's "immediate view and presence" … . Insofar as the order may be deemed to sanction the mother for civil or criminal contempt that occurred in the presence of Supreme Court, we conclude that, because "due process requires that . . . the contemnor be afforded an opportunity to be heard at a meaningful time and in a meaningful manner' " … , and the court failed to provide notice that it was considering finding the mother in contempt or an opportunity to be heard thereon, the court erred in imposing such sanction … . …

Assuming, arguendo, that sanctions for frivolous conduct may be based on a party's perjury, we conclude that the regulation permitting the imposition of such sanctions specifically provides that it "shall not apply to . . . proceedings in the Family Court commenced under article . . . 8 of the Family Court Act" … . …

In awarding attorney's fees to the father, the court did not state, and we cannot determine on this record, whether it did so based upon the custodial stipulation between the parties or pursuant to statute. Consequently, we are unable " to determine whether the award was within the proper exercise of the court's discretion' " … . Ritchie v Ritchie, 2020 NY Slip Op 03316, Fourth Dept 6-12-20

ACCOUNTING CAUSE OF ACTION IN THIS SHAREHOLDERS' DERIVATIVE SUIT SHOULD NOT HAVE BEEN DISMISSED; ALTHOUGH SUA SPONTE ORDERS ARE NOT APPEALABLE, THE APPEAL WAS HEARD IN THE INTEREST OF JUSTICE; PROPER WAY TO HANDLE A SUA SPONTE ORDER IS TO MOVE TO VACATE AND THEN APPEAL (FIRST DEPT).

The First Department, reversing Supreme Court in this shareholders' derivative action against a low-income Housing Development Fund Corporation (HDFC), determined: (1) although a sua sponte order is not appealable, the appeal of the dismissal of the cause of action for an accounting is heard in the interest of justice; (2) the proper way to handle a sua sponte order is to move to vacate it and then appeal; (3) there was no need to amend the complaint because the accounting cause of action included the right to damages for wrongdoing (here the alleged failure to account for the sale of an apartment for $90,000):

> An order issued sua sponte is not appealable as of right (see CPLR 5701[a][2] ...). Plaintiffs' remedy is to move to vacate the court's order, and, if the motion is denied, appeal from that order (CPLR 5701[a][3] ...). ...
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> ... [W]e find that Supreme Court erred in dismissing the complaint because the cause of action for an equitable accounting was not moot. Supreme Court conflated the first cause of action for the inspection of the HDFC's books and records with the second cause of action for an equitable accounting ... . Defendants failed to demonstrate what happened to the $90,000 from the sale of Apartment 6A, and the funds do not appear in the HDFC's financials. Defendants' affidavits did not address this glaring deficiency.
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> ... An equitable accounting involves a remedy "designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession" ... . Available relief includes a personal judgment against the wrongdoer ... . Hall v Louis, 2020 NY Slip Op 03268, First Dept 6-11-20

JUDGE SHOULD NOT HAVE SEARCHED THE RECORD AND, SUA SPONTE, GRANTED RELIEF NOT REQUESTED IN THE MOTION PAPERS, INCLUDING THE APPLICATION OF THE RES IPSA LOQUITUR DOCTRINE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have, sua sponte, searched the record to grant relief that was not requested in this Labor Law 200, 240(1), 241(6), negligence action. Plaintiff was injured when a portion of a ceiling fell causing a scaffold to collapse on him. The judge should not have granted summary judgment on a negligence cause of action which was not included in the motions, and should not have granted summary judgment on a res ipsa loquitur theory:

> While it is well settled that the Supreme Court has the authority to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a motion before the court (see CPLR 3212[b] ...), here, the court, in effect, searched the record and awarded summary judgment to the movant with respect to an issue that was not the subject of the motion before the court. ...
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> The doctrine of res ipsa loquitur applies when the injury-causing event (1) is "of a kind which ordinarily does not occur in the absence of someone's negligence"; (2) "[is] caused by an agency or instrumentality within the exclusive control of the defendant"; and (3) was not "due to any voluntary action or contribution on the part of the plaintiff" ... . Contrary to the Supreme Court's determination, this is not one of "the rarest of res ipsa loquitur cases" where the plaintiff's circumstantial evidence is so convincing and the defendant's response so weak that the inference of the defendant's negligence is inescapable ... . Although the first and third elements may be satisfied in the plaintiff's favor, based upon the limited record, this standard was not met as to the second element. Even though courts do not generally apply the requirement of exclusive control as it is literally stated or as a fixed, mechanical or rigid rule ... , the plaintiff failed to demonstrate that the plaster ceiling is "structural" and, therefore, the obligation of [defendant] Lexington to maintain pursuant to the terms of the lease it entered into with [defendant] Dover. Moreover, the papers do not establish the plaintiff's entitlement to summary judgment against Dover on this issue, which was raised by the court sua sponte as against Dover, and was not the subject of the plaintiff's motion as against Dover. Zhigue v Lexington Landmark Props., LLC, 2020 NY Slip Op 02948, Second Dept 5-20-20

JUDGE SHOULD NOT HAVE, SUA SPONTE, TERMINATED THE GUARDIANSHIP OF AN INCAPACITATED PERSON WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, terminated the guardianship of an incapacitated person (IP) without holding a hearing:

> In April 2016, Fanny K. commenced this proceeding pursuant to Mental Hygiene Law article 81 seeking to be appointed as the guardian to manage Angeliki K.'s property located in Greece. After a hearing, the Supreme Court determined that Angeliki K. (hereinafter the IP) was incapacitated within the meaning of Mental Hygiene Law article 81 and appointed Fanny K. (hereinafter the guardian) as the guardian of her property. In September 2018, due to the IP's health problems and resultant inability to communicate in English, the IP was admitted to an assisted living and rehabilitation facility in Athens, Greece. In November 2018, the guardian moved for leave to change the IP's place of abode from New York to the assisted living and rehabilitation facility, with the IP continuing to maintain her permanent residence in New York. The court, without a hearing, denied the motion and, sua sponte, terminated the guardianship due to a lack of a continuing nexus between the guardianship and New York.
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> The Supreme Court should not have, sua sponte, terminated the guardianship, without a hearing, as a guardianship may be terminated "only on application of a guardian, the incapacitated person, or any other person entitled to commence a proceeding under Mental Hygiene Law article 81 with a hearing on notice" (... see Mental Hygiene Law §§ 81.36[b], [c] ...). Matter of Angeliki K. (Fanny K.), 2020 NY Slip Op 02786, Second Dept 5-13-20

FAMILY COURT SHOULD HAVE REOPENED THE NEGLECT HEARING WHEN MOTHER ARRIVED AT COURT SHORTLY AFTER SUMMATIONS (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should have reopened the neglect hearing when mother arrived just after summations:

> The Family Court conducted a fact-finding hearing over the course of several days, during which the mother was present, and the maternal grandmother and a DSS caseworker testified. On the fifth day of the hearing, the mother was late in arriving to court because she allegedly was traveling by bus from Georgia to New York, and the bus was delayed. The mother's counsel notified the court of the mother's transportation issue, and of her intention to testify, and requested an adjournment. The court denied the adjournment request and directed that the hearing proceed as scheduled. The mother arrived shortly after summations, but the court did not reopen the hearing to afford the mother the opportunity to testify.
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> Following the hearing, the Family Court found that the mother neglected the child. ...
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> A finding of neglect constitutes "a permanent and significant stigma" which might indirectly affect the mother's status in future proceedings ... . The Family Court has the authority to reopen a Family Court Act article 10 proceeding to allow a party to present additional testimony at a fact-finding hearing ... .
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> Under the circumstances of this case, the Family Court should have exercised its discretion to reopen the fact-finding hearing to afford the mother the opportunity to present her case. Matter of Katie P.H. (Latoya M.), 2020 NY Slip Op 02265, Second Dept 4-9-20

JUDGE EXHIBITED BIAS AGAINST MOTHER AND INTERFERED EXCESSIVELY IN THE CUSTODY HEARING; NEW HEARING ORDERED BEFORE A DIFFERENT JUDGE (SECOND DEPT).

The Second Department, reversing Family Court, determined the judge was biased against mother and excessively interfered in the custody hearing:

> The record of the proceedings supports the mother's contention that the Family Court was biased against her, depriving her of a fair and impartial hearing. Although the mother's claim of bias is not preserved for appellate review ... . Here, the record demonstrates that the court predetermined the outcome of the case during the hearing and took an adversarial stance against the mother by, among other things, interjecting itself into the proceedings by cross-examining the mother on matters irrelevant to a determination of custody, including referring to the mother as "emotionally excessive" and inquiring as to how many online dating web sites the mother utilized at the time she met the father and as to when the mother and the father became intimate. The court also asked the

mother, “so you were looking to start a relationship with someone?” and then commented, “And so you were married at the time?” Although the father was also married to someone when he began his relationship with the mother, no such questions or comments were directed to him by the court. The court’s inquiry of the mother exceeded 30 pages of transcript over the course of the two-day hearing. Although the court also questioned the father, the first inquiry related to setting up a parental access schedule for the father while the hearing was pending and the second set of inquiries appeared designed to elicit testimony from the father that was unfavorable to the mother, including one instance where the court intimated that the mother was practicing “extortion” against the father in order to gain an advantage in the proceedings … . Matter of Siegell v Iqbal, 2020 NY Slip Op 02084, Second Dept 3-25-20