DIFFERENT STANDARDS OF PROOF OF EMPLOYMENT DISCRIMINATION UNDER THE NY CITY HUMAN RIGHTS LAW, AS OPPOSED TO THE NY STATE HUMAN RIGHTS LAW, EXPLAINED IN SOME DEPTH; PLAINTIFF'S CAUSE OF ACTION FOR GENDER DISCRIMINATION UNDER THE NY CITY HUMAN RIGHTS LAW ON A THEORY OF A HOSTILE WORK ENVIRONMENT REINSTATED (SECOND DEPT).

The Second Department, in a comprehensive opinion by Justice Brathwaite Nelson, reversing (modifying) Supreme Court, determined plaintiff's cause of action for gender discrimination on a theory of a hostile work environment under the NY City Human Rights Law should not have been dismissed. The Second Department held that the "materially adverse" change in employment conditions, which applies to the NY State Human Rights Law, does not apply to the NY City Human Rights Law. The standard under the NY City Human Rights Law is a showing that plaintiff was subject to an unfavorable change or treated less well than other employees on the basis of a protected characteristic. The Second Department took pains to explain the different standards of proof under the State and City Human Rights Laws:

> ... [U]nder the City Human Rights Law, in order to demonstrate liability, a plaintiff need not establish that she or he was subjected to a "materially adverse" change to terms and conditions of employment, but only that she or he was subject to an unfavorable change or treated less well than other employees on the basis of a protected characteristic ... . * * *
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> The alleged comment by Denesopolis [plaintiff's boss], that he did not "like women on this job because they have babies," plainly expresses a view of the role of women in the workplace. Considering the totality of the circumstances, which include the plaintiff's testimony that Denesopolis expressed displeasure upon learning of her transfer to his unit as a pregnant woman, and then again at her second pregnancy, we cannot say that this is a "truly insubstantial case" as a matter of law. In addition, while it might be inferred that the incidents in which Denesopolis publicly reprimanded the plaintiff and referred to her as an "empty suit" and "Sergeant do nothing" were related to deficiencies in her performance as a sergeant, on the defendants' motion for summary judgment, we must view the facts in the light most favorable to the plaintiff. A jury could agree with the plaintiff that the conduct was based upon her pregnancies and conclude that the plaintiff was subject to a workplace in which she was treated less well than others because of her gender. Accordingly, the cause of action alleging gender discrimination on a theory of a hostile work environment under the City Human Rights Law must be reinstated. Golston-Green v City of New York, 2020 NY Slip Op 02768, Second Dept 5-13-20

RESPONDENT WAIVED HIS RIGHT TO ARBITRATE HIS TERMINATION PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT BY BRINGING A BREACH OF CONTRACT ACTION SEEKING THE SAME RELIEF ON THE SAME GROUNDS, AS WELL AS DAMAGES (THIRD DEPT).

The Third Department, reversing Supreme Court, determined respondent (Ferreira) had waived his right to arbitrate his discharge from employment as a teacher pursuant to the collective bargaining agreement (CBA) because he sought an action at law seeking the same relief on the same grounds, as well as damages:

> "Generally, when addressing waiver, courts should consider the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established" ... . Moreover, the Court of Appeals has found no waiver where the ultimate objective of multiple procedures is the same, but the grounds urged for relief are discrete ... .
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> Here, Ferreira waived his right to arbitrate because he chose to pursue an action at law asserting virtually the same grounds for relief and remedies sought in the arbitration. His notice of claim, alleging breach of contract, was filed approximately three months prior to his request for arbitration. An action was thereafter commenced, which was still pending at the time of oral argument, and, "[b]y commencing an action at law involving arbitrable issues, [Ferreira] waived whatever right [he] had to arbitration" ... . Although use of litigation to preserve the status quo while awaiting arbitration does not effectuate waiver, Ferreira did not merely seek an equitable relief; rather, he sought monetary damages and other affirmative relief as a result of the termination of his employment and petitioner's alleged violation of the CBA ... . Matter of New Roots Charter Sch. (Ferreira), 2020 NY Slip Op 02223, Third Dept 4-9-20

WHETHER THE SCHOOL PRINCIPAL RECEIVED COMPETENT REPRESENTATION AT

HER DISCIPLINARY PROCEEDINGS BEFORE THE NYC DEPARTMENT OF EDUCATION WAS RELEVANT TO HER DECERTIFICATION PROCEEDINGS BEFORE THE NYS DEPARTMENT OF EDUCATION; THEREFORE THE MOTION TO QUASH THE SUBPOENA SEEKING THE ATTORNEY'S TESTIMONY SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that the motion to quash a subpoena seeking an attorney's (Guerra's) testimony in a teacher decertification proceeding should not have been granted. The attorney was seeking employment with the NYC Department of Education (NYCDOE) at the time she was representing the respondent school principal (Klingsberg) in disciplinary proceedings brought by the NYCDOE. The issue of whether respondent received competent representation in the disciplinary proceedings was relevant to whether those proceedings should be given collateral estoppel effect in the New York State Department of Education (SED) teacher decertification proceedings:

> "[A] subpoena will be quashed only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry" ... . The party moving to quash bears "the burden of establishing that the subpoena should be [quashed] under such circumstances" ... . * * *
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> ... [W]hether Klingsberg was competently represented at that prior proceeding so as to warrant giving preclusive effect to its factual findings is very much in issue in this decertification proceeding and, given that Guerra has firsthand knowledge regarding her representation of Klingsberg at that prior proceeding, it cannot be said that "the information sought [from Guerra] is utterly irrelevant" to the decertification inquiry ... . Rather, Guerra's testimony is highly relevant to whether collateral estoppel will be applied in the pending decertification proceeding. For this reason, petitioners have not satisfied their burden of proof on their motion to quash the subpoena ... . Matter of Board of Educ. of the City Sch. Dist. of the City of N.Y. v New York State Dept. of Educ., 2020 NY Slip Op 02140, Third Dept 4-2-20

AN ATTORNEY REPRESENTING A SCHOOL-EMPLOYEE-UNION-MEMBER IN DISCIPLINARY PROCEEDINGS PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT CAN NOT BE LIABLE IN MALPRACTICE TO THE UNION MEMBER (SECOND DEPT).

The Second Department determined the attorney (Guerra) who represented a union can not be held liable in malpractice to individual union members in disciplinary proceedings:

> Pursuant to CPLR 3211(a)(2), a party may move to dismiss a cause of action on the ground that the court lacks subject matter jurisdiction as the cause of action is preempted by federal law ... . Here, we agree with the Supreme Court's determination that the complaint insofar as asserted against Guerra is preempted by section 301 of the Federal Labor Management Relations Act, and that attorneys such as Guerra who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants such as the plaintiff where the services performed constitute part of the collective bargaining process ... . Klingsberg v Council of Sch. Supervisors & Adm'rs-Local 1, 2020 NY Slip Op 02083, Second Dept 3-25-20

LABOR LAW 198-b, WHICH PROHIBITS AN EMPLOYER'S COLLECTING KICKBACKS FROM AN EMPLOYEE, DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST THE EMPLOYER (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined Labor Law 198-b, which essentially prohibits an employer from collecting kickbacks from and employee, did not create a private right of action:

> Plaintiff, a former teacher at defendant Utica Academy of Science Charter School (UASCS), commenced this action seeking to recover damages based upon allegations that there in which plaintiff was required to provide donations to [defendant] High Way in the form of illegal kickbacks of his salary under threat of demotion or termination. In his third cause of action, plaintiff alleged that defendants' conduct violated Labor Law § 198-b, and plaintiff sought damages arising from that violation pursuant to Labor Law § 198. ...

Although we offer no opinion with respect to whether other provisions within article 6 of the Labor Law afford private rights of action, we agree with High Way that the legislature did not intend to create a private right of action for violations of Labor Law § 198-b … , inasmuch as " [t]he [l]egislature specifically considered and expressly provided for enforcement mechanisms' in the statute itself" … . Indeed, by its express terms, a violation of section 198-b constitutes a misdemeanor offense … . Konkur v Utica Academy of Science Charter Sch., 2020 NY Slip Op 01827, Fourth Dept 3-13-20

THE COLLECTIVE BARGAINING AGREEMENT DID NOT ALLOW THE AWARD OF BACK PAY TO AN EMPLOYEE WHO FACED DISCIPLINARY ACTION RELATING TO A CRIMINAL OFFENSE BUT WAS ULTIMATELY ACQUITTED AFTER TRIAL; THEREFORE THE ARBITRATOR EXCEEDED HIS AUTHORITY (THIRD DEPT).

The Third Department determined the arbitrator exceeded his authority in awarding back pay to a corrections officer (Spratley) who was terminated by the Department of Corrections and Community Services (DOCCS) after shooting someone while off-duty. The officer was found not guilty of the criminal offense but was subject to disciplinary action based upon the incident:

> … Section 8.4 of the CBA [collective bargaining agreement] sets forth the procedures under which DOCCS may suspend an employee without pay prior to the service of a notice of discipline and the limited circumstances under which back pay is owed following that act. Spratley was suspended without pay pursuant to section 8.4 (a) (2), which, in relevant part, authorizes that step for "an employee charged with the commission of a crime." The same section provides that, where DOCCS fails to serve a notice of discipline within 30 days of the suspension or seven days after learning of a disposition of the criminal charges, "whichever occurs first," an award of back pay is called for. There is nothing to suggest, and the arbitrator did not find, that either of those conditions were satisfied. … Section 8.4 (a) (5) provides another path for an award of back pay where the suspended employee does not face related disciplinary action and is "not found guilty" of the pending criminal charges, but Spratley did face related disciplinary action. The CBA accordingly contains no provision for the "retroactive" invalidation of the interim suspension and award of back pay under the circumstances presented, and the arbitrator, who was expressly barred by a term of the CBA from adding to, subtracting from or otherwise modifying its provisions, was powerless to add one … . Thus, the arbitrator exceeded his authority in making an award of back pay, and Supreme Court should have granted respondents' cross motion to the extent of vacating that award. Matter of Spratley (New York State Dept. of Corr. & Community Supervision), 2020 NY Slip Op 01424, Third Dept 2-27-20

HOSPITAL DID NOT DEMONSTRATE THE TREATING EMERGENCY PHYSICIAN WAS NOT AN EMPLOYEE AND DID NOT DEMONSTRATE THE EMERGENCY PHYSICIAN DID NOT DEPART FROM ACCEPTED STANDARDS OF MEDICAL CARE; THE HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the medical malpractice action against the hospital (Mercy) should not have been dismissed. The hospital failed to demonstrate the emergency physician (Hughes) was not an employee and failed to demonstrate the emergency physician did not depart from the accepted standards of care:

> … [T]he Mercy defendants failed to establish, prima facie, that they could not be held vicariously liable for the alleged malpractice of Hughes on the ground that he was not an employee. The medical records submitted by the Mercy defendants in support of the subject branches of the motion established that the plaintiff arrived at the hospital for treatment of her abdominal pain through the emergency department, and not as a patient of any particular physician … . In addition, the affidavit of a registered nurse employed by the defendant Mercy Medical Center as a Director Risk Management/Privacy Officer contained no evidentiary basis to support her conclusory assertion that Hughes was not an employee of the hospital … .
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> The Mercy defendants also failed to establish, prima facie, that Hughes did not depart from accepted community standards of medical care in the treatment of the plaintiff, or that any departure by Hughes was not a proximate cause of the plaintiff's injuries … . Pinnock v Mercy Med. Ctr., 2020 NY Slip Op 01374, Second Dept 2-26-20

PLAINTIFF PROPERLY ALLOWED TO AMEND THE MEDICAL MALPRACTICE COMPLAINT AFTER THE STATUTE OF LIMITATIONS HAD RUN TO ADD A TREATING DOCTOR EMPLOYED BY A NAMED DEFENDANT PURSUANT TO THE RELATION-BACK DOCTRINE (SECOND DEPT).

The Second Department determined the relation-back doctrine allowed the amendment of the complaint (CPLR 1003) in this medical malpractice, wrongful death action to add a doctor, Abergel, who treated plaintiff's decedent and was employed by the defendant professional corporation (P.C.):

> The causes of action arose out of the same conduct, to wit, the alleged negligence by [defendant] Purow and Abergel in the course of treating the decedent for her ulcerative colitis at the P.C.'s office, which they each did within the scope of their employment with the P.C. ...
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> The vicarious liability of the P.C. allows for a finding of unity of interest with Abergel, "regardless of whether the actual wrongdoer or the person or entity sought to be charged vicariously was served first'" ... .
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> ... [T]he plaintiff satisfied the third prong of the test, which focuses, inter alia, on "whether the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that person at all and that the matter has been laid to rest as far as he [or she] is concerned'" ... . The decedent's medical records from the P.C. included several notes signed by Abergel, and clearly and repeatedly referenced Abergel as a physician who treated the decedent as part of the care rendered to the decedent by the P.C. * * * In addition, the plaintiff demonstrated that the failure to originally name Abergel as a defendant was the result of a mistake, and there was no need to show that such mistake was excusable ... . Petruzzi v Purow, 2020 NY Slip Op 01372, Second Dept 2-26-20

QUESTION OF FACT WHETHER THE DOCTRINE OF RES IPSA LOQUITUR APPLIES IN THIS MEDICAL MALPRACTICE CASE; QUESTION OF FACT WHETHER THE MEDICAL CENTER IS LIABLE UNDER THE OSTENSIBLE AGENCY DOCTRINE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined: (1) there is a question of fact whether the doctrine of res ipsa loquitur applied in this medical malpractice action; (2) the lack of informed consent cause of action should be reinstated; (3) there is a question of fact whether the medical center (NYU Langone) is liable for the anesthesiologist (Coopersmith) who performed the pre-surgery nerve block pursuant to the doctrine of ostensible agency; and (4) the action against the doctor who assisted Dr. Coopersmith was properly dismissed because she didn't exercise any independent judgment in the procedure:

> ... [W]e agree with plaintiff that she sufficiently established that the doctrine of res ipsa loquitur applies to her cause of action for medical malpractice. The parties' experts disagreed as to whether plaintiff's injury ordinarily occurs in the absence of negligence, raising an issue of fact on that point ... . Plaintiff also established that defendants were in control of all instruments used in the nerve block, and plaintiff's actions did not contribute to her injuries ... . To the extent that defendants' expert opined that post-operative symptoms and image studies were not consistent with needle trauma to a nerve, that opinion did not refute plaintiff's assertion of res ipsa loquitur because it failed to identify any other possible cause of plaintiff's plexopathy, let alone a more probable cause ... . Moreover, defendants' expert did not dispute that plaintiff sus tained nerve damage and did not opine that the nerve damage pre-existed the surgery. ...
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> We agree with defendants that they were entitled to a determination that no actual agency existed between NYU Langone and Dr. Coopersmith because NYU Langone did not employ or otherwise control Dr. Coopersmith. However, we find that an issue of fact exists as to whether NYU Langone could be held liable for Dr. Coopersmith's actions in his treatment of plaintiff through ostensible agency. It is undisputed that plaintiff was treated by Dr. Feldman [the surgeon] because she sought out his care. However, Dr. Feldman testified that he did not choose which anesthesiologist at NYU Langone would perform the nerve block on plaintiff, instead an anesthesiologist was assigned by the Department of Anesthesia. A jury could reasonably infer from this testimony that Dr. Coopersmith was provided by NYU Langone and that plaintiff reasonably believed that Dr. Coopersmith was acting on NYU Langone's behalf ... . Sklarova v Coopersmith, 2020 NY Slip Op 01033, First Dept 2-13-20

DISMISSAL OF THE ACTION SEEKING OVERTIME PAY IN FEDERAL COURT ON THE GROUND NO NOTICE OF CLAIM WAS FILED DID NOT PRECLUDE, PURSUANT TO THE DOCTRINE OF RES JUDICATA, AN ACTION IN SUPREME COURT SEEKING PERMISSION TO FILE A LATE NOTICE OF CLAIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the dismissal of the action concerning overtime pay in federal court, on the ground no notice of claim had been filed, did not preclude the action in Supreme Court seeking leave to file a late notice of claim:

> … [T]he federal court dismissed the New York Labor Law claims for failure to file a timely notice of claim (see County Law § 52; General Municipal Law § 50-e). …
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> … [S]o much of the petition as sought leave to deem the late notice of claim timely served nunc pro tunc is not barred by the doctrines of collateral estoppel and res judicata. Although collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue which was raised and decided in a prior action or proceeding … , the issue of whether the petitioners could obtain leave to deem the late notice of claim timely served nunc pro tunc pursuant to General Municipal Law § 50-e(5) was not litigated or decided by the 2017 federal order. As the issue was not litigated, the petitioners are not precluded from raising it … .
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> Res judicata also is inapplicable to so much of the petition as sought leave to deem the late notice of claim timely served nunc pro tunc. "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" … . Since the federal court was without jurisdiction to determine whether the petitioners could obtain leave to deem the late notice of claim timely served nunc pro tunc (see General Municipal Law § 50-e[7]), the petitioners are not precluded by the doctrine of res judicata from seeking a determination of this issue … . Matter of Chodkowski v County of Nassau, 2020 NY Slip Op 01058, Second Dept 2-13-20