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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.

The Table of Contents Describes All the Issues Addressed by the Selected Decisions in March, 2019, Organized Alphabetically by Legal Category.

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APPELLATE DIVISION

APPEALS

APPEALS, CIVIL PROCEDURE.

30-DAY TIME TO APPEAL WITH RESPECT TO ALL PARTIES IS TRIGGERED BY THE SERVICE OF THE ORDER OR JUDGMENT WITH WRITTEN NOTICE OF ENTRY BY ANY PARTY (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Dillon, determined that the 30-day period for filing a notice of appeal (CPLR 5513(a)) is triggered for all parties when any party serves the other parties with the order or judgment appealed from with written notice of entry:

> This appeal provides our Court with an occasion to clarify the meaning of CPLR 5513(a). The 1996 amendment to CPLR 5513(a), effective January 1, 1997, requires that an order or judgment be served "by a party" with written notice of entry in order to commence the time to undertake an appeal (L 1996, ch 214, § 1). ... [W]e hold that service of the order or judgment with written notice of entry by any party upon the other parties to the action operates to commence the 30-day time to appeal with respect to not only the serving party, but all the parties in the action. * * *
>
> ... [T]he language of CPLR 5513(a) as to who serves notice of entry is not limited to the "prevailing party," or to "the appealing party," or to "the party seeking to limit an adversary's appellate time." Rather, "a" party, which is unrestricted, necessarily refers to "any" party to an action. As a result, the service of an order or judgment with written notice of entry commences the 30-day time to appeal as to not only the party performing the service, but as to all other parties as well.
>
> Here, the County's [defendant's] service on June 17, 2015, of the Supreme Court's order with written notice of entry commenced the plaintiffs' time to appeal the order as to all of the defendants, including those who served a notice of entry at a later date, and those who may have served no notice of entry at all. The plaintiffs' appeal must therefore be dismissed as untimely as to all of the defendants (see CPLR 5513[a]). **W. Rogowski Farm, LLC v County of Orange, 2019 NY Slip Op 01815, Second Dept 3-13-19**

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ATTORNEYS

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NONPARTY LAW FIRM SHOULD HAVE BEEN ALLOWED TO WITHDRAW AS COUNSEL FOR DEFENDANTS BASED UPON DEFENDANTS' FAILURE TO PAY REASONABLE ATTORNEY'S FEES AND FAILURE TO COOPERATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the nonparty law firm, Kaufman, should have been allowed to withdraw as counsel for defendants T & V and Komninos based upon defendant's failure to pay attorney's fees and failure to cooperate:

> The Supreme Court improvidently exercised its discretion in denying the law firm's unopposed motion for leave to withdraw as counsel for T & V and Komninos. An attorney may be permitted to withdraw from employment where a client refuses to pay reasonable legal fees (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[c][5] ...). Likewise, an attorney may withdraw from representing a client if the client "fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[c][7] ...).
>
> Here, the law firm established that T & V and Komninos failed in their obligation to pay the legal fees earned by the law firm and further failed to cooperate in their representation. Moreover, T & V and Komninos did not oppose that branch of the law firm's motion which was for leave to withdraw as their counsel. Accordingly, that branch of the motion which was for leave to withdraw as counsel for T & V and Komninos should have been granted ... . **Villata v Kokkinos, 2019 NY Slip Op 02143, Second Dept 3-20-19**

ATTORNEYS, ACCOUNT STATED.

THE ABSENCE OF A RETAINER AGREEMENT DOES NOT PRECLUDE RECOVERY OF ATTORNEY'S FEES UNDER THE ACCOUNT STATED THEORY (FIRST DEPT).

The First Department determined the absence of a retainer agreement did not preclude recovery of attorney's fees under the account stated theory:

> ... "[F]ailure to comply with the letter of engagement rule (22 NYCRR 1215.1) does not preclude . . . recovery of legal fees under a theory of account stated" ... . The record before us shows that, after receiving the benefit of Carling's services, Peters invoked the absence of a retainer agreement in an effort to evade her payment obligations, and the court was right to award him the amounts reflected in his bills. **Carling v Peters, 2019 NY Slip Op 01713, First Dept 3-12-19**

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ATTORNEYS, AGENCY, CONTRACT LAW.

ATTORNEY HAD APPARENT AUTHORITY TO SIGN STIPULATION OF SETTLEMENT WHICH THEREFORE BOUND THE PLAINTIFF TO ITS TERMS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's attorney had apparent authority to sign a stipulation of settlement which was therefore binding on plaintiff:

> "A stipulation made by the attorney may bind a client even where it exceeds the attorney's actual authority if the attorney had apparent authority to enter into the stipulation" ... . Here, the plaintiff is bound by the settlement agreement signed by her former attorney. Even if the attorney lacked actual authority to enter into the settlement agreement on the plaintiff's behalf, a finding that he had the apparent authority to do so is warranted by the facts ... . The plaintiff's former attorney participated in the mediation with the plaintiff's knowledge and consent, and represented to the mediator and to defense counsel that a representative from his office had spoken with the plaintiff and obtained authority to settle the action for the sum of $150,000. Additionally, the law firm that employed the attorney who participated in the mediation was the plaintiff's attorney of record in the action, and attorneys from that law firm signed and verified the summons and complaint and signed and certified a note of issue filed in the action ... . **Amerally v Liberty King Produce, Inc., 2019 NY Slip Op 01550, Second Dept 3-6-19**

ATTORNEYS, CIVIL PROCEDURE.

SANCTIONS PROPERLY IMPOSED FOR BRINGING A FRIVOLOUS LAWSUIT (SECOND DEPT).

The Second Department determined sanctions for frivolous conduct were properly imposed. The action was precluded by collateral estoppel and should not have been brought:

> "The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct" (22 NYCRR 130-1.1[a]). Conduct is frivolous under 22 NYCRR 130-1.1 if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR 130-1.1[c][1], [2] ...).
>
> Here, the Supreme Court providently exercised its discretion in granting that branch of the defendant's motion which was pursuant to 22 NYCRR 130-1.1(a) to impose a sanction upon Miller and his attorney consisting of costs in the form of an attorney's fee (see 22 NYCRR 130-1.1[a]). Under the circumstances of this case, the court properly determined that Miller and his attorney engaged in frivolous conduct in commencing this action, as it was completely without merit in law, and could not be supported by a reasonable argument for an extension, modification, or reversal of existing law (see 22 NYCRR 130-1.1[c]). **Miller v Falco, 2019 NY Slip Op 01589, Second Dept 3-6-19**

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CIVIL PROCEDURE

CIVIL PROCEDURE.

IN THIS COMBINED ARTICLE 78 AND DECLARATORY JUDGMENT ACTION, THE FOUR-MONTH STATUTE OF LIMITATIONS APPLICABLE TO ARTICLE 78 DID NOT APPLY TO THE DECLARATORY JUDGMENT ACTION WHICH ONLY INVOLVED PRIVATE PARTIES, NOT A GOVERNMENT BODY OR OFFICER (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, determined that the declaratory judgment action was not subject to the four-month statute of limitations for Article 78 actions. The plaintiff and defendant are private parties who own land on opposite sides of Cady Road. A portion of the Cady Road was declared discontinued and defendant allegedly erected a barrier. Plaintiff's action sought Article 78 relief against a town official as well as a declaratory judgment. Because no Article 78 relief was possible with respect to the private defendant who allegedly erected the barrier, the shorter statute of limitations did not apply to the declaratory judgment action concerning the rights of the private parties:

> Relief under CPLR article 78 is available only against a limited subset of official and institutional parties. It follows that the four-month statute of limitations applicable to article 78 proceedings cannot be imported to bar a declaratory judgment action against a private individual not subject to article 78. * * *
>
> ... [D]efendant is not a "body or officer" within the meaning of CPLR 7802 (a), i.e., he is not a "court, tribunal, board, corporation, [or] officer," and it is well established that article 78 relief is available only against a "body or officer" as defined by section 7802 (a) ... .
>
> ... [T]he true gravamen of its declaratory claims "requires a judicial determination as to the rights of the parties to use Cady Road [which] would [thereby] settle the rights of private [parties]," i.e., plaintiff and defendant. And it is well established that such a contest between the "rights of private [parties]" cannot be adjudicated in an article 78 proceeding ... .
>
> ... [B]ecause an article 78 proceeding was not a "proper vehicle" for plaintiff's private claims for declaratory relief against defendant, the four-month "limitations period set forth in CPLR 217 [1] is not applicable to [such claims] and the six-year statute of limitations set forth in CPLR 213 (1) applies instead" ... . **Matter of Grocholski Cady Rd., LLC v Smith, 2019 NY Slip Op 01966, Fourth Dept 3-15-19**

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CIVIL PROCEDURE, APPEALS.

DEMAND FOR A JURY TRIAL, MADE ONE DAY LATE, SHOULD HAVE BEEN GRANTED, THE DENIAL OF THE ORAL APPLICATION FOR A JURY TRIAL IS PROPERLY CONSIDERED ON APPEAL FROM THE FINAL JUDGMENT, EVEN THOUGH NO FORMAL MOTION ON NOTICE WAS MADE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over an extensive dissent, determined (1) defendants' oral application requesting a jury trial, made one day late, should have been granted, and (2) the appeal from a final judgment allows an appeal of the denial of the late application for a jury trial, even though no formal motion on notice was made. The dissent argued the denial was not appealable because there was no formal motion on notice:

> An appeal from a final judgment "brings up for review . . . any non-final judgment or order which necessarily affects the final judgment" (CPLR 5501 [a] [1]). The parties do not dispute that the order denying defendants' application for leave to file a late demand for a jury trial necessarily affected the final judgment. ...
>
> ... [T]he State Constitution provides for a right to a jury trial in civil cases (see NY Const, art I, § 2 ...). Although that right may be waived through the failure to demand it in a timely fashion (see CPLR 4102 [a]), the court "may relieve a party from the effect" of such waiver "if no undue prejudice to the rights of another party would result" (CPLR 4102 [e]). While "[t]he decision . . . to relieve a party from failing to timely comply with CPLR 4102 (a) lies within the sound discretion of the trial court" ... , we conclude that the court's denial of defendants' application was an abuse of discretion. **Braun v Cesareo, 2019 NY Slip Op 01962, Fourth Dept 3-15-19**

CIVIL PROCEDURE, ATTORNEYS.

DELIBERATE ACTS BY DEFENDANT'S ATTORNEY RESULTED IN THE DEFAULT, DEFENDANT'S MOTION TO VACATE THE DEFAULT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's attorney's deliberate acts required denial of defendant's motion to vacate the default:

> The affirmations of the defendant's attorney reveal that he made a conscious decision not to submit any papers in opposition to the plaintiff's motion even though the Supreme Court gave him ample opportunity to do so. In addition, defense counsel waited until the plaintiff served a proposed default order, more than four months after the court declared the defendant to be in default, before serving the defendant's motion to vacate. Under these circumstances, the defendant's failure to oppose the plaintiff's motion was willful ... .
>
> The defendant claims that her default was caused by law office failure based on defense counsel's statement in his affirmation that his "office will take full responsibility." At most, defense counsel's advice, and the defendant's decision to follow it, constituted a misguided strategy, not law office failure ... . Thus, the defendant failed to establish a reasonable excuse for her default ... . **Bove v Bove, 2019 NY Slip Op 01555, Second Dept 3-6-19**

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CIVIL PROCEDURE, CORPORATION LAW.

DEFENDANT'S MOTION TO VACATE A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED DESPITE FAILURE TO UPDATE THE ADDRESS ON FILE WITH THE SECRETARY OF STATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion to vacate a default judgment should have been granted, despite defendant's failure to update its address with the Secretary of State:

> There was no evidence that the defendant received actual notice of the summons delivered to the Secretary of State, which does not constitute personal delivery, in time to defend this action). Although the defendant did not explain why it failed to update its address with the Secretary of State, "there is no necessity for a defendant moving pursuant to CPLR 317 to show a reasonable excuse for its delay" ... . Furthermore, there is no basis in the record to conclude that the defendant deliberately attempted to avoid service, especially since the plaintiff had actual knowledge of the defendant's Westchester County... business address at least two months before the summons and complaint were filed in this action and, thus, could have attempted to serve the defendant personally pursuant to CPLR 311 ... . Nor is there any evidence that the defendant was placed on notice that the address on file with the Secretary of State was incorrect ... . Moreover, the defendant met its burden of demonstrating the existence of a potentially meritorious defense ... . **Berardi Stone Setting, Inc. v Stonewall Contr. Corp., 2019 NY Slip Op 02053, Second Dept 3-20-19**

CIVIL PROCEDURE, FORECLOSURE.

FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED OR FOR FAILURE TO PROSECUTE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the foreclosure action should not have been dismissed as abandoned pursuant to CPLR 3215(c) or for neglect to prosecute pursuant to CPLR 3216:

> 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) ... . Within one year after the defendant's default, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (see RPAPL 1321[1]) and, thus, did not abandon this action ... .
>
> Furthermore, the Supreme Court was without power to direct dismissal of the complaint pursuant to CPLR 3216 on the ground of lack of prosecution. While CPLR 3216 authorizes the dismissal of a complaint for neglect to prosecute, joinder of issue and service of a 90-day notice are conditions precedent to a dismissal under that statute ... . Here, dismissal was improper, as issue was never joined in the action ... . **US Bank, N.A. v Picone, 2019 NY Slip Op 02141, Second Dept 3-20-19**

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CIVIL PROCEDURE, JUDGES.

SANCTION FOR PLAINTIFF'S FAILURE TO COMPLY WITH A CONDITIONAL ORDER OF PRECLUSION SHOULD NOT HAVE GONE BEYOND THE PENALTY DESCRIBED IN THE ORDER (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that the sanction imposed for plaintiff's failure to turn over audio files and transcripts she was apparently relying upon to prove employment discrimination should not have gone beyond the terms of the conditional order of preclusion:

> "A conditional order of preclusion requires a party to provide certain discovery by a date certain, or face the sanctions specified in the order" ... . " With this conditioning, the court relieves itself of the unrewarding inquiry into whether a party's resistance was willful'" ... . "When a plaintiff fails to timely comply with a conditional order of preclusion, the conditional order becomes absolute" ... .
>
> ... [W]here, as here, a conditional order of preclusion specifies a penalty for the failure to comply, absent a change in circumstances, it is inappropriate for the court to impose a harsher penalty ... . The Supreme Court improvidently exercised its discretion in barring the plaintiff from offering any evidence for any claim premised on the introduction of or which relies on the audio files the plaintiff failed to produce. Instead, the appropriate sanction was the one set forth in the conditional order of preclusion, which precluded the plaintiff from using the audio files and corresponding transcripts at trial unless she produced these items by a date certain, which she failed to do. **Felice v Metropolitan Diagnostic Imaging Group, LLC, 2019 NY Slip Op 02067, Second Dept 3-20-19**

CIVIL PROCEDURE, JUDGES, TRADEMARKS, UNFAIR COMPETITION, CORPORATION LAW.

JUDGE SHOULD NOT HAVE, SUA SPONTE, GRANTED A PRELIMINARY INJUNCTION IN THIS TRADEMARK INFRINGEMENT CASE, CORPORATE OFFICERS PROPERLY SUED IN THEIR INDIVIDUAL CAPACITIES (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that defendants' motion to dismiss the trademark infringement, trademark dilution and unfair competition causes of action was properly denied. The court noted that the complaint properly alleged torts by defendants in their individual capacities without alleging facts supporting piercing the corporate veil. The Second Department held that the judge, sua sponte, should not have granted the preliminary injunction:

> " [P]reliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant'" ... . "As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" ... . "In exercising that discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction" ... . " [A]bsent

> extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment'" ... .
>
> The plaintiff did not request a preliminary injunction ... [T]he record in this case lacks evidence establishing, among other things, irreparable harm or extraordinary circumstances warranting a preliminary injunction that would, in effect, depart from the status quo and grant the plaintiff its ultimate relief ... . The evidence at this stage further fails to demonstrate that the plaintiff possesses a likelihood of success on the merits ... . The court therefore improvidently exercised its discretion in sua sponte awarding preliminary injunctive relief to the plaintiff. **Emanuel Mizrahi, DDS, P.C. v Angela Andretta, DMD, P.C., 2019 NY Slip Op 02315, Second Dept 3-27-19**

CIVIL PROCEDURE, NEGLIGENCE, EMPLOYMENT LAW.

EVEN WHERE A CAUSE OF ACTION HAS NOT BEEN PROPERLY PLED THE COURT WILL SEARCH THE RECORD TO DETERMINE WHETHER THERE IS AN ACTIONABLE CLAIM IN RESPONSE TO A DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, HERE IN THIS SLIP AND FALL CASE THERE WAS NO EVIDENTIARY SUPPORT FOR CERTAIN CAUSES OF ACTION AGAINST THE BUILDING OWNER (FIRST DEPT).

The First Department noted that, even where a cause of action is not properly pled, on a motion for summary judgment it must search the record to determine whether there is an actionable claim. In this slip and fall case, the building owner was defendant 90 Merrick and the employer of the janitor who allegedly mopped the floor where plaintiff fell was defendant ABM. The First Department held that the 90 Merrick's motion for summary judgment should have been granted:

> The complaint's allegations that defendants were negligent in their ownership, operation, control and maintenance of the premises by causing or allowing a dangerous condition on the floor gave no indication that plaintiff's theories of liability would include 90 Merrick's negligent retention of ABM or its vicarious liability for ABM's independent contractor's negligence in performing its duties under the contract ... . Notwithstanding, a motion for summary judgment must be denied if there are issues of fact as to an actionable claim, even if the claim was not properly pleaded ... , and we find that there are no factual issues as to whether ABM was an independent contractor — it was — when the accident happened. The deposition testimony elicited from nonparty CLK Commercial Management, LLC's employee, John S. Burke, the property manager for the building at the time of the accident, and ABM's manager, Victor Orellana, whose duties at the time of the accident included making sure the building was kept clean, shows that 90 Merrick did not direct, supervise or control ABM's work and that an ABM employee had responsibility for supervising and inspecting the work performed by ABM's employees, which comports with the duties and obligations as set forth in defendants' contract ... . **Burgdoerfer v CLK/HP 90 Merrick LLC, 2019 NY Slip Op 01532, First Dept 3-5-19**

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CIVIL PROCEDURE, NEGLIGENCE, JUDGES, MUNICIPAL LAW.

SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD AND AWARDED SUMMARY JUDGMENT TO THE CITY IN THIS SIDEWALK SLIP AND FALL CASE, NO SUCH MOTION WAS BEFORE THE COURT (SECOND DEPT).

The Second Department determined that Supreme Court should not have searched the record and awarded summary judgment to the city in this sidewalk slip and fall case. No such motion was before the court:

> ... [T]he Supreme Court should not have, in effect, searched the record and awarded summary judgment to the City, which did not move for such relief. "A court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court" ... . Since no party made any motion with respect to the plaintiff's direct cause of action against the City contained in the amended complaint, the court should not have granted relief with respect to that cause of action ... . **Cerbone v Lauriano, 2019 NY Slip Op 02056, Second Dept 3-20-29**

CIVIL PROCEDURE, NEGLIGENCE, MEDICAL MALPRACTICE.

AUDIT TRAIL, I.E., METADATA SHOWING WHO ACCESSED PLAINTIFF'S MEDICAL RECORDS, WHERE AND WHEN THEY WERE ACCESSED, AND ANY CHANGES TO THE RECORDS, WAS DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION ALLEGING IMPROPER TREATMENT AFTER SURGERY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the so-called "audit trail," which indicates who accessed plaintiff's medical records, where and when they were accessed and any changes made to the records (metadata), was discoverable in this medical malpractice action. The complaint alleged failure to properly treat plaintiff after surgery which led to infection and amputation:

> The plaintiffs demonstrated, and Wyckoff [medical center] does not dispute, that an audit trail generally shows the sequence of events related to the use of a patient's electronic medical records; i.e., who accessed the records, when and where the records were accessed, and changes made to the records ... . Hospitals are required to maintain audit trails under federal and state law (see 45 CFR 164.312[b]; 10 NYCRR 405.10[c][4][v]). As argued by the plaintiffs, the requested audit trail was relevant to the allegations of negligence that underlie this medical malpractice action in that the audit trail would provide, or was reasonably likely to lead to, information bearing directly on the post-operative care that was provided to the injured plaintiff. Moreover, the plaintiffs' request was limited to the period immediately following the injured plaintiff's surgery. The plaintiffs further demonstrated that such disclosure was also needed to assist preparation for trial by enabling their counsel to ascertain whether the patient records that were eventually provided to them were complete and unaltered ... .
>
> In response to the plaintiffs' threshold showing, Wyckoff failed to demonstrate that the requested disclosure was improper or otherwise unwarranted. Although Wyckoff argued that the audit trail may contain information that would not be useful to the plaintiffs, it did not dispute that the audit trail would nevertheless contain information pertaining to the medical care that it provided to the injured plaintiff in the wake of his foot surgery. **Vargas v Lee, 2019 NY Slip Op 02142, Second Dept 3-20-19**

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CIVIL PROCEDURE, NEGLIGENCE, PRIVILEGE, EVIDENCE.

DEFENDANTS' DECEDENT'S PHARMACY RECORDS IN THIS BICYCLE-VEHICLE COLLISION CASE ARE NOT PROTECTED BY PHYSICIAN-PATIENT PRIVILEGE AND MUST BE DISCLOSED SUBJECT TO TIME LIMITATIONS AND IN CAMERA REVIEW (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendants' decedent's pharmacy records were not protected by physician-patient privilege and must be disclosed to plaintiff, subject to certain limitations and an in camera review. Plaintiff was injured when her bicycle collided with a vehicle driven by decedent:

> We agree with plaintiffs, however, that decedent's pharmacy records are not protected by the physician-patient privilege (see CPLR 4504 [a] ...) and are "material and necessary" to the prosecution of the action (CPLR 3101 [a] ...). Nevertheless, we conclude that plaintiffs' request for records "before and after" the collision was overly broad, and we therefore limit disclosure of the pharmacy records to the six-month period immediately preceding the collision. Furthermore, those records "should not be released to [plaintiffs] until the court has conducted an in camera review thereof, so that irrelevant information is redacted"... . ... [D]efendants are directed to submit to the court, for the six-month period immediately preceding the accident, pharmacy records identifying the medications prescribed to decedent and the prescribed dosages of those medications, and we remit the matter to Supreme Court for an in camera review of those records. **Carr-Hoagland v Patterson, 2019 NY Slip Op 02000, Fourth Dept 3-15-19**

CIVIL PROCEDURE, NEGLIGENCE, TOXIC TORTS, EVIDENCE.

IN THIS ASBESTOS EXPOSURE CASE, A WITNESS'S VIDEOTAPED DEPOSITION TESTIMONY FROM PROCEEDINGS IN OTHER STATES SHOULD NOT HAVE BEEN ADMITTED IN THE PLAINTIFF'S DIRECT CASE OR IN THE DEFENSE CASE, NEW TRIAL ORDERED (THIRD DEPT).

The Third Department, ordering a new trial, determined that videotaped deposition testimony from proceedings in other states was not admissible in the New York action. It was alleged that plaintiff's decedent died from exposure to asbestos in a joint compound made by Georgia-Pacific. An employee of Georgia-Pacific, Charles Lehnert, who was familiar with the formula for the joint compound, gave the videotaped deposition testimony:

> CPLR 3117 (a) (3) provides, in relevant part, that "any part or all of a deposition, so far as admissible under the rules of evidence, may be used . . . by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules." Here, defendant was permitted to introduce deposition testimony given by Lehnert in the 2007 Texas state court action for the purpose of demonstrating that it contradicted the 2001 and 2003 testimony that plaintiff had been permitted to introduce as part of its case-in-chief. However, although defendant was a party to the 2007 Texas action, plaintiff was not, and he had no opportunity to be present and cross-examine Lehnert. Thus, this testimony was not admissible under CPLR 3117 (a) (3) ... .
>
> Although defendant did not cross-appeal, our holding reversing Supreme Court's ruling regarding Lehnert's 2007 testimony necessarily brings up for review Supreme Court's denial of defendant's motion to preclude Lehnert's 2001 and 2003 testimony (seeCPLR 5501 [a] [1] ...). Upon review, we find that none of Lehnert's deposition testimony should have been admitted into evidence at this trial. Although a live witness may be impeached with

prior inconsistent testimony, Lehnert never testified for any party in this action, either at the trial itself or at any pretrial deposition. He was merely a witness who had testified years ago in multiple other states on the subject of the content of Georgia-Pacific joint compound. Rather than calling him (or any other witness) to testify on this topic, both parties resorted to retrieving video of Lehnert's testimony in those earlier actions and selectively playing those portions they believed supported their respective contentions. The jury was essentially asked to determine whether Lehnert, an empty chair in New York, testified more credibly in Illinois or Texas. In this scenario, CPLR 3117 (a) (2) did not permit plaintiff to introduce the 2001 and 2003 depositions on his case-in-chief, and CPLR 3117 (c) did not permit defendant to impeach those depositions with another deposition. **Billok v Union Carbide Corp., 2019 NY Slip Op 02185, Third Dept 3-21-19**

CIVIL RIGHTS LAW

CIVIL RIGHTS LAW, CRIMINAL LAW.

STOP AND ARREST OF PLAINTIFF PURSUANT TO NYC'S STOP AND FRISK POLICY STATED VALID CAUSES OF ACTION PURSUANT TO 42 USC 1983 AGAINST THE POLICE OFFICERS AND THE CITY (FIRST DEPT).

The First Department determined the allegations describing the stop and arrest of the plaintiff pursuant to NYC's stop and frisk policy stated causes of action pursuant to 42 USC 1983 against the individual officers and the city:

> The complaint, as amplified by plaintiff's opposition papers, alleges that, on February 13, 2013, plaintiff and a friend, both black men, were driving in a luxury sports car in the Bronx. They were not driving recklessly or violating any traffic laws. Nevertheless, they were pulled over by the police, and five or six officers, including the individual defendants, removed them from the car and searched them and the car. The police found marijuana in the friend's pocket, but recovered no other contraband, either in the car or on plaintiff's person. Nevertheless, plaintiff was arrested and held for two days. Charges against him were dismissed in October 2013.
>
> The complaint alleges further that, during this time period, the New York City Police Department employed a "stop and frisk" policy, pursuant to which every year the police stopped hundreds of thousands of overwhelmingly and disproportionately minority persons, including black men, and subjected them to searches, for no reason other than that they were in supposedly high-crime areas. The complaint alleges that the "stop and frisk" policy, rather than some constitutionally cognizable cause, was the reason plaintiff was detained, searched, and arrested. To prove the existence of this policy, plaintiff submitted, among other things, the New York City Bar Association's 24-page "Report on the NYPD's Stop-and-Frisk Policy," dated May 2013, which examined the policy and made recommendations for its reform and the protection of city residents' civil liberties.
>
> The foregoing states a cause of action under 42 USC § 1983 against the individual defendants ... . At this procedural juncture, it is not necessary for plaintiff to allege that any of the individual defendants did any more than participate in his unlawful arrest.
>
> By alleging the existence of an extraconstitutional municipal "stop and frisk" policy, and that the individual defendants unlawfully arrested plaintiff pursuant to that policy, the complaint states a cause of action under 42 USC § 1983 against the City ... . **Smith v City of New York, 2019 NY Slip Op 01828, First Dept 3-14-19**

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CONTRACT LAW

CONTRACT LAW, CORPORATION LAW, CIVIL PROCEDURE.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM IN THIS BREACH OF CONTRACT ACTION, BASED UPON DOCUMENTARY EVIDENCE, SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing Supreme Court, determined the motion to dismiss based on documentary evidence should not have been granted in this breach of contract action. Plaintiff and defendant had entered a Share Purchase Agreement (SPA) in which plaintiff agreed to purchase defendant, Symbio, for between $100 and $110 million. The opinion is fact specific and cannot be fairly summarized here:

> Plaintiff's claims are not definitively contradicted by the documentary evidence. The record (to the extent there is one on this motion pursuant to CPLR 3211) demonstrates the existence of issues of fact concerning when plaintiff determined that there was a matter that might give rise to a right of indemnification so that it was required to give notice pursuant to section 8.03(a) of the parties' contract. ...
>
> Further, defendants' defense of a condition precedent is not conclusively established. Even if section 8.03(a) might be construed as a condition precedent (which is highly doubtful), there has been no showing regarding the materiality of the provision as would be necessary given that nonoccurrence of the condition would lead to a draconian forfeiture. **XI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 2019 NY Slip Op 02437, First Dept 3-28-19**

CONTRACT LAW, NEGLIGENCE.

QUESTION OF FACT WHETHER GROSS NEGLIGENCE MIGHT OVERCOME A CONTRACTUAL LIMITATION ON LIABILITY (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether gross negligence might overcome a contractual limitation on liability. Here a bid on a highway project turned out to be more than $80 million short, which resulted in the withdrawal of the bid. The project was for a toll road, the toll to be paid to the builder of the road. The bid was low because the date of the beginning of construction, rather than the end of construction, was used to calculate the income from the toll. Gross negligence factors included, the firing of key personnel overseeing the creation of the bid, failure to follow company policy in reviewing the bid, and departure from industry standards:

> It is well-settled that contractual limitations on liability are generally enforceable ... . However, "public policy forbids a party from attempting to avoid liability for damages caused by grossly negligent conduct" ... . Thus, a gross negligence claim will be sustained where a party's conduct "evinces a reckless disregard for the rights of others or smacks' of intentional wrongdoing" ... . **S.A. De Obras y Servicios, COPASA v Bank of Nova Scotia, 2019 NY Slip Op 01706, First Dept 5-12-19**

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CORPORATION LAW

CORPORATION LAW.

PLAINTIFF IN THIS DERIVATIVE STOCKHOLDER ACTION DID NOT SUFFICIENTLY ALLEGE THAT A DEMAND FOR RELIEF ON THE BOARD COULD BE EXCUSED, COMPLAINT PROPERLY DISMISSED (FIRST DEPT).

The First Department determined the complaint in this shareholder derivative action was properly dismissed for failure to first make a demand for relief on the board. The *Rales* criteria were not met:

> Under Rales, "a court must determine whether . . . the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand" ... . The " mere threat of personal liability . . . is insufficient to challenge either the independence or disinterestedness of directors'" ... . However, "a substantial likelihood" of liability "disables [a director] from impartially considering a response to a demand by" a stockholder ... .
>
> "Where, as here, directors are exculpated from liability except for claims based on fraudulent, illegal or bad faith conduct, a plaintiff must . . . plead particularized facts that demonstrate that the directors acted with scienter, i.e., that they had actual or constructive knowledge that their conduct was legally improper" ... .
>
> Even though the complaint alleges that BMS' audit committee and senior management knew about gaps in the company's internal controls, it fails to establish bad faith or scienter ... .
>
> Plaintiff's contention that defendants face a substantial likelihood of liability because they signed 10-K's that contained false statements is also unavailing. It is true that "when directors communicate publicly . . . about corporate matters[,] the sine qua non of directors' fiduciary duty to shareholders is honesty" ... . However, "to establish liability for misstatements when the board is not seeking shareholder action, shareholder plaintiffs must show that the misstatement was made knowingly or in bad faith" ... . **Deckter v Andreotti, 2019 NY Slip Op 01717, First Dept 3-12-19**

CORPORATION LAW, DEBTOR-CREDITOR.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, A DE FACTO MERGER OF THE JUDGMENT DEBTOR WITH THE CURRENT DEFENDANT WAS DEMONSTRATED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiff judgment-creditor's motion for summary judgment should have been granted. Plaintiff alleged a de facto merger between defendant Luigi's Bakery Corp and its predecessor Luigi's Family Bakery, making the Bakery Corp. liable for the Family Bakery's debt:

> Factors courts consider in determining whether a de facto merger has occurred include "continuity of ownership; . . . a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; . .

. assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and . . . a continuity of management, personnel, physical location, assets, and general business operation" ... . Not all of these factors are required to demonstrate a merger; " rather, these factors are only indicators that tend to show a de facto merger' " ... .

Here, defendants admitted to continuity of ownership between Family Bakery and Bakery Corp., and to two of the other factors of a de facto merger: cessation of ordinary business operations, and continuity of management, personnel, physical location, and general business operation. In both their answer and their bill of particulars, defendants admitted that the successor corporation, Bakery Corp., was formed in the same month that the predecessor corporation, Family Bakery, ceased operations. They also admitted that the successor corporation used the same address and phone number as the predecessor corporation. We therefore conclude that the court erred in determining that there are issues of fact with respect to the date of incorporation of the successor corporation or the date of dissolution of the predecessor corporation. A case for de facto merger can be made without a legal dissolution where, as here, the predecessor company "has become, in essence, a shell" ... . **Energy Coop. of Am., Inc. v Luigi's Family Bakery, Inc., 2019 NY Slip Op 02211, Fourth Dept 3-22-19**

COURT OF CLAIMS

COURT OF CLAIMS, NEGLIGENCE.

QUESTIONS OF FACT WHETHER STATE HAD CONSTRUCTIVE NOTICE OF THE CONDITION OF THE ROAD WHICH ALLEGEDLY CAUSED PLAINTIFF'S BICYCLE ACCIDENT (THIRD DEPT).

The Third Department determined claimant's motion for summary judgment in this bicycling accident case was properly denied. There were questions of fact whether the state had constructive notice of the road conditions which allegedly caused the accident:

There was no evidence that defendant had actual notice of this hazard and only conflicting evidence regarding constructive notice. Savoury testified that there had been no prior complaints or accidents and that the road was regularly inspected . However, defendant may be charged with constructive notice of the hazard if it "existed for a sufficient period of time to allow defendant[] to discover and rectify the problem" ... . Although most of the witnesses attributed the bumps to the effects of cars driving over cold patch and the delamination to the effects of the freeze/thaw cycle, evidence regarding the length of time that the bumps and delaminated section were present was equivocal, and there was no evidence regarding how long the debris had been on the shoulder ... . Even if defendant had actual or constructive notice of the hazardous condition, claimant's submissions evince that temporary repair work had been done in the months leading up to the accident, and the submissions fail to demonstrate what "reasonable [corrective] measures" should have been taken given the circumstances ... . Given the myriad factual questions presented, including whether defendant had notice of the hazardous condition in the highway but failed to respond with appropriate maintenance measures, the Court of Claims properly denied claimant's motion. **Schleede v State of New York, 2019 NY Slip Op 02188, Third Dept 3-21-19**

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CRIMINAL LAW

CRIMINAL LAW.

COURT DID NOT CONSIDER THE APPROPRIATE FACTORS BEFORE PROCEEDING TO TRIAL IN DEFENDANT'S ABSENCE, DEFENDANT HAD MADE ALL PRIOR APPEARANCES AND NO EFFORT WAS MADE TO SECURE HIS PRESENCE AT THE TRIAL (THIRD DEPT).

The Third Department, reversing defendant's conviction, determined County Court did not consider the appropriate factors before ordering the trial in defendant's absence. Defendant had made all prior appearances and no effort was made to secure his presence:

> Defendant had been present at all prior appearances, and there was no explanation for his failure to appear at trial. Defendant's counsel stated that he had been calling defendant for a week without success. That morning, counsel had contacted local jails and hospitals looking for defendant. Despite counsel's request for an adjournment, County Court concluded that defendant had been warned of the consequences of failing to appear and had voluntarily decided to be absent. The court then issued a bench warrant and immediately began the trial.
>
> County Court abused its discretion in conducting the trial in defendant's absence, as the record does not reflect that the court considered the appropriate factors. Nothing in the record indicates any difficulty in rescheduling the trial, fear that evidence or witnesses would be lost or that further efforts to locate defendant would be futile ... . "Moreover, the fact that trial was commenced immediately after issuance of a bench warrant demonstrates only a minimal effort to locate defendant prior to trial" ... . The court did not provide even a short adjournment for execution of the warrant or a determination as to whether defendant could be located within a reasonable time ... . Because the court violated defendant's right to be present at his trial, we reverse. **People v Smith, 2019 NY Slip Op 01858, Third Dept 3-14-19**

CRIMINAL LAW.

INABILITY TO IMPOSE THE PROMISED SENTENCE REQUIRED THAT DEFENDANT'S GUILTY PLEA BE VACATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to vacate his plea because the promised sentence could not be imposed should have been granted:

> ... [D]efendant is entitled to vacatur of the plea because his negotiated plea included a promise of shock incarceration, and that promise cannot be honored because shock incarceration is only available for persons convicted of controlled substance or marijuana offenses ... . Since the guilty plea was induced by an unfulfilled promise, we vacate the plea in its entirety. The SCI was part and parcel of the negotiated plea. Therefore, we restore defendant to his preplea status and reinstate the indictment ... . **People v Golden, 2019 NY Slip Op 02027, First Dept 3-19-19**

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CRIMINAL LAW.

TRAFFIC STOP WAS SUPPORTED BY REASONABLE SUSPICION DESPITE THE DMV COMPUTER IMPOUNDMENT RECORD'S CAUTIONARY STATEMENT THAT THE VEHICLE SHOULD NOT BE CONSIDERED STOLEN (FOURTH DEPT).

The Fourth Department, over a two-justice dissent, determined the traffic stop was supported by reasonable suspicion even though the DMV impoundment record indicated the vehicle was not stolen:

> Here, a New York State Trooper properly stopped the vehicle defendant was driving based on his check of Department of Motor Vehicles (DMV) computer records for the vehicle's license plate number, which revealed that the car had been impounded and thus should have been located in an impound lot ... .
>
> Our dissenting colleagues conclude that the Trooper did not have reasonable suspicion to stop defendant's vehicle because the Trooper disregarded cautionary language in the DMV impoundment record stating that it "should not be treated as a stolen vehicle hit[, and] [n]o further action should be taken based solely upon this impounded response." We conclude, however, that the Trooper's testimony that the cautionary language was "generic," inasmuch as it even "comes up with stolen vehicles," and that, based on his experience, he interpreted the impoundment record as requiring him to conduct a further investigation because the vehicle "should not be out on the road," establishes that the stop was not unreasonable. Rather, we conclude that the impoundment record, coupled with the Trooper's explanation of its import, provided reasonable suspicion to stop the vehicle. In disregarding the Trooper's explanation that the cautionary language was "generic," the dissent would obligate us to find unreasonable any stops where that same message appears, irrespective of the facts surrounding the stop. We reject such a categorical determination. **People v Hinshaw, 2019 NY Slip Op 02252, Fourth Dept 3-22-19**

CRIMINAL LAW, APPEALS.

SENTENCING COURT DID NOT MAKE THE APPROPRIATE FINDINGS FOR THE IMPOSITION OF ELECTRONIC MONITORING, MATTER SENT BACK, BECAUSE THE LEGALITY OF THE SENTENCE IS IMPLICATED THE ISSUE NEED NOT BE PRESERVED FOR APPEAL (FOURTH DEPT).

The Fourth Department determined Supreme Court did not make the appropriate findings in support of imposing electronic monitoring as a condition probation. The matter was sent back. The court noted that the issue involves the legality of the sentence and therefore need not be preserved for appeal:

> A sentencing court imposing probation may require the defendant, pursuant to the statute, to submit to electronic monitoring (see § 65.10 [4]). "Such condition may be imposed only where the court, in its discretion, determines that requiring the defendant to comply with such condition will advance public safety, probationer control or probationer surveillance" (id.). Here, the court failed to make such a determination. To the contrary, it is evident from our review of the sentencing minutes that the court did not consider defendant or his actions to pose a threat to public safety. There may, however, be a legitimate purpose for the electronic monitoring based on probationer control or probationer surveillance. Therefore, we modify the judgment by striking the condition of probation requiring that defendant submit to surveillance via electronic monitoring and pay the fees associated therewith, and

> we remit the matter to Supreme Court to make a discretionary determination whether to impose electronic monitoring based on appropriate findings. **People v Fitch, 2019 NY Slip Op 01973, Fourth Dept 3-15-19**

CRIMINAL LAW, APPEALS.

PERIOD OF POSTRELEASE SUPERVISION CAN NOT BE IMPOSED ON AN INDETERMINATE SENTENCE, ILLEGAL SENTENCE CONSIDERED ON APPEAL EVEN THOUGH THE ISSUE WAS NOT RAISED BY EITHER PARTY (FOURTH DEPT).

The Fourth Department determined the period of postrelease supervision was not authorized for the indeterminate sentence imposed on the tampering with physical evidence conviction:

> Supreme Court imposed a period of postrelease supervision in connection with defendant's conviction of tampering with physical evidence. That was error inasmuch as a period of postrelease supervision is not authorized in connection with an indeterminate sentence (see Penal Law § 70.45 [1] ...). Although the issue is not raised by either party, we cannot allow an illegal sentence to stand ... . We therefore modify the judgment by vacating that period of postrelease supervision ... . **People v Harvey, 2019 NY Slip Op 02250, Fourth Dept 3-22-19**

CRIMINAL LAW, APPEALS.

SURCHARGE, DNA DATABANK FEE, CRIME VICTIM ASSISTANCE FEE SHOULD NOT HAVE BEEN ASSESSED AGAINST A JUVENILE OFFENDER (FOURTH DEPARTMENT).

The Fourth Department, over a two-justice concurrence, determined that defendant juvenile offender waived his right to appeal but found that the surcharge, DNA databank fee and crime victim assistance fee should not have been imposed on a juvenile offender. The concurrence argued that the waiver of appeal precluded the challenge to the imposed fees, but the People waived defendant's appeal-waiver on that narrow issue:

> As defendant contends and the People correctly concede, we conclude that the surcharge, DNA databank fee, and crime victim assistance fee imposed by County Court must be vacated because defendant is a juvenile offender ... . **People v Works, 2019 NY Slip Op 02247, Fourth Dept 3-22-19**

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CRIMINAL LAW, APPEALS.

DEFENDANT WAS 17 WHEN HE COMMITTED THE CRIMES AND WAS CONVICTED OF MURDER IN 1992, THAT CONVICTION WAS OVERTURNED AND DEFENDANT PLED GUILTY TO MANSLAUGHTER IN 2016, ALTHOUGH DEFENDANT WAIVED HIS RIGHT TO APPEAL, HE WAS ENTITLED TO CONSIDERATION OF WHETHER HE SHOULD BE AFFORDED YOUTHFUL OFFENDER STATUS (FOURTH DEPT).

The Fourth Department remitted the matter for consideration whether defendant should be afforded youthful offender status. The original murder conviction was in 1992. Defendant was granted a new trial and pled guilty to manslaughter in 2016. The youthful offender issue survives a waiver of appeal:

> Defendant was 17 years old at the time he committed the underlying crimes and, based on the record before us, he appears to be an eligible youth within the meaning of CPL 720.10 (2). Defendant was sentenced, however, without the benefit of an updated presentence report. The court obtained from defendant a waiver of an updated report, which is generally permissible where, as here, the "defendant had been continually incarcerated between the time of the initial sentencing and resentencing and at the time of . . . resentencing [the defendant] was afforded the opportunity to supply information about his [or her] subsequent conduct" ... . Nonetheless, "[w]hen determining whether a defendant is an eligible youth, the defendant's status at the time of the conviction—in this case at the time of his plea of guilty—is controlling" ... . The original presentence report prepared in 1992 on which the court relied is insufficient to establish that defendant was an eligible youth at the time he pled guilty to the manslaughter counts in 2016. We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant is an eligible youth within the meaning of CPL 720.10 (2) with the benefit of an updated presentence report and, if so, whether defendant should be afforded youthful offender status. **People v Jarvis, 2019 NY Slip Op 02206, Fourth Dept 3-22-19**

CRIMINAL LAW, ATTORNEYS.

HEARING NECESSARY ON THAT ASPECT OF DEFENDANT'S MOTION TO VACATE THE JUDGMENT OF CONVICTION WHICH ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL, DEFENDANT ALLEGED DEFENSE COUNSEL TOLD THE JURY DEFENDANT WOULD TESTIFY WITHOUT FIRST CONSULTING WITH DEFENDANT (FOURTH DEPT).

The Fourth Department, reversing County Court, determined defendant was entitled to a hearing on that aspect of his motion to vacate the judgment of conviction on ineffective assistance of counsel grounds. Defendant alleged defense counsel told the jury that defendant would testify without first consulting with defendant:

> We ... conclude ... that defendant is entitled to a hearing with respect to whether counsel was ineffective in telling the jury that defendant would testify at trial. In support of his motion, defendant submitted his own affidavit stating that his trial counsel never discussed with him whether testifying would be a good or bad idea, and that he never

> told counsel that he would testify at trial, and that trial counsel nevertheless told the jury that defendant would testify. Defendant's account is supported by the affirmation of defendant's appellate counsel, who stated that trial counsel admitted that defendant did not tell him before trial that he would testify. Thus, defendant's allegations are potentially supported by other evidence, and "it cannot be said that there is no reasonable possibility that [they are] true" ... . We therefore conclude that a hearing is required to afford defendant an opportunity to prove that trial counsel did not discuss with him whether he would testify before informing the jury that defendant would do so, and that there was no strategic or tactical explanation for telling the jury that defendant would testify ... . **People v Pendergraph, 2019 NY Slip Op 02212, Fourth Dept 3-22-19**

CRIMINAL LAW, ATTORNEYS, APPEALS, EVIDENCE.

EVIDENCE DEFENDANT'S STEPFATHER APOLOGIZED TO THE ROBBERY VICTIM FOR THE DEFENDANT'S ACTIONS AND THE TESTIMONY ABOUT AN ANONYMOUS INFORMANT'S IDENTIFICATION OF THE DEFENDANT SHOULD NOT HAVE BEEN ADMITTED, PROSECUTOR SHOULD NOT HAVE ENCOURAGED INFERENCE OF GUILT BASED ON FACTS NOT IN EVIDENCE, APPELLATE ISSUES CONSIDERED IN THE INTEREST OF JUSTICE (SECOND DEPT).

The Second Department, reversing defendant's conviction, reaching the appellate issues in the interest of justice, determined that improperly admitted evidence warranted a new trial, noting that the prosecutor also acted improperly. The identity of the defendant was a key issue in this robbery case. The victim (Fernandez) should not have been allowed to testify that the defendant's stepfather told the victim he was sorry for what defendant had done and returned the victim's keys. Also, the investigating detective should not have been allowed to testify that an anonymous informant had identified the defendant:

> There was no showing that the defendant participated in or was in any way connected to his stepfather's actions ... .
>
> ... [T]he testimony of an investigating detective recounting a conversation with an anonymous informant, a nontestifying witness, violated the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution... . The informant reportedly was an eyewitness to the crime and identified the defendant by name. The testimony "went beyond the permissible bounds of provid[ing] background information as to how and why the police pursued [the] defendant" ... .
>
> Upon retrial, we remind the People that, on summation, a prosecutor may not "improperly encourage[ ] inferences of guilt based on facts not in evidence" ... . Here, there was no evidence to support the prosecutor's assertion that Fernandez had identified the defendant as the robber "immediately" by recognizing a distinctive "dot" on the defendant's face. **People v Gonsalves, 2019 NY Slip Op 01792, Second Dept 3-13-19**

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CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENDANT WAS HOUSED FIVE HOURS AWAY FROM THE COURT AND HIS ATTORNEY, REPEATED REQUESTS TO MOVE DEFENDANT CLOSER WERE GRANTED BUT NOT COMPLIED WITH, DEFENDANT MOVED TO WITHDRAW HIS PLEA AT SENTENCING, GIVEN THE POSSIBILITY DEFENDANT HAD EFFECTIVELY BEEN DEPRIVED OF HIS RIGHT TO COUNSEL, INQUIRY INTO THE VOLUNTARINESS OF THE PLEA SHOULD HAVE BEEN CONDUCTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the sentencing judge should have inquired into the voluntariness of defendant's guilty plea before accepting it. The defendant had been housed more than one hundred miles from the court and his attorney. Repeated requests to move the defendant closer to allow consultation with his attorney were granted but not complied with. When the court set the matter down for trial anyway, the defendant pled guilty:

> The Supreme Court ordered that the defendant be moved to Rikers Island, or at a minimum, a correctional facility closer to the court. The court issued numerous orders over the following two weeks directing that the defendant be moved, none of which was complied with. Each appearance required the defendant to travel at least five hours each way. Defense counsel continued to argue that the Department of Corrections and Community Supervision was violating the defendant's constitutional rights to consult with his attorney and to defend this case. The court noted that it would be nearly impossible to hold a jury and try the case under these conditions. The court nevertheless stated that the trial would commence, regardless of where the defendant was housed. The very next court date, the defendant agreed to plead guilty.
>
> Two weeks later, at the sentencing, the defendant made an application to withdraw his plea, contending that he had entered the plea involuntarily, given the circumstances and his lack of access to his counsel. The Supreme Court denied the application without engaging in any inquiry of the defendant, other than to comment on the favorable plea offer secured by defense counsel.
>
> Under the circumstances, it cannot be said that the Supreme Court was able to make an informed determination as to the question of the voluntary nature of the defendant's plea without conducting such an inquiry. The record substantiates the defendant's claim that his plea was effectively coerced by the ongoing violation of his Sixth Amendment right to counsel and, thus, a genuine factual issue as to the voluntariness of the plea existed that could only be resolved after a hearing. Under these circumstances, the court should have conducted a hearing to explore the defendant's allegations in order to make an informed determination ... . **People v Hollmond, 2019 NY Slip Op 02354, Second Dept 3-27-19**

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CRIMINAL LAW, EVIDENCE.

PEOPLE DEMONSTRATED THE RAPE KIT AND BLOOD AND SALIVA EVIDENCE RELATED TO A 1988 PROSECUTION HAD BEEN DESTROYED AND DEFENDANT DID NOT DEMONSTRATE THE AVAILABILITY OF THE EVIDENCE WOULD HAVE CHANGED THE VERDICT, MOTION FOR DNA TESTING AND MOTION TO VACATE THE CONVICTION PROPERLY DENIED (FIRST DEPT).

The First Department determined defendant's motion for DNA testing and his motion to vacate his conviction were properly denied. Defendant had been convicted of sodomy in 1988. After a successful habeas corpus petition, a second trial was held and defendant was again convicted. After the habeas corpus petition had been filed, but before it was docketed, the NYPD destroyed the rape kit and blood and saliva samples. No DNA testing had been done on the evidence:

> Any defendant, regardless of the date of conviction, may move for DNA testing on specified evidence. The court shall grant the application if it determines that had a DNA test been conducted on the evidence and had the results of that evidence been admitted at trial, "there exists a reasonable probability that the verdict would have been more favorable to the defendant" (CPL 440.30[1-a][a][1]). Defendant bears the burden of making the "reasonable probability" showing ... . Where the People assert that the evidence to be tested has been destroyed or cannot be located, the statute provides that the people must make "a representation to that effect" and submit "information and documentary evidence in the possession of the people concerning the last known physical location of such specified evidence" (CPL 440.30[1-b][b]). It is the People's burden to show that the evidence could no longer be located and was thus no longer available for testing ... .
>
> We find that the People met their burden. ...
>
> .. .[W]e find that defendant has not carried his burden of establishing that, even had he been able to secure the original evidence and perform DNA testing on it, there is a reasonable probability that the verdict would have been different ... . **People v Dorsey, 2019 NY Slip Op 01526, First Dept 3-5-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S FLIGHT WHEN APPROACHED BY POLICE IN PLAINCLOTHES AND DRIVING AN UNMARKED CAR DID NOT JUSTIFY PURSUIT, MOTION TO SUPPRESS WEAPON DISCARDED BY THE DEFENDANT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, over two separate full-fledged dissenting opinions, determined that the police did not have justification for pursuing defendant when he ran as the police (in plainclothes driving an unmarked car) approached. The police had a report of a shooting by a black man wearing a black jacket.

Defendant was wearing a gray jacket and was walking out of an apartment complex with a black man wearing a black jacket. Defendant's motion to suppress the weapon he discarded during the chase should have been granted:

> "Flight alone, even if accompanied by equivocal circumstances that would justify a police request for information, does not establish reasonable suspicion of criminality and is insufficient to justify pursuit, although it may give rise to reasonable suspicion if combined with other specific circumstances indicating the suspect's possible engagement in criminal activity" ... . "Police pursuit of an individual 'significantly impede[s]' the person's freedom of movement and thus must be justified by reasonable suspicion that a crime has been, is being, or is about to be committed" ... .
>
> ... [T]he radio report simply indicated a sole perpetrator with a vague description — black man in a black jacket. There was nothing at all about defendant that matched any aspect of the suspect in the radio report, except that he was black. Nor was defendant wearing a black jacket. He was wearing a gray jacket and was with a second individual, several minutes after the radio report of shots fired. The men did not appear to be fleeing the scene, but rather, were exiting an apartment complex. Thus, unlike the cases relied on by the People, defendant did not match any description, general or otherwise ... . Further, there was insufficient evidence to support the conclusion that defendant knew Pengel and his colleagues were police officers... .
>
> That defendant was with someone who matched an extremely vague, generic description of the suspect, which contained no information about the suspect's height or weight, was not sufficiently indicative of criminal activity on defendant's part ... . **People v Bilal, 2019 NY Slip Op 01673, First Dept 3-7-19**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER'S ALLEGED OBSERVATION OF A DRUG DEAL WAS DEEMED INCREDIBLE AS A MATTER OF LAW, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED, INDICTMENT DISMISSED (SECOND DEPT).

The Second Department determined defendant's motion to suppress evidence should have been granted and the indictment dismissed in this drug possession case. The police officer's (Borden's) testimony that he observed the drug transaction, which took place inside a car, through his rearview mirror, was incredible as a matter of law:

> ... [W]e find that the People failed to establish the legality of the police conduct in the first instance, as Borden's testimony was incredible and patently tailored to meet constitutional objections. Borden's claim that he observed the alleged transaction through his rearview mirror with sufficient clarity to see that the object passed between the occupants of the car was Suboxone strains credulity and defies common sense ... . Rather, common experience dictates that the dashboard of the defendant's vehicle would have obscured Borden's view of a hand-to-hand transaction between the defendant and the front-seat passenger. Borden's testimony that the transaction occurred at a height sufficient for "public view" lacked credibility and suggested that his testimony was tailored to meet constitutional objections ... . Moreover, the difference in size between the eight-inch by two-inch object Borden claimed to have seen passed between the occupants of the vehicle, and the two-inch by one-inch object recovered ... , casts significant doubt on Borden's testimony that he recognized the object as Suboxone. Accordingly, exercising our independent power of factual review, we conclude that the defendant's motion to suppress the physical evidence recovered incident to his arrest should have been granted. **People v Maiwandi, 2019 NY Slip Op 01618, Second Dept 3-6-19**

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CRIMINAL LAW, EVIDENCE.

RECORDED JAIL PHONE CALLS MAY NOT HAVE RELATED TO THE OFFENSE WHICH WAS THE SUBJECT OF THE TRIAL, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined recordings of jail phone calls made by the defendant should not have been admitted in this criminal possession of a weapon case. It was possible the recordings related to a subsequent weapons charge, not the charge before the jury:

> ... [T]he timing and content of the telephone calls made it highly unlikely that the defendant was referencing his September 2014 arrest for the instant offense, rather than his subsequent arrest on the unrelated gun possession charge. Moreover, in addition to the lack of relevance of this evidence to the charges in this case, the jury was unaware of the defendant's subsequent May 2015 arrest, and therefore was unable to properly evaluate the weight to be accorded to the recordings as evidence of the defendant's guilt of the instant offense. Thus, there was a substantial risk that the jury would be misled into believing that the defendant's admissions in the telephone recordings referred to the instant offense. The admission of the recordings into evidence placed the defendant in the untenable position of deciding whether to accept this misleading narrative that the telephone recordings referred to the instant offense or disclose his later arrest on a similar gun possession charge, which disclosure itself would have caused him undue prejudice ... . **People v Robinson, 2019 NY Slip Op 01799, Second Dept 3-13-19**

CRIMINAL LAW, EVIDENCE.

HANDCUFFING THE DEFENDANT PENDING IDENTIFICATION BY THE UNDERCOVER OFFICER AMOUNTED AN ARREST WITHOUT PROBABLE CAUSE, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined handcuffing the defendant pending identification by the undercover officer amounted to an arrest without probable cause. Defendant's motion to suppress the identification and the buy money should have been granted:

> The hearing court expressly determined that the police detention of defendant was supported by reasonable suspicion, but that probable cause did not exist until the undercover officer who allegedly bought drugs from defendant made an identification. Because the record provides no reason for the officers to have concluded that defendant, a suspect in a street drug sale, was armed or dangerous, or likely to resist arrest or flee, handcuffing him was inconsistent with an investigatory detention and elevated the intrusion to an arrest not based on probable cause ... . Accordingly, the undercover officer's identification of defendant and the buy money recovered as a result

of the unlawful arrest should have been suppressed, and defendant is entitled to a new trial preceded by an independent source hearing ... . **People v Perez, 2019 NY Slip Op 01822, First Dept 3-14-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S INSTRUCTING ANOTHER TO KILL HIS WIFE AND HER MOTHER DID NOT COME NEAR ENOUGH TO ACCOMPLISHING MURDER TO SUPPORT THE ATTEMPTED MURDER CONVICTIONS (FOURTH DEPT).

The Fourth Department, reversing the attempted murder convictions, determined the evidence did not demonstrate that the defendant came near enough to accomplishing murder to support the convictions. The defendant, who was in jail, gave detailed instructions to kill his wife and her mother to another inmate, who immediately informed jail authorities:

> "Acts of preparation to commit an offense do not constitute an attempt . . . There must be a step in the direct movement towards the commission of the crime after preparations have been made . . . Likewise, acts of conspiring to commit a crime, or of soliciting another to commit a crime do not per se constitute an attempt to commit the contemplated crime" ... . Consequently, the People must establish that defendant "engaged in conduct that came dangerously near commission of the completed crime" ... .
>
> The evidence establishes only that defendant planned the crimes, discussed them with the inmate in the next cell and with that inmate's girlfriend, and exchanged notes about them. Thus, inasmuch as " several contingencies stood between the agreement in the [jail] and the contemplated [crimes],' defendant[] did not come very near' to accomplishment of the intended crime[s]" ... . Where, as here, the evidence fails to establish that defendant took any action that brought the crime close to completion, no matter how slight ... , the evidence is not legally sufficient to support a conviction of attempt to commit that crime ... . **People v Lendof-Gonzalez, 2019 NY Slip Op 01904, Fourth Dept 3-15-19**

CRIMINAL LAW, EVIDENCE.

CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION SHOULD HAVE BEEN GIVEN, ERROR HARMLESS HOWEVER (FIRST DEPT).

Although the error was deemed harmless, the First Department determined the cross-racial identification jury instruction should have been given:

> The trial court denied defendant's request for a charge on cross-racial identification. Since then, the Court of Appeals decided People v Boone, which held that "when identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on

cross-racial identification" and the trial court must give the charge if a party requests it (30 NY3d 521, 526 [2017]). Since identification was an issue in this case and the victim and defendant were of different races, the motion court should have granted the request for the charge on cross-racial identification. However, we find the error harmless given that the video supports the victim's testimony about the incident and his familiarity with defendant. Further, the victim told police that the robber had an MTA connection, and defendant was arrested wearing an MTA jacket. The identification testimony was unusually strong and the evidence of defendant's guilt was overwhelming ... . Also, there is no significant probability that defendant would have been acquitted but for this charge error ... . **People v Patterson, 2019 NY Slip Op 02154, First Dept 3-21-19**

CRIMINAL LAW, EVIDENCE.

THE PEOPLE DID NOT PRESENT EXTRINSIC EVIDENCE AT THE *DARDEN* HEARING THAT THE INFORMANT EXISTED, THEREFORE THE SUPPRESSION MOTION WAS GRANTED AND THE INDICTMENT DISMISSED (FOURTH DEPT).

The Fourth Department determined the evidence submitted by the People at the *Darden* hearing did not establish the existence of an informant with extrinsic evidence. Therefore the motion to suppress was granted and the indictment dismissed. The People presented only a death certificate purporting to demonstrate the informant was dead. No extrinsic evidence of the existence of the informant was presented:

> The People must produce a confidential informant for an ex parte hearing upon defendant's request where, as here, they rely on the statements of the confidential informant to establish probable cause (... People v Darden, 34 NY2d 177, 181 [1974] ...). ...
>
> There are, however, exceptions to the requirement that the People produce a confidential informant for a Darden hearing. If the People succeed in making a threshold showing that the informant "is unavailable and cannot be produced through the exercise of due diligence" ... , they are permitted instead to establish the existence of the informant by extrinsic evidence ... .
>
> Even assuming, arguendo, that the People succeeded here in making such a threshold showing, we conclude that they nevertheless failed to establish the existence of the informant by extrinsic evidence ... . The evidence establishes only that a deposition was executed in the name of the alleged confidential informant, that the police obtained a search warrant using the deposition, and that a death certificate was later issued for a person having the same name as the confidential informant. There is no evidence that the alleged informant actually made the statements attributed to her ... . The People could have met their burden by offering the testimony of a police witness, which is evidence that is explicitly contemplated in Darden. Yet, they did not. Without it, there is nothing to refute the possibility that the police fabricated the statements in the informant's purported deposition in order to conceal the fact that information critical to the probable cause inquiry was instead obtained through illegal police action. **People v Givans, 2019 NY Slip Op 02220, Fourth Dept 3-22-19**

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CRIMINAL LAW, EVIDENCE.

POLICE ENTERED HOME ILLEGALLY AND OBTAINED CONSENT TO SEARCH BY MISLEADING THE OCCUPANT, MOTION TO SUPPRESS PROPERLY GRANTED (FOURTH DEPT).

The Fourth Department, affirming Supreme Court's suppression of a weapon found in a home, determined the police illegally entered the home and gained consent to search by misleading the woman in the home:

> Asked by defense counsel why he entered the home, the officer testified, "An individual who's known to carry guns entered that house running into that house actually, coming out acting nervous, there's a baby crying in the house, who is taking care of the baby?" ...
>
> ... [T]he People correctly concede that the officer entered the home illegally. An illegal entry by the police requires the suppression of the fruits of an ensuing search notwithstanding a voluntary consent, unless the consent attenuates the taint of the illegal entry ... . In determining whether the illegal entry is so attenuated, a court is required to consider a variety of factors, including: (1) the temporal proximity of the consent to the illegal entry; (2) whether there were intervening circumstances; (3) whether the purpose underlying the illegal entry was to obtain the consent or the fruits of the search; (4) whether the consent was volunteered or requested; (5) whether the person who gave consent was aware that he or she could refuse consent; and, most importantly, (6) the purpose and flagrancy of the misconduct ... .
>
> ... The purpose of the illegal entry was to recover a gun that the officer presumed was hidden inside. Any consent obtained thereafter was not volunteered. It was requested, and the woman was not advised that she could refuse consent. ... Most importantly, the officer engaged in flagrant misconduct. Without having witnessed any illegality, the officer entered a private residence without permission, after midnight, while a woman in that residence was trying to feed her newborn child, and coerced her into consenting to a search of her home. **People v Sweat, 2019 NY Slip Op 02240, Fourth Dept 3-22-19**

CRIMINAL LAW, EVIDENCE.

SHOWUP IDENTIFICATION TESTIMONY SUPPRESSED, CONVICTIONS REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's convictions, determined that the showup indentification testimony should have been suppressed. The showup took place 90 minutes after the occurrence of the crime, in a hospital parking lot, where defendant was handcuffed and flanked by officers. The victim had already identified the defendant in a hospital-room showup procedure:

> We conclude that, "[g]iven the identification made by the victim" during the first showup, the noncomplainant witness's identification conducted far from the scene of the crime "is not rendered tolerable in the interest of prompt identification" ... . The identification was also unjustified insofar as the noncomplainant witness was not present at the hospital as a victim ... . The People have proffered no reason that a lineup identification procedure would have been unduly burdensome under the circumstances ... . Absent any exigency or spatial proximity to the crime scene, and given that the showup occurred "approximately 90 minutes after the occurrence of the crime, while defendant

was handcuffed and" flanked by police, we conclude that, under the totality of the circumstances, the second "showup identification procedure was infirm" ... .

Inasmuch as the witness who identified defendant in the second showup procedure did not testify at the Wade hearing, "the People did not establish that [he] had an independent basis for [his] in-court identification of defendant" ... , and "there is no evidence upon which this Court can base such a determination" ... . We therefore conclude that defendant is entitled to a new Wade hearing on that issue ... . **People v Knox, 2019 NY Slip Op 02230, Fourth Dept 3-22-19**

CRIMINAL LAW, EVIDENCE.

AMENDMENT OF THE INDICTMENT ON THE EVE OF TRIAL CHANGED THE THEORY OF PROSECUTION FROM ACTUAL POSSESSION OF A WEAPON TO CONSTRUCTIVE POSSESSION OF A WEAPON, CONVICTION REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction and dismissing the indictment, determined that the People should not have been allowed to amend the indictment on the eve of trial. The indictment charged defendant with possession of a weapon when he visited his girlfriend on October 20. The People sought to amend the indictment to allege possession of a weapon on October 22, when the weapon was found pursuant to a search of defendant's residence:

By seeking, on the eve of trial, to amend the indictment to include the days following the purported incident with the former girlfriend, the People changed the theory of their case from the defendant's actual possession of a weapon, as witnessed and attested to by the former girlfriend, to constructive possession, meaning his exercise of dominion or control over an area of the defendant's residence where a loaded weapon was found ... . Defense counsel, in opposing the amendment, asserted that he had relied upon the indictment and the VDF [voluntary disclosure form] prepared by the District Attorney's Office, giving the date of the offense as October 20, 2015, in preparing for the case, including defense counsel's efforts to prove, through time cards and testimony, that it was impossible for the defendant to have been at his former girlfriend's apartment at the time of the incident on October 20, 2015. As such, defense counsel presented evidence that the defense had been substantially undermined by the amendment of the indictment and that, effectively, he was forced to forgo an alibi-type defense ... . **People v McLean, 2019 NY Slip Op 02356, Second Dept 3-27-19**

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CRIMINAL LAW, EVIDENCE, APPEALS.

MOTION TO SUPPRESS SHOULD NOT HAVE BEEN DENIED ON THE GROUND THAT DEFENDANT LACKED STANDING, OTHER GROUNDS FOR SUPPRESSION NOT RAISED BELOW COULD NOT BE CONSIDERED ON APPEAL, DEFENSE COUNSEL SHOULD NOT HAVE BEEN PRECLUDED FROM CROSS-EXAMINING A POLICE OFFICER ABOUT A CIVIL SUIT AGAINST HIM (FIRST DEPT).

The First Department, reversing defendant's conviction, determined that defendant's motion to suppress the weapon he dropped should not have been denied on the ground defendant lacked standing and defense counsel should not have been precluded from cross-examining a police officer about allegations made in a federal civil suit against him. The First Department noted it could not consider alternative grounds for suppression not raised below:

> Two officers testified at the hearing to the effect that the pistol was recovered immediately after it fell from defendant's person. Since this Court lacks jurisdiction to affirm the denial of defendant's motion to suppress the pistol on the alternative ground that the police had reasonable suspicion to stop and frisk him, a ground upon which the hearing court did not rule, we "reverse the denial of suppression and remit the case to Supreme Court for further proceedings"... .
>
> Defendant is also entitled to a new trial, because the trial court improperly precluded his counsel from cross-examining the only police officer who allegedly saw the pistol falling from his person about allegations raised in a federal civil action against the officer, which had settled. Counsel had a good faith basis for seeking to impeach the officer's credibility by asking him about allegations that he and other officers approached and assaulted the plaintiff in that case without any basis for suspecting him of posing a danger and filed baseless criminal charges against him ... . Although trial courts "retain broad discretion" over the admission of prior bad acts allegedly committed by a police witness or other witness ... , the court improvidently exercised its discretion by entirely precluding any cross-examination about the allegations at issue here without any valid ... . **People v Holmes, 2019 NY Slip Op 02033, First Dept 3-19-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE OPERATION OF THE KNIFE WAS DEMONSTRATED AT TRIAL, THERE WAS NO RECORD EVIDENCE THAT THE KNIFE POSSESSED BY DEFENDANT WAS A GRAVITY KNIFE, RELATED CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS (SECOND DEPT).

The Second Department, under a weight of the evidence analysis, determined that the proof did not support the jury's finding that the weapon possessed by defendant was a gravity knife:

> Penal Law § 265.00(5) defines a "[g]ravity knife" as a "knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." "[A] gravity knife, as so defined, requires that the blade lock in place automatically upon its release and without further action by the user" ... .

> Although an officer demonstrated the operation of the knife at trial, the record contains "no contemporaneous description of what the jury saw" during that demonstration ... . Further, there is no other evidence in the record that established whether or how the blade locked. In short, the People failed to create a record proving that the knife satisfied the statutory definition of a gravity knife ... . Thus, the weight of the evidence before us does not support a finding that the defendant's knife was, in fact, a gravity knife ... . **People v Sauri, 2019 NY Slip Op 02359, Second Deplt 3-27-19**

CRIMINAL LAW, MENTAL HYGIENE LAW.

CONFLICTING PSYCHIATRIC EVALUATIONS REQUIRED A COMPETENCY HEARING, EVEN IF ONE OF THE PSYCHIATRISTS HAD CHANGED HIS OR HER MIND (THIRD DEPT).

The Third Department, over a dissent, determined a hearing was required to assess defendant's competency to stand trial because conflicting reports from the two psychiatric evaluations. The fact that one of the psychiatrists apparently changed his or her opinion was deemed irrelevant. The matter was sent back for a reconstruction hearing:

> ... [T]here can be no dispute that, after receiving conflicting examination reports, County Court failed to conduct a competency hearing. Although the People rely on defense counsel's representation that the psychiatric examiner who filed a report stating that defendant was not competent to stand trial had changed his mind, this representation and subsequent withdrawal of the request for a hearing did not relieve the court of its statutory duty to conduct a hearing pursuant to CPL 730.30 (4) for the purpose of determining defendant's mental capacity to stand trial ... . We agree with the dissent that, pursuant to CPL 730.30 (2), a competency hearing need not always be held "[w]hen the examination reports submitted to the court show that each psychiatric examiner is of the opinion that the defendant is not an incapacitated person" (emphasis added). However, we do not agree that CPL 730.30 (2) applies when the record demonstrates that the court has been provided with two conflicting examination reports, even if the defendant's attorney represents that one of the examiners has since changed his or her opinion.
>
> Given the circumstances present here, reconstruction of defendant's mental capacity at the time of his violation hearing should be possible by means of "contemporaneous observation and records" ... . **People v Vandegrift, 2019 NY Slip Op 01854, Third Dept 3-14-19**

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

DEFENDANT SHOULD NOT HAVE BEEN ASSESSED 20 POINTS FOR A CONTINUING COURSE OF SEXUAL MISCONDUCT, PROOF OF A SECOND INSTANCE OF SEXUAL MISCONDUCT WAS INSUFFICIENT, AN ALLEGATION IN AN INDICTMENT IS NOT, BY ITSELF, EVIDENCE THE INCIDENT OCCURRED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined that defendant should not have been assessed 20 points for a continuing course of sexual misconduct, noting that a reference in an indictment is not sufficient proof:

> Defendant pleaded guilty to one count of having sexual intercourse with the victim and claimed that he only had sex with the victim once. The People presented a sworn statement given to the police by the victim's mother in which she recounts that, when she confronted the victim concerning her relationship with defendant, the victim told her that they "had sex two times." Even assuming that this statement constitutes reliable hearsay ... there is no indication by the victim as to when the acts of sexual contact occurred. Although the case summary states that the presentence investigation report reflects that acts of sexual contact occurred in May 2013 and September 2013, the only reference to a September 2013 act in that report is when it lists the charges contained in the indictment. Notably, "the fact that an offender was arrested or indicted for an offense is not, by itself, evidence that the offense occurred" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 5 [2006]). Inasmuch as there is no evidence in the record regarding when the second act of sexual contact occurred, we cannot say that there is clear and convincing evidence that two sexual acts occurred that were separated by at least 24 hours ... . **People v Hinson, 2019 NY Slip Op 02184, Third Dept 3-21-18**

DEFAMATION

DEFAMATION, CIVIL PROCEDURE, CONSTITUTIONAL LAW.

SUPREMACY CLAUSE DOES NOT PRECLUDE DEFAMATION SUIT AGAINST PRESIDENT TRUMP FOR STATEMENTS MADE WHILE A CANDIDATE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, over a two-justice dissent, determined that the Supremacy Clause did not preclude a New York State civil suit for defamation against President Trump. In response to allegations by the plaintiff that Donald Trump had made unwanted sexual advances, then candidate Trump made statements denying the allegations (made by plaintiff and other women), calling them false and outright lies saying, for example, "all of these liars will be sued after the election is over:"

> ... [T]he current sitting President attempts to shield himself from consequences for his alleged unofficial misconduct by relying upon the constitutional protection of the Presidency. We reject defendant President Trump's argument that the Supremacy Clause of the United States Constitution prevents a New York State court - and every other state court in the country - from exercising its authority under its state constitution. Instead, we find that the Supremacy Clause was never intended to deprive a state court of its authority to decide cases and controversies under the state's constitution.

> ... [T]he Supremacy Clause provides that federal law supersedes state law with which it conflicts, but it does not provide that the President himself is immune from state law that does not conflict with federal law. Since there is no federal law conflicting with or displacing this defamation action, the Supremacy Clause does not provide a basis for immunizing the President from state court civil damages actions. Moreover, in the absence of a federal law limiting state court jurisdiction, state and federal courts have concurrent jurisdiction. Thus, it follows that the trial court properly exercised jurisdiction over defendant and properly denied his motion to dismiss. **Zervos v Trump, 2019 NY Slip Op 01851, First Dept 3-14-19**

EDUCATION-SCHOOL LAW

EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

NYC CHARTER DID NOT GIVE THE PUBLIC ADVOCATE AUTHORITY FOR A SUMMARY INQUIRY INTO THE ADEQUACY OF SOFTWARE USED TO TRACK STUDENTS WITH INDIVIDUALIZED EDUCATION PROGRAMS, SUPREME COURT REVERSED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, over a full-fledged, two-justice, dissenting opinion, reversing Supreme Court, determined that the NYC Charter did give the Public Advocate the power to conduct a summary inquiry into the adequacy of computer software designed to keep track of students with Individualized Education Programs (IEP's) and to seek appropriate funding from Medicaid:

> We agree with [Matter of Green v Giuliani (187 Misc 2d at 138)] that [NYC Charter] section 1109's reach includes not only corruption, but "all forms of official misconduct."... Arguably, in light of Green, section 1109's reach continues to evolve over time to include areas not limited to corruption. The question that remains is whether the section 1109 phrase "any alleged violation or neglect of duty" should be broadened so as to bring within its reach all forms of conduct, including acts that amount to administrative inefficiency, deficiency, or mismanagement. We believe it should not, mindful of the admonition uttered over a century ago: "It would be intolerable if . . . all the heads of departments of the city could be haled into court and cross-examined by disaffected taxpayers, or even by some other hostile official, with no result except publicity. It is much better that proceedings of this kind should be confined to the legitimate purposes of the law" ... .
>
> Section 1109 is set forth in Chapter 49 of the Charter, entitled "Officers and Employees." Neither that chapter, nor the Charter itself, defines "violation" or "neglect of duty." In the absence of a clear definition, either by statute or case law, we are guided by dictionary definitions because they are "useful guideposts" in determining the meaning of a statutory word or phrase ... . * * *
>
> ... .[W]e find no legal basis to expand section 1109's reach beyond allegations that clearly fall within the plain meaning of a "violation" or a "neglect of duty..."... . ... [P]etitioner's allegations of administrative mismanagement, namely, the inefficient governmental administration of a computer software ... are not sufficient bases to support the instant section 1109 judicial summary inquiry application. **Matter of James v Fariña, 2019 NY Slip Op 01729, First Dept 3-12-19**

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EDUCATION-SCHOOL LAW, NEGLIGENCE.

QUESTION OF FACT WHETHER SCHOOL BUS DRIVER AND MONITOR TOOK APPROPRIATE STEPS AFTER THE FIGHT IN WHICH PLAINTIFF STUDENT WAS INJURED BROKE OUT ON THE BUS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the negligent supervision action against the school bus company and the school district should not have been dismissed. Plaintiff (J.W.) was injured by another student on the bus:

> ... [T]he bus company defendants and the school district established, prima facie, that they did not have sufficiently specific knowledge or notice of the dangerous conduct which caused injury ... . However, in opposition, the plaintiff raised triable issues of fact as to whether J. W.'s injuries were a foreseeable consequence of the bus driver and bus monitor's alleged failure to respond appropriately as the events unfolded ... , and whether the bus driver and bus monitor took "energetic steps to intervene" in the fight ... . Accordingly, the Supreme Court should have denied the motion of the bus company defendants and the school district for summary judgment dismissing the complaint insofar as asserted against them. **Williams v Student Bus Co., Inc., 2019 NY Slip Op 02146, Second Dept 3-20-19**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

LACK OF SUPERVISION WAS NOT THE PROXIMATE CAUSE OF PLAINTIFF STUDENT'S FALL, PLAINTIFF WAS ENGAGING IN AGE-APPROPRIATE BEHAVIOR TAKING TURNS JUMPING OVER A KNEE-HIGH FENCE WHEN SHE FELL AND WAS INJURED, SCHOOL DISTRICT'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED (SECOND DEPT).

The Second Department determined the school district's motion for summary judgment in this school recess injury case was properly granted. Plaintiff, who was in eighth grade, was injured when her shin struck a knee-high fence as she attempted to jump over it, causing her to fall on a concrete walkway. She had been taking turns with her friends jumping the fence for 10 or 15 minutes:

> The plaintiff testified at a General Municipal Law § 50-h hearing and her deposition that she did not see any school personnel outside the school building either before or at the time of the incident. ...
>
> "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" ... . However, "[s]chools are not insurers of safety, . . . for they cannot reasonably be expected to continuously supervise and control all movements and activities of students" ... . Here, the defendant established ... that the plaintiff was engaged in an age-appropriate activity that did not constitute dangerous play, and that the alleged lack of supervision was not a proximate cause of the accident ... . **Chiauzzi v Sewanhaka Cent. High Sch. Dist., 2019 NY Slip Op 02310, Second Dept 3-27-19**

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

STUDENT ON STUDENT ASSAULT WAS NOT FORESEEABLE, THEORIES IN THE PLEADINGS WHICH WERE NOT MENTIONED IN THE NOTICE OF CLAIM PROPERLY DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant school district's motion for summary judgment should have been granted in this student-on-student assault case. The assault arose abruptly and and lasted 20 to 30 seconds and was not foreseeable. In addition, the theories of liability not mentioned in the notice of claim, but asserted in the pleadings, should have been dismissed:

> ... [T]he School District established, prima facie, that the alleged assault by the fellow student was an unforeseeable act and that the School District had no actual or constructive notice of prior conduct of the students involved here which was similar to the subject incident ... . Moreover, the School District established, prima facie, that "the incident occurred in so short a period of time that any negligent supervision on its part was not a proximate cause of the infant plaintiff's injuries" ... .
>
> "[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" ... . However, if the defendant is a municipality, the plaintiff may not raise in the complaint causes of action or legal theories that were not directly or indirectly mentioned in the notice of claim and that "substantially alter" the nature of the claim or add a new theory of liability ... . By submitting evidence that the notice of claim did not mention ... causes of action and legal theories, the School District established its ... entitlement to judgment as a matter of law dismissing all of the causes of action, other than negligent supervision, that were asserted in the complaint and bill of particulars against the School District ... . **Meyer v Magalios, 2019 NY Slip Op 02336, Second Dept 3-27-19**

EMINENT DOMAIN

EMINENT DOMAIN, MUNICIPAL LAW.

PRIOR PUBLIC USE DOCTRINE PRECLUDED CONDEMNATION OF LAND ALREADY SUBJECT TO A PUBLIC USE BECAUSE THE PROPOSED USE WOULD INTERFERE WITH THE EXISTING PUBLIC USE (SECOND DEPT).

The Second Department, reversing the condemnation of a parcel of land owned by the city, determined that the proposed new use of the land would interfere with its current public use as a bus depot, a violation of the prior public use doctrine:

> ... [T]he proposed condemnation is prohibited under the doctrine of prior public use. Under the doctrine of prior public use, land already devoted to a public use may not be condemned absent legislative authority for the particular acquisition at issue ... . However, land already devoted to a public use may be condemned without legislative authority " where the new use would not materially interfere with the initial use'" ... . The Agency does not

contest that the subject parcel is devoted to a public use, or that there exists no legislative authority for the proposed condemnation ... . Thus, the subject parcel may not be condemned unless the new use would not materially interfere with the existing public use ... .

The Agency's proposed condemnation of the subject parcel for the purpose of returning the parcel to productive use in furtherance of urban renewal would materially interfere with its existing public use as a bus depot. ... Accordingly, the Agency's determination to condemn the subject parcel must be rejected. **Matter of City of New York v Yonkers Indus. Dev. Agency, 2019 NY Slip Op 02087, Second Dept 3-20-19**

ENVIRONMENTAL LAW

ENVIRONMENTAL LAW, CIVIL PROCEDURE.

PETITIONER DID NOT HAVE STANDING TO SEEK A STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) REVIEW OF A ONE-DAY SQUIRREL-HUNTING FUND-RAISING EVENT (FOURTH DEPT).

The Fourth Department determined petitioner did not have standing to seek a State Environmental Quality Review Act (SEQRA) review of one-day squirrel hunting event put on by a volunteer fire department:

Prior to 2017, the one-day hunting contests at issue had been held annually by respondent as fundraisers, with prizes having been awarded based on the weight of squirrels turned in at the end of each contest. Petitioner resides approximately 50 miles from the area where respondent has held the hunting contests. She alleges an environmental injury-in-fact based on her fondness for squirrels, the impact that the hunting contests may have on the "local ecology," and the possibility that the contests may result in the killing of squirrels that she sees near her residence. Petitioner contends that she therefore has standing to bring this proceeding/action. We reject that contention.

Standing is "a threshold requirement for a [party] seeking to challenge governmental action" ... . The burden of establishing standing to challenge an action pursuant to SEQRA is "on the party seeking review" ... . "The existence of an injury in fact—an actual legal stake in the matter being adjudicated—ensures that the party seeking review has some concrete interest in prosecuting the action" ... . In addition, to establish standing under SEQRA, a petitioner must establish, inter alia, "an environmental injury that is in some way different from that of the public at large"... .

Here, we conclude that petitioner has not met her burden of establishing an environmental [*2]injury-in-fact. Although petitioner may have alleged some environmental harm, she has alleged, at most, an injury that is "no different in either kind or degree from that suffered by the general public" . Petitioner also has not established that the hunting activities at issue have affected the wildlife where she resides, nor has she established that she has used, or even visited, the area where the hunting contests have been conducted ... . **Matter of Sheive v Holley Volunteer Fire Co., Inc., 2019 NY Slip Op 01982**

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FALSE ARREST

FALSE ARREST, MALICIOUS PROSECUTION.

PLAINTIFF WAS ARRESTED AND CHARGED WITH MURDER IN 2002 AND ACQUITTED IN 2006, CHALLENGES TO THE PROBABLE CAUSE TO ARREST AND THE PROPRIETY OF THE PROSECUTION DEEMED SPECULATIVE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissenting opinion, determined defendants' motion for summary judgment was properly granted. The opinion is fact-specific and cannot be fairly summarized here. Plaintiff was arrested and charged with murder in 2002 and was acquitted in 2006:

> Certain facts pertinent to the shooting are undisputed. For the subsequent civil action, plaintiff's strategy has focused on disputing the identification of him as the shooter. The record, including numerous police reports and statements by witnesses, reflects that the shooting outside of a well attended social event caused significant confusion as witnesses were alerted from various vantage points while many attendees remained inside. Some participants in a physical confrontation preceding the shooting apparently had not been invited and likely were unknown by attendees. Nevertheless, plaintiff's various attempts to dispute his identification as well as disparage the credibility of police and identification witnesses do not withstand a close analysis with respect to establishing the requisite elements of the civil claims. When the speculative challenges to probable cause and the propriety of the prosecution are cleared away, we are left with a record of the criminal investigation and prosecution that is factually compelling, warranting dismissal of the civil claims relevant to this appeal. **Roberts v City of New York, 2019 NY Slip Op 02177, First Dept 3-21-19**

FAMILY LAW

FAMILY LAW.

FAMILY COURT PROPERLY LIMITED THE CHILDREN'S VISITS WITH FATHER, WHO IS INCARCERATED, TO TWICE A YEAR (THIRD DEPT).

The Third Department, over a partial dissent, determined Family Court properly limited visitation with father, who is incarcerated, to two visits per year. The dissent agreed visitation should be limited, but argued for four visits per year:

> As the father argues, we recognize that recent social science research strongly supports the legal presumption that children benefit from continuing contact with an incarcerated parent ... . Nonetheless, the best interests of a child, and particularly a young child, may not be served by imposing in-person visits to a correctional facility. The atmosphere and setting of such visits may be traumatic to the child and his or her view of the parent. Other means of contact, such as frequent phone calls and letters, can provide children and incarcerated parents meaningful

communication and ways to continue and strengthen their relationships, without subjecting young children to unnecessary distress ... .

Here, the children were six and seven years old at the time of the fact-finding hearing, the mother described a history of domestic violence, indicating that it had occurred in front of at least one of the children, and she remained concerned for both her safety and the mental well-being of the children, as she testified that the children were exhibiting behavioral difficulties following contact with the father. The father, meanwhile, is serving a lengthy sentence and is not eligible for release until, at the earliest, 2021. Accordingly, under the circumstances, we find that there is a sound and substantial basis in the record to support Family Court's determination limiting the father to biannual visitation, with weekly telephone contact with the children ... . **Matter of Benjamin OO. v Latasha OO., 2019 NY Slip Op 02187, Third Dept 3-21-19**

FAMILY LAW.

PUBLIC POLICY PRECLUDED RECOVERY OF CHILD SUPPORT OVERPAYMENTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that public policy precluded plaintiff from recovering child support overpayments:

"There is strong public policy in this state, which the [Child Support Standards Act] did not alter, against restitution or recoupment of the overpayment of child support" ... . The rationale behind this policy is that child support payments are deemed to have been used to support the children, so "no funds exist from which one may recoup moneys so expended"... . "[R]ecoupment of child support payments is only appropriate under limited circumstances'" ... .

The plaintiff failed to demonstrate the existence of any circumstances which counter this state's strong public policy against reimbursement of child support overpayments ... . The plaintiff could have requested a modification of his child support obligation in accordance with the stipulation, but failed to do so ... . **Fortgang v Fortgang, 2019 NY Slip Op 02068, Second Dept 3-20-19**

FAMILY LAW.

A NEW HEARING ON FATHER'S PETITION TO RELOCATE IS REQUIRED BECAUSE THE COURT MAY HAVE PLACED TOO MUCH EMPHASIS ON THE CHILD'S ENROLLMENT IN A PARTICULAR SCHOOL AS THE BASIS FOR GRANTING THE PETITION (THIRD DEPT).

The Third Department, reversing Family Court, determined a new hearing on father's relocation petition was required because the court may have put too much emphasis on the child's enrollment in a particular school:

> Family Court determined that it was in the best interests of the child to award the father physical custody of the child and to permit the child to relocate to New York City. In making this determination, we note that the court took into account the child's relationship with the family members in each parties' household, the child's current school and Promise Academy, the parties' relative fitness to provide a safe and healthy environment and the structure in each household to support the child's educational needs. The court, however, conditioned such change of custody and relocation upon the child's enrollment in Promise Academy for the 2017-2018 school year. In our view, by imposing such condition, the court erroneously elevated the child's matriculation at Promise Academy from one factor to be considered in the best interests analysis to the sole dispositive factor. Inasmuch as no one factor is dispositive ... , the order must be reversed and a new hearing to be conducted on the father's modification petition within 20 days of this Court's decision. **Matter of Lionel PP. v Sherry QQ., 2019 NY Slip Op 02398, Third Dept 2-28-19**

FAMILY LAW, APPEALS, CIVIL PROCEDURE.

THERE IS NO APPEAL FROM A DEFAULT STEMMING FROM FAILURE TO APPEAR, MUST MOVE TO VACATE THE DEFAULT (THIRD DEPT).

The Third Department, dismissing the appeal, explained that where a party in default for failing to appear wishes to appeal, the party must first move to vacate the default:

> Respondent appeared by telephone before the Support Magistrate for arraignment, an appearance and a hearing, following which the Support Magistrate concluded that respondent had willfully violated the support order and recommended that he be incarcerated. The matter was referred to Family Court for confirmation. Respondent requested permission to give electronic testimony. Family Court denied that application both in writing and orally and directed, on the record, that respondent must appear in person for the hearing. When respondent did not appear, the court conducted the hearing in his absence, found that he willfully violated the support order and committed him to jail for 180 days. Respondent appeals.
>
> Family Court properly found respondent in default ... . Although respondent's counsel appeared and offered the explanation that respondent could not afford to travel to New York, the court had already heard and rejected that excuse in connection with respondent's application to give electronic testimony and directed him to appear in person for the hearing. When respondent failed to do so, the court did not abuse its discretion by finding him in default ... . "[T]he proper procedure would be for [respondent] to move to vacate the default and, if said motion is denied, take an appeal from that order" ... . Because no appeal lies from an order entered on default, we must dismiss this appeal ... . **Matter of Ulster County Support Collection Unit v Beke, 2019 NY Slip Op 01864, Third Dept 3-14-19**

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FAMILY LAW, ATTORNEYS, CONTEMPT.

COURT SHOULD HAVE INQUIRED INTO FATHER'S ELIGIBILITY FOR ASSIGNED COUNSEL IN THE CONTEMPT PROCEEDINGS STEMMING FROM FATHER'S FAILURE TO PAY CHILD SUPPORT, FATHER WAS DEPRIVED OF HIS RIGHT TO COUNSEL, NEW HEARING ORDERED (SECOND DEPT).

The Second Department, ordering a new hearing, determined father was deprived of is right to counsel in a contempt proceeding stemming from his failure to pay child support:

> A respondent in a contempt proceeding before the Family Court "has the right to the assistance of counsel," including "the right to have counsel assigned by the court" if "he or she is financially unable to obtain the same" (Family Ct Act § 262[a]). "Where a party indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel" ... . "The deprivation of [a parent's] fundamental right to counsel requires reversal, without regard to the merits of [his or] her position" ... .
>
> We agree with the father's contention that he was deprived of his right to counsel. After the Support Magistrate adjourned the hearing for the express purpose of allowing the father to retain counsel, the father appeared at the next hearing date without counsel and informed the Support Magistrate that he could not afford to hire an attorney because he had lost his job following the last court date. The Support Magistrate should have inquired into the father's current financial circumstances, including his expenses, to determine whether he had become eligible for assigned counsel ... . After the matter was referred to the Family Court, the court should have inquired into the father's financial circumstances, including his expenses, to determine whether he was eligible for assigned counsel in light of his contention that he could not afford to retain an attorney because he was unemployed ... . Although the court later assigned the father an attorney, the court failed to provide the "attorney a reasonable opportunity to appear," as the court assigned the attorney midway through the final court appearance, after the fact-finding hearing had concluded, after the Support Magistrate had made its credibility and factual findings, and after the court had decided to incarcerate the father ... . Indeed, the court denied the assigned attorney's request for an adjournment ... . **Matter of Worsdale v Holowchak, 2019 NY Slip Op 02104, Second Dept 3-20-19**

FAMILY LAW, CIVIL PROCEDURE, CONTRACT LAW.

NONPARTY SUBPOENA PROPERLY QUASHED BECAUSE IT DID NOT PROVIDE THE REASONS FOR THE REQUESTED DISCLOSURE, QUESTIONS OF FACT WHETHER STIPULATION OF SETTLEMENT WAS UNCONSCIONABLE AND WHETHER PLAINTIFF EXECUTED THE STIPULATION UNDER DURESS (SECOND DEPT).

The Second Department, modifying Supreme Court in this divorce action, determined: (1) the subpoena for a nonparty was defective because the reasons for the disclosure were not provided; (2) the stipulation of settlement was not demonstrated to be unconscionable as a matter of law; and (3) there were questions of fact whether the stipulation was signed under duress:

> Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty where the matter sought is material and necessary to the prosecution or defense of an action ... . A party seeking discovery from a nonparty must apprise the nonparty of the circumstances or reasons requiring disclosure (see CPLR 3101[a][4] ...). Here, we disagree with the Supreme Court's determination that the testimony sought from the nonparty was utterly irrelevant [the nonparty was a women with whom defendant allegedly had an affair]. However, we agree with the court's determination that the subpoenas were defective since, among other things, the defendant failed to provide the nonparty with the required explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material (see CPLR 3101[a][4] ...). Accordingly, we agree with the court's granting of the nonparty's motion to quash the subpoenas. **Gandham v Gandham, 2019 NY Slip Op 02069, Second Dept 3-20-19**

FAMILY LAW, EVIDENCE.

CHILD'S INCOMPLETE TESTIMONY STRICKEN IN A FAMILY COURT ACT 1028 PROCEEDING MAY BE ADMITTED IN A FAMILY COURT ACT 1046 CHILD ABUSE PROCEEDING (FIRST DEPT).

The First Department determined that a child's testimony stricken from a Family Court Act 1028 proceeding can be admitted in a Family Court Act 1046 (a)(vi) child abuse proceeding:

> On the merits, this appeal raises the issue of whether a child's testimony stricken from a hearing pursuant to Family Ct Act § 1028 may be considered in connection with a fact-finding hearing regarding abuse allegations, pursuant to Family Ct Act § 1046(a)(vi). We hold that it may be so used. Family Ct Act § 1046(a)(vi) sets forth, in relevant part, that "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence," when corroborated, and "[t]he testimony of the child shall not be necessary to make a fact-finding of abuse or neglect." Here, then 14-year-old Ashley refused to continue with her testimony at the FCA 1028 hearing regarding her allegations of sexual abuse after she already had been cross-examined for three days by respondent's counsel. According to a letter from Ashley's therapist submitted to the court, it would be detrimental for the child to return to testify. We agree with the Family Court that it could rely upon Ashley's incomplete testimony for the purposes of the subsequent fact-finding hearing, subject to a statutory requirement of corroboration. The use of Ashley's incomplete testimony was in accordance with the legislative intent of Family Ct Act § 1046(a)(vi) to address "the reluctance or inability of victims to testify" ... . **Matter of Jaylyn Z. (Jesus O.), 2019 NY Slip Op 01846, First Dept 3-14-19**

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FAMILY LAW, EVIDENCE.

EVIDENCE OF EXCESSIVE CORPORAL PUNISHMENT WARRANTED A NEGLECT FINDING, FAMILY COURT REVERSED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined that the evidence of excessive corporal punishment warranted a finding of neglect:

> A party seeking to establish neglect must establish, by a preponderance of the evidence, " first that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " ... . Although a parent may use reasonable force to discipline his or her child to promote the child's welfare ... , the "infliction of excessive corporal punishment" constitutes neglect (Family Ct Act § 1012 [f] [i] [B]). Indeed, " a single incident of excessive corporal punishment is sufficient to support a finding of neglect' " ... .
>
> Here, petitioner established by a preponderance of the evidence that the father neglected the child by inflicting excessive corporal punishment (see generally Family Ct Act § 1012 [f] [i] [B]). At the hearing, petitioner presented, among other things, witness testimony and medical records indicating that the child sustained a bruised left temple, a bruised eye, and a bloody and swollen nose after the father struck him ... . **Matter of Justin M.F. (Randall L.F.), 2019 NY Slip Op 01907, Fourth Dept 3-15-19**

FAMILY LAW, EVIDENCE, SOCIAL SERVICES LAW.

EVIDENCE NOT SUFFICIENT TO SUPPORT 'INDICATED' CHILD MALTREATMENT REPORT, DETERMINATION ANNULLED AND REPORT AMENDED TO 'UNFOUNDED' AND SEALED (FOURTH DEPT).

The Fourth Department determined the evidence of child maltreatment was insufficient and the "indicated" report maintained in the New York State Central Register of Child Abuse and Maltreatment should be amended to unfounded and sealed:

> At the fair hearing, DSS had the burden of establishing by a fair preponderance of the evidence that petitioner maltreated the child by the use of excessive corporal punishment (see Social Services Law § 424-a [2] [d]), and that such corporal punishment impaired or was in imminent danger of impairing the child's physical, mental, or emotional condition (see Social Services Law § 412 [2] [a]; Family Ct Act § 1012 [f] [i]). Impairment of mental or emotional condition is defined as "a state of substantially diminished psychological or intellectual functioning" (Family Ct Act § 1012 [h]). Physical impairment is defined as " a state of substantially diminished physical growth, freedom from disease, and physical functioning' " ... .
>
> Other than a general reference in DSS records that the child was "upset" by the incident, DSS did not present evidence that the incident physically, mentally, or emotionally impacted the 10-year-old child. The marks observed on the child's back, i.e., the sole marks attributed to petitioner by a preponderance of the evidence, apparently resolved the day after petitioner struck him, and before the DSS case worker examined the child. Under the circumstances here, the evidence is insufficient to establish that the child suffered the requisite impairment of his

physical, mental, or emotional well-being to support a finding of maltreatment. Thus, the determination that petitioner placed the child in imminent risk of physical or emotional impairment is not supported by substantial evidence, and we therefore annul the determination and grant the petition ... . **Matter of Jonathan L. v Poole, 2019 NY Slip Op 01908, Fourth Dept 3-15-19**

FAMILY LAW, JUDGES.

FAMILY COURT DID NOT MAKE THE REQUIRED FINDINGS OF FACT IN THIS FAMILY OFFENSE, CUSTODY AND VISITATION CASE, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, sending the matter back to Family Court, determined Family Court did not make the requisite findings of fact in this family offense, custody and visitation case:

... [W]e agree with the father that Family Court failed to adequately set forth its essential findings of fact (see CPLR 4213 [b]; Family Ct Act § 165 [a] ...). ...[T]he court failed to specify the family offense upon which the order of protection was predicated ... . [T]he court failed to "set forth its analysis of those factors that traditionally affect the best interests of a child, namely, the relative fitness of each party, each parent's ability to provide for the emotional and intellectual development of the child, the ability to provide financially for the child, the quality of the home environment, the length of time and stability of prior custodial arrangements, [and] the need of a child to reside with siblings[, if any] . . . As a result, we are unable to review [the court's] ultimate factual finding regarding each of those factors and the weight it placed upon each factor relative to the best interests of the child[ ]" ... . Under the circumstances of these cases, we decline to exercise our discretion to make the requisite findings ... . **Matter of Benson v Smith, 2019 NY Slip Op 02221, Fourth Dept 3-22-19**

FAMILY LAW, JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DRAWN AN ADVERSE INFERENCE AGAINST FATHER BASED UPON FATHER'S FAILURE TO CALL HIS GIRLFRIEND AS A WITNESS WITHOUT FIRST INFORMING FATHER AND GIVING FATHER A CHANCE TO EXPLAIN, ERROR DEEMED HARMLESS HOWEVER (FOURTH DEPT).

The Fourth Department determined the judge should not have drawn an adverse inference against father for his failure to call his girlfriend as a witness without first informing father and giving father a chance to explain. The error was deemed harmless however:

"A party is entitled to a missing witness charge when the party establishes that an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under the control of and available to that party" ... . "The party seeking a missing witness inference has the initial burden of setting forth the basis for the request as soon as practicable . . . to[, inter alia,] avoid substantial

possibilities of surprise" ... . Here, in its written decision, "[t]he court sua sponte drew a negative inference based on the [father's] failure to call [his girlfriend] as a witness, and failed to advise [him] that it intended to do so" ... . Thus, the father "lacked the opportunity to explain [his] failure to call [his girlfriend] as a witness, or to discuss whether [his girlfriend] was even available to testify or under [his] control" ... . We conclude, however, that the error did not affect the result ... . **Matter of Liam M.J. (Cyril M.J.), 2019 NY Slip Op 02207, Fourth Dept 3-22-19**

FORECLOSURE

FORECLOSURE, CONTRACT LAW.

PROVISION IN MORTGAGE WHICH GAVE BORROWER RIGHT TO DE-ACCELERATE THE DEBT DID NOT PRECLUDE PLAINTIFF BANK FROM ACCELERATING THE DEBT BY FILING A SUMMONS AND COMPLAINT, FORECLOSURE ACTION TIME-BARRED (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, determined that a reinstatement provision in a mortgage which gives the borrower the option to de-accelerate the debt did not preclude the plaintiff bank from accelerating the debt, rendering the foreclosure action time-barred:

> This appeal presents an issue of first impression for this Court. The plaintiff in this mortgage foreclosure action contends that it lacked the authority to exercise its contractual option to accelerate the maturity of the entire balance of the loan it seeks to recover. The plaintiff argues that it was prevented from validly accelerating the debt by virtue of a reinstatement provision in the subject mortgage which gives the borrower the option, under certain circumstances, to effectively de-accelerate the maturity of the debt. The plaintiff further argues that the statute of limitations did not begin to run until the borrower's rights under the reinstatement provision in the subject mortgage were extinguished. * * *
>
> .. .[T]he defendant demonstrated that the subject mortgage provided the plaintiff with the right to require the defendant to immediately pay "the entire amount then remaining unpaid under the Note and [mortgage]" if the plaintiff first satisfied certain conditions set forth in the mortgage. The defendant's evidentiary submissions established that the plaintiff complied with those conditions ... , and then validly exercised its option to accelerate the entire remaining balance due under the note by filing the summons and complaint in the first foreclosure action in June 2010 ... . Accordingly, since this action was not commenced until October 2016, the defendant established, prima facie, that the time in which to commence this action has expired (see CPLR 213[4]). * * *
>
> .. [T]the extinguishment of the defendant's contractual right to de-accelerate the maturity of the debt pursuant to the reinstatement provision in paragraph 19 of the mortgage was not a condition precedent to the plaintiff's acceleration of the mortgage ... . **Bank of N.Y. Mellon v Dieudonne, 2019 NY Slip Op 01732, Second Dept 3-13-19**

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FORECLOSURE, CONTRACT LAW.

THE 30-DAY NOTICE PROVISION IN THE MORTGAGE DID NOT PRECLUDE ACCELERATING THE DEBT BY THE ALLEGATIONS IN THE FORECLOSURE COMPLAINT, SUPREME COURT SHOULD NOT HAVE NULLIFIED THE ACCELERATION (FIRST DEPT).

The First Department, reversing Supreme Court, determined Supreme Court should not have nullified the acceleration of the mortgage in this foreclosure action. Because acceleration was optional, the 30-day notice provision in the mortgage did not preclude acceleration by the allegations in the foreclosure complaint:

> Supreme Court erred in nullifying plaintiff's assignor's acceleration in the prior action based on Section 22 of the mortgage which provides that the lender may accelerate the mortgage only if, inter alia, it has served defendant with a proper 30-day notice of default. Where the acceleration is optional as here, some affirmative action must be taken to evince the note holder's election to accelerate ... . Affirmative action can be in the form of a letter ... or the commencement of a foreclosure action ... . Plaintiff's assignor accelerated the mortgage debt by commencing the prior action and stating in its complaint that "plaintiff elects herein to call due the entire amount secured by the mortgage(s)." **Capital One, N.A. v Saglimbeni, 2019 NY Slip Op 01837, First Dept 3-14-19**

FORECLOSURE, EVIDENCE.

PROOF OF STANDING DID NOT MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence of standing did not meet the business record exception to the hearsay rule:

> Here, since Thrasher [plaintiff's loan officer] did not allege that she was personally familiar with the plaintiff's record-keeping practices and procedures, a proper foundation for the admission of the records was not provided, rendering them inadmissible to establish that the subject note was possessed by or assigned to the plaintiff prior to the commencement of the action. Moreover, even if a proper foundation had been set forth in the Thrasher affidavit, Thrasher's assertions as to the contents of the records is inadmissible hearsay to the extent that the records she purports to describe were not submitted with her affidavit. While a witness may read into the record from the contents of a document which has been admitted into evidence ... , a witness's description of a document not admitted into evidence is hearsay (seeCPLR 4518[a]...). Furthermore, although the plaintiff submitted an endorsed copy of the note in support of its motion for summary judgment, after having appended an unendorsed copy of the note to the complaint, the plaintiff failed to eliminate a triable issue of fact as to whether the plaintiff was in possession of the original note at the time the action was commenced ... . **U.S. Bank Natl. Assn. v 22 S. Madison, LLC, 2019 NY Slip Op 01635, Second Dept 3-6-19**

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FORECLOSURE, EVIDENCE.

THE SECOND DEPARTMENT USED THIS OPINION AS A VEHICLE TO EXPLAIN THE COMPLEX PROOF REQUIREMENTS FOR SUMMARY JUDGMENT MOTIONS BROUGHT IN FORECLOSURE ACTIONS, EMPHASIZING THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Miller, explained in detail the proof requirement for a summary judgment motion in a foreclosure action, emphasizing the requirements of the business records exception to the hearsay rule. The court determined that the bank's proof of standing was sufficient, but the proof of defendant's default was not. The opinion is too detailed to be fairly summarized here and should be consulted for guidance in foreclosure actions:

> From an appellate perspective, the recent flood of foreclosure appeals has revealed consistent and repeated confusion about some of the most fundamental aspects of the procedural, substantive, and evidentiary law that must be routinely applied in a foreclosure context. In an effort to provide additional clarity in this important area of the law, we deem it appropriate to collect and reiterate some of these foundational principles in the hope that such clarity will eliminate many of the disputes that make up an ever-increasing proportion of trial-level dockets. For the reasons that follow, we modify the order appealed from.
>
> ... [I]t bears noting that the business record exception to the hearsay rule applies to a "writing or record" (CPLR 4518[a]). Although "[t]he foundation for admission of a business record usually is provided by the testimony of the custodian, the author or some other witness familiar with the practices and procedures of the particular business" ... , it is the business record itself, not the foundational affidavit, that serves as proof of the matter asserted ... . Accordingly, "[e]vidence of the contents of business records is admissible only where the records themselves are introduced" ... . **Bank of N.Y. Mellon v Gordon,2019 NY Slip Op 02306, Second Dept 3-27-19**

FORECLOSURE, EVIDENCE.

PLAINTIFF'S PROOF OF STANDING IN THIS FORECLOSURE ACTION WAS NOT IN ADMISSIBLE FORM, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the evidence that the plaintiff had standing in this foreclosure action did not meet the requirements of the business records exception to the hearsay rule and plaintiff's summary judgment motion should not have been granted:

> In support of its motion, the plaintiff relied on the affidavit of Gabriel De Souza, a contract management coordinator for Ocwen Loan Servicing, LLC (hereinafter Ocwen), which serviced the subject mortgage for the plaintiff. De Souza indicated that his knowledge of this case was based on his "review of the business records," and asserted that the plaintiff was "in possession of the Note at the time of commencement of this action." He did not indicate that the business records of the plaintiff had been incorporated into Ocwen's business records. Moreover, the plaintiff failed to demonstrate the admissibility of the assertions made by De Souza or the records relied upon by him under the business records exception to the hearsay rule (see CPLR 4518[a] ...). Inasmuch as the plaintiff's motion was based on evidence that was not in admissible form, it failed to establish its prima facie entitlement to

judgment as a matter of law ... . **Deutsche Bank Natl. Trust Co. v Lee, 2019 NY Slip Op 02313, Second Dept 3-27-19**

FORECLOSURE, EVIDENCE.

NO PROOF NOTE WAS IN POSSESSION OF PLAINTIFF WHEN THE ACTION WAS COMMENCED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, over a two justice dissent, reversing Supreme Court, determined the evidence of standing was insufficient and plaintiff's motion for summary judgment in this foreclosure action should not have been granted. The majority held there was no proof the plaintiff was in possession of the note when the action was brought:

> On or about September 17, 2014, plaintiff executed a power of attorney appointing Ocwen Loan Servicing, LLC (Ocwen) as its attorney-in-fact with power to enforce its rights with regard to loans included in the PSA [pooling and service agreement].
>
> Two years after that, on October 19, 2016, plaintiff moved for summary judgment. Plaintiff submitted an affidavit by Kyle Lucas, an employee of a company whose indirect subsidiary is Ocwen. Lucas alleged that plaintiff had had physical possession of the note since June 6, 2007, but he failed to identify any document which provided the basis for his knowledge. A copy of defendant's note, endorsed in blank ... , was attached to plaintiff's summary judgment motion. However, there is nothing in the record that proves when the note was physically delivered to plaintiff. **Deutsche Bank Natl. Trust Co. v Guevara, 2019 NY Slip Op 02412, First Dept 3-28-19**

FORECLOSURE, EVIDENCE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PLAINTIFF'S PROOF OF COMPLIANCE WITH THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW 1304 IN THIS FORECLOSURE ACTION WAS INSUFFICIENT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304:

> ... [T]he plaintiff failed to submit an affidavit of service or proof of mailing by the United States Postal Service evidencing that it properly served the defendant pursuant to RPAPL 1304. The plaintiff instead relied on the "Affidavit of Mailing" of a vice president of loan documentation of Wells Fargo. However, the affiant did not aver that she personally mailed the notice, and she did not aver that she was familiar with the plaintiff's mailing

> practices and procedures, and, therefore, she did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed .... Similarly, the presence of numbered bar codes on the copies of the 90-day statutory notices submitted by the plaintiff did not suffice to establish, prima facie, proper mailing under RPAPL 1304 ... . **U.S. Bank N.A. v Offley, 2019 NY Slip Op 02377, Second Dept 3-27-19**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

BANK FAILED TO DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff bank failed to demonstrate compliance with the notice requirements of RPAPL 1304. Therefore the bank's motion for summary judgment should not have been granted:

> ... [T]he plaintiff relied upon the affidavit of an employee who claimed that the plaintiff's business records showed that RPAPL 1304 notices were sent by certified and first-class mail. However, the documentary evidence submitted in support of those claims redacted certain tracking numbers and failed to establish, prima facie, that the notices were mailed by first-class mail ... . **Citimortgage, Inc. v Succes, 2019 NY Slip Op 02058, Second Dept 3-20-19**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE.

PROOF DID NOT DEMONSTRATE THE NOTICE REQUIREMENTS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304 WERE MET (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the bank did not demonstrate that the notice requirements of RPAPL 1304 were met:

> ... Lechtanski [the loan servicer representative] did not have personal knowledge of the purported mailing and failed to make the requisite showing that he was familiar with the plaintiff's mailing practices and procedures, and therefore, did not establish "proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed" ... . Moreover, the copy of the notice annexed to the Lechtanski affidavits, while bearing a notation "VIA CERTIFIED AND FIRST CLASS MAIL," bears no indicia of actual mailing such as postal codes and was unaccompanied by any mailing receipts or tracking information ... . **Wells Fargo Bank, N.A. v Taylor, 2019 NY Slip Op 01817, Second Dept 3-13-19**

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FREEDOM OF INFORATION LAW (FOIL)

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS, PRIVILEGE.

DOCUMENTS SOUGHT BY PETITIONER WERE EXEMPT FROM DISCLOSURE BASED UPON THE ATTORNEY-CLIENT PRIVILEGE, THE ATTORNEY WORK PRODUCT AND THE INTER-, INTRA-AGENCY COMMUNICATION EXEMPTIONS (THIRD DEPT).

The Third Department, modifying Supreme Court, determined emails between the governor's office, counsel and Department of Transportation (DOT) employees concerning a gas station sublease which had been held by petitioner, but which was terminated by DOT, were exempt from disclosure based upon attorney-client privilege, attorney work-product, and the inter-, intra-agency communication exemption:

> In determining whether a communication is protected by the attorney-client privilege, "the critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client" ... . In that regard, inasmuch as facts are the foundation of legal advice, the attorney-client privilege protects communications between an attorney and his or her client that convey facts relevant to a legal issue under consideration, even if the information contained in the communication is not privileged ... . Each of the emails at issue are communications between counsel in the Governor's Office and DOT employees that contain or reference factual information relevant to counsel providing legal advice regarding the proposed termination of the sublease. Accordingly, we conclude that the emails are protected by the attorney-client privilege and, therefore, Supreme Court erred in ordering their disclosure.
>
> Respondents further contend that preliminary drafts of the letter that was ultimately sent terminating the sublease are exempt from disclosure under FOIL as inter-agency or intra-agency materials and as attorney work product ... . The letters are drafts of the final termination notice that incorporate counsel's recommendations and that were circulated in furtherance of the decision-making process prior to a final determination; accordingly, they are exempt from disclosure under FOIL as inter-agency or intra-agency materials and as attorney work product ... . **Matter of Gilbert v Office of the Governor of the State of N.Y., 2019 NY Slip Op 02189, Third Dept 3-21-19**

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INSURANCE LAW

INSURANCE LAW.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON ACTION TO RECOVER PROCEEDS OF LIFE INSURANCE POLICY, INSURER DID NOT DEMONSTRATE THE INSURED WAS NOTIFIED OF THE PREMIUM DUE DATE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the life insurance policy was never canceled and plaintiff was entitled to summary judgment in the action to recover the proceeds:

> As relevant here, Insurance Law § 3211 provides that "[n]o policy of life insurance . . . delivered or issued for delivery in this state . . . shall terminate or lapse by reason of default in payment of any premium . . . in less than one year after such default, unless, for scheduled premium policies, a notice shall have been duly mailed at least fifteen and not more than forty-five days prior to the day when such payment becomes due" (Insurance Law § 3211[a][1]). The notice required shall "be duly mailed to the last known address of the policyowner" ... .
>
> "The burden of proving valid cancellation of an insurance policy is upon the insurance company disclaiming coverage based on cancellation" ... . We agree with the Supreme Court that William Penn failed to meet that burden and, therefore, was not entitled to summary judgment dismissing the complaint insofar as asserted against it. The evidence submitted on the motion and cross motion established that William Penn was aware that the policyholder had changed his address, but it failed to send a notice of premium due to that last known address at least fifteen days prior to the day when such payment became due ... . Consequently, in accordance with the statute, the policy remained in effect for one year after the March 14, 2012, premium due date (see Insurance Law § 3211[a][1]). Since the policy was in effect on the date of the policyholder's death, the plaintiff was entitled to summary judgment on the complaint insofar as asserted against William Penn ... . **Bradley v William Penn Life Ins. Co. of N.Y., 2019 NY Slip Op 02054, Second Dept 3-20-19**

INSURANCE LAW, DEBTOR-CREDITOR.

RELEVANT REGULATION, RATHER THAN THE POLICY LANGUAGE, CONTROLLED THE CALCULATION OF INTEREST ON INSURANCE POLICY PROCEEDS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the relevant regulation, as opposed to the less generous insurance policy provision, controlled the payment of interest on policy proceeds:

> Defendant['s] ... insurer's bare offer to pay the policy limit was not a "tender" of the policy for the purposes of stopping the accrual of prejudgment interest under 11 NYCRR 60-1.1(b). While the policy provides that the insurer will pay interest on a judgment until "we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance," 11 NYCRR 60-1.1(b) requires the insurer to pay postjudgment interest until it has "paid or tendered or deposited in court" the part of the judgment that does not exceed the policy limit. As the policy language is less generous to the insured than the regulation, it is deemed superseded by the regulation ... . Within that framework, a bare offer to pay does not constitute a tender. Thus, interest must be calculated from the date of

entry of the order that granted summary judgment to plaintiff until the date of payment ... . **Gyabaah v Rivlab Transp. Corp., 2019 NY Slip Op 02417, First Dept 3-28-19**

LABOR LAW-CONSTRUCTION LAW

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS DOING ROUTINE MAINTENANCE WHEN HE FELL FROM A LADDER, NOT COVERED BY LABOR LAW 240 (1) (FIRST DEPT).

The First Department determined plaintiff was not engaged in work covered by Labor Law 240 (1) when he fell from a ladder:

> Although plaintiff injured his elbow when the ladder he was using in defendant's building fell over, he is not entitled to relief under Labor Law § 240(1) since he was not engaged in construction-related activity at the time of his accident ... . Plaintiff's actions of opening a splice box affixed to the wall and splicing telephone wires therein while on a service call for a customer of his employer did not constitute an alteration of the building, but rather routine maintenance ... . **Spencer v 322 Partners, L.L.C., 2019 NY Slip Op 01523, First Dept 3-5-19**

LABOR LAW-CONSTRUCTION LAW.

THAT THE LADDER WAS NOT DEFECTIVE DID NOT MATTER, THE LADDER WAS NOT AN ADEQUATE SAFETY DEVICE UNDER THE CIRCUMSTANCES AND THE LADDER WAS NOT ADEQUATELY SECURED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION PROPERLY GRANTED (FIRST DEPT).

The First Department determined plaintiff's motion for summary judgment on his Labor Law 240 (1) cause of action was properly granted. The ladder was deemed an inadequate safety device because plaintiff had to step off the ladder onto display cases to do his work. The fact that the ladder was not defective was not dispositive because the ladder was not secured:

> Plaintiff, who fell from a ladder while installing light fixtures in [the] building, was forced to install a portion of the light by standing on display cases approximately 20 feet high, and then returning to the top of the ladder to finish that portion of the installation, which was located partially over the cases. While attempting to maneuver himself into position on the ladder, he lost his balance and fell. Whether the ladder shook prior to his fall or during that period in time when he was attempting to recover his balance is of no moment, since the ladder was an inadequate safety device for the work being performed ... . The claim ... that plaintiff was the sole proximate cause of his

accident is unpersuasive, since plaintiff's stance was necessary to perform the work ... . It also does not avail defendants that the ladder was not defective, since it is undisputed that the ladder was unsecured, and the worker who had been holding the ladder walked away only minutes before the accident ... . **Nieto v CLDN NY LLC, 2019 NY Slip Op 01537, First Dept 3-5-19**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF WAS INJURED WORKING ON AN HVAC SYSTEM, THE WORK WAS ROUTINE MAINTENANCE, NOT COVERED BY LABOR LAW 241 (1) (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's work on an HVAC system was routing maintenance, not covered by Labor Law 241 (6):

The plaintiff allegedly injured his back when he was performing a seasonal "start-up" of a cooling tower on the defendant's HVAC system, which consisted of transitioning the HVAC system from heating to cooling. The company the defendant was employed by had done this work on a yearly basis for the past 10 years. As part of the work, the plaintiff and his coworker needed to reinstall a circulation pump on the HVAC tower, which had been removed for the winter months. To do so, the plaintiff tied a rope around the circulation pump, which weighed approximately 100 pounds, passed the rope over the top of an overhead beam, and pulled from the other side to raise the pump about three to five feet off the ground so his coworker could install it in the cooling tower. The plaintiff held the pump in the air for about 20 or 25 minutes while his coworker attempted to install it, but felt pain in his back and was unable to hold it any longer. The plaintiff allegedly needed back surgery as a result of the incident. ...

Although maintenance work performed in connection with construction, demolition, or excavation work is included under Labor Law § 241(6), "[r]outine maintenance is not within the ambit of Labor Law § 241(6)" ... . The Labor Law "does not cover routine maintenance in a nonconstruction, nonrenovation context" ... . **Byrnes v Nursing Sisters of the Sick Poor, Inc., 2019 NY Slip Op 01736, Second Dept 3-13-19**

LABOR LAW-CONSTRUCTION LAW, EMPLOYMENT LAW, CORPORATION LAW, WORKERS' COMPENSATION LAW.

DEFENDANT WAS NOT AN ALTER EGO OF PLAINTIFF'S EMPLOYER, PLAINTIFF WAS NOT DEFENDANT'S SPECIAL EMPLOYEE, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240 (1) CAUSE OF ACTION BASED UPON THE ALLEGATION THE LADDER MOVED FOR NO APPARENT REASON, NOTWITHSTANDING EVIDENCE PLAINTIFF MAY HAVE SAID HE PLACED THE LADDER ON A DROP CLOTH (SECOND DEPT).

The Second Department, modifying Supreme Court, determined defendant's affirmative defenses alleging it was an alter ego of plaintiff's employer and plaintiff was its special employee, thereby insulating defendant from anything other than

liability under the Workers' Compensation Law, should have been dismissed. Summary judgment was properly awarded to plaintiff on his Labor Law 240 (1) cause of action. Plaintiff alleged the ladder he was on moved for no apparent reason. The fact that plaintiff apparently told a co-worker that he set the ladder on a drop cloth merely raised a question of his contributory negligence, which is not a defense to a Labor Law 240 (1) action:

> "Labor Law § 240(1) imposes a nondelegable duty upon owners and general contractors to provide safety devices to protect workers from elevation-related risks" ... . The sole proximate cause defense applies where the plaintiff, acting as a "recalcitrant worker," misused an otherwise proper safety device, chose to use an inadequate safety device when proper devices were readily available, or failed to use any device when proper devices were available ... . Contributory negligence on the part of the worker is not a defense to a Labor Law § 240(1) cause of action ... .
>
> Here, the plaintiff made a prima facie showing of entitlement to ... judgment as a matter of law on the issue of liability on the Labor Law § 240(1) cause of action, by submitting evidence that the ladder on which he was standing moved for no apparent reason, causing him to fall ... . In opposition to the plaintiff's prima facie showing, the defendant failed to raise a triable issue of fact as to whether the plaintiff's own acts or omissions were the sole proximate cause of his injuries ... . Contrary to the defendant's contention, the deposition testimony of the plaintiff's coworker implying that, after the accident, the plaintiff might have told the coworker that the plaintiff had set the ladder up on top of a drop cloth, even if true, would render the plaintiff only contributorily negligent, a defense not available under Labor Law § 240(1) ... . **Salinas v 64 Jefferson Apts., LLC, 2019 NY Slip Op 02370, Second Dept 3-27-19**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

DEFECTIVE A-FRAME LADDER ENTITLED PLAINTIFF TO SUMMARY JUDGMENT IN THIS LABOR LAW 240 (1) ACTION, STATEMENTS IN MEDICAL RECORDS WERE INADMISSIBLE HEARSAY (SECOND DEPT).

The Second Department determined plaintiff was entitled to summary judgment in this Labor Law 240 (1) action. Plaintiff fell from an A-frame ladder which had a defective locking mechanism. The court noted that the evidence in the medical records did not raise a question of fact because the statements in the records were not admissible. The hearsay statements were not attributable to the plaintiff and had nothing to do with treatment:

> The plaintiff's deposition testimony established, prima facie, that the defendant, as the general contractor, violated Labor Law § 240(1) by providing a ladder with a defective lock, which caused the ladder to collapse and the plaintiff to fall to the ground ... .
>
> ... [T]he notations in the hospital records upon which the defendant relies were not attributed to the plaintiff. As the defendant failed to offer evidence sufficiently connecting the plaintiff to the statements in the hospital records, the party admission exception to the hearsay rule does not apply ... . Moreover, none of the notations were germane to the plaintiff's diagnosis or treatment and, at trial, would not be admissible for their truth under the business records exception to the hearsay rule (see CPLR 4518 ...). While hearsay statements may be used to oppose motions for summary judgment, they cannot, as here, be the only evidence submitted to raise a triable issue of fact ... . **Gomez v Kitchen & Bath by Linda Burkhardt, Inc., 2019 NY Slip Op 02070, Second Dept 3-20-19**

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LANDLORD-TENANT

LANDLORD-TENANT, CIVIL PROCEDURE, INSURANCE LAW.

TENANT'S ALLEGED FAILURE TO INSURE THE PROPERTY AND ALLEGED IMPROPER ASSIGNMENT OF THE LEASE ARE NOT DEFAULTS THAT CAN BE CURED, THEREFORE THE TENANT IS NOT ENTITLED TO A *YELLOWSTONE* INJUNCTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the tenant was not entitled to a *Yellowstone* injunction because the alleged failure to insure the property and the alleged improper assignment of the lease were not curable defaults:

> The purpose of a Yellowstone injunction, which tolls the period in which a tenant may cure a claimed violation of the lease, is for a tenant to avoid forfeiture after a determination against it has been made on the merits, because the tenant will still have an opportunity to cure ... .
>
> A necessary lynchpin of a Yellowstone injunction is that the claimed default is capable of cure. Where the claimed default is not capable of cure, there is no basis for a Yellowstone injunction... . Here, the claimed defaults are the tenant's failure to procure insurance and improper assignment of the lease. The tenant provides various steps that it will take to cure if it is ultimately found to be in material violation of the insurance provisions of the lease. None of these proposed cures involve any retroactive change in coverage, which means that the alleged defaults raised by the landlord are not susceptible to cure ... . * * *
>
> We reject the tenant's argument, that even if no Yellowstone injunction is warranted, it is still entitled to a preliminary injunction. Yellowstone injunctions are available on a far lesser showing than preliminary injunctions ... . Because the Yellowstone injunction fails, the preliminary injunction does as well. In any event, no injunction is needed to preserve the status quo because the landlord cannot evict the tenant unless and until there is a determination of the merits in the landlord's favor. If the tenant prevails, then there will be no eviction. The right lost by the denial of a Yellowstone injunction is the right to cure any default. **Bliss World LLC v 10 W. 57th St. Realty LLC, 2019 NY Slip Op 01509, First Dept 3-5-19**

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MEDICAL MALPRACTICE

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

ACTION BASED UPON FAILURE TO SUPERVISE PLAINTIFF'S USE OF A HOSPITAL REST ROOM SOUNDED IN MEDICAL MALPRACTICE, NOT NEGLIGENCE, THE ACTION WAS THEREFORE TIME-BARRED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's action, which alleged inadequate supervision when plaintiff used a hospital rest room, sounded in medical malpractice, not negligence. Therefore the action was time-barred:

> Plaintiff alleges that defendants failed to properly assess her condition and the degree of her supervisory needs in the restroom, a claim sounding in medical malpractice, and her action, brought three years after her injuries, is therefore untimely ... . Because the loss of consortium claim is derivative of the injured plaintiff's claim, that cause of action must also be dismissed as untimely ... . **Kim v New York Presbyt., 2019 NY Slip Op 02425, First Dept 3-28-19**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE.

DEFENDANTS' MOTION TO SET ASIDE THE VERDICT FINDING LIABILITY IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF'S MOTION TO SET ASIDE THE VERDICT AWARDING NO DAMAGES FOR PAST AND FUTURE PAIN AND SUFFERING OR FUTURE LOST WAGES SHOULD HAVE BEEN GRANTED, PLAINTIFF ALLEGED HER CHILD WAS INJURED IN UTERO (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendants' motion to set aside the verdict finding liability in this medical malpractice action should not have been granted, and the plaintiff's motion to set aside so much of the verdict as awarded no damages for past or future pain and suffering or future lost earnings should have been granted. The action alleged damage to plaintiff's child in utero:

> Here, the plaintiff adduced legally sufficient proof to establish a departure from the standard of care and as to causation. In particular, the plaintiff's expert obstetrician-gynecologist, Barry Schifrin, opined that the child suffered a placental "abruption plus or minus fetomaternal transfusion," which caused "a problem of oxygen availability in the baby's brain." Schifrin opined that continuous EFM testing should have been undertaken beginning on the date of the mother's fall, November 4, 2008. Schifrin testified that the EFM performed on November 12, 2008, showed that the child had been in distress for "quite some time." The plaintiff's expert pediatric hematologist, Jill DeJong, opined that the child's anemia was related to a fetomaternal transfusion. Based on that evidence, the jury could have reasonably found that had the respondents undertaken or begun continuous EFM on November 10, 2008, the harm to the child would have been avoided or mitigated. Further, although the respondents' experts opined that the respondents did not depart from accepted practice, the jury was entitled to resolve the conflicting expert testimony in the plaintiff's favor ... . Accordingly, the Supreme Court should not have granted that branch of the respondents' motion which was to set aside the jury verdict on the issue of liability and for judgment as a matter of law ... .

> The jury's failure to award any damages for past pain and suffering and future pain and suffering deviates materially from reasonable compensation, in light of the evidence of the severe deficits suffered by the child, her ongoing need for medical treatment, ongoing medical events such as intractable seizures, and evidence of her consciousness and ability to interact with others (see CPLR 5501[c] ...). The jury's failure to award any damages for future lost earnings also deviates materially from reasonable compensation ... . **Larkin v Wagner, 2019 NY Slip Op 02327, Second Dept 3-27-19**

MEDICAL MALPRACTICE, NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE, TRUSTS AND ESTATES.

DECEDENT'S CONSENT TO SURGERY SUBMITTED IN SUPPORT OF SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION DID NOT VIOLATE THE DEAD MAN'S STATUTE, THE CONSENT WAS AUTHENTICATED BY THE MEDICAL RECORDS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the medical malpractice and wrongful death actions should have been dismissed. With respect to the "lack of informed consent" cause of action, the court held that the submission of the informed consent form by the defendant did not violate the Dead Man's Statute:

> The plaintiff contends that Meyerson [defendant surgeon] cannot rely upon the portion of his expert's affidavit which states that the decedent was aware of the risks of the procedure because he signed a consent form for a similar procedure in 2012, because this evidence would be inadmissible pursuant to CPLR 4519, the so-called Dead Man's Statute. CPLR 4519 "precludes a party or person interested in the underlying event from offering testimony concerning a personal transaction or communication with the decedent" ... .
>
> While evidence excludable at trial under CPLR 4519 may be considered in opposition to a motion for summary judgment so long as it is not the sole evidence proffered ... , such evidence "should not be used to support summary judgment" ... . However, the statute does not bar "the introduction of documentary evidence against a deceased's estate. . . . [A]n adverse party's introduction of a document authored by a deceased does not violate the Dead Man's Statute, as long as the document is authenticated by a source other than an interested witness's testimony concerning a transaction or communication with the deceased" ... . Inasmuch as the expert's affidavit as to the decedent's execution of the form was predicated upon the medical records, which contained the decedent's consent form for the prior surgery and on which the expert relied, and the records were properly authenticated and submitted on the motion, Meyerson properly relied upon the expert opinion to support his motion ... . **Wright v Morning Star Ambulette Servs., Inc., 2019 NY Slip Op 02381, Second Dept 3-27-19**

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MUNICIPAL LAW

MUNICIPAL LAW, NEGLIGENCE, ATTORNEYS.

ALTHOUGH PLAINTIFFS APPEARED FOR THE 50-h HEARING, PLAINTIFFS' ATTORNEY REFUSED TO LET THE PLAINTIFFS TESTIFY UNLESS EACH PLAINTIFF COULD HEAR THE OTHER'S TESTIMONY, BECAUSE THE 50-h HEARING IS A CONDITION PRECEDENT TO BRINGING SUIT, PLAINTIFFS' LAWSUIT WAS PROPERLY PRECLUDED (SECOND DEPT).

The Second Department, over a two-justice dissent, determined that plaintiffs were precluded from proceeding with the lawsuit because, although plaintiffs appeared for the 50-h hearing, plaintiffs attorney refused to participate in the 50-h hearing unless each plaintiff was present when the other testified. The majority held that the 50-h hearing is a condition precedent to any lawsuit and the statute does not create a right for plaintiff's to be present for each other's testimony at the hearing:

> The purpose of General Municipal Law § 50-h is to enable a municipality to make a prompt investigation of the circumstances of a claim by examining the claimant about the facts of the claim ... . The oral examination of a claimant pursuant to General Municipal Law § 50-h serves to supplement the notice of claim and provides an investigatory tool to the municipality, with a view toward settlement ... . "Compliance with a demand for a General Municipal Law § 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action" ... . "A party who has failed to comply with a demand for examination pursuant to General Municipal Law § 50-h is precluded from commencing an action against a municipality" ... .
>
> " [A] court cannot amend a statute by inserting words that are not there, nor will a court read into a statute a provision which the Legislature did not see fit to enact'" ... . Moreover, "[i]n the construction of statutes, each word or phrase in the enactment must be given its appropriate meaning" ... , which is in derogation of the common law, is to be strictly construed ... . In strictly construing a statute, courts "will not go beyond the clearly expressed provisions of the act" ... . **Colon v Martin, 2019 NY Slip Op 02312, Second Dept 3-27-19**

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NEGLIGENCE

NEGLIGENCE.

QUESTION OF FACT WHETHER DEFENDANT IN THIS SLIP AND FALL CASE HAD CONSTRUCTIVE KNOWLEDGE OF MELTED ICE CREAM ON THE STAIRS, THERE WAS EVIDENCE THE ICE CREAM HAD BEEN THERE FOR AT LEAST THREE HOURS, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined there was a question of fact whether defendant had constructive notice of melted ice cream which had spilled onto interior stairs in this slip and fall case. There was evidence the ice cream was on the step for at least three hours:

> Although defendants' superintendent testified that he complied with his regular maintenance routine on the day of the accident and never observed the cup of ice cream on the stairs, plaintiff testified that she observed the cup of ice cream in an upright position approximately three hours before her fall when she had returned home from work. Such conflicting testimony, along with a photograph showing a tipped over cup of melted ice cream taken moments after plaintiff's fall, creates a triable issue as to whether defendants had constructive notice of the condition ... . **Cruz v Perspolis Realty LLC, 2019 NY Slip Op 01531, First Dept 3-5-19**

NEGLIGENCE.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE CONSTRUCTIVE NOTICE OF THE WET CONDITION ON THE STAIRS IN THIS SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this stairway slip and fall case should have been granted. Defendants demonstrated they did not have constructive notice of a wet condition:

> Defendants ... relied on plaintiff's testimony that, in the 15 minutes before his accident, he had gone up and down the stairs without incident and did not notice any liquid or water on the steps, demonstrating that the alleged dangerous condition was not visible and apparent for a sufficient time before the accident to provide constructive notice ... . Although plaintiff did testify that he saw a woman with a mop coming down the stairs as he was going upstairs the first time, implying that she could have caused the wet condition, he acknowledged that the surveillance video did not show any woman with a mop. Furthermore, defendants' witnesses stated that the daytime worker for defendant United Building Maintenance Associates, Inc. was only responsible for cleaning the area near the ATM machines on the first floor and never mopped, and that the staircase was cleaned by night personnel. **Fernandez v JPMorgan Chase Bank, NA, 2019 NY Slip Op 01645, First Dept 5-7-19**

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NEGLIGENCE.

DEFENDANTS DID NOT SUBMIT EVIDENCE SHOWING WHEN THE SIDEWALK WAS LAST INSPECTED IN THIS SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this sidewalk slip and fall case should not have been granted. Defendants offered no evidence of when the sidewalk was last inspected:

> In a trip and fall case, a defendant moving for summary judgment has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it .... A movant cannot satisfy its initial burden by merely pointing to gaps in the plaintiff's case ... .
>
> Here, the defendants failed to establish, prima facie, that they did not have constructive notice of the alleged hazardous condition. In support of their motion, the defendants submitted no evidence as to when the subject sidewalk was last inspected prior to the accident ... . **Ariza v Number One Star Mgt. Corp., 2019 NY Slip Op 01551, Second Dept 3-6-19**

NEGLIGENCE.

DEFENDANTS' PROOF DEMONSTRATED THE SNOW STORM WAS OVER 12 HOURS BEFORE PLAINTIFF'S SLIP AND FALL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT UNDER THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants did not demonstrate the applicability of the storm in progress rule in this ice and snow slip and fall case. Therefore defendants motion for summary judgment should not have been granted:

> The climatological data submitted by the defendants showed that there was an accumulation of approximately seven inches of snow, which had ceased to fall by 8:00 p.m. on February 3, 2014, more than 12 hours prior to the accident, and that the temperature was 32 degrees when the storm stopped and dropped below freezing during the time prior to the happening of the accident. Further, the defendants submitted a transcript of the deposition testimony of the injured plaintiff, who testified that the walkway from the hotel to the parking lot was clear while the parking lot was icy and had not been cleared by 9:00 a.m. on February 4, 2014, when the accident occurred. **Casey-Bernstein v Leach & Powers, LLC, 2019 NY Slip Op 01557, Second Dept 3-6-19**

Similar issues and result in **Yeung v Selfhelp (KIV) Assoc., L.P., 2019 NY Slip Op 01558, Second Dept 3-6-19**

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NEGLIGENCE.

PLAINTIFF FELL INTO A THREE-FEET-DEEP HOLE, QUESTION OF FACT WHETHER THE HOLE WAS AN OPEN AND OBVIOUS CONDITION, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant's motion for summary judgment should not have been granted in this slip and fall case. Plaintiff fell into a three-feet-deep hole near where a fence was being installed:

> "A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property" ... . A property owner has no duty to protect or warn against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous ... . "The issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question," but "a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion . . . on the basis of clear [and undisputed evidence" ... . Further, the law is clear that "[e]vidence that the dangerous condition was open and obvious cannot relieve the landowner" of the burden to exercise reasonable care in maintaining the property in a safe condition ... .
>
> In this case, the defendant failed to establish its prima facie entitlement to judgment as a matter of law. The defendant's submissions did not demonstrate, prima facie, that the hole was not inherently dangerous. No evidence was submitted that the hole was too small to create an inherently dangerous condition ... . Even if the condition were open and obvious—and it is by no means clear that it was—that would relate to the issue of comparative fault, and not absolve the landowner of all fault ... . **Kastin v Ohr Moshe Torah Inst., Inc., 2019 NY Slip Op 01582, Second Dept 3-6-19**

NEGLIGENCE.

DEFENDANT DID NOT SHOW A LACK OF CONSTRUCTIVE NOTICE IN THIS SLIP AND FALL CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Defendant did not demonstrate the absence of constructive notice:

> A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of making a prima facie showing that it did not create the hazardous condition which allegedly caused the fall, and did not have actual or constructive notice of that condition for a sufficient length of time to discover and remedy it ... . A defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case ... .
>
> Here, the defendant failed to meet its initial burden as the movant ... . The defendant failed to affirmatively demonstrate that it did not have constructive notice of the condition that allegedly caused the plaintiff to fall ... . **Seedat v Capital One Bank, 2019 NY Slip Op 01632, Second Dept 3-6-19**

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NEGLIGENCE.

MERELY QUESTIONING THE CREDIBILITY OF PLAINTIFF'S EXPLANATION OF THE CAUSE OF HER STAIRWAY SLIP AND FALL DID NOT RAISE A QUESTION OF FACT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that defendant's motion for summary judgment in this slip and fall case should not have been granted. Defendant did not submit evidence refuting plaintiff's explanation of the cause of her fall (a hole in the stairs). Merely questioning the credibility of the plaintiff did not raise a question of fact:

> Plaintiff was injured when, while walking down a staircase in defendant's building, her foot struck a hole in the stairs, causing her to fall from the third floor to the second floor. Defendant failed to establish entitlement to judgment as a matter of law by submitting evidence refuting plaintiff's testimony identifying the cause of her fall ... . Defendant's challenge to the credibility of plaintiff's evidence is a matter for resolution by a trier of fact ... . **Morales v 320 E. 176th St., LLC, 2019 NY Slip Op 01711, First Dept 3-12-19**

NEGLIGENCE.

QUESTION OF FACT WHETHER DEFENDANTS HAD ACTUAL OR CONSTRUCTIVE NOTICE OF ELEVATED WHEEL STOP IN THIS SLIP AND FALL CASE (SECOND DEPT).

The Second Department determined defendants' motion for summary judgment in this parking lot slip and fall case was properly denied. There was a question of fact whether defendants had actual or constructive notice of an elevated plastic wheel stop:

> The appellants failed to demonstrate, prima facie, that they lacked constructive notice of the elevated and broken wheel stop over which the plaintiff alleged she fell. They failed to present evidence of when the specific area where the plaintiff fell was last cleaned or inspected relative to when the subject accident occurred ... . **Baviello v Patterson Auto Convenience Store, Inc., 2019 NY Slip Op 02052, Second Dept 3-20-19**

NEGLIGENCE.

DEFENDANT DRIVER HAD ONLY TWO SECONDS TO REACT TO FORKLIFT WHICH ENTERED THE ROADWAY BLOCKING THE RIGHT-OF-WAY, DRIVER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, NO COMPARATIVE NEGLIGENCE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant driver was entitled to summary judgment in this traffic accident case. Defendant driver (Kim) had only two seconds to react when a forklift entered the roadway blocking the right-of-way:

> "A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" ... . A driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way ... . A driver traveling with the right-of-way may nevertheless be found partially responsible for an accident if he or she did not use reasonable care to avoid the accident. "Although a driver with a right-of-way . . . has a duty to ... use reasonable care to avoid a collision, . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" ... .
>
> Here, Kim established his prima facie entitlement to judgment as a matter of law by demonstrating that the driver of the forklift negligently entered the roadway mid-block from in front of a parked truck without yielding the right-of-way to Kim, and that such negligence was the sole proximate cause of the accident. The evidence submitted in support of the motion ... demonstrated that Kim had, at most, two seconds to react before the forklift struck the passenger side of his vehicle. Thus, Kim demonstrated that he was not negligent for failing to avoid colliding with the forklift ... . **Jeong Sook Lee-Son v Doe, 2019 NY Slip Op 02073, Second Dept 3-20-19**

NEGLIGENCE.

DEFENDANTS DID NOT DEMONSTRATE THRESHOLD STRIP WHICH ALLEGEDLY CAUSE PLAINTIFF TO SLIP AND FALL WAS NOT INHERENTLY DANGEROUS AND TRIVIAL AS A MATTER OF LAW, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendants did not demonstrate the threshold strip which allegedly caused plaintiff to slip and fall was not inherently dangerous and was trivial:

> "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case" ... , and the existence or nonexistence of a defect or dangerous condition "is generally a question of fact for the jury" ... . Defendants' submissions in support of their motion included excerpts of plaintiffs' deposition testimony and defendants' affidavits, which raised a question of fact whether the threshold strip on the step created an unreasonably dangerous or defective condition. We further conclude that summary judgment dismissing the complaint was not warranted on the ground that the alleged defect was, as a matter of law, too trivial to be actionable. It is well settled that "a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify

the dangers it poses, so that it unreasonably imperil[s] the safety of' a pedestrian" ... . Here, it is impossible to ascertain from the black and white photographs submitted by defendants in support of the motion the width, depth, elevation, height differential or actual appearance of the threshold, and thus defendants failed to establish that the defect was, in fact, trivial. In addition, the threshold and step were located in a doorway, "where a person's attention would be drawn to the door, not to the [step]" ... . **Wiedenbeck v Lawrence, 2019 NY Slip Op 02246, Fourth Dept 3-22-19**

NEGLIGENCE.

PLAINTIFF MADE A LEFT TURN IN FRONT OF DEFENDANT'S ONCOMING CAR WHEN DEFENDANT WAS FOUR CAR LENGTHS AWAY, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, PLAINTIFF'S ALLEGATION THE TRAFFIC LIGHT WAS YELLOW DID NOT RAISE A QUESTION OF FACT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this intersection traffic accident case should have been granted. Plaintiff made a left turn in front of defendant. Plaintiff's claim that defendant was proceeding through a yellow light did not raise a question of fact:

> ... [W]e conclude that the record establishes that plaintiff made a left turn in front of defendant's oncoming vehicle, which was only four car lengths away from the intersection and traveling at the speed limit of 40 miles per hour. At that speed and distance, defendant entered the intersection with insufficient time to take evasive action to avoid the collision ... . Thus, defendant's vehicle was so close to the intersection as to constitute an immediate hazard to the left-turning plaintiff, and plaintiff was therefore required to yield the right-of-way to defendant (see Vehicle and Traffic Law § 1141).
>
> In addition, plaintiff's assertion that the traffic light facing her vehicle had changed from green to yellow just before she started to make her left turn does not raise a question of fact inasmuch as a yellow light would not deprive defendant of the right-of-way and confer it upon plaintiff ... . **Godwin v Mancuso, 2019 NY Slip Op 02248, Fourth Dept 3-22-19**

NEGLIGENCE, ARCHITECTURAL MALPRACTICE.

ARCHITECT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED, THE FACT THAT ANOTHER PARTY PLACED THE ANGLE IRON WHICH INJURED PLAINTIFF IN AN EFFORT TO FIX AN ALLEGED DEFECT IN THE DESIGN OF THE SUBJECT BOILER SYSTEM DID NOT CONSTITUTE A SUPERSEDING CAUSE OF PLAINTIFF'S INJURY AS A MATTER OF LAW (FIRST DEPT).

The First Department determined defendant architect's (Cannon's) motion for summary judgment in this personal injury case was properly denied. Plaintiff was injured when an angle iron used to support part of a boiler system struck him on

the head. Cannon argued it did not have any responsibility for the use of the angle iron as a support, which was placed there by a third party. However Cannon approved the boiler system and therefore may have been responsible for the defect which resulted in the need for the angle-iron support. Therefore the placement of the angle iron may not have been a superseding cause of the injury:

> ... [A]ccording to Cannon, even if it was negligent in its review of the component list or in its inspections of the ongoing work, any such negligence was not a proximate cause of the accident, because the installation of angle irons, which it never approved, and the failure of DASNY [building owner] and Martin [HVAC contractor} to heed its remediation recommendation for eight months before the accident occurred were intervening superseding causes.
>
> "When a question of proximate cause involves an intervening act, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence'" ... . "The mere fact that other persons share some responsibility for plaintiff's harm does not absolve defendant from liability because there may be more than one proximate cause of an injury'" ... . Here, a jury could reasonably conclude that the effort to reinforce the cleanout port covers with angle irons was a normal and foreseeable consequence of the alleged inadequacy of the covers, which Cannon either approved or failed to detect, and which Cannon's principal acknowledged were not the proper covers. Thus, under the circumstances presented in this case, there remain triable issues of fact as to whether, inter alia, the use of the angle iron bracing, as well as DASNY and Martin's failure to replace the covers, despite notice from Cannon, constituted superseding causes of plaintiff's injuries ... . **Demetro v Dormitory Auth. of the State of N.Y., 2019 NY Slip Op 01642, First Dept 3-7-19**

NEGLIGENCE, EVIDENCE,

PLAYGROUND EQUIPMENT ON WHICH PLAINTIFF'S SON WAS INJURED, ACCORDING TO EXPERT EVIDENCE, WAS IN COMPLIANCE WITH APPLICABLE GUIDELINES AND STANDARDS, WAS PROPERLY MAINTAINED AND WAS NONHAZARDOUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this playground equipment injury case should have been granted. Plaintiff's son was injured when his leg was caught in a gap between two platforms:

> ... [T]he defendants submitted, inter alia, an expert affidavit, which established, prima facie, that the playground apparatus was not in violation of any relevant statutes or safety guidelines, that it was maintained in a reasonably safe condition, that the platforms were nonhazardous, and that the gaps between the platforms did not violate any applicable guidelines or standards ... . In opposition, the plaintiff failed to raise a triable issue of fact. **Valenzuela v Metro Motel, LLC, 2019 NY Slip Op 01639, Second Dept 3-6-19**

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NEGLIGENCE, EVIDENCE.

THE CAUSE OF PLAINTIFF'S DECEDENT'S SLIP AND FALL CALL COULD NOT BE IDENTIFIED, THE LIGHTER BURDEN OF PROOF PURSUANT TO THE *NOSEWORTHY* DOCTRINE DID NOT APPLY (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment should have been granted because the cause of plaintiff's decedent's fall could not be identified. The *Noseworthy* lighter burden of proof did not apply. Although plaintiff's expert identified defects in the area where plaintiff's decedent fell, none of the defects were demonstrated to have caused the fall:

> Contrary to the plaintiff's contention, the Noseworthy doctrine does not apply to the circumstances of this case, since the defendants' knowledge concerning the cause of the decedent's accident is no greater than that of the plaintiff ... . Even accepting the defects identified in the plaintiff's expert's affidavit, the plaintiff failed to raise a triable issue of fact as to whether the decedent's fall was proximately caused by those allegedly unsafe conditions ... . " Since it is just as likely that the accident could have been caused by some other factor, such as a misstep or loss of balance, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation'" ... . **Perrelli v Evangelista, 2019 NY Slip Op 01807, Second Dept 3-13-19**

NEGLIGENCE, EVIDENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFFS NO LONGER NEED TO DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT (FIRST DEPT).

The First Department, reversing Supreme Court, noted the plaintiff in a traffic accident case no longer has to demonstrate freedom from comparative fault to warrant summary judgment:

> Plaintiff made a prima facie showing of negligence on the part of defendants by submitting an affidavit stating that as she was driving through the intersection she noticed that defendant driver failed to stop at the stop sign when plaintiff had the right of way (see Vehicle and Traffic Law § 1142[a]). Plaintiff was not required to demonstrate her own freedom from comparative negligence to be entitled to summary judgment as to defendants' liability ... . **Garcia v McCrea, 2019 NY Slip Op 01842, First Dept 3-14-19**

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NEGLIGENCE, EVIDENCE.

CAUSE OF THE SLIP AND FALL WAS NOT BASED UPON PURE SPECULATION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that defendants' motion for summary judgment in this slip and fall case should not have been granted. The cause of the fall was not based upon pure speculation. Plaintiff fell stepping out of a bath tub at a hotel:

> ... [D]efendants submitted plaintiff's deposition testimony, which, when viewed in the light most favorable to plaintiff and giving her the benefit of every reasonable inference ... , establishes that plaintiff believed that the alleged dangerous or defective configuration or installation of the tub caused her to fall and sustain injuries. In addition, defendants failed to establish in support of their motion the absence of a dangerous or defective condition, and thus they were not entitled to summary judgment dismissing the complaint on that ground either ... . We agree with defendants, however, that the court properly granted their motion to the extent that plaintiff alleged that they were negligent in failing to warn of dangerous and defective conditions. Defendants met their initial burden of establishing that any dangerous or defective condition was open and obvious, and plaintiff failed to raise a triable issue of fact ... . **DelRosario v Liverpool Lodging, LLC, 2019 NY Slip Op 01986, Fourth Dept 3-15-19**

NEGLIGENCE, EVIDENCE.

DAMAGES AWARDED 69-YEAR-OLD PLAINTIFF FOR PAST AND FUTURE PAIN AND SUFFERING DEEMED EXCESSIVE (FIRST DEPT).

The First Department determined the damages awarded the 69-year-old plaintiff for past and future pain and suffering were too high:

> Judgment ... upon a jury verdict, which ... awarded plaintiff $1.2 million for past pain and suffering, $1 million for future pain and suffering over 10 years, $255,582 for future medical expenses, and $250,000 for future loss of earnings ... unanimously modified ... to remand the matter for a new trial on damages for past pain and suffering and future pain and suffering, unless plaintiff stipulates ... to reduce the awards for past pain and suffering to $1,000,000 and for future pain and suffering to $675,000 ... . **Dacaj v New York City Tr. Auth., 2019 NY Slip Op 02171, First Dept 3-21-19**

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NEGLIGENCE, EVIDENCE.

PLAINTIFF WAS STRUCK BY A FACE PLATE WHICH FELL OFF AN AIR CONDITIONER, ALTHOUGH PLAINTIFF MADE OUT A PRIMA FACIE CASE UNDER THE DOCTRINE OF RES IPSA LOQUITUR, DEFENDANTS RAISED QUESTIONS OF FACT ABOUT THE CAUSE AND EXCLUSIVE CONTROL, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although a prima facie case was made out under the doctrine of res ipsa loquitur, the defendant raised questions of fact. Plaintiff was injured when a face plate fell off an air conditioner:

> ... [A]lthough the plaintiff demonstrated, prima facie, that a face plate falling off an air conditioner is an event of a kind that ordinarily does not occur absent negligence... , the defendants raised a triable issue of fact as to whether the face plate could have fallen off the air conditioner because of the slamming of the door and not as a result of negligence ... .
>
> Furthermore, while the plaintiff demonstrated, prima facie, that the elevated air-conditioning unit was in the defendants' exclusive control ... , the defendants raised a triable issue of fact through their submissions, which demonstrated that outside contractors were responsible for the repairs and installations of air conditioning units in the school. Exclusive control is not established when third-party contractors have access to an instrumentality causing injuries ... . **Dilligard v City of New York, 2019 NY Slip Op 02064, Second Dept 3-20-19**

NEGLIGENCE, EVIDENCE.

DEFENDANT DID NOT ELIMINATE QUESTIONS OF FACT CONCERNING WHETHER IT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE ALLEGEDLY DANGEROUS CONDITION IN THIS ESCALATOR SLIP AND FALL CASE, ANY CONFLICT IN PLAINTIFF'S TESTIMONY DID NOT RENDER IT INCREDIBLE AS A MATTER OF LAW, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in the escalator slip and fall case should not have been granted:

> The defendant's submissions, which included a transcript of the plaintiff's deposition testimony, failed to eliminate all triable issues of fact as to whether the defendant had actual or constructive notice of the allegedly dangerous condition of the escalator steps ... . Furthermore, the plaintiff testified at his deposition that he slipped and fell on a wet step while he was riding an escalator. In light of this testimony, it cannot be said that the plaintiff was unable to identify the cause of his accident ... . Contrary to the defendant's contention, the plaintiff's deposition testimony was not incredible as a matter of law, and any conflict in the testimony or evidence presented merely raised an issue of

fact for the factfinder to resolve ... . **Kerzhner v New York City Tr. Auth., 2019 NY Slip Op 02077, Second Dept 3-20-19**

NEGLIGENCE, EVIDENCE, CIVIL PROCEDURE, PRIVILEGE, ATTORNEYS, AGENCY.

NOTES TAKEN BY AN OBSERVER HIRED BY PLAINTIFF'S ATTORNEY TO WITNESS AN INDEPENDENT MEDICAL EXAMINATION OF PLAINTIFF BY DEFENDANTS' DOCTOR ARE PRIVILEGED AS MATERIAL PREPARED FOR TRIAL, THE OBSERVER WAS ACTING AS AN AGENT OF PLAINTIFF'S ATTORNEY (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, in a matter of first impression, determined that the notes taken by an observer at an independent medical exam (IME) of plaintiff by defendants' doctor are protected by the privilege afforded materials prepared for litigation. The observer was hired by plaintiff's attorney and was deemed to be acting as an agent of the attorney:

> The IME observer, however, is an agent of the plaintiff's attorney. Consequently, the requested notes and materials constitute materials prepared for trial, bringing them within the conditional or qualified privilege protections of CPLR 3101(d)(2). Materials prepared in anticipation of litigation and preparation for trial may be obtained only upon a showing that the requesting party has a "substantial need" for them in the preparation of the case and that without "undue hardship" the requesting party is unable to obtain the substantial equivalent by other means (CPLR 3101[d][2] ...).
>
> The IME observer was hired to assist plaintiff's attorney in advancing the litigation and preparing for trial ... . Although present, she was not involved in the doctor's examination of the plaintiff. Her function was to serve as the attorney's "eyes and ears," observing what occurred during the IME, and then reporting that information back to plaintiff's attorney.
>
> Defendants have not shown, in response, any "substantial need" for the IME observer's notes, etc., or why they are unable, without undue hardship, to obtain the "substantial equivalent" of the materials by other means ... . Key to this analysis is that the defendants' doctor conducted plaintiff's examination and can provide defendants with any information concerning what generally occurred and what he did at the IME. **Markel v Pure Power Boot Camp, Inc., 2019 NY Slip Op 02049, First Dept 3-19-19**

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NEGLIGENCE, LANDLORD-TENANT.

PLAINTIFF, WHO WAS ASSAULTED IN DEFENDANT'S BUILDING, DID NOT RAISE A QUESTION OF FACT ON WHETHER THE ASSAILANT WAS AN INTRUDER OR A TENANT, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, over a two-justice dissent, reversing Supreme Court, determined that the NYC Housing Authority's (NYCHA's) motion for summary judgment in this third party assault case should have been granted. Plaintiff, who was assaulted in defendant's building, did not raise a question of fact on whether the assailant was an intruder or a tenant. The defendant would only be liable if, due to negligence, an intruder entered the building and committed the assault:

> NYCHA met its prima facie burden by demonstrating that plaintiff failed to raise an issue of fact as to whether the assailant was an intruder, as opposed to a tenant or invitee lawfully on the premises ... . In support of its motion, NYCHA submitted plaintiff's deposition testimony that she was not a resident and did not know any other tenants in the building aside from her two patients. Plaintiff also testified that she did not see her assailant's face because he kept his face covered with the hood of his sweatshirt and that she did not know if her assailant was a tenant or guest.
>
> We previously have held that the victim's familiarity with building residents, a history of ongoing criminal activity, and the assailant's failure to conceal his or her identity tend to demonstrate that the assailant was more likely than not an intruder ... . Here, plaintiff's testimony demonstrates that these important factors were not present. Thus, plaintiff "provided no evidence from which a jury could conclude, without pure speculation, that it was more likely than not that the assailant was an intruder" ... . **Laniox v City of New York, 2019 NY Slip Op 02026, First Dept 3-19-19**

NEGLIGENCE, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS MEDICAL MALPRACTICE ACTION, PLAINTIFF'S EXPERT'S AFFIDAVIT WAS CONCLUSORY AND SPECULATIVE AND IMPROPERLY RAISED AN ISSUE NOT DISCERNABLE FROM THE PLAINTIFF'S BILL OF PARTICULARS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should have been granted because the plaintiff's expert affidavit was conclusory and speculative. The court noted that plaintiff's expert raised an issue that was not discernable from the plaintiff's bill of particulars and therefore should not have been considered:

> ... [T]he defendant established his prima facie entitlement to judgment as a matter of law by submitting an expert affirmation indicating that the treatment and care given to the plaintiff by the defendant on May 13, 2013, did not deviate from accepted community standards of practice, that the plaintiff's infection, which occurred more than four months after that visit, was too remote in time to have been proximately caused by the defendant's treatment, and that the defendant had the plaintiff's informed consent for the procedure.

> In opposition, the plaintiff submitted, inter alia, an affirmation of her expert, who opined that the defendant did not follow the good and accepted podiatric standard of care because although the defendant tested the plaintiff's foot pulse and found it to be low, the defendant did not refer the plaintiff to a vascular surgeon. We agree with the defendant that this assertion was not readily discernable from the allegations in the plaintiff's bill of particulars, and, thus, was a new theory of liability that should not have been considered by the Supreme Court ... . **Iodice v Giordano, 2019 NY Slip Op 02072, Second Dept 3-20-19**

NEGLIGENCE, MEDICAL MALPRACTICE, MUNICIPAL LAW.

LATE NOTICE OF CLAIM IN THIS MEDICAL MALPRACTICE ACTION, SERVED THREE YEARS AFTER THE DEVELOPMENTALLY DELAYED CHILD'S BIRTH, SHOULD HAVE BEEN DEEMED TIMELY SERVED (SECOND DEPT).

The Second Department, reversing Supreme Court, determent the late notice of claim in this medical malpractice action should have been deemed timely served. The notice of claim was served in 2012 and the plaintiff-child was born in 2009. It became apparent in 2010 that the child was unable to bear weight on her legs and her development was delayed:

> The record here indicates that the defendant was aware that the child's condition was related to glucose levels, which were not measured at birth. Thus, the defendant acquired actual knowledge of the essential facts constituting the claim immediately after the incident, and well within the 90 day period after the claim arose ... .
>
> The delay in serving a notice of claim was also directly attributable to the child's infancy, since it was not apparent that the child had suffered a permanent injury until after the 90-day period expired. When the child's injuries became apparent, the plaintiff served a late notice of claim without leave of court. Although this Court has ruled that actual knowledge of the essential facts constituting the claim cannot be inferred from a late notice of claim served without leave of the court ... , in this case the late notice of claim generated a hearing pursuant to General Municipal Law § 50-h, where the defendant conducted an examination of the plaintiff and the essential facts constituting the claim were explore ... . **Feduniak v New York City Health & Hosps. Corp. (Queens Hosp. Center), 2019 NY Slip Op 01564, Second Dept 3-6-19**

NEGLIGENCE, MUNICIPAL LAW.

ELDERLY PLAINTIFF'S HEALTH PROBLEMS EXCUSED HER FAILURE TO APPEAR FOR A 50-h HEARING, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the elderly plaintiff's complaint, based upon a fall at defendant's city hospital, should not have been dismissed because plaintiff failed to appear at an oral examination pursuant to General Municipal Law 50-h. Her failure to appear was due to medical problems and should have been excused:

> "Compliance with a demand for a General Municipal Law § 50-h examination is a condition precedent to the commencement of an action against a municipal defendant, and the failure to so comply warrants dismissal of the action" ... . The failure to submit to such an examination, however, may be excused in exceptional circumstances, such as extreme physical or psychological incapacity ... .
>
> Under the circumstances of this case, the plaintiff's failure to appear for the examination pursuant to General Municipal Law § 50-h should have been excused in light of the nature and extent of the plaintiff's medical and mental conditions, as documented by her doctors' letters ... . **Riabaia v New York City Health & Hosps. Corp., 2019 NY Slip Op 02136, Second Dept 3-20-19**

NEGLIGENCE, MUNICIPAL LAW.

UNEXCUSED FAILURE TO APPEAR AT A SCHEDULED 50-h HEARING REQUIRED DISMISSAL OF THE COMPLAINT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined plaintiffs' failure to comply with defendants' demand for a 50-h hearing required dismissal of the complaint. Defendants were sued in their capacities as municipal employees acting within the scope of their employment:

> We agree with defendants that Supreme Court erred in denying the motion. "It is well settled that a plaintiff who has not complied with General Municipal Law § 50-h (1) is precluded from maintaining an action against a municipality" ... . Here, plaintiffs failed to appear at the scheduled examination due to an apparent disagreement with their attorney. Under the circumstances, plaintiffs had the burden of rescheduling the examination and, because they failed to do so, they were barred by statute from commencing an action ... . "Although compliance with General Municipal Law § 50-h (1) may be excused in exceptional circumstances' "... , there were no such circumstances here. **Kluczynski v Zwack, 2019 NY Slip Op 02236, Fourth Dept 3-22-19**

NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

FAILURE TO PROVIDE SEATBELTS IN A TAXICAB VIOLATES THE VEHICLE AND TRAFFIC LAW AND IS NEGLIGENCE AS A MATTER OF LAW (FIRST DEPT).

The First Department noted that the failure to provide seatbelts in taxicab violates the Vehicle and Traffic Law and constitutes negligence:

> The failure to provide seatbelts in a taxicab is a violation of Vehicle and Traffic Law § 383, and constitutes negligence as a matter of law ... . Where an injured party fails to wear an available seatbelt, such failure would go to damages, not liability ... . That is not the case when the vehicle owner fails to provide seatbelts in the first instance ... . **Grant v AAIJ African Mkt. Corp., 2019 NY Slip Op 01823, First Dept 3-14-19**

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PRODUCTS LIABILITY

PRODUCTS LIABILITY, NEGLIGENCE.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS FARM EQUIPMENT PRODUCTS LIABILITY ACTION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined that defendants' motion for summary judgment in this products liability action should have been granted. Plaintiff "was working inside of a piece of farm equipment known as a grain cart, she lost her footing and her right leg became caught in a rotating auger." A steel safety guard covering the auger had apparently been removed:

> ... [T]he Killbros defendants submitted the affidavit of an expert, which was incorporated by reference into Bentley's moving papers, who opined that plaintiff's injuries would not have occurred if the steel safety guard had not been removed. ...
>
> Defendants established their entitlement to summary judgment dismissing the strict products liability causes of action insofar as they are predicated on a design defect theory by submitting evidence that the product was reasonably safe ... . The Killbros defendants' expert averred that the steel safety guard was manufactured in accordance with industry standards, was designed to last the life of the product, and was "state of the art" inasmuch as it was permanently welded to the interior of the grain cart and could not be removed except by using an acetylene torch or other such heavy-duty tool ... .
>
> ... [T]he Killbros defendants are entitled to summary judgment dismissing the cause of action against them alleging negligent design and manufacture. "[I]nasmuch as there is almost no difference between a prima facie case in negligence and one in strict liability," we conclude that plaintiffs similarly failed to raise an issue of fact with respect to their cause of action for negligent design and manufacture ... . **Beechler v Kill Bros. Co., 2019 NY Slip Op 01993, Fourth Dept 3-15-19**

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TRUSTS AND ESTATES

TRUSTS AND ESTATES.

THERE WAS NO SHOWING THAT THE ALLEGEDLY DISABLED PERSON WAS NOT COMPETENT IN 2015 WHEN THE SHORT FORM POWER OF ATTORNEY WAS EXECUTED, THEREFORE THE ATTORNEY-IN-FACT HAD THE AUTHORITY TO CREATE A SUPPLEMENTAL NEEDS TRUST FOR THE ALLEGEDLY DISABLED PERSON (SECOND DEPT).

The Second Department, reversing Surrogate's Court, determined the short form power of attorney executed in 2015 by Delaney, an allegedly disabled person, was valid and allowed the attorney-in-fact, Pacchiana, to set up a supplemental needs trust for Delaney:

> To be valid, a statutory short form power of attorney must "[b]e signed and dated by a principal with capacity, with the signature of the principal duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property" (General Obligations Law § 5-1501B[1][b] ...). "Capacity" is defined as the "ability to comprehend the nature and consequences of the act of executing and granting, revoking, amending or modifying a power of attorney, any provision in a power of attorney, or the authority of any person to act as agent under a power of attorney" (General Obligations Law § 5-1501[2][c]). "A party's competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function, and the party asserting incapacity bears the burden of proof'" ... . "The incapacity must be shown to exist at the time the pertinent document was executed" ... . Such incapacity was not shown here ... .
>
> Pacchiana, as Delaney's attorney-in-fact, had the authority to commence a proceeding in the Surrogate's Court for the creation of a supplemental trust in Delaney's behalf (see General Obligations Law § 5-1502H ...). **Matter of Delaney, 2019 NY Slip Op 02090, Second Dept 3-20-19**

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COURT OF APPEALS

CRIMINAL LAW

CRIMINAL LAW, APPEALS, ATTORNEYS.

DEFENDANT WAS NOT AFFORDED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, DESPITE COUNSEL'S LIMITED COMMUNICATION WITH DEFENDANT, COUNSEL'S NOT ACTING UNTIL THE APPEAL WAS ON THE DISMISSAL CALENDAR, AND COUNSEL'S SUBMISSION OF A MINIMAL BRIEF WITH SIX LINES OF TEXT IN THE STATEMENT OF FACTS AND NO CITATIONS TO THE RECORD, WHICH INCLUDED A 4000 PAGE TRIAL TRANSCRIPT (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two separate, extensive dissenting opinions, determined defendant was not afforded ineffective assistance by his appellate counsel. The majority acknowledged that the appellate brief was "terse" and was not a model to be emulated, but noted the brief raised substantive issues that were addressed by the Appellate Division on the merits. The failure to raise the harsh and excessive sentence issue, and the failure to seek review by the Court of Appeals did not constitute ineffective assistance:

FROM JUDGE RIVERA'S DISSENT:

... [D]efendant maintains that counsel was ineffective because he initially failed to perfect the appeal, causing the Appellate Division to place the matter on the court's Dismissal Calendar, thus risking the loss of defendant's only appeal as of right ... .

... [C]ounsel failed to communicate at all with his client in the three years following his appointment to represent defendant, and only as a late-day response to the Dismissal Calendar notification. ... * * *

The failings of the brief are substantial. ... The brief is barely 20 double-spaced pages, including separate pages for the cover, tables of contents and cases, CPLR 5531 statement, and issues presented. ... Inexplicably, at the end of the facts section, appellate counsel inserted a photocopy of a six-page letter from trial counsel to the judge requesting an adjournment. The factual recitation consists of two pages and six lines of text. There is not a single citation in this section to the record on appeal, as required by the First Department's Local Rule § 120.8 (b)(4) which requires an appellant's brief to include a statement of facts "with appropriate citations to the . . . record." This hardly seems adequate given defendant appealed from a judgment following a three-month joint trial with two co-defendants, resulting in a trial transcript spanning over 4,000 pages, and involving multiple serious counts, including murder. In contrast, the People submitted a brief over 175 pages long, with 60 pages solely devoted to the facts. **People v Alvarez, 2019 NY Slip Op 02383, CtApp 3-28-19**

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CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, ADMINISTRATIVE LAW, EVIDENCE.

POLICE OFFICER HAD REASONABLE GROUNDS TO PULL OVER PETITIONER'S CAR AFTER THE CAR CROSSED THE FOG LINE WITH A BLINKER ON AND THEN MOVED BACK INTO THE LANE, REVOCATION OF DRIVER'S LICENSE FOR FAILURE TO SUBMIT TO A CHEMICAL TEST AFFIRMED (CT APP).

The Court of Appeals, over a dissent, determined the stop of defendant's car was based upon reasonable grounds to believe petitioner had violated Vehicle and Traffic Law 1128. Therefore the revocation of petitioner's license for refusing to submit to a chemical test was affirmed:

> At the administrative hearing, testimony was elicited that, while on patrol at 1:00 AM on December 22, 2013, a police officer observed petitioner's vehicle "make an erratic movement off the right side of the road, crossing the fog line and [moving] off the shoulder [with the vehicle's] right front tire." Once the vehicle left the paved roadway — and with the right-hand turn signal on — the officer saw the vehicle immediately move left, returning to its original lane of travel. After observing that there was no animal or other obstruction of the roadway that would have explained the "erratic jerking action," the police officer pulled the vehicle over. During the stop, the officer noticed that petitioner smelled of alcohol and exhibited other signs of inebriation. Petitioner admitted that he "had a few drinks" and asked the officer to give him a ride home, failing field sobriety tests and a preliminary breath test given at the scene. At the precinct, despite receiving the appropriate warnings, petitioner refused to take a chemical test, resulting in an administrative license revocation hearing. The police officer's testimony at the hearing, articulating credible facts to support a reasonable belief that petitioner violated Vehicle and Traffic Law § 1128 (a) (failure to remain in lane), provided substantial evidence that he had probable cause to stop petitioner's vehicle ... . Any negative or adverse inference that was drawn from petitioner's failure to testify at the administrative revocation hearing was permissible ... . **Matter of Schoonmaker v New York State Dept. of Motor Vehs., 2019 NY Slip Op 02259, CtApp 3-28-19**

DEBTOR-CREDITOR

DEBTOR-CREDITOR, SECURITIES, CIVIL PROCEDURE.

ONCE AN ACTION TO RECOVER THE PRINCIPAL OF A BOND IS TIME-BARRED, THERE IS NO LEGALLY COGNIZABLE CLAIM FOR POST-MATURITY INTEREST (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Feinman, determined that a bond issuer is not obligated to pay interest once a claim for the principal is time-barred:

> The United States Court of Appeals for the Second Circuit has asked us to decide ... "[i]f a bond issuer remains obligated to make biannual interest payments until the principal is paid, including after the date of maturity ... , do enforceable claims for such biannual interest continue to accrue after a claim for principal of the bonds is time-barred?" We answer this question in the negative ... . Pursuant to New York common law and the terms of the indenture, in the absence of a timely action to recover principal, a bondholder cannot enforce the conditional obligation to make post-maturity interest payments. * * *

> The rule we reiterate today effectuates the agreement negotiated by the parties and reinforces our longstanding view of interest as generally dependent on principal. Moreover, it promotes the purposes underlying the statute of limitations ... . For those reasons, we conclude that once a claim on the principal is time-barred, a claim to recover unpaid post-maturity interest payments is not legally cognizable. **Ajdler v Province of Mendoza. 2019 NY Slip Op 02151, CtApp 3-21-19**

EMPLOYMENT LAW

EMPLOYMENT LAW, LABOR LAW, CIVIL PROCEDURE.

DEPARTMENT OF LABOR'S INTERPRETATION OF A WAGE ORDER WHICH ALLOWED 24-HOUR LIVE-IN HOME HEALTH CARE AIDES TO BE PAID FOR 13 HOURS WAS NOT IRRATIONAL OR UNREASONABLE, APPELLATE DIVISION REVERSED, MATTER REMITTED FOR CONSIDERATION OF OTHER GROUNDS FOR CLASS CERTIFICATION (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge dissent, reversing the Appellate Division, determined that the Department of Labor's interpretation of a minimum wage order applicable to home health aides was not irrational or unreasonable. The matter was sent back for consideration of other grounds for class certification:

> The common issue presented in these joint appeals is whether, pursuant to the New York State Department of Labor's (DOL) Miscellaneous Industries and Occupations Minimum Wage Order (Wage Order), an employer must pay its home health care aide employees for each hour of a 24-hour shift. DOL has interpreted its Wage Order to require payment for at least 13 hours of a 24-hour shift if the employee is allowed a sleep break of at least 8 hours—and actually receives five hours of uninterrupted sleep—and three hours of meal break time. DOL's interpretation of its Wage Order does not conflict with the promulgated language, nor has DOL adopted an irrational or unreasonable construction, and so the Appellate Division erred in rejecting that interpretation. Therefore, we reverse the Appellate Division orders and remit for consideration of alternative grounds for class certification for alleged violations of New York's Labor Law, inclusive of defendants' alleged systematic denial of wages earned and due, unaddressed by the courts below because of their erroneous rejection of DOL's interpretation. **Andryeyeva v New York Health Care, Inc., 2019 NY Slip Op 02258, CtApp 3-26-19**

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HUMAN RIGHTS LAW

HUMAN RIGHTS LAW, COOPERATIVES, ANIMAL LAW.

NYS STATE DIVISION OF HUMAN RIGHTS' DETERMINATION THAT THE DISABLED COOPERATIVE SHAREHOLDER WAS DISCRIMINATED AGAINST WHEN SHE WAS PROHIBITED FROM KEEPING A DOG IN HER COOPERATIVE APARTMENT CONFIRMED BY THE COURT OF APPEALS, REVERSING THE APPELLATE DIVISION (CT APP).

The Court of Appeals, over a two-judge dissent, in a brief memorandum that did not recite the facts, reversed the Appellate Division and confirmed the NYS Division of Human Rights (SDHR) determination that petitioners had discriminated against the disabled complainant, a cooperative shareholder, by prohibiting her from keeping a dog in the cooperative apartment. **Matter of Delkap Mgt., Inc. v New York State Div. of Human Rights, 2019 NY Slip Op 02260, CtApp 3-26-19**

SUMMARY OF THE FACTS FROM THE APPELLATE DIVISION'S DECISION (WHICH THE COURT OF APPEALS REVERSED HERE):

The complainant testified that, since obtaining the dog, her cardiac arrhythmia, which caused her to have rapid heart rate and experience palpitations, had significantly decreased; her ability to sleep had improved, resulting in her feeling less tired during the day; her discomfort due to her rheumatoid arthritis had improved because she was more physically active with the dog; and the dog decreased her stress, helping to improve the symptoms caused by her rheumatoid arthritis and cardiac arrhythmia.

Sometime after the hearing concluded, the petitioners directed the complainant to immediately remove her dog from her apartment contending, erroneously, that the SDHR had issued a final order in their favor. The complainant thereafter moved out of her apartment with the dog.

In a recommendation and findings ... an administrative law judge (hereinafter ALJ) of the SDHR determined that the Coop had discriminated against the complainant in the terms, conditions, and privileges of her housing on the basis of her disability, and that she should have been allowed to keep the dog in her apartment as a reasonable accommodation for her disability. The ALJ also determined that the respondents retaliated against the complainant for opposing the discrimination and filing a complaint with the SDHR. The Acting Commissioner of the SDHR adopted the ALJ's recommendation and findings and directed the petitioners to pay $5,000 to the complainant in compensatory damages for mental anguish and $10,000 in punitive damages, assessed a $5,000 penalty upon each petitioner payable to the State, and directed the petitioners to create and implement standard policies and procedures to evaluate shareholders' requests for reasonable accommodations and to develop and implement training to prevent unlawful discrimination.

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MUNICIPAL LAW

MUNICIPAL LAW, ADMINISTRATIVE LAW.

RELATED PUBLIC AUTHORITIES PROPERLY REQUIRED TO FILE SEPARATE REPORTS WITH THE NYS AUTHORITIES BUDGET OFFICE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the NYS Authorities Budget Office (ABO) properly required the Madison County Industrial Development Agency (MCIDA) and the related Madison Grant Facilitation Corporation (MGFC) to file separate reports pursuant to the Public Authorities Accountability Act (PAAA) and the Pbblic Authorities Law. MCIDA had filed a single consolidated report and brought an Article 78 proceeding arguing the ABO's determination that separate reports must be filed was arbitrary and capricious:

> The ABO's narrow record-keeping determination was not contrary to law. The Public Authorities Law plainly provides that a local development corporation such as MGFC, which is "affiliated" with a local IDA, is also a local authority subject to the PAAA and, as such, has reporting obligations (Public Authorities Law § 2 [2] [d]). Regardless of whether MGFC is also a subsidiary, it is clearly an "affiliate" of MCIDA within the meaning of the statute ... . The PAAA does not contain a reporting exception for subsidiaries of local authorities, and petitioners have not identified any other statute or regulation that excused MGFC from its obligation to separately report. **Matter of Madison County Indus. Dev. Agency v State of New York Auths. Budget Off., 2019 NY Slip Op 02150, CtApp 3-21-19**

MUNICIPAL LAW, LAND USE.

CONVERSION OF A HISTORIC LOWER MANHATTAN LANDMARK, A RARE CLOCK AND CLOCK TOWER, TO A LUXURY APARTMENT WAS PROPERLY APPROVED BY THE NYC LANDMARKS PRESERVATION COMMISSION, APPELLATE DIVISION REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over an extensive two-judge dissenting opinion, reversing the Appellate Division, determined the NYC Landmarks Preservation Commission (LPC) properly approved the redevelopment of 346 Broadway, a historic building in Lower Manhattan that the LPC had previously designated as a landmark. The redevelopment entailed conversion of an interior landmark (a clock) to a luxury apartment:

> In its initial designation report, the LPC noted several of the building's unique features. The exterior of the "palazzo-like tower," constructed in "the neo-Italian Renaissance style," was largely built with "white Tuckahoe marble." The "interiors" were also "designed using the finest craftmanship and lavish materials" including "marble, bronze, [and] mahogany." Among the interior spaces designated were the former "Banking Hall," a "grand and boldly scaled neo-Classical room" with "monumental freestanding Corinthian columns, and "[t]he clock tower" which housed a "No. 4 Striking Tower Clock"—a mechanical clock driven "by a thousand pound weight" which "strikes the hours" with a hammer and a "5000 pound bell." The clock was manufactured by E. Howard Watch & Clock Company and "was specially equipped with a double three-legged gravity escapement"—a feature, petitioners claim, is shared by only one other tower clock: the clock housed by Elizabeth Tower (also home to the bell known as Big Ben) in London. In total, the LPC landmarked 20,000 square feet out of the building's total interior space of 420,000 square feet. * * *

.. [T]the developer intended to keep the clock running electrically. ...

... [T]he LPC found that the developer's plan would have "the main lobby, stair hall, clock tower rooms and banking hall . . . fully restored." Additionally, it would "allow accessibility by the public to the lobby and former banking hall." The LPC also found that "the clock mechanism and faces will be retained, thereby preserving these significant features." In sum, the LPC found that "the proposed restorative work will return . . . the interior closer to [its] original appearance, and will aid in [its] long-term preservation."

FROM JUDGE RIVERA'S DISSENT:

Notwithstanding the historical significance of the clock to the City, the LPC approved the building owner's request to convert this interior landmark into a luxury apartment. The former is a rare horological masterpiece; the latter is a typical, now-commonplace, development for the wealthy by the wealthy. Although the LPC has great latitude to decide whether to approve an alteration to an interior landmark, it cannot approve an alteration that, by its very nature, amounts to a de facto rescission of a landmark designation. So, the question is, when is an interior landmark no longer an interior landmark? The answer is contained in the plain language of the Landmarks Preservation Law, which defines an interior landmark as accessible to the public for the people's benefit and welfare. Transforming an interior landmark into a private residence such that it is completely closed off from the public, annuls its designation and is inconsistent with the purpose of the Landmarks Preservation Law. **Matter of Save America's Clocks, Inc. v City of New York, 2019 NY Slip Op 02385, CtApp 3-28-19**

REAL PROPERTY LAW

REAL PROPERTY LAW, REAL PROPERTY TAX LAW, CONDOMINIUMS, AGENCY.

CONDOMINIUM UNIT OWNERS' AUTHORIZATION OF THE CONDOMINIUM BOARD TO CHALLENGE THE CONDOMINIUM'S REAL PROPERTY TAX ASSESSMENT REMAINS VALID FOR SUBSEQUENT TAX YEARS UNLESS CANCELED OR RETRACTED, THERE IS NO NEED FOR YEARLY AUTHORIZATIONS (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two judge dissent, reversing the Appellate Division, determined that a condominium board of managers need only seek one authorization from condominium unit owners to challenge the condominium's real property tax assessment The authorization is deemed to remain in effect in subsequent tax years unless canceled or retracted:

> This appeal presents the question whether Real Property Law § 339-y (4) requires a condominium board of managers to obtain a separate authorization from each condominium unit owner granting the board authority to proceed on behalf of that owner for each tax year in which the board challenges the condominium's real property tax assessment. We conclude that section 339-y (4) allows a standing authorization issued by an owner to confer authority upon a board to act on behalf of that owner for the tax year in which that authorization was issued and in all subsequent tax years, unless such authorization is canceled or retracted. **Matter of Eastbrooke Condominium v Ainsworth, 2019 NY Slip Op 02384, CtApp 3-28-19**