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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

APPEALS, NOTICE OF ENTRY.

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

DEAD MAN'S STATUTE.

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

DEFAMATION, 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

DEFAULT, MOTION TO VACATE, 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

DEFAULT, MOTION TO VACATE.

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

DEMAND FOR JURY TRIAL, 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

DISCOVERY, METADATA, 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

DISCOVERY, ORDERS OF PRECLUSION.

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

DISCOVERY, PHARMACY RECORDS, PRVILEGE.

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

DOCUMENTARY EVIDENCE, MOTION TO DISMISS.

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

ENVIRONMENTAL LAW, STANDING.

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

FAMILY LAW, DEFAULT, APPEALS.

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

FORECLOSURE, ACTION NOT ABANDONED.

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

FRIVILOUS ACTIONS.

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

JUDGES, SUA SPONTE, PRELIMINARY INJUNCTION.

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

JUDGES, SUA SPONTE.

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

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MEDICAL MALPRACTICE, EXPERT OPINION.

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

NOTICE OF CLAIM, EDUCATION-SCHOOL LAW.

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

PRIVILEGE, INDEPENDENT MEDICAL EXAMINATION.

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

SEARCH THE RECORD, SUMMARY JUDGMENT.

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

STATUTE OF LIMITATIONS, DECLARATORY JUDGMENTS.

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

STATUTE OF LIMITATIONS, INTEREST.

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

STATUTE OF LIMITATIONS, MEDICAL MALPRACTIVE VS NEGLIGENCE.

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

SUBPOENAS.

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

VERDICT, MOTION TO SET ASIDE, MEDICAL MALPRACTICE, DAMAGES.

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

VIDEOTAPED DEPOSITION TESTIMONY INADMISSIBLE.

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

YELLOWSTONE INJUNCTION, LANDLORD-TENANT.

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