NEW YORK APPELLATE DIGEST, LLC

First Department
Quarterly Reversal
Report
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An Organized Compilation of the Summaries of Selected Decisions, Mostly Reversals, Released by the Appellate Division, First Department, and Posted on the New York Appellate Digest Website April – June 2022. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Reversal Report.

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ANTI-SLAPP STATUTES, ONLINE REVIEWS, DEFAMATION.

THE ANTI-SLAPP STATUTES IN THE CIVIL RIGHTS LAW PROTECTED DEFENDANT AGAINST A DEFAMATION ACTION BY THE PLASTIC SURGEON ABOUT WHOM DEFENDANT POSTED NEGATIVE ONLINE REVIEWS; THE COMPLAINT WAS PROPERLY DISMISSED AND DEFENDANT WAS ENTITLED TO ATTORNEY'S FEES AND DAMAGES (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Rodriguez, in a matter of first impression, determined the Civil Rights Law anti-SLAPP statutes protected defendant's negative online reviews of plaintiff Aristocrat Plastic Surgery and Dr. Kevin Tehrani. Supreme Court dismissed the complaint but did not award defendant attorney's fees or damages because the anti-SLAPP statutes were deemed not to apply. The First Department held that the anti-SLAPP statutes applied and defendant was entitled to attorney's fees and damages:

… [D]efendant posted her reviews on two public internet forums, one of which has a stated purpose of being a key advisor for people considering plastic surgery, and the purpose of defendant's reviews was to provide information to potential patients, including reasons not to book an appointment with Dr. Tehrani. Defendant's posts concerning the plastic surgery performed upon her by Dr. Tehrani qualify as an exercise of her constitutional right of free speech and a comment on a matter of legitimate public concern and public interest—namely, medical treatment rendered by a physician's professional corporation and the physician performing surgery under its auspices … . We therefore find that defendant's negative website reviews of plaintiffs' services constitute a matter of "public interest" as set forth in Civil Rights Law § 76-a(1)(d).

Since defendant's posts fall under the ambit of the amended anti-SLAPP law, defendant is entitled to seek damages and attorneys' fees under Civil Rights Law §§ 70-a and 76-a(1)(a)(1). Aristocrat Plastic Surgery, P.C. v Silva, 2022 NY Slip Op 03311, First Dept 5-19-22

Practice Point: The anti-SLAPP statutes in the Civil Rights Law protected defendant from a defamation action by the plastic surgeon about whom defendant posted negative online reviews. The doctor's complaint was dismissed and defendant was entitled to attorney's fees and damages. Business reviews are matters of public interest and concern.

ATTORNEYS, LEGAL MALPRACTICE, STATUTE OF LIMITATIONS, INSANITY TOLL.

QUESTIONS OF FACT ABOUT WHETHER THE INCAPACITATED PERSON (IP) WAS "INSANE" WITHIN THE MEANING OF THE CPLR WHEN HE WAS REPRESENTED BY THE DEFENDANT ATTORNEY MUST BE DETERMINED AT THE LEGAL MALPRACTICE TRIAL; IF THE IP WAS INSANE, THE MALPRACTICE STATUTE OF LIMITATIONS WILL BE TOLLED; IF NOT THE MALPRACTICE ACTION IS UNTIMELY (FIRST DEPT).

The First Department determined questions about the incapacitated person's (IP's) sanity should be part of the legal malpractice trial. If the IP is determined to have been "insane" at the time he was represented by defendant attorney, the statute of limitations for the legal malpractice action would have been tolled, if not, the action was not timely:

The parties do not dispute that [defendant attorney] established prima facie that this action asserting breach of fiduciary duty and related causes of action (the malpractice action) was commenced after the applicable statutes of limitations had expired. However, plaintiff raised an issue of fact whether the statutes of limitations were tolled for "insanity" (… CPLR 208[a]). Viewed in the light most favorable to plaintiff, the record presents issues of fact as to the IP's ability to protect his legal rights and his overall ability to function in society at the time his claims against [defendant attorney] accrued … . Matter of Verdugo v Smiley & Smiley, LLP, 2022 NY Slip Op 04138, First Dept 6-28-22

Practice Point: There is an "insanity" statute-of -imitations toll in the CPLR. Here there a question of fact whether an incapacitated person was insane when he was

represented by defendant attorney such that the legal malpractice statute of limitations was tolled.

CIVIL PROCEDURE, AMENDMENT OF COMPLAINT.

THE COMPLAINT WAS NEVER PROPERLY AMENDED TO ADD DEFENDANT AS A PARTY PURSUANT TO CPLR 1003 OR CPLR 3025 REQUIRING DISMISSAL (FIRST DEPT).

The First Department, reversing Supreme Court, determined the action against defendant (Adam) must be dismissed because the complaint was never properly amended to had Adam as a party:

This action must be dismissed as against Adam Max (Adam) because the complaint was never properly amended to add him as a defendant. CPLR 1003 requires leave of court or a stipulation by all parties to add parties, at least where, as here, parties have previously been added. CPLR 3025(a)-(b) similarly requires leave of court or a stipulation by all parties to amend a complaint, at least when done so late in the case. Because this procedure was not followed, the amended complaint must be dismissed, at least as against the newly joined Adam … . ALP, Inc. v Moskowitz, 2022 NY Slip Op 03962, First Dept 6-16-22

Practice Point: Here the amendment of the complaint to add a party was not done by leave of court or a stipulation of all parties/ The action against the added party was dismissed.

CIVIL PROCEDURE, COVID.

PLAINTIFF'S ATTORNEY WAS NOT AWARE OF COVID-RELATED PROCEDURAL CHANGES FOR CONDUCTING COMPLIANCE CONFERENCES; PLAINTIFF'S MOTION TO VACATE DISMISSAL OF THE ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the COVID-related law office failure was an adequate excuse and plaintiff's motion to vacate the dismissal of the action should have been granted:

Supreme Court improvidently exercised its discretion in denying plaintiffs' motion to vacate the dismissal, as plaintiffs showed both a reasonable excuse for their default and a meritorious cause of action (see CPLR 2005 …). Under the circumstances, law office failure constitutes a reasonable excuse for the default, since plaintiffs' counsel was unaware that procedures for conducting compliance conferences had changed during the COVID-19 pandemic and, as a result, inadvertently failed to submit stipulations before a scheduled conference … .. Furthermore, plaintiffs demonstrated a meritorious cause of action by submitting the complaint, a bill of particulars, and the injured plaintiff's deposition testimony … . Defendants also were not prejudiced by plaintiffs' failure to appear, and indeed, did not oppose the motion to vacate … . Willner v S Norsel Realties LLC, 2022 NY Slip Op 04111, First Dept 6-23-22

Practice Point: Plaintiff's attorney was not aware of procedural changes related to COVID and the action was dismissed because counsel did not submit stipulations before the scheduled compliance conference. This "law office failure" was a "reasonable excuse." Plaintiff's motion to vacate the dismissal of the action should have been granted.

CIVIL PROCEDURE, LONG-ARM JURISDICTION.

NEW YORK DID NOT HAVE LONG-ARM JURISDICTION OVER A BAVARIAN STEM DONOR REGISTRY INVOLVED IN DECEDENT'S PHYSICIANS' SEARCH FOR A BONE-MARROW MATCH TO TREAT LEUKEMIA (FIRST DEPT).

The First Department, reversing Supreme Court, determined New York did not have jurisdiction over BSB, a Bavarian stem donor registry:

BSB was contacted through a chain of interactions between donor registries that began with decedent's New York physicians reaching out to the National Marrow Donor Program in Minnesota to find a match for decedent so that she could undergo a bone marrow transplant to treat her leukemia. When no match was found there, the search was expanded, including to Republic of German's central registry, and ultimately a donor was located in the BSB registry. BSB did not engage in a regular course of conduct, nor did it purposefully avail itself of the privilege of conducting activities within New York State … . Furthermore, BSB, a 20-employee not-for-profit organization, was reimbursed with a set sum by a German entity for providing the donation to decedent's transplant center's courier in Germany, and reimbursement was not contingent on decedent's ability to pay, insurance, or the like. There is no evidence that BSB derived substantial revenue from the transaction or from New York, where it has no offices, employees, agents, marketing, registrations, or presence … . Even if the long-arm statute applied, BSB does not have the minimum contacts necessary such that it should have reasonably expected to be brought into court here … .Aloisio v New York-Presbyt./Weill Cornell Med. Ctr., 2022 NY Slip Op 03205, First Dept 5-17-22

Practice Point: A Bavarian stem donor registry did not have sufficient contacts with New York to allow New York to exercise long-arm jurisdiction over the registry. The registry played a role in decedent's physicians' search for a bone-marrow match to treat decedent's leukemia. The registry had no presence in New York and did not purposely conduct activities in New York. Even if the long-arm statute applied, the registry did not have the minimum contacts with New York required under a due-process analysis.

CIVIL PROCEDURE, LONG-ARM JURISDICTION.

PLAINTIFF, A TEXAS RESIDENT WHO WAS A FLIGHT ATTENDANT FOR 30 YEARS WITH MONTHLY STAY-OVERS IN NEW YORK, DEMONSTRATED NEW YORK HAD LONG-ARM JURISDICTION OVER THE NEW JERSEY COMPANY WHICH MANUFACTURED AND DISTRIBUTED TALCUM POWDER PLAINTIFF USED; THE TALCUM POWDER ALLEGEDLY CAUSED PLAINTIFF'S MESOTHELIOMA (FIRST DEPT).

The First Department determined New York had specific long-arm jurisdiction of defendant Shulton, the manufacturer and distributor of talcum powder alleged to have cause plaintiff's peritoneal mesothelioma. Plaintiff (English) was a fight attendant for 30 years who used the talcum powder when she stayed in New York. Shulton has its principal place of business in New Jersey but has an office in New York and markets the product in New York:

English, a Texas resident, was employed as a flight attendant for 33 years, from 1966 to 1999. During a substantial part of that time, she used Desert Flower on a daily basis after showering. From 1966 to 1984, English was regularly assigned to flights into New York and flew into this state two to four times a month. She usually remained in New York on two- or three-day layovers. When English travelled, she packed Desert Flower in her luggage, so she would have it available for use when she showered. There is no claim that the Desert Flower English used in New York was purchased in New York.

Shulton is incorporated in New Jersey, where it had its principal place of business during the time that English claims to have used Desert Flower. Shulton never manufactured Desert Flower in New York, and in the mid-1970s the manufacture of its talc products shifted from Tennessee to New Jersey. Desert Flower was marketed nationally, including in New York. During the relevant period of time, Shulton maintained a New York office from which it conducted its marketing activities for its Cosmetics and Toiletries Division. The New York office was also headquarters for its International Division. * * * Shulton's maintenance of its own New York office satisfies the first prong under CPLR 302(a)(1). * * * Desert Flower was marketed and sold nationally, and English used Desert Flower when she travelled to and while she stayed in New York. Shulton's activities and

contacts with New York and the allegedly hazardous talcum powder used by English are sufficient to support an assertion of specific jurisdiction over Shulton…. . English v Avon Prods., Inc., 2022 NY Slip Op 03571, First Dept 6-2-22

Practice Point: Even though plaintiff was a Texas resident and the company she was suing was based in New Jersey, she was able to sue using New York courts. Plaintiff was a flight attendant for 30 years with monthly stay-overs in New York. Defendant had an office in New York and marketed the talcum powder which allegedly cause plaintiff's mesothelioma nationwide.

CIVIL PROCEDURE, RES JUDICATA.

HERE THE DOCTRINE OF RES JUDICATA PRECLUDED PLAINTIFF'S FRAUDULENT CONVEYANCE ACTION; THE CAUSE OF ACTION COULD HAVE BEEN RAISED IN THE PRIOR ACTION WHICH WAS DISMISSED (FIRST DEPT).

The Frist Department, reversing Supreme Court, determined the fraudulent conveyance cause of action was precluded by the doctrine of res judicata. Although the fraudulent conveyance claim was not alleged in the prior action, which was dismissed, it could have been raised in the prior action:

In 2016, plaintiff sued NBC, NBF, and PIM, alleging — as she does in the instant action — that NBC and NBF were PIM's alter egos. In August 2018, Supreme Court (Gerald Lebovits, J.) granted NBC and NBF's motion to dismiss that action.

While the prior action did not allege fraudulent conveyance, the doctrine of res judicata bars plaintiff from raising that claim here because she could have raised it in the prior action … . Plaintiff learned on or about May 9, 2017 that nonparty Conquest Capital Group had repurchased the equity it had previously sold to PIM. She filed an amended complaint in the prior action on May 26, 2017. Although plaintiff alleges that she did not discover the price at which Conquest repurchased its equity until November 2018, she could have learned this fact earlier by making

inquiries … . Aboelnaga v National Bank of Can., 2022 NY Slip Op 03467, First Dept 5-31-22

Practice Point: The doctrine of res judicata precludes causes of action which could have been investigated and raised in a prior action.

CIVIL PROCEDURE, AMENDMENT OF ANSWER, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), REAL PROPERTY LAW.

ALTHOUGH DEFENDANT'S MOTION TO AMEND ITS ANSWER (ADDING AFFIRMATIVE DEFENSES) WAS MADE AFTER A TWO-YEAR DELAY, THE DELAY ALONE DID NOT DEMONSTRATE THE PLAINTIFF WAS PREJUDICED; THE MOTION TO AMEND SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant's motion to amend its answer to add additional affirmative defenses should have been granted. The two-year delay was not enough to show plaintiff was prejudiced. Discovery was ongoing:

The court should have granted defendant's motion to amend its answer to add the four affirmative defenses of RPAPL 1951, adverse possession, mutual breach, and unclean hands, as leave to amend is freely given and plaintiff did not show that it would be prejudiced by the delay in asserting the defenses (CPLR 3025[b] …). While over two years had passed since defendant served its original answer, discovery was still ongoing … . Plaintiff's claim of significant prejudice is unpersuasive, as all it points to is mere delay, which is insufficient to show prejudice … . Nor did plaintiff rebut defendant's showing that the proffered amendment is not palpably insufficient or clearly devoid of merit … . Board of Mgrs. of the Porter House Condominium v Delshah 60 Ninth LLC, 2022 NY Slip Op 03680, First Dept 6-7-22

Practice Point: Here defendant moved to amend its answer by adding affirmative defenses two years after the answer was served. Discovery was still ongoing. The

delay alone was not enough to demonstrate the plaintiff was prejudiced. The motion to amend should have been granted.

CIVIL PROCEDURE, APPEALS, LEAVE TO AMEND COMPLAINT AFTER APPELLATE DISMISSAL.

SUPREME COURT DID NOT HAVE THE DISCRETION TO GRANT PLAINTIFF LEAVE TO AMEND A COMPLAINT AFTER THE COMPLAINT HAD BEEN DISMISSED FOR LACK OF STANDING BY THE APPELLATE DIVISION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Renwick, reversing Supreme Court, over a two-justice dissent, determined Supreme Court did not have the discretion to grant leave to amend a complaint which had been dismissed by the First Department for lack of standing. After the appeal, plaintiff had cured the standing defect and Supreme Court allowed the amendment after the time-period to commence a new action (CPLR 205(a)) had expired:

This appeal raises the interesting question of whether a trial court has the discretion to grant a plaintiff leave to amend a complaint, pursuant to CPLR 3025 (b) … , after the Appellate Division has already ordered the complaint dismissed, with direction to enter judgment. We dismissed the complaint because plaintiffs, as non-managing members of a manager-managed Delaware limited liability company, lacked capacity … or standing to act on behalf of the Company when they obtained a Certificate of Revival of the Company before filing a second amended complaint. After plaintiffs purportedly remedied this deficiency of proper standing, they sought to revive the dismissed action by seeking leave to file a third amended complaint. As aforementioned, after we had already ordered the complaint dismissed, the motion court granted plaintiffs leave to file the third amended complaint. At the time plaintiffs sought leave to amend, the time to commence a new action had expired, including the six-month grace period provided by CPLR 205(a). … Under these circumstances, we find that the trial court lacked discretion to grant plaintiffs leave to amend a complaint that had already been dismissed by this Court. * * *

Given this Court's outright dismissal of the claims based on a finding of lack of standing, there was no action pending when plaintiffs moved for leave to file the third amended complaint. Thus, the trial court lacked any discretion or authority to grant plaintiffs such leave, where we had properly dismissed the second amended complaint before plaintiffs filed the motion to amend … .Favourite Ltd. v Cico, 2022 NY Slip Op 03987, First Dept 6-21-22

Practice Point: Once the complaint was dismissed for lack of standing by the First Department, there was no pending action. Once the time for commencing a new action pursuant to CPLR 205(a) had expired plaintiff was out of luck. Supreme Court did not have the discretion to grant plaintiff's motion to amend the complaint after it had been dismissed by the First Department.

CIVIL PROCEDURE, ATTORNEY'S FEES, DISMISSAL WITHOUT PREJUDICE, BREACH OF FORUM SELECTION CLAUSE.

A DISMISSAL WITHOUT PREJUDICE IS NOT A FINAL DETERMINATION ON THE MERITS AND IS NOT SUBJECT TO COLLATERAL ESTOPPEL; ATTORNEY'S FEES ARE APPROPRIATE DAMAGES IN AN ACTION FOR BREACH OF A FORUM SELECTION CLAUSE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's (Wormser's) action for breach of the forum selection clause seeking attorney's fees could go ahead. The defendant's (L'Oreal's) New Jersey action had been dismissed "without prejudice," and therefore was not precluded by collateral estoppel:

After the New Jersey court had dismissed [defendant's] complaint "with prejudice within the jurisdiction of New Jersey," L'OrÉal commenced an action against Wormser in Supreme Court, New York County. Subsequently, a New Jersey appellate court amended the New Jersey trial court's orders to make the dismissal "without prejudice" … , and Wormser brought this action.

Wormser's claim is not barred by the doctrine of res judicata, because the dismissal was without prejudice by the New Jersey appellate court and therefore was not a final determination on the merits ,,, ,

Wormser's claim for attorneys' fees may proceed, as "damages may be obtained for breach of a forum selection clause, and an award of such damages does not contravene the American rule that deems attorneys' fees a mere incident of litigation" … . Wormser Corp. v L'Oréal USA, Inc., 2022 NY Slip Op 03093, First Dept 5-10-22

Practice Point: A dismissal without prejudice is not a final determination on the merits and is not therefore subject to collateral estoppel.

Practice Point: Attorney's fees are properly demanded as damages in an action for breach of a forum selection clause.

CIVIL PROCEDURE, CIVIL DISCOVERY NOT PRECLUDED BY PARALLEL CRIMINAL INVESTIGATION.

SUPREME COURT PROPERLY REFUSED TO QUASH SUPBOENAS ISSUED BY THE OFFICE OF THE ATTORNEY GENERAL (OAG) TO THE TRUMP ORGANIZATION IN THE OAG'S FRAUD INVESTIGATION; THE FACT THAT THERE IS A RELATED CRIMINAL INVESTIGATION DOES NOT PRECLUDE CIVIL DISCOVERY (FIRST DEPT).

The First Department, in this civil investigation by the Office of Attorney General (OAG) into whether the respondent Trump Organization committed fraud in their financial practices and disclosure, Supreme Court properly refused to quash the OAG's subpoenas seeking depositions and documents. The fact that there is also a criminal investigation does preclude civil discovery:

The existence of a criminal investigation does not preclude civil discovery of related facts, at which a party may exercise the privilege against self-incrimination … .. Individuals have no constitutional or statutory right to be called to testify before a grand jury under circumstances that would give them immunity from

prosecution for any matter about which they testify; although subjects of a grand jury proceeding have a statutory right to appear and testify, this right is conditioned upon the witness waiving the right to immunity and giving up the privilege against self-incrimination (CPL 190.50[5] …). The political campaign and other public statements made by OAG about appellants do not support the claim that OAG initiated, or is using, the subpoenas in this civil investigation to obtain testimony solely for use in a criminal proceeding or in a manner that would otherwise improperly undermine appellants' privilege against self-incrimination … . Neither does the record suggest that, in the absence of a civil investigation, OAG would be likely to grant immunity to appellants — the primary subjects of the criminal investigation — to secure their grand jury testimony. Thus, the subpoenas did not frustrate any right to testify with immunity. Matter of People of the State of New York v Trump Org., Inc., 2022 NY Slip Op 03456, First Dept 5-26-22

Practice Point: This case stems from the Office of Attorney General's (OAG's) fraud investigation of the Trump Organization. Supreme Court properly refused to quash the OAG's subpoenas. The fact that there is a related criminal investigation does not preclude civil discovery. There was no showing the appellants' privilege against self-incrimination was being undermined by the subpoenas seeking depositions and documents.

CIVIL PROCEDURE, EVIDENCE FIRST PRESENTED IN REPLY, LABOR LAW-CONSTRUCTION LAW, WORKERS' COMPENSATION.

PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS LABOR LAW 241(6) CAUSE OF ACTION SHOULD HAVE BEEN DENIED BECAUSE IT WAS BASED ON EVIDENCE FIRST PRESENTED IN REPLY; PLAINTIFF WAS COLLATERALY ESTOPPED FROM CLAIMING TRAUMATIC BRAIN INJURY AND COGNITIVE DISORDER BY THE RULING IN HIS WORKERS' COMPENSATION CASE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this construction accident case, determined plaintiff's motion for summary judgment on his Labor Law 241(6) cause of action should not have been granted because it was based

upon information raised for the first time in reply. The First Department noted that Supreme Court properly found that the ruling in plaintiff's Workers' Compensation case collaterally estopped plaintiff from claiming traumatic brain injury and cognitive disorder in this Labor Law action:

Supreme Court should have denied plaintiff's motion for summary judgment with respect to Labor Law § 241(6), which was based on an expert affidavit submitted in reply. The affidavit, which constituted the first time plaintiff asserted violations of 12 NYCRR 23-2.2(a) and (b), was not addressed to the arguments made in defendants' opposition, and instead sought to assert new grounds for the motion … .

Plaintiff is collaterally estopped from litigating his allegation that he sustained traumatic brain injury and cognitive disorder, since the allegation was previously raised and conclusively decided against him in a Workers' Compensation Board proceeding, where plaintiff had a full and fair opportunity to litigate the issue … . Douglas v Tishman Constr. Corp., 2022 NY Slip Op 03344, First Dept 5-24-22

Practice Point: Evidence first presented in reply and which does not address anything raised by the other party's opposition papers should not be considered by the court. A ruling in a Workers' Compensation case, here rejecting the worker's traumatic brain injury and cognitive disorder claims, may preclude the same claims in a Labor Law action pursuant to the collateral estoppel doctrine.

CIVIL PROCEDURE, LANDLORD-TENANT, CLASS ACTIONS.

CLASS CERTIFICATION SHOULD NOT HAVE BEEN DENIED ON THE GROUND THE CLASS WAS TOO SMALL; PLAINTIFF-TENANTS ALLEGED THE LANDLORD DEREGULATED APARTMENTS WHILE RECEIVING J-51 TAX BENEFITS (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiffs, tenants of a 49-unit apartment building, should have been certified as a class. The complaint alleged the landlord deregulated apartments while receiving J-51 tax benefits:

Supreme Court erred in denying class certification on the ground that plaintiffs failed to show that "the class is so numerous that joinder of all members . . . is impracticable" (CPLR 901[a][1]). Borden v 400 E. 55th St. Assoc., L.P. (24 NY3d 382, 383 [2014]) and subsequent cases, such as Maddicks v Big City Props., LLC (34 NY3d 116 [2019]), make it clear that qualified plaintiffs may "utilize the class action mechanism to recover compensatory rent overcharges against landlords who decontrolled apartments in contravention of Rent Stabilization Law of 1969 (RSL) (Administrative Code of City of NY) § 26-516 (a) while accepting tax benefits under New York City's J-51 tax abatement program." The legislature contemplated classes involving as few as 18 members … . Here, as in Borden, plaintiffs allege defendant deregulated apartments while receiving J-51 tax benefits. Construing the class certification statute liberally … given that the asserted class consists of former and current tenants who lived in the 16 units improperly treated as deregulated after November 15, 2013, while defendant was receiving J-51 tax benefits, it is reasonable to infer that some units in this 49-unit apartment building would have had more than one tenant and several tenants would have moved away, making joinder of all members impracticable … . The identity of class members, i.e., which units were treated as deregulated and who leased them during the relevant time period, is within defendant's knowledge. Hoffman v Fort 709 Assoc., L.P., 2022 NY Slip Op 02510, First Dept 4-19-22

Practice Point: Here class certification should not have been denied on the ground the class was too small. The plaintiffs are tenants alleging the landlord improperly deregulated apartments while receiving tax benefits. Classes as small as 18 members were contemplated by the legislature.

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW, REAL PROPERTY LAW, DEFAULT, LIS PENDENS.

THE LLC'S FAILURE TO CHANGE THE ADDRESS ON FILE WITH THE SECRETARY OF STATE IS NOT A SUFFICIENT EXCUSE FOR A DEFAULT; PARTIES TO WHICH THE SUBJECT PROPERTY WAS TRANSFERRED AFTER THE LIS PENDENS WAS FILED ARE NOT NECESSARY PARTIES BECAUSE THEY ARE BOUND BY THE RESULT IN THIS ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined (1) defendant E&A did not show a reasonable excuse for its default, and (2) the parties to which the property was transferred after the lis pendens was filed were not necessary parties because they are bound by the result of the instant action:

E&A asserted that it did not receive the summons and complaint, which had been served on the Secretary of State, because it had failed to keep its address updated. However, where a defendant does not receive service of process because it failed to keep a current address on file with the Secretary of State, courts will not find a reasonable excuse for a default … . …

Supreme Court should have denied E&A's cross motion insofar as it sought to join as defendants Yuanqing Liu (who purchased the property from E&A) and NYC Happy Housing LLC (which purchased the property from Liu), as Liu and NYC Happy Housing are not necessary parties. On the contrary, Liu and NYC Happy Housing need not be joined to accord complete relief or to avoid an inequitable effect (CPLR 1001[a]); rather, they are "bound by all proceedings taken in the action . . . to the same extent as a party" because their conveyances were recorded after the filing of the notice of pendency (CPLR 6501 …). Majada Inc. v E&A RE Capital Corp., 2022 NY Slip Op 03476, First Dept 5-31-22

Practice Point: A limited liability corporation's (LLC's) failure to change the address on file with the Secretary of State is not an acceptable excuse for a default. Because a lis pendens was filed against the defendant's property here, the parties to which the property was subsequently transferred are bound by the result of this action and are not, therefore, necessary parties.

CIVIL RIGHTS LAW, DEFAMATION. ANTI-SLAPP STATUTES, ONLINE REVIEWS.

THE ANTI-SLAPP STATUTES IN THE CIVIL RIGHTS LAW PROTECTED DEFENDANT AGAINST A DEFAMATION ACTION BY THE PLASTIC SURGEON ABOUT WHOM DEFENDANT POSTED NEGATIVE ONLINE REVIEWS; THE COMPLAINT WAS PROPERLY DISMISSED AND DEFENDANT WAS ENTITLED TO ATTORNEY'S FEES AND DAMAGES (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Rodriguez, in a matter of first impression, determined the Civil Rights Law anti-SLAPP statutes protected defendant's negative online reviews of plaintiff Aristocrat Plastic Surgery and Dr. Kevin Tehrani. Supreme Court dismissed the complaint but did not award defendant attorney's fees or damages because the anti-SLAPP statutes were deemed not to apply. The First Department held that the anti-SLAPP statutes applied and defendant was entitled to attorney's fees and damages:

… [D]efendant posted her reviews on two public internet forums, one of which has a stated purpose of being a key advisor for people considering plastic surgery, and the purpose of defendant's reviews was to provide information to potential patients, including reasons not to book an appointment with Dr. Tehrani. Defendant's posts concerning the plastic surgery performed upon her by Dr. Tehrani qualify as an exercise of her constitutional right of free speech and a comment on a matter of legitimate public concern and public interest—namely, medical treatment rendered by a physician's professional corporation and the physician performing surgery under its auspices … . We therefore find that defendant's negative website reviews of plaintiffs' services constitute a matter of "public interest" as set forth in Civil Rights Law § 76-a(1)(d).

Since defendant's posts fall under the ambit of the amended anti-SLAPP law, defendant is entitled to seek damages and attorneys' fees under Civil Rights Law §§ 70-a and 76-a(1)(a)(1). Aristocrat Plastic Surgery, P.C. v Silva, 2022 NY Slip Op 03311, First Dept 5-19-22

Practice Point: The anti-SLAPP statutes in the Civil Rights Law protected defendant from a defamation action by the plastic surgeon about whom defendant

posted negative online reviews. The doctor's complaint was dismissed and defendant was entitled to attorney's fees and damages. Business reviews are matters of public interest and concern.

CONTRACT LAW, RELEASES, DURESS.

PLAINTIFF RAISED A QUESTION OF FACT WHETHER HE WAS INDUCED TO SIGN RELEASES BY FRAUD, DURESS AND/OR MUTUAL MISTAKE; PLAINTIFF WAS APPROACHED BY HIS EMPLOYER'S LAWYER AND ALLEGEDLY BELIEVED HE WOULD LOSE HIS JOB IF HE DIDN'T SIGN (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff raised a question of fact about whether the releases were signed by plaintiff because of fraud, duress and/or mutual mistake. The facts are not described. Apparently plaintiff was injured at work and he alleged that he believed he would lose his job if he didn't sign the releases:

"A release, even though properly executed, may nonetheless be void. Where fraud or duress in the procurement of a release is alleged, a motion to dismiss should be denied" … . Specifically, plaintiff alleged that Selina Maddock, a lawyer, was sent by their employer Navillus to secure plaintiff's signature on the release, before he retained counsel, and made both the promise that he would have a job if he signed the releases, and the implicit threat that he would not have a job in the future if he failed to sign. He further alleged that Maddock advised plaintiff that he did not need to consult counsel and misrepresented to plaintiff that he was only releasing claims against his employer, Navillus. Consistent with this, plaintiff testified that he did not understand that he was releasing anyone besides his employer. Furthermore, "a mistaken belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release"; here, while defendants argue that plaintiff is merely mistaken as to the sequelae of a known injury, plaintiff raises a factual issue as to whether the additional injuries he claims to suffer from were a sequelae of his right knee injury. Forcing a Hobbesian choice on injured workers to accept a small settlement or else lose their job before they can ascertain the nature and scope of their injury is contrary to the strong public policy of New York state

to protect injured workers, as reflected in the Labor Law…. . Dolcimascolo v 701 7th Prop. Owner, LLC, 2022 NY Slip Op 02944, First Dept 5-3-22

Practice Point: Plaintiff was apparently injured at work. A lawyer for his employer approached him about signing releases. Plaintiff signed, allegedly because he believed he would lose his job if he didn't. Therefore there was a question of fact about whether fraud, duress or mutual mistake invalidated the releases.

CONTRACT LAW, RELEASES, PRODUCT OF OVERREACHING.

HERE THE DEFENDANTS RAISED PLAINTIFF'S SIGNING A RELEASE AS AN AFFIRMATIVE DEFENSE; THE COMPLAINT ALONG WITH PLAINTIFF'S AFFIRMATION ADEQUATELY ALLLEGED THE RELEASE WAS THE PRODUCT OF OVERREACHING OR UNFAIR CIRCUMSTANCES AND THEREFORE WAS NOT A BAR TO CERTAIN CAUSES OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff adequately alleged a release (raised by defendants as an affirmative defense) was the product of overreaching and therefore did not bar certain causes of action:

… [T]he amended complaint, along with the affirmation plaintiff submitted in opposition to defendants' motion, sufficiently alleges that the release was the result of overreaching or unfair circumstances. A court must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory … . Under the alleged facts, the affirmative defense of the release does not entirely bar plaintiff's action at this stage of the litigation. "[I]t is inequitable to allow a release to bar a claim where. . .it is alleged. . .that it was the result of overreaching or unfair circumstances" … . Chadha v Wahedna, 2022 NY Slip Op 04089, First Dept 6-23-22

Practice Point: At least at the motion-to-dismiss stage, adequate allegations that a release was the product of overreaching or unfair circumstances will preclude dismissal of causes action which would have been barred by a valid release.

CONTRACT LAW, FRAUD, PLEADING.

THE FRAUD CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE IT WAS NOT DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION; CRITERIA EXPLAINED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the fraud cause of action was not duplicative of the breach of contract cause of action and therefore should not have been dismissed:

The fraud claim is not duplicative of the contract claim … , this is not a case where "the only fraud alleged" was the defendant's "unkept promise to perform certain of its preexisting obligations under the parties' contract" … . Rather, plaintiff alleges, "Whenever ADP's services for Plaintiff[] proved to be deficient, ADP would purport to deal with the problem and then misrepresent to Plaintiff[] that the problem had been fixed, when . . . it had not." "Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract and therefore involves a separate breach of duty" … .

Moreover, plaintiff seeks at least some damages on its fraud claim that it does not seek on its contract claim … . IS Chrystie Mgt. LLC v ADP, LLC, 2022 NY Slip Op 02950, First Dept 5-3-22

Practice Point: Fraud causes of action are often dismissed as duplicative of breach-of-contract causes of action. Here the fraud cause of action should not have been dismissed because the misrepresentations concerned present facts, not a future intent to perform. In addition, the complaint sought damages for fraud that were not sought for breach of contract.

CONTRACT LAW, FRAUD, RELEASES.

PLAINTIFF'S COMPLAINT ALLEGING HE WAS INDUCED TO SIGN A RELEASE BY FRAUD, DURESS AND/OR OVERREACHING SHOUILD NOT HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the defendants' motion to dismiss to complaint should not have been granted. Plaintiff alleged he signed a released because of the fraud, duress and/or overreaching of the defendants:

The complaint and plaintiff's affidavit raise issues of fact as to whether defendants engaged in fraud, duress, and/or overreaching to procure plaintiff's signature on a general release of his claims against them related to his alleged fall from a 30-foot ladder while working at a construction site … . There is little dispute that the release, written in English, unambiguously released all plaintiff's claims against defendants in exchange for $30,000 in consideration, which plaintiff received. However, plaintiff avers that he does not read English, that he did not have counsel at the time he executed the document, that he did not know the nature or purpose of the document he signed, and that defendants represented to him that the execution of the document was a mere formality required for his receipt of compensation for work performed. Plaintiff averred that he was out of work at the time, facing eviction and medical bills, and in need of financial support, and that he was hoping to travel to Puerto Rico to see his brother, who was dying. He averred that he did not understand the nature of the release he signed until he retained counsel to aid him in prosecuting a workers' compensation claim. Rosa v McAlpine Contr. Co., 2022 NY Slip Op 03216, First Dept 5-17-22

Practice Point: Here plaintiff raised questions of fact about whether he was induced to sign a release by fraud, duress and/or overreaching. His allegations included his inability to read English, he did not have a lawyer, he did not know what he was signing, and defendants said signing was a mere formality,

CONVERSION, IDENTIFIABLE FUND, ATTORNEY IOLA ACCOUNT.

ALTHOUGH THE PLAINTIFFS' $96,000, CONSTITUTING TWO MONTHS' RENT AND A SECURITY DEPOSIT, WAS TRANSFERRED TO DEFENDANT FROM AN ATTORNEY'S IOLA ACCOUNT, THE $96,000 CONSTITUTED AN "IDENTIFIABLE FUND" WHICH DEFENDANT "CONVERTED" WHEN IT WAS NOT RETURNED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Rodriguez, over a two-justice dissent, determined the $96,000 transferred from an attorney's IOLA account to defendant landlord was an "identifiable fund" which was a proper subject of this conversion action. The fund was for two months rent and a security deposit on a lease. But the lease was never signed. By keeping the $96,000 defendant had converted the "identified fund." One of the points in the opinion was that the transfer of funds to an attorney's IOLA account does not necessarily render the funds incapable of being "identified:"

… [W]e now clarify that our prior decision in SH575 Holdings [195 AD3d 429], which found that funds were not specifically identifiable by virtue of being transferred into the IOLA account of an attorney involved in a Ponzi scheme, should not be read to preclude a cause of action for conversion when funds at issue have been commingled to any extent. Here, notwithstanding the funds' transmission through plaintiffs' attorney's IOLA account, the funds' temporary presence in that account did not constitute commingling under any measure pertinent to this cause of action. While the funds were in plaintiffs' attorneys' IOLA account, they remained plaintiffs' funds. Consequently, this conclusion is not at odds with this Court's holding in SH575 Holdings. Family Health Mgt., LLC v Rohan Devs., LLC, 2022 NY Slip Op 03796, First Dept 6-9-22

Practice Point: Here the plaintiffs' security deposit and two-months rent amounting to $96,000 were transferred to defendant landlord from an attorney's IOLA account. However the lease was never signed and defendant did not return the money. Despite the fact that the money was deposited in the IOLA account, it remained an "identifiable fund" and was therefore a proper subject for this conversion action.

CORPORATION LAW, COOPERATIVES, FIDUCIARY DUTY.

A LEASE BETWEEN PLAINTIFF CORPORATION AND DEFENDANTS (ONE OF WHOM WAS A MEMBER OF PLAINTIFF'S BOARD) WAS NOT VOTED ON BY A MAJORITY OF DISINTERESTED DIRECTORS AND WAS THEREFORE VOIDABLE UNDER BUSINESS CORPORATION LAW 713(B); DEFENDANTS BREACHED THEIR FIDUCIARAY DUTY TO THE CORPORATION BY SUBLETTING THE LEASED PREMISES FOR A MUCH HIGHER RENT WITHOUT PLAINTIFF'S KNOWLEDGE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff cooperative apartment corporation (HDFC) demonstrated defendants (one of whom was a member of plaintiff's board) had entered a lease with plaintiff which was not voted upon by a majority of disinterested directors and was therefore voidable under Business Corporation Law 713(b). In addition plaintiff demonstrated defendants had breached their fiduciary duty to the corporation:

Plaintiff, a low-income cooperative apartment corporation (HDFC), established prima facie that the lease between plaintiff and defendants Thomas Green and A Cup of Harlem was not voted on by a majority of disinterested directors and is therefore voidable under Business Corporation Law § 713(b). A Cup of Harlem is a partnership between Thomas Green and Siwana Green, who are married. Siwana Green is a shareholder in the HDFC and a former officer and member of plaintiff's board of directors. By lease dated April 1, 2004, while Siwana Green was one of three members of the board, plaintiff leased one of the two commercial spaces in the building to Thomas Green and A Cup of Harlem for a 99-year term, with a monthly rent of $700 for the entirety of the term and an option to extend the lease for a 10-year term at a rate of $800 per month. In support of its motion, plaintiff submitted a former board member's affidavit that he was elected to a one-year term in February 2004, that he only learned of the lease in 2018, when Siwana Green was removed from the board, and that he never would have approved a lease with such "outlandish" terms. …

The record demonstrates that Siwana Green breached her fiduciary duty to plaintiff by diverting a corporate opportunity without plaintiff's knowledge or consent and admittedly receiving more than $200,000 profit from the sublessee to whom, in

March 11, 2009, Thomas Green sublet the leased premises at a monthly rent of $2,500 for a ten-year term, which was then renewed for a monthly rent of $2,800. 67-69 St. Nicholas Ave. Hous. Dev. Fund Corp. v Green, 2022 NY Slip Op 04087, First Dept 6-23-22

Practice Point: Here a low-rent lease between plaintiff corporation and defendants (one of whom was a member of plaintiff's board) was voidable because the lease was not approved by a majority of disinterested directors. Defendants sublet the leased premises for a much higher rent without plaintiff corporation's knowledge and thereby breached their fiduciary duty to the corporation.

CORPORATION LAW, OFFICER OR SHAREHOLDER LIABILITY.

A CORPORATE OFFICER OR SHAREHOLDER CANNOT BE PERSONALLY LIABLE FOR NONFEASANCE (DOING NOTHING), AS OPPOSED MISFEASANCE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the complaint against the individual defendant, John Milevoi, an officer or shareholder of the property management company, defendant M&L Milevoi Management, must be dismissed. Plaintiff alleged a leak in the ceiling of her apartment caused her slip and fall:

The complaint should be dismissed against the individual defendant John Milevoi, because there is no allegation that his liability stems from an act of misfeasance or malfeasance, as opposed to nonfeasance. A corporate officer or shareholder may not be held personally liable for a failure to act … . Defendant owner and defendant management company, on the other hand, have not established their entitlement to judgment as a matter of law. De Barcacel v 1015 Concourse Owners Corp., 2022 NY Slip Op 02869, First Dept 4-28-22

Practice Point: A corporate officer or shareholder cannot be personally liable for nonfeasance (doing nothing), as opposed to misfeasance. The complaint against the corporate officer or shareholder here was dismissed. But the complaint against the

corporation was not. The corporation is a property management company and plaintiff's slip and fall complaint alleged there was a water leak in her apartment.

CRIMINAL LAW, DNA DATATBASE, FAMILIAL MATCH.

PETITIONERS. RELATIVES OF PERSONS IN THE NYS DNA DATABASE, HAD STANDING TO CHALLENGE THE RESPONDENTS' REGULATIONS ALLOWING THE RELEASE OF "FAMILIAL DNA MATCH" INFORMATION LINKING DNA FROM A CRIME SCENE TO A FAMILY, NOT AN INDIVIDUAL; THE REGULATIONS WERE BASED ON SOCIAL POLICY AND THEREFORE EXCEEDED THE REGULATORY POWERS OF THE RESPONDENT AGENCIES; TWO-JUSTICE DISSENT ARGUED THE PETITIONERS DID NOT HAVE STANDING TO CHALLENGE THE REGULATIONS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gische, reversing Supreme Court, over a full-fledged two-justice dissenting opinion, determined the respondent agencies exceeded their regulatory powers when they authorized the release of so-called "familial DNA" information to be used as a possible lead for identifying the perpetrator of a crime. In the absence of a DNA "match" or a "partial match" a "familial match" may indicate the perpetrator has a familial relationship with someone in the DNA database. A crucial threshold question was whether the petitioners, relatives of persons whose genetic profiles are in the New York State DNA database, had standing to contest the familial DNA regulations. The dissenters argued the petitioners did not have standing. The majority concluded the basis for the familial DNA regulations was primarily social policy, and therefore the regulations were legislative, rather than administrative, in nature:

Each petitioner's brother has genetic information stored in the DNA databank. Neither petitioner has been asked or mandated to provide DNA for comparison. Because they are law abiding citizens, neither petitioner knows if they have been targeted for investigation as a result of a familial DNA search, but they harbor great concern and anxiety that they might be investigated for no other reason than that they share family genetics with a convicted criminal … . * * *

We are not required to determine whether respondents made a good or beneficial policy decision. The fact that the decisions respondents made are by their very nature policy driven, greatly favors a conclusion that they were made in excess of respondents' authority. Matter of Stevens v New York State Div. of Criminal Justice Servs., 2022 NY Slip Op 03062, First Dept 5-5-22

Practice Point: Relatives of persons in the NYS DNA database had standing to challenge the regulations issued by the respondent agencies allowing the release of "familial DNA match" information linking DNA from a crime scene to a family, not an individual.

Practice Point: The "familial DNA match" regulations were deemed to be rooted in social policy, which is the realm of the legislature, and therefore the promulgation of the regulations exceeded the agencies' powers.

CRIMINAL LAW, NEW YORK CITY, CRIMINALIZING COMPRESSION OF THE DIAPHRAGM DURING ARREST.

THE NEW YORK CITY ADMINISTRATIVE CODE PROVISION WHICH PROHIBITS "COMPRESSION OF THE DIAPHRAGM" (BY KNEELING, SITTING OR STANDING ON A PERSON) WHEN EFFECTING AN ARREST IS NOT VOID FOR VAGUENESS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the NYC Administrative Code provision prohibiting and criminalizing the use of certain methods of restraint in effecting an arrest was not void for vagueness.

Plaintiffs challenge Administrative Code § 10-181 as unconstitutionally vague and preempted by New York State law. This provision, which became effective July 15, 2020, makes it a criminal misdemeanor to use certain methods of restraint "in the course of effecting or attempting to effect an arrest" (Administrative Code § 10-181[a]). Specifically, the statute prohibits "restrain[ing] an individual in a manner that restricts the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck [the chokehold ban], or sitting, kneeling,

or standing on the chest or back in a manner that compresses the diaphragm [the diaphragm compression ban]" ,,, , …

The only language plaintiffs take issue with is "in a manner that compresses the diaphragm." But the meaning of this language, even if "imprecise" or "open-ended," is sufficiently definite "when measured by common understanding and practices" … . Police officers — the targets of the law — can be (and are) trained on the location and function of the diaphragm. And even plaintiffs have no difficulty understanding the meaning of the word "compress[]" when used in the context of the accompanying chokehold ban, which they do not challenge. That it may not be the most accurate word, from a medical standpoint, to describe what happens to the diaphragm when someone sits, kneels, or stands on it does not mean that it is incapable of being understood. Police Benevolent Assn. of the City of N.Y., Inc. v City of New York, 2022 NY Slip Op 03329 First Dept 5-19-22

Practice Point: The NYC Administrative Code provision which prohibits and criminalizes "compressing the diaphragm" by sitting, kneeling or standing on a person when effecting an arrest is not void for vagueness.

CRIMINAL LAW, COURT CLERK'S QUESTIONING PROSPECTIVE JURORS, MODE OF PROCEEDINGS ERROR.

AN INQUIRY MADE BY THE COURT CLERK OF PROSPECTIVE JURORS ABOUT WHETHER THEY COULD SERVE IN THIS SEXUAL-ASSAULT-OF-A-CHILD CASE DID NOT AMOUNT TO AN IMPROPER DELEGATION OF JUDICIAL AUTHORITY; THERE WAS NO MODE OF PROCEEDINGS ERROR (FIRST DEPT).

The First Department determined the judge did not improperly delegate judicial authority to the court clerk who made a preliminary inquiry of a group of prospective jurors:

Defendant was charged with committing sex crimes against his girlfriend's six-year-old daughter. The evidence included two videos, taken with defendant's phone, showing defendant having sexual intercourse with the child. On the first

day of jury selection, to identify and dismiss prospective jurors who could not be fair and impartial in light of the nature of the charges and the graphic evidence, the court addressed the approximately 200 prospective jurors in groups of approximately 50. The court told each group about the charges and described the video evidence. All panelists who stated that they could not be fair and impartial in light of these circumstances were excused.

When jury selection continued two days later, 92 panelists remained. Because of the size of the group, they were placed in an assembly room down the hall from the courtroom and in the courtroom next door. The court informed the parties that some of the remaining panelists had approached court officers, stating that they had "thought about it" and now believed they could not serve as jurors. The court proposed sending the court clerk to each of the rooms where the jurors were waiting "to ask generally the question of since Tuesday is there anybody who in thinking about the judge's questions believe they can't serve on the case." Any prospective jurors who answered in the affirmative would be brought into the courtroom for further questioning by the court. Defense counsel consented to this procedure.

Upon returning to the courtroom, the clerk reported that there were 10 prospective jurors who had "an issue." The 10 panelists were brought to the courtroom, where the court inquired whether, based on "the nature of the case [and] the kind of evidence you will be seeing during the course of this trial," the panelists now thought they could not be fair and impartial. People v Ocampo, 2022 NY Slip Op 03803, First Dept 6-9-22

Practice Point: Here defense counsel consented to the court clerk's asking prospective jurors whether they could serve in this sexual-assault-of-a-child case. The inquiry was not an improper delegation of judicial authority. There was no mode of proceedings error (which would have required reversal on appeal even though the issue was not preserved).

CRIMINAL LAW, HARVEY WEINSTEIN.

HARVEY WEINSTEIN'S CRIMINAL SEXUAL ACT AND RAPE CONVICTIONS AFFIRMED (FIRST DEPT).

The Frist Department, affirming Harvey Weinstein's criminal sexual act and rape convictions, in a full-fledged opinion by Justice Mazzarelli, determined the expert testimony about rape trauma was admissible, the Molineux evidence was properly admitted on the issue of intent, and the Sandoval ruling was proper. The opinion is fact-specific and much too detailed to fully summarize here:

… [W]e find that the trial court properly permitted Dr. Ziv to testify. … [D]efendant has presented us with no authority suggesting that rape trauma syndrome has been discredited as a scientific phenomenon … . And because the syndrome is shrouded by certain rape "myths," we can think of no more appropriate area where a jury requires the elucidation that can be facilitated by an expert witness. In other words, where there was a risk that the jury would be "puzzled" by some of the behaviors of the complainants during and after their sexual encounters with defendant, it was appropriate to admit "evidence of psychological syndromes" that would eliminate that confusion … . After all, defendant made clear that his defense would be based on those behaviors, which he would argue to the jury were inconsistent with how a victim of sexual assault would behave. * * *

From the People's perspective, there was a significant risk that the jury would have concluded that defendant did not intend to compel the women to have sex with him. By introducing the Molineux evidence, the People were able to counter defendant's narrative, by showing that the offenses against Haley and Mann were simply more elaborate manifestations of his practice of baiting women with opportunities for career advancement, and then taking advantage, all the while being completely uninterested in whether the women welcomed his advances, and being determined to go forward whether or not they did. Of course, the People could have attempted to prove defendant's guilt merely by relying on the testimony of Haley, Mann and Sciorra, but that is an insufficient reason to preclude Molineux evidence … . * * *

The amount of Sandoval material is unquestionably large, and, at first blush, perhaps appears to be troublingly so. Nevertheless, in considering the propriety of whether to admit Sandoval material, and how much, the Court of Appeals has plainly stated that "the determination rests largely within the reviewable discretion of the trial court, to be exercised in light of the facts and circumstances of the particular case before it" (People v Hayes, 97 NY2d 203, 208 [2002]). While we acknowledge the sheer size of the impeachment material that the court allowed, we have analyzed that decision within the larger context of all of the circumstances presented by this case, and have concluded that the court providently exercised its discretion…. . People v Weinstein, 2022 NY Slip Op 03576, First Dept 6-2-22

Practice Point: The First Department found that the expert testimony about rape trauma syndrome, the extensive Molineux evidence, and the extensive Sandoval evidence were properly admitted in the Harvey Weinstein trial.

CRIMINAL LAW, JUDGES, SELF-REPRESENTATION.

THE TRIAL JUDGE PROPERLY TERMINATED DEFENDANT'S SELF-REPRESENTATION DURING THE TRIAL BASED ON DEFENDANT'S BEHAVIOR; THE TRIAL JUDGE PROPERLY DECLINED TO EXCUSE A JUROR WHO, DURING DELIBERATIONS, SAID HE DID NOT WANT TO CONTINUE; DEFENDANT WAS NOT EXCLUDED FROM A MATIERAL STAGE OF THE PROCEEDING WHEN THE TRIAL JUDGE DISCUSSED HIS MENTAL CONDITION WITH COUNSEL (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Webber, determined defendant, who was representing himself at the time, was not deprived of his right to be present at a material stage of the proceeding when the judge, outside defendant's presence, discussed whether defendant, who apparently was in an agitated state, should be examined by a psychiatrist. Ultimately no examination was ordered. The First Department held the trial judge properly terminated defendant's self-representation based on his behavior during the trial. In addition, the First Department concluded that a juror who apparently stated he did not wish to continue participating in the deliberations, was not grossly unqualified:

… [T]he record supports a determination that defendant's conduct prevented the fair and orderly exposition of the issues and was disruptive to the proceedings … . During the examination of the People's witnesses, defendant was repeatedly told by the court to "calm down," to not get agitated, to not argue and be combative with the witnesses, and to not argue with the court regarding its rulings. The record also reflects instances where the court explained its rulings to defendant, defendant stated he understood and would then immediately engage in the same conduct. Moreover, during his testimony, the court repeatedly admonished defendant to stop making arguments to the jury. When asked twice by the court to sit down, he refused to do so. Defendant also repeatedly ignored the direction of the court officer to sit down. Instead, defendant remained standing, continued his argument and questioned the court's ruling. Defendant also made reference to his over one-year period of pretrial detention as well as that he had a teenage son. People v Williams, 2022 NY Slip Op 04135, First Dept 6-28-22

Practice Point: Here defendant's agitated behavior during the trial was a proper ground for terminating his self-representation. The judge's discussion with counsel, outside defendant's presence, of defendant's mental health was not a material stage of the proceedings. The judge properly refused to exclude a juror who, during deliberations, said he did not want to continue.

CRIMINAL LAW, MUNICIPAL LAW, COMPRESSION OF DIAPHRAGM WHEN EFFECTING ARREST.

THE NEW YORK CITY ADMINISTRATIVE CODE PROVISION WHICH PROHIBITS "COMPRESSION OF THE DIAPHRAGM" (BY KNEELING, SITTING OR STANDING ON A PERSON) WHEN EFFECTING AN ARREST IS NOT VOID FOR VAGUENESS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the NYC Administrative Code provision prohibiting and criminalizing the use of certain methods of restraint in effecting an arrest was not void for vagueness.

Plaintiffs challenge Administrative Code § 10-181 as unconstitutionally vague and preempted by New York State law. This provision, which became effective July

15, 2020, makes it a criminal misdemeanor to use certain methods of restraint "in the course of effecting or attempting to effect an arrest" (Administrative Code § 10-181[a]). Specifically, the statute prohibits "restrain[ing] an individual in a manner that restricts the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck [the chokehold ban], or sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm [the diaphragm compression ban]" ,,, , …

The only language plaintiffs take issue with is "in a manner that compresses the diaphragm." But the meaning of this language, even if "imprecise" or "open-ended," is sufficiently definite "when measured by common understanding and practices" … . Police officers — the targets of the law — can be (and are) trained on the location and function of the diaphragm. And even plaintiffs have no difficulty understanding the meaning of the word "compress[]" when used in the context of the accompanying chokehold ban, which they do not challenge. That it may not be the most accurate word, from a medical standpoint, to describe what happens to the diaphragm when someone sits, kneels, or stands on it does not mean that it is incapable of being understood. Police Benevolent Assn. of the City of N.Y., Inc. v City of New York, 2022 NY Slip Op 03329 First Dept 5-19-22

Practice Point: The NYC Administrative Code provision which prohibits and criminalizes "compressing the diaphragm" by sitting, kneeling or standing on a person when effecting an arrest is not void for vagueness.

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), ONLY ONE SORA RULING FOR THE SAME CONDUCT IN DIFFERENT COUNTIES.

THE SEX OFFENDER LEVEL ADJUDICATION IN NEW YORK COUNTY REQUIRED THE DISMISSAL OF THE SORA PROCEEDING IN BRONX COUNTY WHICH WAS BASED ON THE SAME CONDUCT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Bronx County SORA proceeding should have been dismissed because New York County had entered a sex offender level adjudication based on the defendant's conduct in both counties:

… [T]he proceeding in Bronx County should have been dismissed on defendant's motion where Supreme Court, New York County had entered a sex offender level adjudication based on defendant's criminal conduct in both counties, which constituted the "current offenses" under the risk assessment instrument … . People v Cisneros, 2022 NY Slip Op 03454, First Dept 5-26-22

Practice Point: The same conduct in two counties will not support more than one SORA sex offender level adjudication.

CRIMINAL LAW, STREET STOPS.

THE LEVEL THREE STREET STOP WAS NOT JUSTIFIED BY THE VAGUE DESCRIPTION OF A ROBBERY SUSPECT WHICH DEFENDANT DID NOT MATCH; THAT THE DEFENDANT HID HIS FACE AND WALKED QUICKLY WHEN THE POLICE FOLLOWED HIM DID NOT PROVIDE THE POLICE WITH THE REQUISITE REASONABLE SUSPICION (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a dissent, determined the police did not have reasonable suspicion defendant had committed a crime and the level-three stop of the defendant was not justified. The suppression motion was granted and the indictment dismissed. The street stop was based upon a vague description of a robbery suspect which did not match the defendant. The fact that the defendant acted "suspiciously" when the police followed him was not enough to validate the stop:

The officers did not have reasonable suspicion to conduct a level three forcible stop and detention by ordering defendant to put his hands against a wall, grabbing his arms, and forcing him to the ground. Defendant matched the description only in that he was a black male. … That a defendant matches a vague, general description, such as the one the complainant gave of the perpetrator, is insufficient to give rise to reasonable suspicion, particularly where, as here, key parts of the description do not match … . …

Although defendant was walking at a fast pace and hiding his face from the officers, such equivocal behavior was just as susceptible to an innocent

interpretation and may not increase the level of suspicion so as to justify a forcible stop … . Walking at a quick pace is not considered flight … . Defendant was under no obligation to walk more slowly or to show his face to the officers since he had a right to be let alone and refuse to respond to police inquiry … . Defendant's desire not to make eye contact with the officers was equally consistent with an innocent desire as a black male to avoid interactions with the police. People v Thorne, 2022 NY Slip Op 03696, First Dept 6-7-22

Practice Point: Here the police conducted a level-three street stop based upon a vague description of a robbery suspect which the defendant did not match. The stop was not justified by defendant's hiding his face and walking quickly when the police followed him.

CRIMINAL LAW, SUGGESTIVE PHOTO-ARRAY.

THE PHOTO ARRAY WAS UNDULY SUGGESTIVE; THE VICTIM WAS FIXATED ON THE UNIQUE WHITE AND BLACK PATTERN ON THE SHIRT WORN BY THE ROBBER; IN THE PHOTO ARRAY A SHIRT WITH A BLACK AND WHITE DESIGN WAS VISIBLE IN THE DEFENDANT'S PHOTO, BUT THE FILLERS WERE ALL WEARING SOLID COLOR SHIRTS (SECOND DEPT).

The First Department, reversing defendant's conviction and ordering a new trial, determined the photo array from which the victim identified defendant was unduly suggestive:

The hearing court should have granted defendant's motion to suppress the victim's identification of defendant in a photo array. The photo array was unduly suggestive because defendant was the only person shown wearing "distinctive clothing . . .which fit the description" of the suspect … . Moreover, the distinctive clothing was an outstanding feature of the identifying witness's description of the robber … The victim told the police that he "fixated" on the "unusual shirt" the r0bber was wearing during the incident, a white shirt with a distinctive black design. In the photo array, the visible part of defendant's shirt closely matched the robber's shirt as described by the victim. The fillers, on the other hand, all wore shirts that,

to the extent visible in the photos, were solid-colored shirts without any markings or designs. People v Sulayman, 2022 NY Slip Op 04132, First Dept 6-28-22

Practice Point: Here the victim told the police the robber wore an "unusual shirt" with a black and white pattern. In the photo array from which the victim identified the defendant, the defendant was the only one with a black-and-white patterned shirt. All the fillers had solid color shirts. The array was deemed unduly suggestive and a new trial was ordered.

ELECTION LAW.

EVEN THOUGH THE STATE ASSEMBLY REDISTRICTING MAP WAS DECLARED INVALID BY THE COURT OF APPEALS IN APRIL 2022, THE MAP WILL BE USED UNTIL THE GENERAL ELECTION IN 2024 (FIRST DEPT).

The First Department determined the state assembly redistricting mag declared invalid by the Court of Appeals on April 27, 2022, shall be used in the upcoming 2022 elections and any new map will not be used before the 2024 general election:

… [T]he February 2022 map is invalid, based on its procedural infirmity as previously determined by the Court of Appeals in Matter of Harkenrider v Hochul (__ NY3d __, 2022 NY Slip Op 02833 [Apr. 27, 2022]), … will remain in effect for the 2022 assembly primary election to be held on June 28, 2022 and the general election to be held on November 8, 2022, and … , upon the formal adoption and implementation of a new legally compliant state assembly map, for use no sooner than the 2024 regular election, the February 2022 map will be void and of no effect … . Matter of Nichols v Hochul, 2022 NY Slip Op 03809, First Dept 6-10-22

Practice Point: The Court of Appeals, in April 2022, declared the state assembly redistricting map invalid. Here the First Department determined the map will continue to be used until the general election in 2024.

EMPLOYMENT LAW, NEGLIGENT HIRING, SUPERVISION.

PLAINTIFF DANCER STATED CAUSES OF ACTION AGAINST DEFENDANT DANCER AND THEIR EMPLOYER, THE NEW YORK CITY BALLET (NYCB), IN CONNECTION WITH INTIMATE IMAGES ALLEGEDLY DISCLOSED BY THE DEFENDANT DANCER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, over an extensive dissenting opinion, determined plaintiff, Waterbury, stated causes of action for: (1) violation of the NYC Administrative Code provision which prohibits the disclosure of intimate images without consent; (2) intentional infliction of emotional distress; and (3) negligent hiring, supervision and retention. The plaintiff (Waterbury) was a dancer with the defendant New York City Ballet (NYCB). The defendant Finlay, who allegedly disclosed the images, was also a NYCB dancer. The negligent hiring cause of action is against NYCB as the defendant-dancer's employer:

Waterbury's allegations that images depict her engaged in sexual activity suffice (see Administrative Code § 10-180 [a] …). Construing the complaint liberally and according Waterbury "the benefit of every possible favorable inference" … , the allegations that Finlay shared images of her breasts are also sufficient (see Administrative Code § 10-180 [a] …). …

Waterbury also sufficiently alleges that Finlay intended to cause her economic, physical, or substantial emotional harm. "A result is intended if the act is done with the purpose of accomplishing such a result or with knowledge that to a substantial certainty such a result will ensue" … . …

Waterbury alleges that NYCB dancers and others affiliated with NYCB shared images and commentary regarding other women and that NYCB knew that Finlay and other dancers were degrading and exploiting young women. She asserts that NYCB implicitly encouraged this behavior. Waterbury states that NYCB knew of Finlay's sexual conduct towards young women and took no steps to prevent such conduct. Waterbury v New York City Ballet, Inc., 2022 NY Slip Op 02890, First Dept 4-28-22

Practice Point: The NYC Administrative Code prohibits the disclosure of intimate images without consent. Here the complaint stated a cause of action based on an alleged violation of that code provision.

EMPLOYMENT LAW, RETALIATION FOR COVID-RELATED PROTESTS.

ACTION AGAINST AMAZON ALLEGING RETALIATION AGAINST WORKERS WHO PROTESTED COVID-RELATED WORKING CONDITIONS PREEMPTED BY NATIONAL LABOR RELATIONS ACT (NLRA) (FIRST DEPT).

The First Department, reversing Supreme Court, determined this action by the NYS Attorney General against Amazon alleging retaliation against workers for protesting COVID-related working conditions was preempted by the National Labor Relations Act (NLRA):

… [W]e find that the Labor Law §§ 215 and 740 claims alleging retaliation against workers based, in part, on their participation in protests against unsafe working conditions plainly relate to the workers' participation in "concerted activities for the purpose of . . . mutual aid or protection," i.e., activities that are protected by the NLRA … , and therefore that the claims are preempted … . Where conduct is clearly protected or prohibited by the NLRA, the NLRB, and not the states, should serve as the forum for disputes arising out of the conduct … . People v Amazon.com, 2022 NY Slip Op 03081, First Dept 5-10-22

Practice Point: Here a state action, brought by the NYS Attorney General, against Amazon alleging retaliation against workers for protesting COVID-related working conditions was deemed preempted by the National Labor Relations Act (NLRA).

FAMILY LAW, DIVORCE, MARITAL SHARE OF APPRECIATION OF PREMARITAL BUSINESS.

PLAINTIFF HUSBAND WAS ENTITLED TO 15% OF THE APPRECIATON OF THE WIFE'S PREMARITAL ART-GALLERY BUSINESS IN THIS DIVORCE PROCEEDING REQUIRING THE DISTRIBUTION OF A NUMBER OF SUBSTANTIAL ASSETS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gesmer, modified some of some of Supreme Court's distribution of marital assets in this divorce action. The opinion is too detailed, and addressed too many substantial assets to be fairly summarized here. With respect to the valuation of the husband's portion of the appreciation of the wife's art gallery, AWI, founded before the marriage, the First Department wrote:

… [P]laintiff met his burden to show that the appreciation in value of defendant's pre-marital business, AWI, during the marriage constituted marital property subject to distribution … . …

An award to plaintiff of significantly less than half of the marital portion of AWI is justified by the following facts: defendant started her business years before she met plaintiff; plaintiff was not involved with defendant's acquisition or sale of art; plaintiff's conduct was at times problematic and even a hindrance to defendant's business success; plaintiff's contributions to the marriage diminished over time; and defendant will bear substantial tax consequences when she sells art to pay plaintiff a distributive award (see Domestic Relations Law § 236[B][5][d][7], [8], [11]; see also Cotton, 170 AD3d at 596). * * * Considering all of the circumstances, we find that plaintiff's share of AWI's appreciation during the marriage should be 15%, or $3,486,821 … . Culman v Boesky, 2022 NY Slip Op 03440, First Dept 5-26-22

Practice Point: In this complex divorce action involving may substantial assets, based upon the husband's limited participation in the wife's pre-marital art-gallery business, the husband was entitled to 15% of the appreciation of the business during the marriage.

FAMILY LAW, DIVORCE, PROOF OF VALUE OF MARITAL RESIDENCE.

A REJECTED PURCHASE OFFER WAS NOT ADMISSIBLE AT TRIAL TO PROVE THE FAIR MARKET VALUE OF THE MARITAL RESIDENCE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this divorce case, determined a purchase offer was not admissible to show the fair market value of the marital residence:

Order … which … granted plaintiff's motion to set a minimum net value for marital real property located in Southampton, New York, at $20 million for equitable distribution purposes, unanimously reversed … .

With respect to the parties' Southampton marital property, we find that the court erred in imposing a minimum value based on a purchase offer of $20 million rejected by defendant, as evidence of an offer to purchase is generally inadmissible at trial to show fair market value … . Lauren S. v Alexander S., 2022 NY Slip Op 03462, First Dept 5-26-22

Practice Point: In a divorce action, a rejected purchase offer was not admissible at trial to prove the fair market value of a marital residence.

FAMILY LAW, MOTHER'S MARIJUANA USE, NEGLECT.

MOTHER'S MARIJUANA USE DURING PREGNANCY AND THE FACT THAT MOTHER AND CHILD TESTED POSITIVE FOR MARIJUANA AT THE TIME OF THE CHILD'S BIRTH WERE NOT SUFFICIENT TO DEMONSTRATE NEGLECT; NEW YORK HAS LEGALIZED MARIJUANA USE (FIRST DEPT).

The First Department, reversing Family Court, determined mother's marijuana use during pregnancy, and the fact that mother and the child tested positive for marijuana at the time of birth, were insufficient to demonstrate neglect:

… [T]he evidence that the mother smoked marijuana while pregnant with her youngest daughter, and that the mother and child both tested positive for marijuana at the time of the birth, is insufficient, in and of itself, to sustain a finding that the child was physically, mentally or emotionally impaired, or was in imminent danger of being impaired … . Here, as acknowledged by the agency, there was no evidence that the mother's marijuana use impacted her judgment or behavior, or that the child was impaired or placed in imminent risk of impairment by the mother's drug use … . Furthermore, the finding of neglect based solely on use of marijuana, without a finding of actual or imminent impairment of the child's physical or emotional condition, is inconsistent with this State's public policy legalizing marijuana, as reflected in the recent amendment to the Family Court Act (Family Court Act § 1046[a][iii] …). Matter of Saaphire A.W. (Lakesha B.), 2022 NY Slip Op 02382, First Dept 4-12-22

Practice Point: Because marijuana use has been legalized, proof mother smoked marijuana and mother and child tested positive for marijuana at the time of birth was not enough to demonstrate neglect. There must be proof, for example, that mother's judgment was affected or the child was harmed in some way.

FAMILY LAW, IMMIGRATION LAW, SPECIAL IMMIGRANT JUVENILE STATUS.

FAMILY COURT SHOULD HAVE MADE THE FINDING THAT PETITIONER'S REUNIFICATION WITH HER FATHER IN THE IVORY COAST WAS NOT VIABLE TO ENABLE HER TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) AND REMAIN IN THE US (SECOND DEPT).

The First Department, reversing (modifying) Family Court, determined Family Court should have found reunification with petitioner's father in the Ivory Coast was not viable. Petitioner, 16 years old, sought findings from Family Court which would allow her to apply for special immigrant juvenile state (SIJS) and remain in the United States:

Family Court erred in not making any findings of fact as to reunification with petitioner's father. Exercising our power to review the record and to make our own

factual determinations … , we find that the record supports a finding that reunification of petitioner with her father, respondent Lassina D., is not viable due to neglect within the meaning of Family Court Act § 1012 (f)(i) (A)—(B). Petitioner's testimony shows that the father did not meet the minimal degree of care since he did not provide for her medical and emotional needs while she was in the Ivory Coast, and has not contributed to her financial support or maintained regular contact with her since she has been in the United States … Her uncontroverted testimony also supports a finding of neglect based on the father's excessive use of corporal punishment … .Matter of Sara D. v Lassina D., 2022 NY Slip Op 04119, First Dept 6-28-22

Practice Point: Family Court can be petitioned to make findings which will allow a juvenile to apply for special immigrant juvenile status in order to avoid deportation to the juvenile's home country. Here the court was asked to make findings that reunification with the petitioner's parents is not viable. The First Department found that father had neglected petitioner and she therefore could not be returned to his care.

FAMILY LAW, JUVENILE DELINQUENCY, DNA.

APPELLANT, 16, IN THIS JUVENILE DELINQUENY PROCEEDING, WAS BEING INTERROGATED ABOUT A ROBBERY WHEN HE DRANK WATER FROM A DISPOSABLE CUP; THE INTERROGATING OFFICER SENT THE CUP FOR DNA ANALYSIS; THERE WAS NO INVESTIGATORY PURPOSE FOR THE DNA COLLECTION; APPELLANT'S MOTION TO EXPUNGE THE DNA EVIDENCE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mendez, over a dissent, reversing Family Court, determined appellant's motion to expunge all DNA evidence collected from him in this juvenile delinquency proceeding should have been granted. When appellant,16, was being interrogated by the police about a robbery, he was given a disposable cup from which he drank water. The cup was then sent by the interrogating officer for DNA analysis. No DNA had been collected from the robbery scene, so there was no investigatory purpose for collection of appellant's DNA:

A juvenile delinquency adjudication, just as a youthful offender adjudication, is not a criminal conviction and a juvenile delinquent should not be denominated a criminal by reason of such adjudication … . A juvenile delinquent is not and should not be afforded fewer adjudication protections than a youthful offender or an adult in the equivalent circumstances … . Family Court, therefore, has the discretion to order the expungement of appellant's DNA and any other documents related to the testing of his DNA sample. * * *

It has not been established that appellant purposefully divested himself of the cup or his DNA, thereby relinquishing his expectation of privacy. Nor has it been established that he waived, impliedly or explicitly, his constitutional rights to that expectation. * * *

DNA evidence obtained after an arrest should be material and relevant and should have a link to the charges for which the individual is arrested. There must be an articulable basis to obtain this DNA evidence and a correlation to the investigation or prosecution of the charged offense. That articulable basis to obtain appellant's DNA is lacking here. * * *

Under the totality of the circumstances, maintaining appellant's DNA profile in OCME's database in perpetuity is completely incompatible with the statutory goal and would result in a substantial injustice to the appellant. Matter of Francis O., 2022 NY Slip Op 03969, First Dept 6-16-22.

Practice Point: Here the appellant was 16 when he was interrogated by the police. He drank water from a paper cup. The interrogating officer sent the cup for DNA analysis. There was no investigative purpose for the DNA collection. The appellant did not abandon the cup and did not waive his privacy interest in it. His constitutional rights were therefore violated by the collection of his DNA and he was entitled to expungement of the DNA evidence.

FAMILY LAW, MENTAL HYGIENE LAW, HUSBAND'S MENTAL ILLNESS AS REASON FOR FAIURE TO APPEAR.

BOTH THE WIFE AND THE JUDGE WERE AWARE OF THE HUSBAND'S MENTAL ILLNESS IN THIS DIVORCE ACTION IN WHICH THE HUSBAND WAS PRO SE; WHEN THE HUSBAND FAILED TO APPEAR FOR THE INQUEST AN INQUIRY INTO WHETHER A GUARDIAN AD LITEM SHOULD BE APPOINTED SHOULD HAVE BEEN HELD (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge should have conducted an inquiry into whether a guardian ad litem should be appointed for the husband in this divorce action. The husband did not appear at the inquest and both the wife and the judge were aware of the husband's significant mental illness:

Judgment was entered in this divorce proceeding after the husband, pro se, failed to appear for an inquest. At the time of the inquest, both the wife and Supreme Court were aware that the husband had been diagnosed with a significant mental health condition, which resulted in episodes during which the husband was demonstrably unable to care for himself or otherwise protect his interests. Indeed, at the conclusion of the inquest, the court explicitly acknowledged that the husband's absence was likely attributable to his mental health. Thus, before entering judgment upon the husband's default, there should have been an inquiry into whether a guardian ad litem was necessary (see CPLR 1201, 1203 …). Because there was no inquiry, the judgment must be vacated and the matter remanded for further proceedings, including, if necessary, an inquiry into the husband's current capacity … . Richard v Buck, 2022 NY Slip Op 03335, First Dept 5-19-22

Practice Point: Here both the wife and the judge in this divorce action were aware of the husband's mental illness. When the husband, who was representing himself, did not appear at the inquest, an inquiry into whether a guardian ad litem should be appointed should have been made.

GUARDIAN OF THE PROPERTY, REMOVAL.

SUPREME COURT SHOULD NOT HAVE REMOVED THE INCAPACITATED PERSON'S (IP'S) SON AS GUARDIAN OF THE PROPERTY WITHOUT HOLDING A TESTIMONIAL HEARING, CRITERIA FOR REMOVAL EXPLAINED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge should not have merely accepted the Court Examiner's position that petitioner, the Incapacitated Person's (IP's) son, should be removed as guardian of the property. A hearing should have been held:

Petitioner interposed an answer in which he raised issues of law and fact. He claimed, in part, that some of his actions did not require further court order but were permissible under the original order appointing him as guardian. He also claimed that he obtained prior court approval, albeit in the informal manner (i.e. emails or phone calls) employed by the previous judge who was assigned to this matter. He also made credible arguments that the decisions he made benefitted, and did not harm, the IP's estate … .

Rather than hold a testimonial hearing, Supreme Court simply accepted what the Court Examiner claimed in her motion and appointed a nonrelative successor guardian…. . …

We have long recognized that strangers will not be appointed either a guardian of the person or the property unless it is impossible to find someone within the family circle who is qualified to serve … . The preference for a relative may be overridden by a showing that the guardian-relative has rendered inadequate care to the IP, has an interest adverse to the IP or is otherwise unsuitable to exercise the powers necessary to assist the IP … . Moreover, the ultimate remedy of removal may be an abuse of discretion, where a guardian's errors do not prejudice or harm the estate. The court should also consider whether other less drastic remedies, such as ordering compliance or reducing the Guardian's compensation, would be appropriate. None of these considerations were addressed by the Supreme Court before removing petitioner…. . Matter of Roberts, 2022 NY Slip Op 03336, First Dept 5-19-22

Practice Point: Here Supreme Court improperly accepted the Court Examiner's position and removed the Incapacitated Person's (IP's) son as guardian of the property without holding a hearing or making any findings. A full testimonial hearing, giving petitioner (the IP's son) the opportunity to be heard, should have been held. The court noted that appointing a stranger as guardian is a last resort and that there are options, such as reducing a guardian's compensation, which should be considered.

INSURANCE LAW, "USE" OF A VEHICLE.

PLAINTIFF'S FALLING INTO A HOLE ON THE PREMISES AFTER HIS TRUCK WAS LOADED WAS NOT THE RESULT OF "USE" OF THE TRUCK WITHIN THE MEANING OF THE INSURANCE POLICIES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the plaintiff's falling into a hole after he was finished loading his truck did not result from his "use" of the truck within the meaning of the applicable insurance policies:

While "use" of an automobile includes loading and unloading , an accident does not arise from the "use" of an automobile merely because it occurs during the loading or unloading process, but rather "must be the result of some act or omission related to the use of the vehicle" … . Tishman Constr. Corp. v Zurich Am. Ins. Co., 2022 NY Slip Op 02886, First Dept 4-28-22

Practice Point: Here plaintiff's falling into a hole on the premises after he had loaded his truck did not result from "use" of the truck within the meaning of the insurance policies.

LABOR LAW-CONSTRUCTION LAW, ELEVATORS.

PLAINTIFF'S DECEDENT WAS IN THE ELEVATOR SHAFT WHEN THE ELEVATOR, OPERATING NORMALLY, DESCENDED AND CRUSHED HIM; THE ELEVATOR WAS NOT A "FALLING OBJECT" WITHIN THE MEANING OF LABOR LAW 240(1); COMPLAINT DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the elevator which descended and crushed plaintiff's decedent, who had entered the shaft, was not a "falling object" within the meaning of Labor Law 240(1). Therefore the complaint against defendants must be dismissed:

Plaintiff's decedent, an elevator mechanic, entered an elevator shaft on the lobby level, under an elevator that he had sent to one of the floors above. After the shaft doors closed, the call button was pressed, and the elevator descended to the lobby, crushing the decedent. The parties agree that the elevator was working normally, in the "automatic" setting, at the time of the accident.

The Labor Law § 240(1) claim must be dismissed because the elevator did not "fall" as a result of the force of gravity but descended in automatic mode, as it was designed to do … . Luna v Brodcom W. Dev. Co. LLC, 2022 NY Slip Op 02873, First Dept 4-28-22

Practice Point: In order to be covered under Labor Law 240(1), this elevator accident must have been the result of the elevator "falling." Because the elevator was descending normally when struck and killed plaintiff, the complaint was dismissed.

LABOR LAW-CONSTRUCTION LAW, FAILURE TO FOLLOW INSTRUCTIONS, SOLE PROXIMATE CAUSE.

QUESTIONS OF FACT ABOUT WHETHER PLAINTIFF WAS INSTRUCTED TO WORK ONLY ON GROUND LEVEL AND NOT TO USE STILTS, AND WHETHER THE SOLE PROXIMATE CAUSE OF THE ACCIDENT WAS PLAINTIFF'S CONTINUED USE OF THE STILTS AFTER HE FELT THEM BECOME UNSTABLE, PRECLUDED SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there were questions of fact which precluded summary judgment on plaintiff's Labor Law 240 (1) cause of action. Apparently, plaintiff fell while using stilts. There was a question of fact whether plaintiff's boss told him to work only on ground level without stilts. And there was a question of fact whether plaintiff was the sole proximate cause of his accident because he kept using the stilts when they became unstable and did not request another pair:

… [G]iven the nature of the work plaintiff was performing at the time of his accident, the distance he fell presented a physically significant elevation within the meaning of Labor Law § 240(1) … . While the distance may have been physically significant within the meaning of Labor Law § 240(1), evidence that plaintiff's boss … specifically instructed him to only work on ground level and not to use stilts "raises triable issues of fact as to whether plaintiff's duties were expressly limited to work that did not expose him to an elevation-related hazard within the purview of Labor Law § 240(1) … .

Issues of fact also exist as to whether plaintiff was the sole proximate cause of the accident because when he felt the stilts become unstable his "normal and logical response" should have been to request another pair rather than to keep working on them … . …

While it is disputed whether plaintiff was using his own stilts or his employer provided them, and it is further unclear whether the stilts failed because a screw came out while they were in use or because they had been jerry-rigged with a wire threaded through a bolt hole, any use of defective stilts or failure to properly

inspect them to discern any such defect was not the sole proximate cause of the accident where, as here, no proper safety devices were provided … . Gonzalez v DOLP 205 Props. II, LLC, 2022 NY Slip Op 03868, First Dept 6-14-22

Practice Point: Here, where plaintiff fell using stilts, evidence plaintiff was instructed to work only on ground level precluded summary judgment on the Labor Law 240 (1) cause of action. Plaintiff's continued use of the stilts after he felt them become unstable raised a question of fact whether plaintiff was the sole proximate cause of the injury.

LABOR LAW-CONSTRUCTION LAW, FALL FROM BATHTUB RIM.

PLAINTIFF FELL OFF THE EDGE OF A BATHTUB WHEN HE WAS ATTEMPTING TO INSTALL A SHOWER-CURTAIN ROD; THE EDGE OF THE TUB WAS THE EQUIVALENT OF A SCAFFOLD AND PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION; TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, over a two-justice dissent, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff alleged he needed to stand on the rim of a bathtub to install a shower-curtain rod. He hit his head and fell when attempting to step up on the rim of the tub. The defendants argued the installation could have been done from floor level. There was no room in the bathroom for an A-frame ladder:

The motion court properly granted plaintiff's motion for partial summary judgment on his section 240(1) claim. Plaintiff established prima facie that he was entitled to judgment by evidence that he suffered harm that "flow[ed] directly from the application of the force of gravity" when he fell from the edge of the bathtub, which served as the functional equivalent of a scaffold or ladder … . The evidence showed that there was insufficient room inside the bathroom for plaintiff to use an A-frame ladder and that plaintiff instead was forced to reach the elevated work area by standing on the edge of the bathtub in order to install the shower-curtain rods. Plaintiff testified that standing on the edge of the tub was necessary because

he otherwise would lack the necessary leverage to tighten the screws with an Allen wrench.

In opposition, [defendants] failed to raise an issue of fact. They rely on an affidavit by their biomechanical expert, Mr. Bove, who opined that plaintiff's overhead reach was sufficient to perform the task while standing on the ground or inside the bathtub. Bove's initial affidavit, however, ignored plaintiff's testimony that he needed the height in order to have leverage so that he would have enough strength to tighten the screws with the Allen wrench. Vitucci v Durst Pyramid LLC, 2022 NY Slip Op 02968, First Dept 5-3-22

Practice Point: Here plaintiff fell attempting to stand on the edge of a bathtub to install a shower-curtain rod. The majority concluded the edge of the bathtub was the equivalent of a scaffold and plaintiff's fall was covered under Labor Law 240(1). Two dissenters argued the job could have been performed from ground level.

LABOR LAW-CONSTRUCTION LAW, FALLING PEBBLE-SIZED DEBRIS.

QUESTIONS OF FACT WHETHER PEBBLE-SIZED DEBRIS WHICH FELL ON PLAINTIFF AND ALLEGEDLY SERIOUSLY INJURED HIS EYE GAVE RISE TO LIABILITY UNDER LABOR LAW 240(1) AND 241(6) (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there were questions of fact about liability pursuant to Labor Law 240(1) and 241(6). Plaintiff was working in a shaft when pebble-sized debris fell on him, allegedly seriously injuring his eye. There were questions of fact whether the distance the debris fell was de minimus and whether the force with which the debris fell was de minimus. There was also a question of fact whether planking should have been installed above the shaft to protect against falling debris:

There are issues of fact as to whether the debris that fell on plaintiff — taking into account the elevation differential, the debris' weight, and the amount of force it could generate … — was "a load that required securing for the purposes of the undertaking at the time it fell" … , and whether his injury was a direct

consequence of defendants' "failure to provide adequate protection against a risk arising from a physically significant elevation differential" … . The trier of fact could find that the elevation differential between plaintiff and the level from which the debris fell was de minimis, that the debris' weight was inconsequential, or that the debris could not have generated any meaningful amount of force, and determine that plaintiff's "injuries were the result of [a] usual and ordinary danger[] at a construction site" … .. However, the trier of fact could determine that the elevation differential of at least one story was not de minimis, that the weight of the debris and the force it was capable of generating were significant, and that the debris should have been secured for the purpose of the undertaking. Peters v Structure Tone, Inc., 2022 NY Slip Op 02518, First Dept 4-19-22

Practice Point: There were questions of fact whether injury from falling pebble-sized debris is covered under Labor Law 240(1) and 241(6). The force generated by the falling debris could be found to be de minimus.

LABOR LAW-CONSTRUCTION LAW, INJURY LIFTING A HEAVY OBJECT FOUR OR FIVE INCHES.

PLAINTIFF FELT HIS ARM SNAP WHEN ATTEMPTING TO LIFT A 400 POUND ELEVATOR PLATFORM FOUR OR FIVE INCHES TO PLACE A PALLET JACK UNDER IT; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this Labor Law 240(1) action should have been granted. The pallet jack, which was deemed a safety device, wasn't long enough to fully lift the 400 pound elevator platform. Plaintiff was lifting the end of the platform which was not supported by the pallet jack (in order to place another pallet jack under it) when he felt his arm snap:

Plaintiff … was injured as he was attempting to move a 400-pound elevator platform from the front of a flatbed truck to the tailgate. The platform, which was about seven feet long, rested on a pallet jack that was too small to allow the

platform to rest properly on it, causing the platform to dip and touch the flatbed. As plaintiff lifted the platform about four or five inches off the pallet jack in order to place a second pallet underneath to facilitate moving the platform, he felt a snap in his left arm.

The pallet jack was a safety device that was insufficient to allow plaintiff to move the platform from the front of the flatbed truck to the tailgate. In view of the weight of the platform and the amount of force it was able to generate, even in falling a relatively short distance, plaintiff's injury resulted from a failure to provide adequate protection, required by Labor Law § 240(1), against a risk arising from a significant elevation differential … . Schoendorf v 589 Fifth TIC I LLC, 2022 NY Slip Op 03580, First Dept 6-2-22

Practice Point: Even a height-differential of four or five inches can support a Labor Law 240(1) cause of action. Here plaintiff was attempting to lift a 400 pound elevator platform a few inches in order to place a pallet jack under it when he injured his arm.

LABOR LAW-CONSTRUCTION LAW, OBJECT LEANING AGAINST WALL FALLS.

A HEAVY PUMP, 3 TO 4 FEET IN HEIGHT, WHICH WAS LEANING AGAINST THE WALL, TIPPED OVER AND STRUCK THE PLAINTIFF; PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. A heavy fire pump that was leaning against the wall, unsecured, tipped over and struck plaintiff:

Liability under Labor Law § 240(1) arises where a safety device of the kind enumerated in the statute either proved inadequate to shield against injury resulting directly from the application of the force of gravity to a person or object or where no safety device was provided to shield against such injury … . Here, plaintiff was injured when he and two coworkers were assigned to run conduits along the wall

and ceiling of an approximately 8 by 10-foot fire pump room. As they were looking at the wall and ceiling and deciding how to proceed, plaintiff felt a sharp pain in his leg when a 3-to-4 foot tall, 300-500+ pound fire pump, which had been standing upright on the floor, on its narrower end and unsecured, fell on his leg. Where a load positioned on the same level as the injured worker falls a short distance, Labor Law § 240(1) applies if the load, due to its weight, is capable of generating significant force … . Here, the fire pump was required to be secured against tipping or falling and the failure to secure it was a violation of Labor Law § 240(1) … . Grigoryan v 108 Chambers St. Owner, LLC, 2022 NY Slip Op 02620, First Dept 4-21-22

Practice Point: Here a heavy fire pump, 3 t0 4 feet in height, was leaning against a wall on the same level as plaintiff when it tipped over and struck him. An unsecured object positioned on the same level as the injured party which generates significant force when it falls over is covered by Labor Law 240(1).

LABOR LAW-CONSTRUCTION LAW, PROXIMATE CAUSE.

IF PLAINTIFF, A FOREMAN, HAD THE AUTHORITY TO STOP WORK BECAUSE OF RAIN, THEN HIS CONTINUING TO WORK MAY HAVE BEEN THE SOLE PROXIMATE CAUSE OF HIS FALL; IF PLAINTIFF HAD BEEN INSTRUCTED TO WORK IN THE RAIN, THEN THE WET PLYWOOD MAY HAVE BEEN THE SOLE PROXIMATE CAUSE OF HIS FALL; BECAUSE OF THE CONFLICTING OR ABSENCE OF EVIDENCE ON THESE ISSUES, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED; TWO JUSTICE DISSENT (THIRD DEPT).

The First Department, in a full-fledged opinion by Justice Kennedy in this Labor Law 241 (6) action, over a two-justice dissenting opinion, determined conflicting testimony about whether plaintiff, who was a foreman, had the authority to stop work because of rain, or was instructed to work in the rain, raised a question of fact about the cause of the accident. Plaintiff slipped on wet plywood and fell as he was passing steel rebar to workers below:

The deposition testimony raised issues of fact as to whether plaintiff's injuries were proximately caused by a slippery condition in violation of Industrial Code (12 NYCRR) § 23-1.7(d), or whether the sole proximate cause was plaintiff's decision, as a foreman, to work on a plywood surface exposed to the elements while it was raining … . * * *

… [T]he evidence is inconclusive as to whether plaintiff's decision to work in the rain, rather than simply following his general foreman's instructions about what work to perform, was the sole proximate cause of his slip-and-fall accident. … [T]his case is distinguishable from the line of cases relied upon by the dissent that conclude that a plaintiff is not the proximate cause of an accident when there is undisputed evidence that they were following the instructions of a foreman. Here, plaintiff was also a foreman with specific duties and potential control over the work that he and his crew were performing. Whether he could or should have ceased work based on his own authority, as a foreman, his extensive work experience and conditions of the site, there are issues of fact that cannot be resolved on this record. Sutherland v Tutor Perini Bldg. Corp., 2022 NY Slip Op 04228, First Dept 6-30-22

Practice Point: Here the plaintiff was a foreman on a construction site. He was working in the rain when he slipped and fell on wet plywood. If plaintiff had the authority to stop work because of the rain, he may be deemed the sole proximate cause of his fall. If plaintiff was ordered to work in the rain, then the slippery plywood may be deemed to be the sole proximate cause of his fall. Because there was conflicting and/or a lack of evidence on these issues, plaintiff's motion for summary judgment should not have been granted.

LABOR LAW-CONSTRUCTION LAW, SUBCONTRACTOR LIABILITY.

ALTHOUGH PLAINTIFF FELL FROM THE SCAFFOLDING SYSTEM CONSTRUCTED BY SWING, A SUBCONTRATOR, PLAINTIFF'S LABOR LAW 240(1) AND 241(6) CAUSES OF ACTION AGAINST SWING SHOULD HAVE BEEN DISMISSED; SWING WAS NOT A CONTRACTOR OR OWNER, OR A CONTRACTOR'S OR OWNER'S STATUTORY AGENT, WITHIN THE MEANING OF THE STATUTES (FIRST DEPT).

The First Department, reversing Supreme Court, determined the Labor Law 240(1) and 241(6) causes of action against Swing, the company which constructed the scaffolding, should have been dismissed. Plaintiff fell when, instead of using the scaffold walkway system, he attempted to descend from some scaffolding pipes to the wooden walkway and a wooden plank broke:

The lower court should have dismissed the Labor Law §§ 240(1) and 241(6) claims as against Swing, the scaffold system subcontractor to general contractor 4 Star, because it is undisputed that Swing was not a contactor or owner within the meaning of the statutes. Nor was it a contractor or owner's statutory agent. Although it contractually retained the right to reenter the premises and inspect the scaffold system, Swing did not have any employees on site during 4 Star's work, and it did not inspect the scaffold system while it was in place … . For all intents and purposes, once Swing constructed the scaffold system, it returned to the premises only to deliver supplies and to disassemble the scaffold system at the end of the project. Guevara-Ayala v Trump Palace/Parc LLC, 2022 NY Slip Op 03049, First Dept 5-5-22

Practice Point: Here the subcontractor which constructed the scaffolding from which plaintiff fell was not a contractor or owner, or a contractor's or owner's statutory agent within the meaning of Labor Law 240(1) or 241(6). Therefore the Labor Law 240(1) and 241(6) causes of action against the subcontractor should have been dismissed.

LABOR LAW-CONSTRUCTION LAW, SUMMARY JUDGMENT MOTION NOT PREMATURE.

PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240(1) CAUSE OF ACTION IN THIS A-FRAME LADDER-FALL CASE; ALTHOUGH NO DEPOSITIONS HAD BEEN TAKEN, THE DEFENDANT FAILED TO SHOW THE SUMMARY JUDGMENT MOTION WAS PREMATURE (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action in this A-frame ladder-fall case. The court noted that the motion for summary judgment was not premature, even though no depositions had been taken:

Plaintiff established prima facie that PPC is liable under Labor Law § 240(1) through plaintiff and his coworker's affidavits that the unstable eight-foot A-frame ladder, which was missing rubber feet, shifted, causing him to fall … . It was undisputed that PPC was the owner of the property. Plaintiff also established that his work of retrofitting light fixtures was covered under § 240(1) and did not constitute mere maintenance … .

We reject PPC's argument that plaintiff's motion was premature (CPLR 3212[f]). The fact that no depositions have been taken does not preclude summary judgment in plaintiff's favor, as PPC failed to show that discovery might lead to facts that would support its opposition to the motion … . PPC also failed to show that facts essential to its opposition were within plaintiff's exclusive knowledge … . Its argument that deposition testimony might further illuminate issues raised by the affidavits is unavailing. "The mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion" … . Laporta v PPC Commercial, LLC, 2022 NY Slip Op 02624, First Dept 4-21-22

Practice Point: In order for a pre-discovery summary judgment motion to be deemed premature, the opposing party must show discovery might lead to facts which would support opposition to the motion (not the case here).

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, INDEMNIFICATION CLAUSE.

THE INDEMNIFICATION CLAUSE IN THIS LADDER-FALL CASE STATED THAT THE CONTRACTOR FOR WHOM THE INJURED PLAINTIFF WORKED WOULD HOLD THE "OWNER'S AGENT" HARMLESS AND DID NOT MENTION THE PROPERTY OWNER; THE CONTRACT MUST BE STRICTLY CONSTRUED; THE PROPERTY OWNER'S INDEMNIFICATION ACTION AGAINST THE CONTRACTOR SHOULD HAVE BEEN DISMISSED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the indemnification clause in the ladder-fall case must be strictly construed. The clause stated that the contractor for whom plaintiff worked, Collins, would hold harmless the "owner's agent" but did not mention the property owner, LIC. Therefore LIC's indemnification action against Collins should have been dismissed:

Plaintiff alleged common-law negligence, including failure to provide her with a safe ladder, and violations of Labor Law §§ 200, 202, 240(1)-(3), and 241(6). * * *

LIC commenced this third-party action against Collins asserting that "Collins was obligated to provide plaintiff, its employee, with the necessary equipment to enable her to properly and safely perform her cleaning related duties" at the premises, and that plaintiff's injuries were due to Collins' failure to perform its duties under the contract and provide her with the proper tools, equipment, supervision, direction, and control. The third-party complaint also asserted that Collins agreed to indemnify LIC from any accidents, injuries, claims, or lawsuits arising out of the cleaning related services Collins provided at the premises. …

The indemnification provision states that Collins shall "hold harmless the OWNER'S AGENT from all claims by Tenants or others whose personnel or property may be damaged by [Collins], its operators, and including but not limited to the use of any of the required equipment or material." Tishman is designated as the "owner's agent" in the contract. LIC is neither identified nor included under the indemnification provision and the indemnification provision must be "strictly

construed" … . Tavarez v LIC Dev. Owner, L.P., 2022 NY Slip Op 03339, First Dept 5-19-22

Practice Point: Indemnification clauses in contracts must be strictly construed. Here the contract said the contractor for whom the injured plaintiff worked would hold harmless the "owner's agent" and did not mention the owner. Therefore the owner's action against the contractor for indemnification should have been dismissed.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ALLEGEDLY TRIPPED AND FELL CARRYING A PIPE DOWN A PLYWOOD RAMP IN THIS LABOR LAW 200 ACTION; THERE WERE QUESTIONS OF FACT WHETHER THE RAMP CONSTITUTED A DANGEROUS CONDITION AND WHETHER THE DEFENDANTS HAD CONSTRUCTIVE NOTICE OF IT (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact whether a plywood ramp was a dangerous condition and whether the defendants had constructive knowledge of the ramp in this Labor Law 200 action. Plaintiff allegedly tripped and fell when carrying a pipe down the ramp:

Defendants established their prima facie entitlement to judgment as a matter of law on the causes of action alleging a violation of Labor Law § 200 and common-law negligence by demonstrating that they did not have authority to supervise or control the means and methods of plaintiff's work. However, to the extent those causes of action are also predicated on the existence of a dangerous or defective condition (a defective plywood ramp), triable issues of fact remain as to whether the owner or general contractor had actual or constructive notice … . Defendants' witnesses all testified to a lack of knowledge of the plywood ramp, thereby establishing lack of actual notice. However, plaintiff raised a triable issue as to constructive notice by his deposition testimony and affidavit that he had seen the plywood ramp in place when he began working at the construction site, although he never traversed it prior to his accident, which occurred months into his work, and that defendants' trailers were located only 30 to 50 feet from where plaintiff's

accident occurred. Contrary to defendants' insinuations, the number of witnesses contradicting plaintiff's account is not a basis for granting them summary judgment; it merely raises issues of credibility for the fact-finder. Jackson v Hunter Roberts Constr., L.L.C., 2022 NY Slip Op 03321, First Dept 5-19-22

Practice Point: The First Department in this Labor Law 200 action noted that a conflict between the plaintiff's testimony and several of defendants' witnesses on the issue of constructive notice of the allegedly dangerous condition which caused plaintiff's slip and fall was not a sufficient ground for granting defendants' summary judgment motion. The conflict merely raised a credibility issue for trial which is not appropriately determined at the summary judgment stage.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL DOWN AN OPEN, UNGUARDED MANHOLE AS HE ATTEMPTED TO STEP OVER IT; PLAINTIFF'S ACTION WAS NOT THE SOLE PROXIMATE CAUSE OF THE FALL BECAUSE THERE WAS NO PROTECTIVE RAILING AROUND THE MANHOLE (FIRST DEPT).

The First Department determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. Plaintiff fell into an unguarded, open manhole. Defendants argued plaintiff's attempting to step over the manhole was the sole proximate cause of the fall. But the fact that the manhole was unguarded (another cause of the fall) defeated the sole proximate cause argument:

Plaintiff established prima facie his entitlement to summary judgment on his Labor Law § 240(1) claim, it being undisputed that he was injured when he fell down an open and unguarded manhole that he had been attempting to cover, as instructed, while working on a construction site … . In opposition, defendants, the operator of the subway facility and its general contractor on the project, failed to raise an issue of fact. Their argument that plaintiff was the sole proximate cause of the accident because he allegedly stepped over the open manhole — at which point he was accidentally bumped by another individual and fell into it — is unavailing, given the lack of protective railing around the manhole or any other safety devices … . Piccone v Metropolitan Tr. Auth., 2022 NY Slip Op 03458, First Dept 5-26-22

Practice Point: A defense to a Labor Law 240(1) construction-accident cause of action is that the plaintiff's own act or omission was the sole proximate cause of the accident. Here, even if plaintiff's attempt to step over the open manhole was a proximate cause of his fall, the absence of a protective railing around the manhole was also a proximate cause. Plaintiff's comparative negligence is not considered in a Labor Law 240(1) cause of action.

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF ALLEGEDLY TRIPPED AND FELL CARRYING A PIPE DOWN A PLYWOOD RAMP IN THIS LABOR LAW 200 ACTION; THERE WERE QUESTIONS OF FACT WHETHER THE RAMP CONSTITUTED A DANGEROUS CONDITION AND WHETHER THE DEFENDANTS HAD CONSTRUCTIVE NOTICE OF IT (FIRST DEPT).

The First Department, reversing Supreme Court, determined there were questions of fact whether a plywood ramp was a dangerous condition and whether the defendants had constructive knowledge of the ramp in this Labor Law 200 action. Plaintiff allegedly tripped and fell when carrying a pipe down the ramp:

Defendants established their prima facie entitlement to judgment as a matter of law on the causes of action alleging a violation of Labor Law § 200 and common-law negligence by demonstrating that they did not have authority to supervise or control the means and methods of plaintiff's work. However, to the extent those causes of action are also predicated on the existence of a dangerous or defective condition (a defective plywood ramp), triable issues of fact remain as to whether the owner or general contractor had actual or constructive notice … . Defendants' witnesses all testified to a lack of knowledge of the plywood ramp, thereby establishing lack of actual notice. However, plaintiff raised a triable issue as to constructive notice by his deposition testimony and affidavit that he had seen the plywood ramp in place when he began working at the construction site, although he never traversed it prior to his accident, which occurred months into his work, and that defendants' trailers were located only 30 to 50 feet from where plaintiff's accident occurred. Contrary to defendants' insinuations, the number of witnesses contradicting plaintiff's account is not a basis for granting them summary

judgment; it merely raises issues of credibility for the fact-finder. Jackson v Hunter Roberts Constr., L.L.C., 2022 NY Slip Op 03321, First Dept 5-19-22

Practice Point: The First Department in this Labor Law 200 action noted that a conflict between the plaintiff's testimony and several of defendants' witnesses on the issue of constructive notice of the allegedly dangerous condition which caused plaintiff's slip and fall was not a sufficient ground for granting defendants' summary judgment motion. The conflict merely raised a credibility issue for trial which is not appropriately determined at the summary judgment stage.

LANDLORD-TENANT, LEASES, COVID SHUTDOWN AND RESTRICTIONS.

THE COVID EXECUTIVE ORDERS REQUIRING A SHUTDOWN AND REOPENING RESTRICTIONS DID NOT TERMINATE PLAINTIFF RETAIL STORE'S LEASE AS A MATTER OF LAW; THE DOCTRINES OF FRUSTRATION OF PURPOSE AND IMPOSSIBILITY DO NOT APPLY (FIRST DEPT).

The First Department determined plaintiff retail store (GAP) was not entitled to a termination of its lease by operation of law based upon the New York governor's COVID shutdown order and subsequent reopening restrictions. Plaintiff relied on the doctrines of frustration of purpose and impossibility, neither of which was deemed applicable:

Plaintiffs admittedly were allowed to provide curbside and in-store pickup on June 8, 2020, and to reopen at half capacity, with masking and social distancing, on June 22, 2020. Moreover, they represent that they were allowed to reopen fully from June 2021, albeit with the mask requirements reimposed during the winter months. Contrary to plaintiffs' contention, "frustration of purpose is not implicated by temporary governmental restrictions on in-person operations" … . …

We have already rejected plaintiff Gap's contention that Executive Order No. 202.8 "rendered it objectively impossible to perform its operations as a retail store" where, as here, Gap filed its complaint after reopening was allowed (Gap, Inc. v 170 Broadway Retail Owner, LLC, 195 AD3d at 577). In addition, even if the reopening restrictions made plaintiffs' ability to provide a flagship store experience

more difficult, the pandemic did not render their performance impossible, as "the leased premises were not destroyed" … . Gap, Inc. v 44-45 Broadway Leasing Co. LLC, 2022 NY Slip Op 03980, First Dept 6-16-22

Practice Point: The COVID executive orders requiring GAP to shutdown its retail store and then imposed restrictions on reopening did not terminate GAP's lease as a matter of law. The contract-law doctrines of frustration of purpose and impossibility did not apply.

LEGAL MALPRACTICE, FAILURE TO EXPLAIN CONTRACT CLAUSE.

PLAINTIFF ALLEGED DEFENDANTS-ATTORNEYS DID NOT ADVISE IT OF AN AMENDMENT TO THE COMMERCIAL LEASE WHICH EFFECTIVELY ELIMINATED THE OPTION FOR PLAINTIFF TO PURCHASE THE PROPERTY FOR $11.4 MILLION IF THE LANDLORD RECEIVES A BONA FIDE PURCHASE OFFER; THE LANDLORD IN FACT RECEIVED SUCH AN OFFER AND PLAINITFF EXERCISED ITS OPTION, BUT PAID $14.5 MILLION (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendants-attorneys' motion for summary judgment in this legal malpractice action should not have been granted. Plaintiff alleged defendants-attorneys did not advise it of an amendment to the commercial lease. The lease included an option to purchase the property for $11.4 million. The amendment extinguished the option to purchase for $11.4 million upon purchase of the property. The landlord received a bona fide purchase offer and plaintiff exercised its option, but paid $14.5 million:

Defendants' email attaching a marked-up copy of the relevant lease section does not establish as a matter of law that defendants advised plaintiff as to the meaning of the amendment, and the parties dispute the oral advice that was provided by defendants. … [T]he fact that plaintiff's agent read the amendment does not establish as a matter of law that defendants were not negligent … . Any evidence that plaintiff's agent, a sophisticated businessman, knew or should have known that the amendment was substantive despite defendants' advice that it was

"housekeeping" does not disprove defendants' negligence but is evidence that can be offered in mitigation of damages … .

… The fact that plaintiff sent the signed lease to the landlord without defendants' knowledge does not as a matter of law refute causation. Alrose Steinway, LLC v Jaspan Schlesinger, LLP, 2022 NY Slip Op 03310, First Dept 5-19-22

Purchase Point: Here the attorneys' alleged failure to advise the plaintiff of the significance of an amendment to a commercial lease raised a question of fact in this legal malpractice action. The amendment eliminated plaintiff's option to purchase the property for $11.4 million if the landlord received a bona fide purchase offer. The landlord received such an offer and plaintiff exercised its option to purchase, but paid $14.5 million.

MEDICAL MALPRACTICE, NEGLIGENCE, PRECONCEPTION NEGLIGENCE, WRONGFUL LIFE.

IN NEW YORK THERE ARE NO CAUSES OF ACTION FOR "PRECONCEPTION NEGLIGENCE" OR "WRONGFUL LIFE;" HERE MOTHER ALLEGED THE DRUG SHE HAD BEEN TAKING FOR EPILEPSY BEFORE SHE LEARNED SHE WAS PREGNANT CAUSED THE BABY TO BE BORN WITH SPINA BIFIDA (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiffs' actions for "preconception negligence" and "wrongful life" should have been dismissed. Plaintiff mother had been treated for epilepsy for years with a drug (VPA). She became pregnant while taking the drug and stopped taking it as soon as she learned she was pregnant. The baby was born with spina bifida:

Defendants treated the infant plaintiff's mother for epilepsy. To control her seizures, they prescribed valproic acid (VPA), which the mother had been taking for years while under the care of other physicians. Unbeknownst to all, while she was on VPA, the mother conceived the infant plaintiff. Although the VPA was discontinued when the mother learned that she was pregnant, the infant was born with spina bifida, for which she seeks to hold defendants responsible.

It is well established that an infant has no cause of action for preconception negligence … . The infant's claims that defendants failed to ensure that her mother was on birth control and monitored regularly for pregnancy while on VPA sound in "wrongful life," for which there is also no cause of action … . Z.L. v Mount Sinai Hosp., 2022 NY Slip Op 04112, First Dept 6-23-22

Practice Point: New York does not recognize actions for "preconception negligence" or "wrongful life." Here mother alleged the epilepsy drug she was taking until she learned she was pregnant caused her baby to be born with spina bifida. Both causes of action should have been dismissed.

MUNICIPAL LAW, RECKLESS DISREGARD, VEHICLE AND TRAFFIC LAW, POLICE CHASE.

PLAINTIFFS RAISED QUESTIONS OF FACT (1) WHETHER THE POLICE ACTED IN RECKLESS DISREGARD OF THE SAFETY OF OTHERS DURING A HIGH-SPEED CHASE AND IN FAILING TO NOTIFY THE DISPATCHER OF THE CHASE, AND (2) WHETHER THE CHASE WAS A PROXIMATE OR CONCURRENT CAUSE OF PLAINTFFS' ACCIDENT (THERE WAS NO CONTACT WITH EITHER VEHICLE INVOLVED IN THE CHASE) (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, in a full-fledged opinion by Justice Kapnick, determined plaintiffs raised questions of fact about whether the police acted in reckless disregard of the safety of others during a high-speed chase, and whether the chase of the BMW driven by Llewellyn was a proximate or concurrent cause of the accident (neither vehicle involved in the chase struck plaintiffs' vehicle):

… [T]he motion court properly held that the reckless disregard standard applied in evaluating the City defendants' conduct in pursuing Llewellyn (see Vehicle and Traffic Law §§ 1104[b], 1104[e]). However, the motion court erred in determining that "there is no evidence that the NYPD officers acted recklessly as a matter of law, and that the pursuit was not the proximate cause or a concurrent cause of this incident" … . …

Plaintiffs … submitted evidence that the City defendants initiated a high-speed chase of Llewellyn's BMW at close proximity after observing it run a single red light, and continued the high-speed chase, which included crossing over a double yellow line and running two red lights, in a known congested and heavily populated residential area which at the time of the pursuit had moderate to heavy traffic and numerous pedestrians…. . …

Plaintiffs also raised an issue of fact concerning whether the NYPD officers acted recklessly in failing to notify the radio dispatcher at the start of the pursuit and inform headquarters with relevant information, including the nature of the offense. Handelsman v Llewellyn, 2022 NY Slip Op 04093, First Dept 6-23-22

Practice Point: Here there were questions of fact whether the police acted in reckless disregard of the safety of others during a high-speed chase such that the city would be liable for plaintiffs' accident, and whether the high-speed chase was a proximate or concurrent cause of plaintiffs' accident (there was no contact with either vehicle involved in the chase). There were questions of fact whether the police drove "in reckless disregard of the safety of others" and whether their failure to notify the dispatcher of the chase was also reckless.

NEGLIGENCE, COMPEL INDEPENDENT MEDICAL EXAMINATION, MENTAL CONDITION IN CONTROVERSY.

DEFENDANT'S MOTION TO COMPEL PLANTIFF TO APPEAR FOR A PSYCHIATRIC EXAMINATION (INDEPENDENT MEDICAL EXAMINATION [IME]) SHOULD HAVE BEEN GRANTED BECAUSE PLAINTIFF HAD PLACED HER MENTAL CONDITION IN CONTROVERSY; DEFENDANT'S MOTION TO VACATE THE NOTE OF ISSUE SHOULD HAVE BEEN GRANTED BECAUSE DISCOVERY WAS NOT COMPLETE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined defendant's motions to compel plaintiff to appear for an independent medical examination (IME) and to vacate the note of issue should have been granted:

We find that plaintiff's mental condition is, in fact, in controversy. Plaintiff requests compensatory damages only for her alleged emotional distress, and she has testified that she experienced depression, anxiety, and dizziness, as well as headaches brought on by severe mental anguish (CPLR 3121[a]). As a result, a mental examination by a psychiatrist is warranted to enable defendants to rebut plaintiff's causes of action for emotional distress … .

… [W]e grant defendants' motion to vacate the note of issue. Contrary to the certificate of readiness, discovery had not been completed, as plaintiff had not yet complied with the court's directive to submit a Jackson affidavit detailing the process she had undertaken to search her social media post … . Lopez v Bendell, 2022 NY Slip Op 03990, First Dept 6-21-22

Practice Point: Plaintiff had placed her mental condition in controversy by testifying about depression, anxiety, dizziness and headaches caused by mental anguish. Defendant was therefore entitled to compel a psychiatric exam (an independent medical examination [IME]). Here defendant's motion to vacate the note of issue should have been granted because defendant's discovery was not complete.

NEGLIGENCE, SLIP AND FALL, LACK OF CONSTRUCTIVE NOTICE.

RARE SLIP AND FALL WON BY THE DEFENDANT AT SUMMARY JUDGMENT BY DEMONSTRATING A LACK OF CONSTRUCTIVE NOTICE OF THE PRESENCE OF THE BOX WHICH ALLEGEDLY CAUSED PLAINTIFF'S FALL (FIRST DEPT).

The First Department, reversing Supreme Court, determined defendant demonstrated it did not have constructive notice of the presence of a cardboard box over which plaintiff allegedly tripped and fell—a rare slip and fall case where a lack of constructive notice was successfully demonstrated at the summary judgment stage:

Defendant sustained its initial burden of showing that it lacked notice of the presence of the cardboard box near the walkway of its building before the accident

and that it observed a reasonable cleaning routine … .. Plaintiff testified that she did not see the box when she left work at 4:00 p.m. on the day before her fall, and defendant's caretaker stated that it was not there when he left work at 4:30 p.m. on the same day. The caretaker also testified that he cleaned the area twice a day, first thing in the morning and last thing at night. Thus, the box could have been deposited near the walkway a few minutes before plaintiff's accident … . Defendant is not required to patrol the area 24 hours a day … , and plaintiff failed to show that the cleaning schedule described by the caretaker was "'manifestly unreasonable'" … .

Plaintiff's argument that the caretaker admitted that tenants regularly left garbage near the walkway and that it was a recurring problem is unavailing. The caretaker's testimony shows that defendant was aware of the general problem, not that it was aware of the specific presence of the cardboard box at issue, and that it addressed the problem by having the caretaker clean the area twice a day … . Rodriguez v New York City Hous. Auth., 2022 NY Slip Op 03461, First Dept 5-26-22

Practice Point: In this slip and fall case, the defendant, at the summary judgment stage, presented evidence, including the plaintiff's deposition testimony, which demonstrated the box which allegedly caused plaintiff's fall was not in the walkway long enough to raise a question of fact whether defendant was or should have been aware of it.

NEGLIGENCE, SLIP AND FALL, STORM IN PROGRESS, EXPERT OPINION.

DEFENDANT PROPERTY OWNER DEMONSTRATED THAT THE STORM IN PROGRESS DOCTRINE APPLIED IN THIS SLIP AND FALL CASE (A PROPERTY OWNER WILL NOT BE LIABLE FOR A SNOW AND ICE CONDITION UNTIL A REASONABLE TIME AFTER THE PRECIPITATION HAS STOPPED); THE BURDEN THEN SHIFTED TO PLAINTIFF TO SHOW DEFENDANT'S EFFORT TO REMOVE SNOW HOURS BEFORE THE FALL CREATED THE DANGEROUS CONDITION; TO MEET THAT BURDEN AN EXPERT AFFIDAVIT SHOULD HAVE BEEN, BUT WAS NOT, SUBMITTED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the property owner's (Site A's) motion for summary judgment in this ice and snow slip and fall case should have been granted. The evidence demonstrate it was still snowing at the time of plaintiff's fall and plaintiff did not submit an expert affidavit demonstrating how defendant's snow removal efforts exacerbated the condition:

Site A made a prima facie showing of entitlement to summary judgment based on the storm-in-progress doctrine, because the meteorological data, its expert meteorological affidavit, and plaintiff's deposition testimony annexed to its moving papers establish that there was a storm in progress when the accident occurred … . …

Although the burden shifted to plaintiff to establish that Site A created the alleged condition or made it more hazardous by attempting to remove the precipitation from the driveway about five hours before he fell, plaintiff failed to meet that burden as he submitted no expert affidavit explaining how Site A, by not salting or sanding the area before the accident, could have created or exacerbated the naturally occurring ice condition … . Colon v Site A – Wash. Hgts., 2022 NY Slip Op 03173, First Dept 5-12-22

Practice Point: Here in this ice and snow slip and fall case, the defendant property owner presented prima facie proof that the storm-in-progress doctrine applied because it was snowing hours before plaintiff fell and was still snowing when plaintiff fell. The burden then shifted to the plaintiff to show that defendant's snow

removal efforts undertaken hours before the fall exacerbated the dangerous condition. Because plaintiff did not submit an expert affidavit on that issue, plaintiff's burden of proof was not met.

NEGLIGENCE, TRAFFIC ACCIDENTS, FAILURE TO YEILD.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC-ACCIDENT CASE SHOULD HAVE BEEN GRANTED; THE EVIDENCE ESTABLISHED DEFENDANT FAILED TO STOP AT A STOP SIGN AND FAILED TO SEE WHAT SHOULD HAVE BEEN SEEN (FIRST DEPT).

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this intersection traffic-accident case should have been granted:

Plaintiffs established their prima facie entitlement to partial summary judgment by averring that, at the time of the accident, their vehicle was traveling westbound through an intersection at 91st Avenue in Queens, when defendants' vehicle failed to stop at a designated stop sign and struck the middle of the driver's side of plaintiffs' vehicle … . A presumption of negligence arises from the failure of a driver at a stop sign to yield the right of way to the vehicle on the highway in violation of Vehicle and Traffic Law § 1142 … . …

Defendants' claim that defendant Bennett stopped at the stop sign, and checked for oncoming traffic but did not see plaintiffs' vehicle until it suddenly appeared in front of her as she proceeded into the intersection, fails to rebut the presumption of negligence arising from her failure to yield the right of way to plaintiffs' vehicle, but instead indicates that she was negligent in failing to see what was there to be seen … . Samnath v Lifespire Servs., Inc., 2022 NY Slip Op 02643, First Dept 4-21-22

Practice Point: Failure to stop at a stop sign raises a presumption of negligence in an intersection traffic-accident case. Proceeding into the intersection and striking a car which has the right-of-way constituted a negligent failure to see what should have been seen.

NEGLIGENCE, TRAFFIC ACCIDENTS, ROADWAY DESIGN.

THE NEGLIGENT ROADWAY DESIGN CAUSE OF ACTION IN THIS TRAFFIC ACCIDENT CASE SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFFS ALLEGED THE ABSENCE OF TURNOUTS FOR DISABLED VEHICLES CREATED A DANGEROUS CONDITION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined the negligent roadway design cause of action against the city should not have been dismissed in this traffic accident case. Plaintiffs alleged the absence of turnouts for disabled vehicles on Harlem River Drive created a dangerous condition:

Defendants failed to establish that they were unaware of dangerous highway conditions on the northbound Harlem River Drive where the decedent's accident occurred … , or that the previous accidents in that area of the Drive disclosed by the record were not of a similar nature to the decedent's accident, or that the causes of those accidents were not similar to the alleged design-related cause(s) of the decedent's accident … .

… [I]n or about 1983, "the City had received a study recommending that shoulders be added to this section of the Harlem River Drive, and even the City's engineer admitted that the absence of a shoulder or other place of refuge created an unsafe traffic condition" … . … [T]he record in this case discloses that at least 11 more motor vehicle accidents occurred on the Harlem River Drive between 165th and 183rd Streets between October 1990 and September 1993 that were "related to disabled vehicles in the travel lanes that could be directly attributed to the Drive's lack of shoulders." The record also reveals that … the City has justified its inaction by minimizing the significance of pertinent accident data, suggesting that the safety benefit of adding shoulders or turnouts to the Harlem River Drive would be outweighed by the onerousness of the undertaking, and estimating a multimillion-dollar cost of the endeavor. A municipality breaches its "nondelegable duty to keep its roads reasonably safe . . . when [it] is made aware of a dangerous highway condition and does not take action to remedy it" … . Chowdhury v Phillips, 2022 NY Slip Op 03067, First Dept 5-10-22

Practice Point: Where, as here, the municipality (or the state) has undertaken studies which concluded a roadway design, here the absence of turnouts for disabled vehicles, created a dangerous condition, the city (or the state) will be liable for an accident caused by that dangerous condition.

NEGLIGENCE, TRAFFIC ACCIDENTS, SOVEREIGN IMMUNITY.

PLAINTIFF WAS STRUCK BY A NEW JERSEY TRANSIT CORP (NJT) BUS IN NEW YORK; NJT IS AN ARM OF THE STATE OF NEW JERSEY AND THE SOVEREIGN IMMUNITY DOCTRINE APPLIES; HOWEVER, UNDER NEW JERSEY LAW PLANTIFF CANNOT SUE IN NEW JERSEY BECAUSE THE CAUSE OF ACTION DID NOT ARISE THERE; APPLYING THE FORUM NON CONVENIENS DOCTRINE AS AN ANALYTICAL FRAMEWORK, PLAINTIFF'S NEW YORK LAWSUIT WAS ALLOWED TO GO FORWARD (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, over an extensive two-justice dissenting opinion, determined the doctrine of sovereign immunity did not require the dismissal of plaintiff's suit against the New Jersey Transit Corp. (NJT) in this bus-pedestrian accident case. Plaintiff was struck by the NJT bus in New York. The plaintiff, under New Jersey law, could not sue in New Jersey because the cause of action did not arise in New Jersey. The First Department held that the forum non coveniens criteria provided an appropriate analytical framework:

We have previously held that NJT is an arm of the State of New Jersey and that, as such, it is entitled to invoke the doctrine of sovereign immunity … . * * *

… Should we dismiss a personal injury action on the ground of sovereign immunity when the action cannot be commenced in the sovereign's own courts because the injury arose outside of the sovereign's borders?

We resolve this issue by analogizing it to the legal framework for the forum non conveniens doctrine. Among the factors to consider in determining whether to dismiss an action under this doctrine, with no single factor controlling, are the burden on New York courts, the potential hardship to the defendant, the

availability of an alternate forum in which the plaintiff may bring suit, the residency of the parties, the forum in which the cause of action arose, and the extent to which the plaintiff's interests may otherwise be properly served by pursing the claim in New York … . Colt v New Jersey Tr. Corp., 2022 NY Slip Op 03343, First Dept 5-24-22

Practice Point: A bus operated by the New Jersey Transit Corp (NJT) struck plaintiff in New York. NJT is an arm of the state of New Jersey to which the sovereign immunity doctrine applies. But, under New Jersey law, the suit cannot be brought in New Jersey. After analyzing the case using the forum non coveniens criteria, the First Department allowed the New York lawsuit to go forward.

NEGLIGENT-HIRING, DOCTOR EMPLOYED BY HOSPITAL, PATIENT ASSAULTS.

NEGLIGENT-HIRING, HOSPITAL LIABILITY FOR ASSAULT BY DOCTOR, DISCOVERY, PRIVILEGE. PLAINTIFF IN THIS NEGLIGENT-HIRING ACTION AGAINST THE HOSPITAL WHICH EMPLOYED A DOCTOR WHO ALLEGEDLY SEXUALLY ASSAULTED HER AND OTHER PATIENTS SOUGHT DISCOVERY; THE IDENTITIES OF THE OTHER ASSAULTED PATIENTS WERE NOT PROTECTED BY THE DOCTOR-PATIENT PRIVILEGE; PARTY STATEMENTS WERE NOT PROTECTED BY THE QUALITY ASSURANCE PRIVILEGE; AND PLAINTIFF WAS ENTITLED TO THE NAMES OF THE DOCTOR'S COWORKERS (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined plaintiff, who, along with other patients, was allegedly sexually assaulted by a doctor, Newman, employed by defendant hospital (Mount Sinai), was entitled to certain discovery. Plaintiff sought discovery of party statements, incident reports, the identities of the other assaulted patients, and the names of the doctor's coworkers at the time of each assault. Plaintiff was entitled to documents not protected by the quality assurance privilege. The doctor-patient privilege did not extend to the identities of the other assaulted patients. And the names of the doctor's coworkers

were in a statement prepared by the Health and Human Services Department to which plaintiff was entitled:

We reject Mount Sinai's assertion that privilege excuses it from complying with plaintiff's discovery demands regarding the identities of the other three patients that defendant Newman assaulted. The doctor-patient privilege provided for by CPLR 4504(a) protects information relevant to a patient's medical treatment, but the privilege does not cover incidents of abuse not part of a patient's treatment … . Moreover, while the court stated that disclosure would violate HIPAA, federal regulations provide for disclosure of HIPAA-protected documents subject to a showing that the party seeking disclosure has made a good faith effort to secure a qualified protective order, and plaintiff has done so in each of her motions (45 CFR 164.512[e][ii], [v] …).

… [T]he identities of defendant Newman's coworkers at the times of each of the assaults are relevant and must be disclosed, as those coworkers may have information concerning his conduct … . The names of the coworkers were contained in a statement of deficiencies prepared by Department of Health and Human Services, Center for Medicare and Medicaid Services, and plaintiff is entitled to production of that statement, redacted to remove conclusions of law and opinions of the Department of Health and Human Services … . Newman v Mount Sinai Med. Ctr., Inc., 2022 NY Slip Op 03327, First Dept 5-19-22

Practice Point: Here plaintiff was allegedly sexually assaulted by a doctor who pled guilty to assaulting other patients. Plaintiff sued the hospital which employed the doctor under a negligent hiring and retention theory. The names of the other assaulted patients were not protected by the physician-patient privilege. Party statements were not protected by the quality assurance privilege. And plaintiff was entitled to the names of the doctor's coworkers.

PRODUCTS LIABILITY, ROUTER, SEVERED THUMB.

IN THIS PRODUCTS LIABILITY ACTION WHERE A ROUTER SEVERED PLAINTIFF'S THUMB, THE FAILURE-TO-WARN CAUSE OF ACTION BASED ON THE MANUAL SHOULD HAVE BEEN DISMISSED BECAUSE PLANTIFF NEVER READ IT; THE GENERALIZED FAILURE-TO-WARN CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; DISAGREEING WITH THE SECOND DEPARTMENT, THE DESIGN-DEFECT CAUSE OF ACTION BASED ON THE LACK OF AN INTERLOCK DEVICE PROPERLY SURVIVED SUMMARY JUDGMENT (FIRST DEPT).

The First Department, modifying Supreme Court in this products liability case where plaintiff severed his thumb using a router, determined: (1) the failure-to-warn cause of action based upon the product manual should have been dismissed because plaintiff testified he never read it; (2) the generalized failure-to-warn cause of cause properly survived summary judgment; and (3) the design defect cause of action alleging the router should have had an interlock device which would shut it down properly survived summary judgment. Whether plaintiff was familiar with the risk of amputation such that the defendant was relieved of the duty to warn is a question of fact. And whether the lack of an interlock device is a design defect is a question of fact (disagreeing with decisions from the Second Department):

… [T]he record contains evidence that plaintiff had knowledge of power tools other than the router and the general hazards associated with cutting devices. Plaintiff also had used the router on one prior occasion at the premises before the accident. However, it is for a jury, not the court, to determine whether, based on the evidence and testimony presented, plaintiff had sufficient knowledge of the specific hazards from the use of the router to relieve defendants of their duty to warn of them. Further, whether the router presented an open and obvious danger is also a jury issue. * * *

The branch of defendants' motion for summary judgment dismissing the design defect claim based on the lack of an interlock was also properly denied. We recognize that the Second Department has held that such a claim is per se unviable in Chavez v Delta Intl. Mach. Corp. (130 AD3d 667 [2d Dept 2015]), Patino v Lockformer Co. (303 AD2d 731 [2d Dept 2003]), and Giunta v Delta Intl. Mach.

(300 AD2d 350 [2d Dept 2002]). Chavez (at 669), the most recent of these cases, cited Patino and Giunta for this proposition, and in Giunta (at 351), the Second Department held that a theory of liability that a "table saw should have been designed with an interlock which would have prevented the motor from starting if the blade guard was off. . . . was explicitly rejected as a matter of law in David v Makita U.S.A. (233 AD2d 145 [1st Dept 1996]), and implicitly rejected in Banks v Makita, U.S.A. (226 AD2d 659 [2d Dept 1996], lv denied 89 NY2d 805 [1996])."

However, we read neither David nor Banks as supporting Giunta's conclusion. Vasquez v Ridge Tool Pattern Co., 2022 NY Slip Op 03488, First Dept 5-31-22

Practice Point: In this products liability case where plaintiff lost a thumb using a router, there was a question of fact whether plaintiff was familiar enough with the danger of amputation that the defendant should be relieved of liability for the failure to warn. Here the First Department, disagreeing with the Second Department, determined the absence of an interlock device which would shut the router down raised a question of fact on the design-defect cause of action.

REAL ESTATE, CONTRACT LAW, SPECIAL FACTS DOCTRINE.

PURSUANT TO THE SPECIAL FACTS DOCTRINE, THE PURCHASE AND SALE AGREEMENT FOR THIS "AS IS" SALE OF A BUILDING RELEASED THE SELLER FROM LIABILIITY FOR NEGLIGENCE AND NEGLIGENT MISREPRESENTATION, BUT NOT FOR FRAUD (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined Supreme Court properly found that the Purchase and Sale Agreement (PSA). Pursuant to the special facts doctrine, did not release the seller of the building from a claim based on fraud (building was sold "as is"). But the PSA did release the seller from liability for negligence or negligent misrepresentation:

Plaintiff's negligence and negligent misrepresentation claims against the seller are barred by the Purchase and Sale Agreement (PSA). In section 6.02 of the PSA, plaintiff agreed that it had not relied on any representations as to the condition of

the building, and agreed to purchase the building "as is." Although Supreme Court correctly found that under the special facts doctrine, section 6.02 does not serve to bar the causes of action based on fraud, the provision does, in fact, bar the causes of action based on negligence (compare TIAA Global Invs., LLC v One Astoria Sq., 127 AD3d 75, 87-88 [1st Dept 2015] [under special facts doctrine, which provides that a contractual disclaimer cannot preclude a fraud claim when the underlying facts are peculiarly within the defendant's knowledge, "as is" and "no reliance" provisions in a real estate sales contract did not require dismissal of fraud claim under CPLR 3211]). Similarly, while the release in PSA section 19.15 exempts fraud claims from the scope of the release, plaintiff released the seller for claims relating to any defects in the building "whether the result of negligence or otherwise." 470 4th Ave. Fee Owner, LLC v Adam Am. LLC, 2022 NY Slip Op 03204 First Dept 5-17-22

Practice Point: Here the building was sold "as is." A provision in the Purchase and Sale Agreement (PSA) released the seller from liability for negligence or negligent misrepresentation. But, pursuant to the special facts doctrine, the PSA did not release the seller from a claim alleging fraud.

SECURITIES, CIVIL PROCEDURE.

PLAINTIFFS STATED CAUSES OF ACTION FOR VIOLATIONS OF THE SECURITIES ACT BASED UPON ALLEGEDLY MISLEADING INFORMATION IN THE SECONDARY PUBLIC OFFERING (SPO) (FIRST DEPT).

The First Department determined plaintiffs, who purchased securities based upon allegedly inaccurate information in defendants' secondary public offering (SPO), stated causes of action for violations of the Securities Act. The court noted that the heightened pleading requirements of CPLR 3015(b) do not apply to the Securities Act violations alleged in the complaint:

… [C]laims for violations of sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (15 USC §§ 77k, 77l[a][2], and 77o) are not subject to the heightened pleading requirements of CPLR 3016(b) … .

… [T]he alleged misstatements in the SPO cannot be deemed forward-looking or mere puffery as a matter of law because the complaint alleges that defendants knew at the time of the SPO that present facts rendered statements in the SPO misleading or false. The generic, boilerplate risk warnings in the offering documents do not shield defendants from liability … .

… [P]laintiff adequately]alleges that, once [defendant] spoke about its "significant exposure to emerging markets in Asia," it was obligated to disclose the "whole truth," namely that its mobile solutions business in China was actually experiencing a sharp decline at the time of the SPO … . Erie County Empls.' Retirement Sys. v NN, Inc., 2022 NY Slip Op 03473, First Dept 5-31-22

Practice Point: The heightened pleading requirements for fraud (CPLR 3016) do not apply to the causes of action here alleging violations of the Securities Act—allegedly misleading information in a secondary public offering (SPO).