CasePrepPlus

April 26, 2017

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FIRST DEPARTMENT

ATTORNEYS, CIVIL PROCEDURE, NEGLIGENCE.

DEFENSE COUNSEL'S UNACCEPTABLE CONDUCT IN THIS PERSONAL INJURY TRIAL WARRANTED THE TRIAL JUDGE'S ORDERING A NEW TRIAL (AFTER THE VERDICT) IN THE INTERESTS OF JUSTICE.

The First Department, in a full-fledged opinion by Justice Renwick, with a concurring opinion, determined the trial judge properly granted plaintiff's motion for a new trial in this personal injury case because of the unacceptable behavior of defense counsel. Plaintiff alleged she was struck by a bus while crossing the street, injuring her back and knee. The jury found the defendant 70% at fault but found that the injuries were not permanent and awarded nothing for future pain and suffering. The First Department concluded the verdict was probably a compromise and the defense attorney's conduct deprived plaintiff of a fair trial: "In ordering a new trial, the trial court concluded that defense counsel's conduct was 'so extreme and pervasive as to make it inconceivable that it did not substantially affect the fairness of the trial.' Also, such conduct 'occurred in front of the jury, created a hostile atmosphere and persisted despite the court threatening to impose sanctions and to hold counsel in contempt.' The court then cited the multiple instances of defense counsel's misconduct: 'frequent assertions of personal knowledge of facts in issue in violation of Rules of Professional Conduct, Rule 3.4(d)(2)'; his many speaking objections, with one of them flagrantly misstating the law; his motion for a mistrial twice in front of a jury; his unfair and false denigration of Dr. Davy as not being a 'real surgeon'; his pattern of interrupting and speaking over the court despite the court's directions to stop; and his interruption of the trial by demanding that plaintiff's counsel move a chart she was showing to the jury to accommodate his refusal to move from his seat. The court further noted that, although not reflected in the record, defense counsel would use a 'sneering, denigrating tone' while cross-examining Dr. Davy and plaintiff's other witnesses. The court also noted as not reflected in the record the 'one of voice' directed at plaintiff's counsel, witnesses, and the court, or the 'volume of his voice'; the court noted that it had admonished counsel 'not to scream' on several occasions. The court continued that not fully reflected in the record was the extent to which defense counsel would continue talking after being directed to stop." ***Smith v. Rudolph*, 2017 N.Y. Slip Op. 02957, 1st Dept 4-18-17**

MEDICAL MALPRACTICE, CIVIL PROCEDURE, PERSONAL INJURY.

NEW THEORY COULD NOT BE CONSIDERED IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION, MOTION SHOULD HAVE BEEN GRANTED.

The First Department, over a dissent, determined defendants' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff raised a new theory in response to the summary judgment motion. The First Department held that the new theory could not be entertained by searching the record and therefore could not support the denial of summary judgment or an amended bill of particulars: "Once the defendants met their burden for summary judgment, plaintiff was obligated to rebut defendant's prima facie showing with medical evidence demonstrating that the defendants departed from accepted medical practice ... . Here, plaintiff failed to address the opinions of defendants' experts or defendants' prima facie showing that the result from the complicated, extensive double jaw surgery was anything but a reasonable result. Thus, there was no basis to preclude a grant of summary judgment in favor of defendants ... . Instead, plaintiff proffered a new theory, based on the report of an expert otolaryngologist, who opined that Dr. Behrman had failed to take into account plaintiff's primary immune deficiency in planning the surgery, that he should have initially consulted with an immunologist who would have performed testing before surgery, and that he failed to refer plaintiff after surgery to an ENT doctor, who would have consulted with an immunologist. Plaintiff's expert asserted that these failures led to the development of an infection, which caused plaintiff's hearing loss, numbness, and teeth misalignment. It is axiomatic that a plaintiff cannot defeat a summary judgment motion that made out a prima facie case by merely asserting, without more, a new theory of liability for the first time in the opposition papers ... . Since plaintiff's opposition papers were insufficient absent this new theory of recovery, defendants' summary judgment motion should have been granted ...". ***Biondi v. Behrman*, 2017 N.Y. Slip Op. 03039, 1st Dept 4-20-17**

MEDICAL MALPRACTICE, EVIDENCE, PERSONAL INJURY.

PLAINTIFF'S EXPERT, A GENERAL SURGEON, DID NOT ASSERT KNOWLEDGE OF GASTROENTEROLOGY AND THEREFORE DID NOT RAISE A QUESTION OF FACT IN THE FACE OF DEFENDANTS' GASTROENTEROLOGY EXPERTS.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's expert (Dr. Befeler) was a general surgeon and did not assert any knowledge of gastroenterology. His affidavit was not sufficient to raise a question of fact in the face of plaintiff's gastroenterology experts: "Here, there is no indication that Dr. Befeler possessed the requisite background and knowledge to furnish a reliable opinion concerning the practice of gastroenterology ... . While a gastroenterologist may well be qualified to render an opinion on a surgical procedure involving the gastrointestinal system, it cannot be said that a general surgeon is qualified to opine on any specialty simply because the specialist may eventually refer the patient for surgery. Indeed, Dr. Befeler averred only that his conclusion that both doctors 'were negligent in failing to follow standard and accepted medical procedures' was based upon his 'review of the above records, [his] education, years of training, and [his] forty year experience in the field of General Surgery.' Nowhere did the doctor set forth any experience in gastroenterology or detail the standard of care for that specialty." ***Bartolacci-Meir v. Sassoon*, 2017 N.Y. Slip Op. 03040, 1st Dept 4-20-17**

SECOND DEPARTMENT

ATTORNEYS, FAMILY LAW.

ALTHOUGH THE DEFENDANT ATTORNEY'S CONTINGENCY FEE IN THIS EQUITABLE DISTRIBUTION MATTER WAS UNENFORCEABLE, THE ATTORNEY MAY BE ENTITLED TO PAYMENT UNDER A QUANTUM MERUIT THEORY.

The Second Department determined plaintiff was entitled to summary judgment on liability in this action against plaintiff's attorney alleging violation of ethics rules in setting a contingency fee in an equitable distribution matter. However the attorney may be entitled to payment under a quantum meruit theory: "The plaintiff demonstrated, prima facie, through the submission of the parties' retainer agreement, that the defendant charged her a contingency fee in violation of rule 1.5(d)(5)(i) of the Rules of Professional Conduct (22 NYCRR 1200.0). Because the defendant's fee was to be 'determined by reference to the amount of . . . equitable distribution' in the form of the money judgment and subsequent enforcement stipulation, the retainer agreement violated rule 1.5(d)(5)(i) of the Rules of Professional Conduct (22 NYCRR § 1200.0). Contrary to the defendant's argument, the enforcement of an equitable distribution award reduced to a money judgment is not exempt from rule 1.5(d)(5)(i) … . The plaintiff also demonstrated prima facie that the defendant violated the rules set forth in 22 NYCRR 1400.3. In that respect, the retainer agreement did not specify how the defendant's fee would be calculated if the plaintiff discharged the defendant 'during the course of the representation' and did not specify how frequently itemized bills would be provided (22 NYCRR 1400.3). Additionally, the plaintiff did not receive itemized bills from the defendant ... . In opposition, the defendant failed to raise a triable issue of fact." ***Medina v. Kraslow*, 2017 N.Y. Slip Op. 02979, 2nd Dept 4-19-17**

CRIMINAL LAW.

DEFENDANT WAS NOT INFORMED OF THE DEPORTATION CONSEQUENCES OF HIS GUILTY PLEA, MATTER REMITTED, PROCEDURE ON REMITTAL EXPLAINED.

The Second Department sent the matter back because defendant was not informed of the deportation consequences of his guilty plea. The court explained the relevant law and procedure: "In *People v. Peque* (22 NY3d 168), the Court of Appeals held that, as part of its independent obligation to ascertain whether a defendant is pleading guilty voluntarily, a trial court must alert a noncitizen defendant that he or she may be deported as a consequence of the plea of guilty (see id. at 193). Although no particular litany is required, '[t]he trial court must provide a short, straightforward statement on the record notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, he or she may be deported upon a guilty plea' (id. at 197). Here, we agree with the defendant that the County Court did not provide him with such a statement on the record. However, contrary to the defendant's contention, he is not entitled to reversal of the judgment of conviction at this juncture. In order to withdraw or obtain vacatur of a plea based upon a *Peque* error, 'a defendant must show that there is a reasonable probability that he or she would not have pleaded guilty and would have gone to trial had the trial court informed the defendant of potential deportation' (id. at 198). Accordingly, we remit the matter to the County Court, Suffolk County, to afford the defendant an opportunity to move to vacate his plea, and for a report by the County Court thereafter. Any such motion shall be made by the defendant within 60 days after the date of this decision and order, and upon such motion, the defendant shall have the burden of establishing that there is a 'reasonable probability' that he would not have pleaded guilty had the court advised him of the possibility of deportation (id. at 176 …). In its report to this Court, the County Court shall state whether the defendant moved to vacate his plea of guilty, and if so, shall include its findings as to whether the defendant has made the requisite showing to entitle him to vacatur of the plea ...". ***People v. Lopez-Alvarado*, 2017 N.Y. Slip Op. 03018, 2nd Dept 4-19-17**

CRIMINAL LAW, EVIDENCE.

COURT REJECTS ARGUMENT DEFENDANT DID NOT CONSENT TO THE RELEASE TO THE PROSECUTION OF RECORDINGS OF HIS PHONE CALLS FROM JAIL.

The Second Department, over a dissent, rejected defendant's argument that he did not consent to the release to the prosecution of recordings of his phone conversations from jail. Defendant acknowledged he was aware the conversations could be monitored and recorded, but noted that the stated reason for recording in the jail handbook was for jail security. The Second Department instructed that the better practice would be to notify inmates the recordings could be turned over to the prosecution: "We note that 'convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison,' and certainly 'pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that . . . are enjoyed by convicted prisoners' ... . Since any concern that the notice provided to inmates by the DOC is inadequate can be readily ameliorated by an express notification that the recorded calls may be turned over to the District Attorney, the better practice going forward may be for the DOC to include such a warning ... . Rather, the trial court must weigh the probative value of the recordings against the potential for prejudice to the defendant ... . '[D]ue to the possibility of prejudice inherent in the prosecutor's use of inmate recordings, the trial judge's role as gatekeeper remains unchanged and necessary to ensure compliance with constitutional mandates and the usual rules of evidence and criminal procedure' ...". ***People v. Diaz*, 2017 N.Y. Slip Op. 03013, 2nd Dept 4-19-17**

EMPLOYMENT LAW, PERSONAL INJURY.

PHOTOGRAPHER WAS AN INDEPENDENT CONTRACTOR NOT AN EMPLOYEE, NO VICARIOUS LIABILITY FOR INJURY CAUSED BY PHOTOGRAPHER.

The Second Department determined a wedding photographer (Kataiev) was an independent contractor and the company which hired him (HR) could not be vicariously liable for injuries to plaintiff allegedly caused by the photographer: " 'The general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts' ... . 'The determination of whether an employer-employee relationship exists turns on whether the alleged employer exercises control over the results produced, or the means used to achieve the results. Control over the means is the more important consideration' ... . 'Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule' ... . ' [I]ncidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship'... . Here, HR demonstrated, prima facie, that Kataiev was hired as an independent contractor. The transcripts of the deposition testimony submitted in support of HR's motion established that HR hired Kataiev only for the wedding, that HR did not provide Kataiev with health insurance, that HR did not provide Kataiev with a W-2 form, that Kataiev used his own equipment at the wedding, that HR paid Kataiev in cash, and that HR did not withhold Social Security taxes or employment taxes from the money paid to Kataiev ... . Additionally, the evidence submitted by HR demonstrated, prima facie, that HR exercised only minimal or incidental control over Kataiev's work ...". ***Weinfeld v. HR Photography, Inc.*, 2017 N.Y. Slip Op. 03038, 2nd Dept 4-19-17**

FAMILY LAW.

BIOLOGICAL FATHER ESTOPPED FROM ASSERTING PATERNITY.

The Second Department determined the acknowledged biological father's paternity petition was properly dismissed in the best interests of the child: "Here, the Family Court properly determined that it was in the best interests of the child to deny the petition. Among other things, the petitioner provided limited financial support for the child and had seen the child only approximately 20 times over the course of the child's life. Additionally, the respondent's husband, whose name appears on the birth certificate, had assumed the role of the child's father, providing for the child financially and emotionally and living with the respondent and their other children as a family unit consistently for the entirety of the child's life. As such, although the parties agreed that the petitioner was the child's biological father, the court properly estopped the petitioner from asserting any paternity claim in the child's best interests ...". ***Matter of Carlos O. v. Maria G.*, 2017 N.Y. Slip Op. 02993, 2nd Dept 4-19-17**

FAMILY LAW, ATTORNEYS.

PARTY FACING POSSIBLE INCARCERATION IN SUPPORT PROCEEDINGS IS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL, FATHER HERE DID NOT RECEIVE MEANINGFUL REPRESENTATION.

The Second Department determined father had a right to meaningful assistance of counsel in proceedings stemming from a failure to pay court-ordered child support. The court further found father's counsel was ineffective because no attempt was made to submit proof father could not work due to his mental illness: "With respect to this proceeding, Family Court Act § 262(a)(vi) extends the right to counsel to 'any person in any proceeding . . . in which an order or other determination is being sought to hold such person . . . in willful violation of a previous order of the court,' because such persons potentially may be

incarcerated. The possibility of incarceration exists where a party fails to comply with a support order, since Family Court Act § 454(3) authorizes the court, upon a finding that a respondent 'has willfully failed to obey any lawful order of support,' to 'commit the respondent to jail for a term not to exceed six months.' The statutory right to counsel afforded under Family Court Act § 262(a)(vi) would be 'meaningless unless the assistance of counsel is effective' ... . Accordingly, in support proceedings such as this one in which a party faces the potential of imprisonment and has a statutory right to counsel, we hold that the appropriate standard to apply in evaluating a claim of ineffective assistance is the meaningful representation standard." ***Matter of Nassau County Dept. of Social Servs. v. King*, 2017 N.Y. Slip Op. 02992, 2nd Dept 4-19-17**

FAMILY LAW, EVIDENCE.

CHILD'S OUT OF COURT STATEMENTS ABOUT FATHER'S ABUSE OF MOTHER SUFFICIENTLY CORROBORATED BY EVIDENCE FROM A PRIOR NEGLECT PROCEEDING, PETITION SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Family Court, determined a child's out of court statements about father's physical abuse of mother was sufficiently corroborated by similar evidence concerning the children in a prior neglect proceeding: "A preponderance of the evidence established that the father neglected the subject children by perpetrating acts of domestic violence against the mother in their presence ... . Contrary to the Family Court's determination, the child's out-of-court statement was sufficiently corroborated. Family Court Act § 1046(a)(vi) provides, in part, that 'previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect. Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration.' Family Court Act § 1046(a)(i) provides, in part, that 'proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of . . . the respondent.' The child's statement was corroborated by, among other evidence, proof of the father's prior neglect of the children by perpetrating acts of domestic violence against the mother in their presence ... . Additionally, contrary to the court's further determination, the evidence was sufficient to establish that the father's acts of domestic violence against the mother in the children's presence impaired, or created an imminent danger of impairing, the children's physical, mental, or emotional condition … . Moreover, a negative inference is properly drawn from the father's failure to testify …", ***Matter of Jubilee S. (James S.)*, 2017 N.Y. Slip Op. 03006, 2nd Dept 4-19-17**

LABOR LAW-CONSTRUCTION LAW.

BED OF A PICKUP TRUCK IS A PROPER PLATFORM WITHIN THE MEANING OF THE INDUSTRIAL CODE, PLAINTIFF'S RIDING ON THE BED OF THE PICKUP WHILE DOING DEMOLITION WORK, THEREFORE, DID NOT VIOLATE THE INDUSTRIAL CODE.

The Second Department, reversing Supreme Court, determined plaintiff's riding in the back of a pick-up truck was not an Industrial Code violation. Plaintiff was injured when the truck came to an abrupt stop. He was instructed to ride in the back of the truck a short distance while moving debris to a dumpster. The Second Department held that the bed of the truck was a proper "platform" within the meaning of the Industrial Code and, therefore, plaintiff's injury was not caused by an Industrial Code violation: "... [T]he plaintiff asserted a cause of action pursuant to Labor Law § 241(6) predicated on an alleged violation of section 23-9.7(e) of the Industrial Code (12 NYCRR 23-9.7[e]), which reads as follows: 'Riding. No person shall be suffered or permitted to ride on running boards, fenders or elsewhere on a truck or similar vehicle except where a properly constructed and installed seat or platform is provided.' * * * [T]he word 'platform' as used in subdivision (e) of section 23-9.7 must reasonably be read to include the platform of a pickup truck. While such a platform is normally intended for transporting cargo, the Vehicle and Traffic Law contemplates that it may also be used, without restriction, to carry people over distances of less than five miles (see Vehicle and Traffic Law § 1222). Thus, it is reasonable to interpret section 23-9.7(e) as excluding from its scope an activity that is not prohibited by Vehicle and Traffic Law § 1222. Therefore, under the facts presented, the defendants established, prima facie, that the plaintiff could not establish a violation of section 23-9.7(e) of the Industrial Code. In opposition, the plaintiff failed to raise a triable issue of fact ...". ***Pruszko v. Pine Hollow Country Club, Inc.*, 2017 N.Y. Slip Op. 03025, 2nd Dept 4-19-17**

MEDICAL MALPRACTICE, MUNICIPAL LAW, PERSONAL INJURY.

NOTICE OF CLAIM CANNOT BE AMENDED BY ADDING A NEW INJURY AND THEORY OF LIABILITY.

The Second Department determined the plaintiff's motion to amend the notice of claim against the NYC Health and Hospitals Corporation was properly denied. A notice of claim cannot be amended by adding a new injury theory of liability: "A notice of claim may be amended only to correct good faith and nonprejudicial technical mistakes, omissions, or defects, not to substantively change the nature of the claim or the theory of liability ... . Here, the proposed amendments to the notice of claim asserted a new injury and added a new theory of liability ... . These amendments were not technical in nature and are not permitted as late-filed amendments to a notice of claim under General Municipal Law § 50-e(6) ...". ***Castillo v. Kings County Hosp. Ctr.*, 2017 N.Y. Slip Op. 02962, 2nd Dept 4-19-17**

MUNICIPAL LAW, PERSONAL INJURY.

LATE NOTICE OF CLAIM PROPERLY DENIED, POSSESSION OF DECEDENT'S HOSPITAL RECORDS NOT ENOUGH TO DEMONSTRATE HOSPITAL'S TIMELY AWARENESS OF THE POTENTIAL CLAIM FOR CONSCIOUS PAIN AND SUFFERING.

The Second Department determined a petition for leave to file a late notice of claim against the NYC Health and Hospitals Corporation for conscious pain and suffering was properly denied. The court determined the hospital was not timely put on notice of the claim simply by its possession of the decedent's hospital records: "Contrary to the petitioner's contention, the respondent did not acquire actual knowledge of the essential facts constituting the claim to recover damages for conscious pain and suffering within the requisite 90-day period or a reasonable time thereafter by virtue of its possession of hospital records relating to the decedent's death ... . A medical provider's mere possession or creation of medical records does not establish that it had 'actual knowledge of a potential injury where the records do not evince that the medical staff, by its acts or omissions, inflicted any injury on' the claimant ... . Furthermore, the petitioner failed to demonstrate a reasonable excuse for the failure to serve a timely notice of claim and for the lengthy delay in filing the petition ... . Even assuming that the petitioner met its initial burden to show that the late notice will not substantially prejudice the respondent, and that the respondent failed to make 'a particularized evidentiary showing that [it] will be substantially prejudiced if the late notice is allowed' in response ... , upon consideration of the balance of the relevant factors (see General Municipal Law § 50-e[5]), the Supreme Court providently exercised its discretion in denying leave to serve a late notice of claim with respect to the cause of action alleging conscious pain and suffering ... ' . ***Matter of Rosenblatt v. New York City Health & Hosps. Corp.*, 2017 N.Y. Slip Op. 03004. 1st Dept 4-19-17**

PERSONAL INJURY.

MISLEVELED SIDEWALK WAS A NON-ACTIONABLE TRIVIAL DEFECT.

The Second Department, in this slip and fall case, determined the misleveled sidewalk was an non-actionable trivial defect: " 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact' ... . Here, the defendant established, prima facie, that the alleged defect that caused the injured plaintiff to fall was trivial and therefore not actionable. In support of its motion, the defendant relied upon, inter alia, the injured plaintiff's deposition transcript, as well as photos identified and marked by the injured plaintiff showing in detail the alleged defect as it existed at the time of the subject accident. Considering the photographs, which showed the height and extent of the alleged defect, along with the injured plaintiff's description of the time, place, and circumstance of the injury, the defendant established, prima facie, that the alleged defect was trivial as a matter of law and, therefore, not actionable ...". ***Fasone v. Northside Props. Mgt. Corp.*, 2017 N.Y. Slip Op. 02966, 2nd Dept 4-19-17**

PERSONAL INJURY.

WRONGFUL DEATH ACTION AGAINST DOCTOR WHO OVER-PRESCRIBED DRUGS TO PERSONS WHO MURDERED A PHARMACIST SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined a wrongful death cause of action brought on behalf of a pharmacist killed by persons addicted to prescription drugs should have been dismissed. The defendant-doctor, who allegedly over-prescribed the drugs, brought the motion to dismiss: "The defendants David Laffer and Melinda Brady conspired to commit a robbery at Haven Drugs Pharmacy, where Raymond A. Ferguson, Jr. (hereinafter the decedent), was employed as a pharmacist. During the robbery, Laffer shot and killed the decedent. Ultimately, Laffer was convicted of murder in the first degree, and Brady was convicted of robbery in the first degree. In this action, the plaintiff, as the administratrix of the decedent's estate, and individually, alleges that in the years leading up to these crimes, the defendant physician Stan Xuhui Li prescribed Laffer and Brady excessive amounts of addictive prescription pain medications, that Laffer and Brady became addicted to these medications, and that they committed their crimes as a result of their addictions. ... The plaintiff does not allege that Li had 'the authority or the ability to control Laffer' or Brady ... , that Li had any relationship with the plaintiff or the decedent ... , or that Li's treatment of Laffer or Brady 'necessarily implicate[d] protection of . . . identified persons foreseeably at risk because of a relationship with [the plaintiff or the decedent]' ... . Accordingly, the complaint fails to state a cause of action sounding in negligence against Li ...". ***Ferguson v. Laffer*, 2017 N.Y. Slip Op. 02967, 2nd Dept 4-19-17**

PERSONAL INJURY.

FIVE INCH HIGH THRESHOLD WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS, NO EVIDENCE BUILDING BUILT IN 1924 MUST BE BROUGHT UP TO CODE OR COMPLY WITH THE AMERICANS WITH DISABILITIES ACT.

The Second Department determined the plaintiff did not demonstrate the property owner's failure to modify a five-inch high threshold in a brightly lit area created a dangerous condition. The building was constructed in 1924 and there was no showing the owner was required to bring the building up to code or to comply with the Americans with Disabilities Act. The court noted that the standards promulgated by the American Society for Testing and Materials were not mandatory and could not be the basis for liability: "… [The owner and property manager] demonstrated their prima facie entitlement to judgment as a matter of law by submitting evidence that the threshold to the entrance of the premises was approximately five inches high and located in a brightly lit area, and therefore open and obvious and not inherently dangerous ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether the defect was actionable ... . In his affidavit, the plaintiff's expert architect did not dispute the fact that the premises were constructed in 1924, prior to the enactment of the building code, and cited no requirement that the premises be renovated to meet the building code enacted subsequent to its construction. Further, the Americans With Disabilities Act ... standards, relied upon by the plaintiff's expert, generally do not require renovation of buildings constructed prior to 1991 ... , and the expert cited no evidence that any exceptions to that rule were applicable here. The expert's reliance on standards promulgated by the American Society for Testing and Materials did not raise a triable issue of fact as to the liability of [the owner and property manager], since those standards are nonmandatory guidelines, a violation of which would not support a finding of liability ...". ***Futter v. Hewlett Sta. Yogurt, Inc.*, 2017 N.Y. Slip Op. 02970, 2nd Dept 4-19-17**

PERSONAL INJURY, CONTRACT LAW, CIVIL PROCEDURE.

AUTO REPAIR SHOP OWED NO DUTY TO PLAINTIFF WHO HAD BORROWED THE CAR WHICH HAD BEEN REPAIRED FOR THE OWNER, SINCE NO *ESPINAL* FACTORS WERE ALLEGED DEFENDANT REPAIR SHOP DID NOT NEED TO NEGATE THOSE FACTORS IN ITS MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendant auto repair shop (Auto Excellence) did not owe a duty to plaintiff who was injured driving a borrowed car. Plaintiff, who alleged the car was negligently repaired (causing injury), did not have a contractual relationship with the repair shop and did not allege any *Espinal* factors which could give rise to tort liability based on a contract. Because no *Espinal* factors were alleged there was no need for defendant to negate those factors in its motion papers: "A contractual obligation, standing alone, generally will not give rise to tort liability in favor of a third party ... , the Court of Appeals recognized that exceptions to this rule apply (1) where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced another party's duty, in *Espinal*, to maintain the premises safely. Here, Auto Excellence made a prima facie showing of its entitlement to judgment as a matter of law by offering proof that the plaintiff was not a party to the repair contract and, thus, Auto Excellence owed her no duty of care ... . Contrary to the plaintiff's contention, since the pleadings did not allege facts which would establish the applicability of any of the *Espinal* exceptions, Auto Excellence was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law ...". ***Koslosky v. Malmut*, 2017 N.Y. Slip Op. 02977, 2nd Dept 4-19-17**

PERSONAL INJURY, LANDLORD-TENANT.

DEFENDANT ABUTTING LESSEE DID NOT AFFIRMATIVELY DEMONSTRATE ITS SNOW REMOVAL EFFORTS DID NOT EXACERBATE THE ICE-SNOW CONDITION IN THIS SIDEWALK SLIP AND FALL CASE, SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendant (Chase) was not entitled to summary judgment in this abutting sidewalk slip and fall case. Although there was no statute or ordinance which imposed tort liability for failure to remove ice and snow on Chase as the abutting lessee, Chase did not affirmatively demonstrate that it did not exacerbate the ice-snow condition with its snow removal efforts: "Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on a property owner to maintain and repair the sidewalk abutting its property, and specifically imposes liability upon certain property owners for injuries resulting from a violation of the code provision ... . In slip-and-fall cases on snow or ice, the general rule is that '[t]he owner or lessee of property abutting a public sidewalk is under no duty to remove ice and snow that naturally accumulates upon the sidewalk unless a statute or ordinance specifically imposes tort liability for failing to do so' ... . 'In the absence of a statute or ordinance imposing tort liability on the lessee, it can be held liable only if it, or someone on its behalf, undertook snow and ice removal efforts which made the naturally-occurring conditions more hazardous' ... Here, there was no statute or ordinance which imposed tort liability on Chase for the failure to maintain the sidewalk abutting its leased portion of the premises. However, Chase failed to make a prima facie showing that it was free from negligence. Chase failed to eliminate triable issues of fact as to whether it undertook snow and ice removal efforts to

clear the sidewalk on the date of the subject accident, or whether any snow and ice removal efforts undertaken by it created or exacerbated the icy condition which allegedly caused the plaintiff to fall ...". ***Ramjohn v. Yahoo Green, LLC*, 2017 N.Y. Slip Op. 03028, 2nd Dept 4-19-17**

PERSONAL INJURY, MUNICIPAL LAW.

COUNTY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED, PLAINTIFFS ALLEGED FAILURE TO CLEAN UP LOOSE GRAVEL IN A BIKE PATH AFTER PATCHING A HOLE CAUSED THE BICYCLE ACCIDENT.

The Second Department determined defendant county was not entitled to summary judgment in this bicycle accident case. Plaintiffs alleged the county left loose gravel in the bike path after patching a hole (the loose gravel allegedly caused the accident). The written notice requirement did not apply because it was alleged the county created the dangerous condition. The primary assumption of the risk doctrine did not apply, The defect was not demonstrated to be trivial. The open and obvious defense applies only to the duty to warn, not the duty to make the property safe: "The plaintiffs alleged, inter alia, that the County defendants affirmatively created the dangerous condition by leaving excess patching material at the scene of the repair. Affirmative creation is an exception to the County's prior written notice ordinance ... . Thus, in order to establish their prima facie entitlement to judgment as a matter of law, the County defendants were required to submit evidence that they did not affirmatively create the defect as the plaintiffs alleged ... . The County defendants failed to meet this burden ...". ***Fornuto v. County of Nassau*, 2017 N.Y. Slip Op. 02969, 2nd Dept 4-19-17**

PISTOL PERMITS, CIVIL PROCEDURE.

APPLICATION TO ADD HANDGUNS TO PISTOL PERMIT PROPERLY DENIED BASED UPON PETITIONER'S CRIMINAL HISTORY, DECLARATORY JUDGMENT ACTION IS THE PROPER PROCEEDING IN WHICH TO CHALLENGE THE CONSTITUTIONALITY OF A STATUTE.

The Second Department determined petitioner's application to add more handguns to his pistol permit was properly denied based upon his criminal history, despite the dismissal of most of the charges. The court noted that the Article 78 proceeding was not the proper venue for attacking the constitutionality of the licensing scheme. That should be done in a declaratory judgment action: "... [G]ood cause existed, based on the petitioner's criminal history, to deny the petitioner's application to amend his license to include additional handguns was not arbitrary and capricious, and should not be disturbed... . The fact that the majority of the petitioner's arrests resulted in the dismissal of the charges against him, or were ultimately resolved in his favor, did not preclude the respondent from considering the underlying circumstances surrounding those arrests in denying the application ... . Moreover, the petitioner's constitutional challenge to the licensing scheme is unfounded ... . We further note that the petitioner's contention that certain aspects of the licensing eligibility requirements of Penal Law § 400.00(1) unconstitutionally infringe upon his right to bear arms under the Second Amendment (US Const, 2d Amend) is not properly before this Court in an original proceeding pursuant to CPLR article 78, as a declaratory judgment action is the proper vehicle for challenging the constitutionality of a statute ...". ***Matter of Jackson v. Anderson*, 2017 N.Y. Slip Op. 02985, 2nd Dept 4-19-17**

REAL PROPERTY TAX LAW.

SMALL CLAIMS ASSESSMENT REVIEW (SCAR) CRITERIA EXPLAINED.

The Second Department determined the small claims assessment review (SCAR) of the tax assessments for petitioners' properties was proper. The court explained the nature of the SCAR proceeding and the criteria for a court review of a SCAR ruling: " 'The Real Property Tax Law provides that hearings held pursuant to the Small Claims Assessment Review procedure are to be conducted on an informal basis, and the hearing officer is vested with the discretion to consider a wide variety of sources and information, including comparable recent sales, in evaluating tax assessments'... . 'The hearing officer shall consider the best evidence presented in each particular case" (RPTL 732[2]), and the hearing officer is required to 'determine all questions of fact and law de novo' (RPTL 732[4]). 'The decision of the hearing officer shall state the findings of fact and the evidence upon which it is based' (RPTL 733[4]). 'Once a homeowner opts to commence a SCAR proceeding, that property owner waives his or her right to commence a tax review proceeding in Supreme Court under RPTL article 7, title 1, and court review of a JHO's determination is limited to commencement of a proceeding pursuant to CPLR article 78'.... Accordingly, '[w]hen a hearing officer's determination is contested, the court's role is limited to ascertaining whether that determination has a rational basis, that is, whether it is not affected by an error of law or not arbitrary and capricious' ...". ***Matter of Klein v. Department of Assessment*, 2017 N.Y. Slip Op. 02988, 2nd Dept 4-19-17**

TRUSTS AND ESTATES.

DEFENDANT DID NOT DEMONSTRATE A LOAN WAS ORALLY CONVERTED TO A GIFT BY DECEDENT, CRITERIA FOR PROOF OF A GIFT EXPLAINED.

The Second Department determined the claim that a loan made by decedent was orally converted to a gift (by the decedent) was not demonstrated. The proof sufficient to prove a gift was laid out by the court: "... [T]he plaintiff submitted evidence that the decedent made a loan to the defendant in February 2010 for $50,000, which he did not repay. Contrary to the de-

termination of the court, the defendant's testimony at his deposition that the decedent told him in 2012 that the loan was 'a gift,' without more, does not raise a material issue fact sufficient to defeat the plaintiff's entitlement to judgment. 'It has long been the rule in this State that a debt owing from one party to another will not, by a mere oral declaration subsequently made, be transformed from a debt to a gift' ... . To make a valid gift, 'the donor must intend to make an irrevocable present transfer of ownership, there must be delivery of the gift, either by physical delivery of the subject of the gift or a constructive or symbolic delivery, and there must be acceptance by the donee' ... . '[I]n the case of an oral gift, the fact of delivery serves to assist, in an evidentiary manner, to confirm the intent of the donor, and to prevent the assertion of fraudulent claims' ... . Thus, while the defendant's allegation provides evidence of the decedent's intent to make a gift of the loan amount, it provides no evidence that the gift was delivered and, consequently, that the gift took effect ...". ***Scotti v. Barrett*, 2017 N.Y. Slip Op. 03031, 2nd Dept 4-19-17**

ZONING.

LOCAL LAWS CONCERNING PROCEDURES TO BE FOLLOWED BY THE VILLAGE ZONING BOARD OF APPEALS WERE NOT PREEMPTED BY THE STATE-WIDE VILLAGE LAW.

The Second Department determined the local procedural laws for the zoning board of appeals (ZBA) were not preempted by the state-wide Village Law and the village's failure to comply with time limits imposed by the local laws did not require the annulment of the board's ruling (approving a variance). The decision includes a good discussion of the interplay between local zoning laws and the state-wide Village Law: " 'Although local laws that are inconsistent with state laws are generally invalid, the Municipal Home Rule Law allows incorporated villages to amend or supersede provisions of the Village Law as they relate to zoning matters' ... . Nevertheless, '[l]ocal lawmaking power under the supersession authority is of course in all instances subject to the State's transcendent interest where the Legislature has manifested such interest by expressly prohibiting a local law, or where a local law is otherwise preempted by State law' ... . Here, contrary to the petitioner's contention, Village Law § 7-712-a does not preempt the Village from regulating the issues of whether its ZBA renders short-form or long-form decisions, or the time periods within which those decisions must be issued. The Legislature has not evinced an intent to preempt the field, and the legislative history of that section indicates that the Legislature envisioned no comprehensive and detailed regulatory scheme with respect to the form or timing of decisions of a zoning board of appeals ...". ***Matter of Wenz v. Brogan*, 2017 N.Y. Slip Op. 03009, 2nd Dept 4-19-17**

THIRD DEPARTMENT

CONTRACT LAW, DEBTOR-CREDITOR.

ALTHOUGH THE NOTE WAS NOT NEGOTIABLE, IT SUFFICIENTLY MEMORIALIZED THE DEBT UNDER CONTRACT PRINCIPLES.

The Third Department determined plaintiff was entitled a judgment based upon a note with was not negotiable but which was enforceable as a contract. Although the note did not specify when the money was to be paid back, payback in a reasonable time could be implied: "Defendant asserts that the note was unenforceable as a matter of law. Although the note did not constitute a negotiable instrument, it may still be enforceable under traditional principles of contract law ... . As Supreme Court found, the note 'memorialize[d] a debt between the parties and by signing same . . . defendant has acknowledged that debt and his obligation to pay same.' And, while the note stated that the money was to be repaid at a time '[t]o be agreed upon' by the parties, '[w]hen a contract does not specify time of performance, the law implies a reasonable time' ... ; here, plaintiff testified that there was an expectation that he would be repaid within two years." ***Shlang v. Inbar*, 2017 N.Y. Slip Op. 03107, 3rd Dept 4-20-17**

CRIMINAL LAW, APPEALS.

COURT IMPROPERLY REQUIRED DEFENDANT TO WAIVE HIS RIGHT TO APPEAL, DEFENDANT'S PLEA WAS NOT SUBJECT TO A PLEA BARGAIN.

The Third Department noted that it was improper for County Court to require defendant to waive his right to appeal because there was no agreement associated with his guilty plea: "... [I]it was improper for County Court to require defendant to waive his right to appeal, as the record establishes that 'there was no promise, plea agreement, reduced charge, or any other bargain or consideration given to . . . defendant in exchange for his plea' ... . As such, defendant's challenge to the sentence is not precluded." ***People v. Tarver*, 2017 N.Y. Slip Op. 03079, 3rd Dept 4-20-17**

DISCIPLINARY HEARINGS (INMATES).

HEARING OFFICER'S FAILURE TO INQUIRE INTO A WITNESS'S REFUSAL TO TESTIFY REQUIRED ANNULMENT.

The Third Department annulled the determination because the hearing officer did not inquire into the reason for an inmate witness's refusal to testify: "... [P]etitioner] asserts that the Hearing Officer failed to make any inquiry into the reason that an inmate, who had initially agreed to testify, later changed his mind. The record discloses that this inmate told petitioner's as-

sistant that he would testify at the hearing, but subsequently refused. Although the inmate did not execute a witness refusal form, he signed a written statement indicating that he did not want to testify out of fear of retaliation. At the hearing, petitioner expressed his desire to have this inmate testify because he was housed in a location where he may have witnessed the incidents in question, and he requested that the Hearing Officer ascertain whether the inmate's refusal was legitimate. The Hearing Officer did not conduct any further inquiry, and ultimately denied the inmate as a witness. The Court of Appeals recently held in *Matter of Cortorreal v. Annucci* (28 NY3d 54, 60 [2016]) that where 'a refusing inmate witness claims that he or she was coerced into refusing to testify at the hearing . . . , the hearing officer has an obligation to undertake a meaningful inquiry into the allegation.' Here, as in *Matter of Cortorreal v. Annucci* (supra), the Hearing Officer did not make any inquiry of the inmate regarding his fear of retaliation, which was clearly a form of coercion. Rather, the Hearing Officer proceeded to deny petitioner's request for this witness as redundant … . In the circumstances presented, the subsequent denial does not excuse the Hearing Officer's failure to make a further inquiry into the inmate's refusal." ***Matter of Kalwasinski v. Venettozzi*, 2017 N.Y. Slip Op. 03092, 3rd Dept 4-20-17**

FAMILY LAW.

JUDGE'S REFUSAL TO ACCEPT PARTIES' AGREEMENT ON ALL BUT ONE ISSUE WAS AN ABUSE OF DISCRETION.
The Third Department expressed concern with the Family Court judge's refusal to accept the parties' agreement on nearly all issues, holding a hearing on all issues, and then making a finding which did not reflect the agreement. The matter was remitted for a hearing in front of a different judge: "Family Court abused its discretion by not accepting the parties' resolution to continue the child's enrollment in the mother's school district when there was no evidence that such agreement was not in the child's best interests. At the time, the attorney for the child supported the parties' proposed agreement. Moreover, the court's concern that the mother violated the prior joint custody order by enrolling the child in the kindergarten program, without first informing the father, was unwarranted. No such violation was asserted by the father, and the mother endeavored to explain several times, without contradiction, that since the child had attended the pre-kindergarten program in her school district, the district continued the child's enrollment in the kindergarten program. For these reasons, a new judge must be assigned upon remittal." ***Matter of Woodrow v. Arnold*, 2017 N.Y. Slip Op. 03081, 3rd Dept 4-20-17**

INSURANCE LAW, PRIVILEGE, EVIDENCE.

RECORDED PHONE CONVERSATION WITH INSURER PROTECTED AS A STATEMENT PREPARED FOR LITIGATION.
The Third Department, reversing Supreme Court, determined the audio recording of a conversation between defendant and his insurer was privileged as a statement prepared for litigation. Plaintiff was injured using a log splitter on defendant's property. Defendant denied owning the log splitter and plaintiff alleged defendant admitted ownership in the statement: "The statement was made during a phone conversation between Judy Gavin, the insurer's claims representative, and defendant five days after the incident. At the start of the conversation, Gavin informed defendant that the conversation was being recorded and taken as part of the normal claims process. Gavin further agreed to provide defendant with a copy of the statement. We have long recognized that '[t]he purpose of liability insurance is the defense and settlement of claims and, once an accident has arisen, there is little or nothing that the insurer or its employees do with respect to accident reports except in preparation for eventual litigation or for a settlement which may avoid litigation' ... . As such, an insurer's file is generally protected by 'a conditional immunity . . . as material prepared for litigation' ... . This conditional privilege may have to yield to disclosure where the other party demonstrates a substantial need for the material and withholding same would result in undue hardship (see CPLR 3101 [d] [2]). Accident reports prepared with a mixed purpose, however, are not exempt from disclosure ...". ***Curci v. Foley*, 2017 N.Y. Slip Op. 03100, 3rd Dept 4-20-17**

UNEMPLOYMENT INSURANCE.

UNDER THE CRITERIA OF THE FAIR PLAY ACT, WINDOW, GUTTER, SIDING INSTALLERS WERE EMPLOYEES, NOT INDEPENDENT CONTRACTORS.
The Third Department determined the installers of windows, siding, gutters, etc. sold by Barrier were employees of Barrier, not independent contractors. The decision has a clear explanation of the "substantial evidence" standard for court review of an administrative agency's ruling and a substantive discussion of the employee/independent contractor criteria of the Fair Play Act (Labor Law § 861-c): "The Fair Play Act, codified in Labor Law article 25-B, was enacted as a measure to curb widespread abuses in the construction industry stemming from the misclassification of workers as independent contractors resulting in unfavorable consequences for both the workers and the public (see Labor Law § 861-a). In accordance therewith, the Fair Play Act contains a statutory presumption that a person performing services for a contractor engaged in construction shall be classified as an employee unless it is demonstrated that such person is an independent contractor or a separate business entity ... . In order to be considered an independent contractor, a person must satisfy three criteria set forth in the statute: (a) the person must be free from the contractor's direction and control in performing the service; (b) the service performed must be outside the usual course of the contractor's business; and (c) the person must be customarily engaged in an independently established occupation similar to the service performed ... . This new statutory test is sometimes referred to as the ABC test ... . The separate business entity test, codified in Labor Law § 861-c (2), sets forth 12 criteria to be

used to determine whether a person is a separate business entity and, thus, not subject to the presumption that he or she is an employee of the contractor. Notably, in each test, all of the criteria must be met to overcome the statutory presumption of an employment relationship." ***Matter of Barrier Window Sys., Inc. (Commissioner of Labor)*, 2017 N.Y. Slip Op. 03093, 3rd Dept 4-20-17**

ZONING.

RECORD DID NOT SUPPORT DENIAL OF SPECIAL USE PERMIT, ZONING BOARD IMPROPERLY BOWED TO THE OBJECTIONS BY TWO NEIGHBORS.

The Third Department, reversing Supreme Court, determined the record did not support the zoning board of appeals' (ZBA's) denial of a special use permit for keeping dogs on petitioner's property. The Third Department found the only competent evidence of the noise level was petitioner's scientific measurement and the neighbors' complaints about the noise were not a proper basis for denial of the permit: "In its determination, the ZBA did not identify any specific shortcomings in petitioner's [noise] mitigation measures, but summarily determined that petitioner had not offered measures that would sufficiently mitigate the dog noise impact from her business. We view this determination of the ZBA to be without sufficient support in the record. Petitioner offered scientific measurement of the noise level and there was no other objective measure of the noise offered at the public hearing. The neighbor's recording of the noise is subject to an unreliable interpretation of its level based upon the ability to control the volume of the recording, and reliance on the recording would be unreasonable. Absent reliable proof that rebuts petitioner's offer of her measurement of the sound level and her offer of measures to address any noise concerns, there is no basis in the record to determine that petitioner did not meet the conditions imposed by the Land Use Law, and it appears that the ZBA bowed to generalized objections from two neighbors ...". ***Matter of Blanchfield v. Hoosick*, 2017 N.Y. Slip Op. 03097, 3rd Dept 4-20-17**

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