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CasePrepPlus

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COURT OF APPEALS

ADMINISTRATIVE LAW, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

THREE CASES IN WHICH THE APPELLATE DIVISIONS FOUND THE TERMINATION OF TEACHERS TOO SEVERE A PUNISHMENT REVERSED, APPELLATE DIVISIONS HAD EXCEEDED THEIR AUTHORITY TO REVIEW ADMINISTRATIVE PENALTIES.

The Court of Appeals, in a brief memorandum decision supplemented by an extensive memorandum by Judge Rivera, reversed the appellate divisions in three cases involving teachers who were terminated from their employment in administrative proceedings. In all three cases, the appellate divisions had found termination too severe a punishment. The Court of Appeals reinstated the punishment (termination) and explained in depth how the appellate divisions had exceeded their statutory powers for review of administrative determinations: **From the Concurring Memorandum:** "Termination of employment for the misconduct evinced in these three appeals is neither irrational nor such an affront to one's sense of fairness as to shock the conscience. This Court has repeatedly explained that under this 'rigorous' standard, an administrative sanction may not be disturbed unless it is 'disproportionate to the misconduct . . . of the individual, or the harm or risk of harm to the agency or the public' ... . Whether a punishment may deter future misconduct and reflects societal standards given the nature of the offense are appropriate factors for judicial consideration. A difference of opinion as to the appropriate penalty, however, 'does not provide a basis for vacating the arbitral award or refashioning the penalty' ... . As in these appeals, dismissal is not a shocking response to cases in which a teacher encourages cheating, falsifies documents leaving a student without educational services, or crosses the line of proper student-teacher interactions by making sexually suggestive inquiries about a student's relatives." ***Matter of Bolt v. New York City Dept. of Educ.*, 2018 N.Y. Slip Op. 00090, Ct App 1-9-18**

FIRST DEPARTMENT

ATTORNEYS, NEGLIGENCE, LEGAL MALPRACTICE.

COMPLAINT ALLEGING LEGAL MALPRACTICE STATED A CAUSE OF ACTION, WHETHER PLAINTIFF WAS AWARE OF THE PROBLEM IN TIME TO AVOID THE CONSEQUENCES, THEREBY PRECLUDING THE MALPRACTICE ACTION, COULD NOT BE DETERMINED ON A MOTION TO DISMISS.

The First Department, reversing Supreme Court, determined the complaint stated a cause of action for legal malpractice. Whether an investigative report in plaintiff's possession precluded recovery by alerting plaintiff to the problem with the public offering underwritten by plaintiff could not be determined on a motion to dismiss: "Plaintiff, a lead underwriter on a public offering of a Chinese corporation, claimed that defendant law firm was negligent in failing to uncover material misrepresentations made by the corporation in connection with the offering. Plaintiff sufficiently asserted that but for defendant's negligence, plaintiff would have ceased its involvement in the public offering and avoided the fees, expenses and other damages it incurred in defending against, as well as settling claims against it ... . Defendant's argument that an investigative report gave plaintiff prior constructive notice of the material misrepresentations is unavailing ... . Here, on a pre-answer motion to dismiss, although plaintiff acknowledges that it had possession of the investigative report, the information contained in the report cannot, at this stage, be described as explicitly putting plaintiff on notice and not requiring counsel's interpretation of the information. Defendant 'may not shift to the client the legal responsibility it was specifically hired to undertake' ...". ***Macquarie Capital (USA) Inc. v. Morrison & Foerster LLP*, 2018 N.Y. Slip Op. 00091, First Dept 1-9-18**

CRIMINAL LAW.

FURTIVE MOVEMENTS JUSTIFIED POLICE OFFICER'S LIMITED SEARCH OF DEFENDANT'S CAR, USE OF BANK CARD READER ON CARDS IN DEFENDANT'S POSSESSION DID NOT REQUIRE A SEARCH WARRANT.

The First Department, affirming defendant's conviction, held that defendant's furtive movements inside a car justified the police officer's fear that defendant may have had a weapon, and the use of a bank card reader to see if the information on the magnetic strips of defendant's cards matched the information on the front of the cards did not require a search warrant: "Upon the officers' approach to his car, defendant's 'furtive motion[] in attempting to stuff something under the passenger seat . . . caused the officer to reasonably fear for his safety and reasonably believe that defendant might possess a weapon'

... . The officers were thus justified in directing defendant to show his hands and get out of the car, and in performing a limited search of the area where defendant appeared to have hidden something ... . The search revealed contraband, providing probable cause for defendant's arrest ... . … Defendant's final suppression argument is that when the police used a bank card reader to determine whether the account information contained in the magnetic strips of the cards recovered from defendant's wallet matched the information printed on the front of the cards, this action was similar to a cell phone search, and it thus required a search warrant under Riley v. California (573 US , 134 S Ct 2473 [2014]). However, a growing number of cases addressing this technology recognize that this type of police action does not violate any privacy interest protected by the Fourth Amendment ...". ***People v. Sankara*, 2018 N.Y. Slip Op. 00224, First Dept 1-11-18**

DEFAMATION, PRIVILEGE.

DEFENDANT'S STATEMENT TO A NEWSPAPER WAS NOT LIBELOUS BECAUSE IT FELL WITHIN THE JUDICIAL PRIVILEGE, THE STATEMENT WOULD BE UNDERSTOOD TO REFER TO AN ALLEGATION IN A LAWSUIT.

The First Department determined that defendant's statement to the Wall Street Journal was within the judicial privilege: "Defendant['s] ... statement to the Wall Street Journal, that plaintiff investment advisor 'just took our money,' fell within the statutory privilege against libel claims for the publication of a fair and true report of a judicial proceeding... . The statement, in the context of the article, which was about lawsuits filed against plaintiff, would be understood by an ordinary reader to refer to defendant Muirfield Capital Management LLC's claim that plaintiff improperly withdrew money from an investment fund plaintiff managed, in which Muirfield invested ...". ***Highland Capital Mgt., L.P. v. Stern*, 2018 N.Y. Slip Op. 00230, First Dept 1-10-18**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

QUESTION OF FACT RAISED ABOUT WHETHER THE PROFFERED REASON FOR PLAINTIFF'S TERMINATION WAS PRETEXTUAL, PLAINTIFF WAS ON MEDICAL LEAVE BECAUSE OF BRAIN TUMORS, EMPLOYER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, in a full-fledged opinion by Justice Andrias, reversing Supreme Court, determined plaintiff's employment discrimination action pursuant to the New York City Human Rights Law should not have been dismissed. Plaintiff had raised a question of fact whether the proffered reason for her termination was pretextual. Plaintiff, who suffered from brain tumors, was on medical leave when she was told by her employer she needed to apply for disability benefits from the Hartford (an insurer). Although plaintiff tried to apply for the disability benefits, the company allegedly based her termination on her failure to timely obtain the disability benefits: "Defendant argues that it met its prima facie burden of establishing a nondiscriminatory motive for its actions by offering evidence that it terminated plaintiff's employment because she did not promptly file a disability claim with the Hartford, as directed. Defendant maintains that although the Hartford may have given plaintiff confusing information about whether she could file a claim later, that phone call was not reported to defendant, and that when defendant decided to terminate her employment, it relied on the Hartford's representation that no claim had been filed. However, when viewed in the light most favorable to plaintiff, the evidence in the record raises a material issue of fact as to whether defendant's stated reason for terminating her employment was a pretext and whether defendant failed to engage in an interactive process and reasonable accommodation analysis prior thereto ...". ***Watson v. Emblem Health Servs.*, 2018 N.Y. Slip Op. 00123, First Dept 1-9-18**

FAMILY LAW.

ALTHOUGH FOSTER MOTHER ENTITLED TO FOSTER CARE BENEFITS AT THE EXCEPTIONAL RATE AFTER THE CHILD WAS DIAGNOSED AS AUTISTIC, SHE WAS NOT ENTITLED TO THE EXCEPTIONAL RATE RETROACTIVELY FOR THE PERIOD OF FOSTER CARE BEFORE THE DIAGNOSIS.

The First Department determined petitioner's (foster mother's) application for retroactive foster care benefits at the "exceptional" rate for the period before the child was diagnosed as autistic was properly denied: "The OCFS's [Office of Children and Family Services'] determination that the child did not meet the relevant criteria to qualify for 'exceptional' rate foster care payments during the first 22 months she was in the foster mother's care is supported by substantial evidence, and is not arbitrary and capricious. It is undisputed that during this time no qualified psychiatrist or psychologist certified that the child had severe behavioral problems that required high levels of individualized supervision in the home (18 NYCRR 427.6[d][3]), and that no physician had certified that she required around-the-clock care or had been diagnosed by a physician with a qualifying illness such as autism ... . The child was diagnosed with autism by a physician, her pediatrician, in July of 2014, and respondents correctly found that she was entitled to exceptional rate benefits following the time she was diagnosed ... . In the absence of a diagnosis from the time the child was placed with the foster mother until the time of her diagnosis 22 months later, however, respondents correctly denied the foster mother's application for exceptional rate benefit ...". ***Matter of Pascall v. Poole*, 2018 N.Y. Slip Op. 00099, First Dept 1-9-18**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED, THE FACT THAT THERE WERE NO WITNESSES DID NOT RAISE A QUESTION OF FACT.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action should have been granted. Plaintiff was standing on top of a sidewalk shed as he loaded sheetrock into a building when the shed broke. The fact that there were no witnesses did not raise a question of fact: "Plaintiff Pedro Serrano was injured when, during the course of moving sheetrock into a building, he stood on top of a sidewalk shed that broke beneath him, causing him to fall to the sidewalk below. While the motion court correctly determined that these facts demonstrated plaintiffs' prima facie entitlement to summary judgment ... , it erred in finding that EAS [defendant] raised a triable issue of fact. That no witness other than plaintiff testified as to the occurrence of the accident does not bar judgment in his favor, 'where nothing in the record contradicts his version of the occurrence or raises an issue as to his credibility' ... , and defendant EAS's expert report was purely speculative in that it was not based on an examination of the sidewalk shed at the time of the accident ...". ***Serrano v. TED Gen. Contr.*, 2018 N.Y. Slip Op. 00113, First Dept 1-9-18**

LANDLORD-TENANT.

QUESTION OF FACT WHETHER THERE HAD BEEN A SURRENDER OF THE LEASED PREMISES BY OPERATION OF LAW, THEREBY LIMITING TENANT'S LIABILITY FOR ABANDONMENT OF THE LEASE WITH TEN YEARS REMAINING.

The First Department, reversing Supreme Court, determined the tenant raised a trial issue of fact about whether there was a surrender of the leased premises (a parking garage with ground-floor subtenants) by operation of law. The tenant had abandoned the lease with ten years remaining: "... [T]the tenant raised a viable issue of fact as to whether the landlord took dominion and control of the building for its own benefit. The tenant submitted evidence that, after it returned the keys to the landlord and vacated the premises, the landlord took possession of the premises, and not only sent bills directly to the subtenants, but also entered into its own contract with Central Parking to operate the parking garage and to pay the landlord each month all the income received from the garage operations. The tenant submitted further evidence that the landlord placed the property for sale at some juncture. When viewed in the light most favorable to the tenant, as nonmoving party, and given the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence ... , these facts support an inference that, upon the tenant's abandonment, the landlord intended to take dominion and control of the premises for its own benefit." ***176 PM, LLC v. Heights Stor. Garage, Inc.*, 2018 N.Y. Slip Op. 00223, First Dept 1-11-18**

PERSONAL INJURY.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS INTERSECTION COLLISION CASE, THE DRIVER OF THE CAR IN WHICH PLAINTIFF WAS A PASSENGER DID NOT STOP AT A STOP SIGN, ALLEGATIONS OF DEFENDANT'S COMPARATIVE NEGLIGENCE INSUFFICIENT.

The First Department, reversing Supreme Court, determined defendant's (Bishop's) motion for summary judgment should have been granted in this intersection traffic accident case. The driver of the car in which plaintiff was a passenger (Pulinario) failed to stop at a stop sign. No question of fact was raised about Bishop's comparative negligence: "Bishop met her prima facie burden for summary judgment by demonstrating that Pulinario was negligent as a matter of law, and that Bishop was not negligently operating her vehicle. Bishop and plaintiff testified that Pulinario failed to stop for a stop sign, which is a violation of Vehicle & Traffic Law §§ 1142(a) and 1172(a), which constitutes negligence as a matter of law... . Bishop, who had the right of way, was 'entitled to anticipate that other vehicles will obey the traffic laws that require them to yield,' and ha[d] no duty to watch for and avoid a driver who might fail to stop . . . at a stop sign' ... . Although a driver lawfully entering an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection ... , plaintiff and Pulinario failed to raise a triable material issue of fact as to whether Bishop was negligent. The evasive measures that Bishop took during the less than three seconds before impact did not constitute negligence, 'under the emergency-like circumstances confronting her' ...". ***Gonzalez v. Bishop*, 2018 N.Y. Slip Op. 00095, First Dept 1-9-18**

PERSONAL INJURY.

EVEN THOUGH PLAINTIFF GAVE CONFLICTING DESCRIPTIONS OF WHERE SHE SLIPPED AND FELL, ONE OF THOSE DESCRIPTIONS WAS SUFFICIENT TO RAISE A QUESTION OF FACT THAT THE FALL OCCURRED IN AN AREA WHICH HAD BEEN EXCAVATED.

The First Department, reversing Supreme Court, determined plaintiff's testimony, which presented conflicting descriptions of where she slipped and fell, was sufficient to raise a question of fact whether the fall took place in the area which had been excavated by defendant (Empire): "Empire failed to establish its entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she tripped and fell on a defect located within a crosswalk. Empire failed to show that the work it performed in the vicinity of plaintiff's fall could not have caused the defect because it was outside

the area where plaintiff stated her accident occurred ... . Although plaintiff did testify that she fell '[a]t least three feet' from the curb that she was approaching and Empire records show that it excavated a trench about 10 to 14 feet from the subject curb, plaintiff also stated that she was not good at measurements and twice described the accident location as being '[a]bout three-quarters' of the way across the intersection, which would be in the area of Empire's trench work." ***Prunella v. Empire City Subway Co.*, 2018 N.Y. Slip Op. 00100, First Dept 1-9-18**

PERSONAL INJURY.

DEFENDANT DEMONSTRATED IT DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE FAILURE OF SHRINK WRAP USED TO SECURE BOXES, PLAINTIFF WAS INJURED MOVING THE LOOSE BOXES.

The First Department determined defendant's motion for summary judgment in this personal injury case was properly granted. Plaintiff, a delivery truck driver, was injured unloading loose boxes from a trailer owned by defendant. Plaintiff alleged the shrink wrap securing the boxes broke, which led to his injury unloading the loose boxes. The defendant demonstrated it lacked actual and constructive notice of the failure of the shrink wrap. The fact that shrink wrap had failed on other occasions did not raise a question of fact. The court noted that plaintiff was not obligated to pick up the loose boxes, so the failed shrink wrap was a condition leading to his injury but was not the cause: "Defendant established its entitlement to judgment as a matter of law first by showing that it did not create the alleged hazardous condition. Defendant submitted, inter alia, plaintiff's testimony that he and defendant's employees inspected the trailer before he left defendant's facility to commence deliveries, and did not observe loose boxes on the floor. Nor did plaintiff observe loose boxes when he re-secured the load after his first delivery on the day of his accident ... . Defendant also showed that it lacked actual or constructive notice that there were boxes on the trailer's floor. Plaintiff testified he did not notify defendant about the loose boxes before he decided to manually unload them at his second delivery of the day ... . The possibility of injury arose only when plaintiff voluntarily opted to pick up the boxes and toss them to a store employee, even though he was not required to do so ... . Furthermore, plaintiff's certified packing expert failed to identify any professional or industry standard to substantiate his assertions ... . The fact that defendant may have been aware that shrink-wrapping had previously come loose from other pallets did not establish that defendant had constructive notice that the subject pallet was loose before plaintiff sustained the injuries alleged ...". ***Lynch v. C & S Wholesale Grocers, Inc.*, 2018 N.Y. Slip Op. 00110, First Dept 1-9-18**

PERSONAL INJURY.

PORTION OF SIDEWALK WHERE PLAINTIFF SLIPPED AND FELL WAS SUBJECT TO A SPECIAL USE BY DEFENDANT PARKING GARAGE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendant parking garage's (New York Parking's) motion for summary judgment in this sidewalk slip and fall case was properly denied. Plaintiff alleged he tripped and fell on a portion of the sidewalk subject to a special use by the parking garage: "The record presents triable issues of fact as to whether New York Parking's use of the sidewalk was a special use, and whether that special use caused the defect in the sidewalk that caused plaintiff to fall ... . The duty to maintain the area of special use runs with the land and is not dependent upon a finding that New York Parking actually inspected the sidewalk or repaired it ...". ***Boneventura v. 60 W. 57 Realty LLC*, 2018 N.Y. Slip Op. 00232, First Dept 1-11-18**

PERSONAL INJURY, EVIDENCE.

DEFENDANT'S STATEMENT IN A POLICE REPORT ACKNOWLEDGING FAILURE TO STOP AT RED LIGHT WAS AN ADMISSION, CONFLICTING STATEMENT MADE LATER PRESENTED ONLY A FEIGNED ISSUE OF FACT, SUMMARY JUDGMENT PROPERLY AWARDED TO PLAINTIFF.

The First Department noted that defendant's statement memorialized in a police report, acknowledging he did not stop at a red light, was an admission and a conflicting statement made later presented only a feigned issue of fact: "The police accident report and the affidavit of plaintiff Jose Colon were sufficient to demonstrate that defendant Jason S. Gilbert's negligence in failing to stop for the red light and yield the right of way in the intersection was the sole proximate cause of the accident ... . His affidavit also showed the absence of comparative negligence in that he stated that he was going 25 miles per hour, looking straight ahead in the direction of travel, and could not see defendants' van because of a chain link fence, train trestle, and the height of his motor scooter ... . Although Gilbert denied that he stated to the police that he did not know that he had to stop for the red light, the court correctly concluded that the affidavit was insufficient to raise an issue of fact because statements by a party in a police accident report may constitute admissions, and later conflicting statements containing a different version of the facts present only a feigned issue of fact ...". ***Colon v. Vals Ocean Pac. Sea Food, Inc.*, 2018 N.Y. Slip Op. 00097, First Dept 1-9-18**

SECOND DEPARTMENT

ATTORNEYS.

ATTORNEY ENTITLED TO FEES PURSUANT TO QUANTUM MERUIT DESPITE FAILURE TO FILE A RETAINER STATEMENT AND THE ABSENCE OF A FEE SHARING AGREEMENT.

The Second Department determined petitioner-attorney was entitled to fees earned in a medical malpractice action prior to the petitioner's suspension and disbarment. Petitioner sought the fees from substitute counsel (DMR) under a quantum meruit theory. Petitioner's failure to file a retainer statement and the absence of a fee-sharing agreement did not preclude quantum meruit recovery: "... [T]he petitioner was not precluded from recovery on the ground that he failed to file a retainer statement with the Office of Court Administration in accordance with 22 NYCRR 691.20(a)(1), since the petitioner did not seek the recovery of fees on a breach of contract theory, but solely on a quantum meruit basis ... . The lack of a fee-sharing agreement between the petitioner and DMR also did not preclude the petitioner from seeking the recovery of fees against DMR ... . Moreover, the petitioner did not forfeit his right to recover fees for the work he performed in the medical malpractice action prior to his suspension ...". ***Matter of Grossbarth v. Dankner, Milstein & Ruffo, P.C.*, 2018 N.Y. Slip Op. 00144, Second Dept 1-10-18**

CIVIL PROCEDURE.

DEFENDANT WAS ENTITLED TO A HEARING ON HER MOTION TO DISMISS THE COMPLAINT FOR FAILURE OF PROPER SERVICE.

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing about whether the complaint should be dismissed for failure to properly serve her: " 'A process server's affidavit of service ordinarily constitutes prima facie evidence of proper service' ... . 'Bare and unsubstantiated denials are insufficient to rebut the presumption of service" ... . "However, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing'... . 'If an issue regarding service turns upon a question of credibility, a hearing should be held to render a determination on this issue' ... . Here, the Supreme Court erred in determining that branch of the motion of the defendant Delia Archibong (hereinafter the defendant) which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against her for lack of personal jurisdiction without first conducting a hearing. The defendant demonstrated her entitlement to a hearing on the issue of service through her affidavit, in which she denied that she knew anyone by the name of Tom Jonel, the person allegedly served at her house, that no one by that name or with that physical description lived in her house, and that she was the only person at home when the summons and complaint were allegedly served ...". ***HSBC Bank USA, N.A. v. Archibong*, 2018 N.Y. Slip Op. 00131, Second Dept 1-10-18**

CONTRACT LAW.

THE ABSENCE OF A PRICE FOR INTERNET SERVICE IN THE CONTRACT FOR THE PURCHASE OF SATELLITE TELEVISION SERVICE RENDERED THE CONTRACT AN UNENFORCEABLE AGREEMENT TO AGREE.

The Second Department determined defendant's motion for summary judgment in this contract action was properly granted. The agreement for the purchase of satellite television equipment was silent about fees for Internet service, which constituted a material term. Therefore the agreement was merely an unenforceable agreement to agree: " 'To create a binding contract, there must be a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms' ... . '[A] court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to' ... . Accordingly, '[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract' ... . 'While there are some instances where a party may agree to be bound to a contract even where a material term is left open . . . there must be sufficient evidence that both parties intended that arrangement' ... . '[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable' ... , unless 'a methodology for determining the material terms can be found within the four corners of the agreement or the agreement refers to an objective extrinsic event, condition, or standard by which the material terms may be determined' ... . Here, the defendant demonstrated its prima facie entitlement to judgment as a matter of law dismissing the complaint by submitting evidence establishing that the contract lacked a material term regarding the price or fees to be paid to the plaintiff for Internet-related service, and therefore constituted an unenforceable agreement to agree ...". ***Total Telcom Group Corp. v. Kendal on Hudson*, 2018 N.Y. Slip Op. 00189, Second Dept 1-10-18**

CRIMINAL LAW.

DENIAL OF PAROLE WAS IRRATIONAL, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the Parole Board's denial of parole was irrational. When petitioner was 17 he murdered a 14-year-old acquaintance. While in prison petitioner earned three college degrees and was deemed a low risk pursuant to the Correctional Offender Management for Profiling for Alternative Sanction (COMPAS)

assessment: "Judicial review of a determination of the Parole Board is narrowly circumscribed ... . While the Parole Board is required to consider the relevant statutory factors ... , it is not required to address each factor in its decision or accord all of the factors equal weight ... . Here, the petitioner demonstrated his entitlement to having the determination of the Parole Board set aside. The Parole Board's findings that there was a reasonable probability that, if released, the petitioner would not remain at liberty without violating the law, and that his release would be incompatible with the welfare of society and would so deprecate the serious nature of the crime as to undermine respect for the law, are without support in the record ... . [T]he record demonstrates that the petitioner took full responsibility for his actions, stating 'I don't blame it on the drugs. I blame it on me. I'm responsible. I was responsible for taking drugs and ultimately I'm responsible for what happened while I was under the influence of those drugs.' The petitioner also acknowledged that he had not forgotten the reason he was in prison, he was aware of the damage he had done to the victim, her family, and his own family, and he deeply regretted that his 'life took that turn at that time but [he was] not that 17 year old angry kid anymore.' " ***Matter of Coleman v. New York State Dept. of Corr. & Community Supervision*, 2018 N.Y. Slip Op. 00138, Second Dept 1-10-18**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

NEGLIGENT SUPERVISION CAUSE OF ACTION AGAINST SCHOOL SHOULD NOT HAVE SURVIVED SCHOOL'S MOTION FOR SUMMARY JUDGMENT, PLAINTIFF KINDERGARTEN STUDENT TRIPPED CARRYING A LUNCH TRAY.

The Second Department, reversing Supreme Court, determined defendant school's (Board of Education's) motion for summary judgment in this negligent supervision action should have been granted. The four-year-old plaintiff tripped and fell as she was carrying a food tray: " 'Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision' ... . 'Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students' ... . Here, the defendants made a prima facie showing of entitlement to judgment as a matter of law by establishing that the level of supervision afforded to the infant plaintiff was adequate ... .. Contrary to the plaintiffs' contention, at the time of the accident, the infant plaintiff was in the midst of executing an age-appropriate task which she and her classmates had performed every single school day since the start of the 2012/2013 academic year ... . Additionally, the mother's affidavit, which contradicted her own 50-h hearing testimony and the infant plaintiff's deposition testimony, was insufficient to raise a triable issue of fact ... ". ***L.R. v. City of New York*, 2018 N.Y. Slip Op. 00132, Second Dept 1-10-18**

ENVIRONMENTAL LAW.

ISSUING A PERMIT FOR THE WITHDRAWAL OF UP TO 1.5 BILLION GALLONS OF RIVER WATER PER DAY TO COOL A POWER PLANT IS NOT A MINISTERIAL, NON-DISCRETIONARY ACT, THEREFORE THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) APPLIES TO THE PERMITTING PROCESS.

The Second Department, in a full-fledged opinion by Justice Connolly, reversing Supreme Court, determined that the Department of Environmental Conservation's (DEC's) issuance of a permit for the withdrawal of up to 1.5 billion gallons of river water (per day) to cool an electric power plant was not a ministerial, non-discretionary act. Therefore the permitting process was not exempt from the requirements of the State Environmental Quality Review Act (SEQRA), including the need for an environmental impact statement (EIS): "Here, while ECL [Environmental Conservation Law] 15-1501(9) states that the DEC 'shall issue' an initial permit to an existing operator for its self-reported maximum water withdrawal capacity, the statute provides that such initial permit is 'subject to appropriate terms and conditions as required under this article.' Notably, the WRPA [Water Resources Protection Act] specifically provides the DEC with the power 'to grant or deny a permit or to grant a permit with conditions' ... . The statutory factors that the DEC is required to consider when reviewing an application and imposing conditions on the permittee do not lend themselves to mechanical application. For instance, whether 'the proposed water withdrawal will be implemented in a manner that incorporates environmentally sound and economically feasible water conservation measures' ... will almost certainly vary from operator to operator, or from water source to water source. The DEC's own regulations state that an "initial permit" must include 'environmentally sound and economically feasible water conservation measures to promote the efficient use of supplies' ... . Whether a condition is 'appropriate' for a given operator is a matter that falls within the DEC's expertise and involves the exercise of judgment, and, therefore, implicates matters of discretion ...". ***Matter of Sierra Club v. Martens*, 2018 N.Y. Slip Op. 00153, Second Dept 1-10-18**

FAMILY LAW.

PRIMA FACIE CASE OF NEGLECT BASED UPON MOTHER'S MENTAL CONDITION HAD BEEN MADE OUT, THE NEGLECT PETITION SHOULD NOT HAVE BEEN DISMISSED, FACT THAT MOTHER HAD NOT BEEN DIAGNOSED AS SUFFERING FROM A MENTAL ILLNESS WAS NOT DISPOSITIVE.

The Second Department, reversing Family Court, determined a prima facie showing of neglect based upon mother's mental condition had been made. Therefore mother's motion to dismiss the neglect petition should not have been granted. The court noted that the fact that mother had not been diagnosed as having a mental illness was not dispositive: "... [T]he petitioner presented a prima facie case of neglect. At the fact-finding hearing, the petitioner introduced into evidence

a recording of two 911 calls made by the mother's stepdaughter, in which she reported, among other things, that the mother, while holding the child, was hitting and slapping the mother's sister. She further stated that the mother was manic, yelling, throwing things, and getting violent. Additionally, the petitioner presented the testimony of the attending psychiatrist in the emergency room at Queens Hospital Center who, based upon his assessment of the mother's mental condition, found that she was unable to care for the child and ordered her admission into a psychiatric emergency program that requires frequent observation for at least 24 hours. The mother's hospital records, which the petitioner also introduced into evidence, demonstrated that the mother's mental condition, which was described as paranoid, violent, and lacking in insight and impulse control, had not resolved within 24 hours and necessitated her admission into the extended observation unit. Moreover, '[t]he absence of a diagnosed condition does not preclude a finding of neglect' ... . Therefore, although the petitioner did not show that the mother had a specific diagnosed mental illness, the petitioner was not required to make such a showing to avoid dismissal. ...". ***Matter of Catalina A. (Evelyn C.)*, 2018 N.Y. Slip Op. 00135, Second Dept 1-10-18**

FAMILY LAW.

PRENUPTIAL AGREEMENT SHOULD HAVE BEEN SET ASIDE AS UNCONSCIONABLE.

The Second Department, reversing Supreme Court, determined defendant-wife's motion to set aside the prenuptial agreement should have been granted: " 'An agreement between spouses or prospective spouses should be closely scrutinized, and may be set aside upon a showing that it is unconscionable, or the result of fraud, or where it is shown to be manifestly unfair to one spouse because of overreaching on the part of the other spouse' ... 'An agreement is unconscionable if it is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense'... . An agreement that might not have been unconscionable when entered into may become unconscionable at the time a final judgment would be entered ... . The burden of proof as to unconscionability is on the party seeking to set aside the agreement ... . Here, contrary to the Supreme Court's determination, the defendant sustained her burden of establishing that the prenuptial agreement was, at the time this action was before the court, unconscionable. Enforcement of the agreement would result in the risk of the defendant's becoming a public charge. The defendant, who is unemployed, largely without assets, and the primary caregiver for the parties' young children, would, under the prenuptial agreement, receive only $20,000, in full satisfaction of all claims, even though the plaintiff earns approximately $300,000 annually as a physician ...". ***Taha v. Elzemity*, 2018 N.Y. Slip Op. 00188, Second Dept 1-10-18**

FAMILY LAW, APPEALS, CRIMINAL LAW.

NO INTIMATE RELATIONSHIP, FAMILY COURT DID NOT HAVE JURISDICTION IN THIS FAMILY OFFENSE PROCEEDING, EVEN THOUGH THE ORDER OF PROTECTION HAD EXPIRED APPELLATE REVIEW WAS APPROPRIATE BECAUSE OF THE REPUTATIONAL CONSEQUENCES.

The Second Department, reversing Family Court, determined that the appellant did not have an intimate relationship with petitioner and therefore Family Court did not have jurisdiction over the family offense proceeding against appellant and could not issue an order of protection. Even though the order of protection had expired, the continuing reputational consequences of the order of protection justified determining the appeal: "The petitioner is the live-in girlfriend of the appellant's brother. The petitioner and the appellant live in the same building, on different floors. The petitioner filed a family offense petition against the appellant, alleging that she had physically attacked and verbally threatened her. * * * The Family Court is a court of limited jurisdiction, and 'cannot exercise powers beyond those granted to it by statute'... . 'Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain prescribed criminal acts that occur between spouses or former spouses, or between parent and child or between members of the same family or household' ... . '[M]embers of the same family or household' include, among others, 'persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time' ... . Expressly excluded from the ambit of 'intimate relationship' are 'casual acquaintance[s]' and 'ordinary fraternization between two individuals in business or social contexts' ... . Beyond those delineated exclusions, what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) is determined on a case-by-case basis ... . Relevant factors include 'the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship' ... . Here, the parties have no direct relationship and are only connected through a third party, who is the petitioner's live-in boyfriend and the appellant's brother. Additionally, the parties have never resided together and their contact with one another has been purely by happenstance, as they live in the same building. Accordingly, they do not have an intimate relationship within the meaning of Family Court Act § 812(1)(e)." ***Matter of Royster v. Murray*, 2018 N.Y. Slip Op. 00151, Second Dept 1-10-18**

INSURANCE LAW.

AFFIDAVIT BY INSURER'S ATTORNEY INSUFFICIENT TO JUSTIFY A STAY OF ARBITRATION AND A FRAMED ISSUE HEARING.

The Second Department, reversing Supreme Court, determined the insurer (GEICO) did not present sufficient evidence to justify a temporary stay of arbitration and a framed issue hearing in this car-accident case. The insured, Tucci, alleged the accident in which he was severely injured was caused by a driver who struck Tucci's car while attempting to pass and then fled the scene. GEICO claimed (1) Tucci failed to timely notify it of the accident and (2) there was no evidence of contact with the other car: " 'The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay' ... . 'Thereafter, the burden shifts to the party opposing the stay to rebut the prima facie showing'... . Where a triable issue of fact is raised, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue ... . Here, GEICO failed to show the existence of evidentiary facts regarding Tucci's failure to satisfy the reporting requirement or whether there was physical contact with a hit-and-run vehicle, since, as to those issues, it only provided the unsupported, conclusory assertions of its attorney ...". ***Matter of Government Employees Ins. Co. v. Tucci*, 2018 N.Y. Slip Op. 00142, Second Dept 1-10-18**

MUNICIPAL LAW, EMPLOYMENT LAW, NEGLIGENCE, 42 U.S.C. § 1983.

OFF DUTY POLICE OFFICER WAS NOT ACTING UNDER COLOR OF LAW WHEN HIS WEAPON DISCHARGED AND KILLED PLAINTIFF'S DECEDENT, 42 U.S.C. § 1983 CAUSE OF ACTION AGAINST MUNICIPALITY PROPERLY DISMISSED,

The Second Department determined that the 42 U.S.C. § 1983 cause of action against the municipality was properly dismissed. Plaintiff's decedent was killed when a handgun handled by an off-duty police officer (Pileggi) went off. The off-duty officer was convicted of manslaughter. The cause of action against the municipality was dismissed because there was no evidence the off-duty officer was acting under color of law and there was no policy which encouraged the reckless actions of the off-duty officer: "Where the conduct complained of was committed by an off-duty police officer, a constitutional violation may be found if, for instance, the officer, albeit off-duty, nonetheless is engaged in some activity arguably invoking the real or apparent power of the police department, or is engaged in the performance of duties prescribed generally for police officers... .. Here, the amended complaint alleged only, in the most conclusory fashion, that Pileggi was "acting under the color of law" when the shooting occurred. Since nothing in the amended complaint suggested that Pileggi identified himself or was recognizable as a police officer, or was otherwise engaged in any activity arguably invoking the real or apparent power of the police department, the seventh cause of action was fatally defective. In turn, because the plaintiffs failed sufficiently to allege that Pileggi was acting under color of state law, it follows that there was no factual basis upon which to hold the defendants liable under [Monell v. New York City Dept. of Social Servs., 436 US 658] ... . In any event, even if the amended complaint had properly pleaded that Pileggi was acting under color of state law and not engaged in purely personal pursuits at the time of the shooting, the seventh cause of action was also fatally defective in that it failed to allege specific facts supporting the plaintiffs' contention that the defendants had a policy or custom of encouraging or sanctioning the type of reckless behavior that led to the shooting ...". ***Everett v. Eastchester Police Dept.*, 2018 N.Y. Slip Op. 00129, Second Dept 1-10-18**

PERSONAL INJURY.

DEFENDANTS IN THIS SLIP AND FALL CASE FAILED TO DEMONSTRATE WHEN THE STAIRS HAD LAST BEEN INSPECTED, THEREFORE DEFENDANTS DID NOT DEMONSTRATE THE ABSENCE OF CONSTRUCTIVE NOTICE AND SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff was injured when he jumped from a step in wooden stairs as it cracked. Defendants papers did not indicate when the stairs had last been inspected. Therefore the papers did not demonstrate the absence of constructive notice: "In a premises liability case, a defendant real property owner or a party in possession or control of real property who moves for summary judgment has the initial burden of making a prima facie showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence ... . A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length of time to afford the defendant a reasonable opportunity to discover and remedy it … . To meet its prima facie burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell ... . Here, while the evidence submitted in support of the subject branch of the defendants' motion may have demonstrated, prima facie, that they did not create the alleged condition or have actual notice thereof, it failed to demonstrate, prima facie, that they did not have constructive notice of it. Indeed, the evidence submitted on their motion failed to demonstrate when the subject staircase was last inspected relative to the plaintiff's accident ... ". ***Hanney v. White Plains Galleria, LP*, 2018 N.Y. Slip Op. 00130, Second Dept 1-10-18**

PERSONAL INJURY.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF THE CARDBOARD ON THE SIDEWALK WHICH CAUSED PLAINTIFF TO SLIP AND FALL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Second Department determined defendant property owners demonstrated they did not have actual or constructive notice of the cardboard on the sidewalk which caused plaintiff to slip and fall: "... [T]he ... defendants established their prima facie entitlement to judgment as a matter of law by submitting evidence of their trash collection and disposal practices, deposition testimony regarding the routine cleaning of the sidewalk each morning, and deposition testimony from several witnesses who walked through the area shortly before the plaintiff's accident and did not observe the condition that allegedly caused his fall ... . In opposition, the plaintiff presented speculative arguments that were insufficient to raise a triable issue of fact ...". ***Mandarano v. PND, LLC*, 2018 N.Y. Slip Op. 00133, Second Dept 1-10-18**

PERSONAL INJURY, EVIDENCE.

BY SUBMITTING PLAINTIFF'S DEPOSITION TESTIMONY IN SUPPORT OF DEFENDANT'S SUMMARY JUDGMENT MOTION DEFENDANT FAILED TO MAKE OUT A PRIMA FACIE CASE IN THIS SLIP AND FALL CASE, THE MOTION WAS PROPERLY DENIED WITHOUT CONSIDERATION OF THE OPPOSING PAPERS.

The Second Department determined plaintiff's deposition testimony raised a question of fact whether plaintiff slipped and fell because of water on the floor near a sink in defendant's nursing home. The testimony was submitted by the defendant in support of its summary judgment motion. The defendant argued there was no proof water was on the floor. However, by submitting plaintiff's deposition testimony, which presented circumstantial evidence of water on the floor, defendant was unable to make out a prima facie case: "In moving for summary judgment, the defendant argued, inter alia, that there was no evidence that water was on the floor. In support of its motion, the defendant submitted, inter alia, the plaintiff's deposition testimony, in which he testified that a nurse washes his roommate every morning, he has personally observed water spill on the floor when that happens, and he has complained about such condition at least 10 times in the past. The plaintiff further testified that he heard his roommate being cared for and someone walking back and forth from the sink to his roommate that morning, and that the roommate's shirt was wet after the accident. Such evidence, although circumstantial, permits a reasonable inference that the nurse washed the plaintiff's roommate that morning and spilled water on the floor, which proximately caused the plaintiff to fall... . Accordingly, the defendant failed to meet its prima facie burden on its motion for summary judgment, and the Supreme Court properly denied its motion without regard to the sufficiency of the plaintiffs' opposition papers ... ". ***Simion v. Franklin Ctr. for Rehabilitation & Nursing, Inc.*, 2018 N.Y. Slip Op. 00184, Second Dept 1-10-18**

PERSONAL INJURY, EVIDENCE.

EXPERT AFFIDAVIT STATING PLAINTIFF PEDESTRIAN DID NOT LOOK FOR TRAFFIC BEFORE CROSSING WAS SPECULATIVE AND DID NOT RAISE A QUESTION OF FACT, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED IN THIS TRAFFIC ACCIDENT CASE.

The Second Department determined an expert affidavit, saying the plaintiff pedestrian did not look for traffic before starting across the street, was speculative and did not raise a question of fact. Plaintiff's motion for summary judgment properly granted: "The plaintiff testified that she looked in both directions and saw no vehicles. When the pedestrian signal changed in her favor, she waited 'a bit,' looked around to her right and left three to four times, and then started walking while looking around as she walked. She had taken about 10 steps before the subject accident occurred. She did not see the defendants' vehicle prior to impact. The defendant driver testified at his deposition that he started his right turn and did not realize there was an accident until he felt contact, and heard his front-seat passenger yell that someone was there. He admitted that he never saw the plaintiff prior to contact with the front of his vehicle. He was cited for the traffic violation of failing to yield the right-of-way, and pleaded guilty to that violation. In opposition, the defendants submitted the affidavit of an expert, stating that in his opinion, the plaintiff did not stop and wait for the light, and she did not look to the left or the right." ***Yuemei Wu v. Automotive Rentals, Inc.*, 2018 N.Y. Slip Op. 00192, Second Dept 1-10-18**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

THIRD PARTY COMPLAINT PROPERLY DISMISSED AS CAUSING UNDUE DELAY OF THE MAIN ACTION, DISCOVERY OF POST-ACCIDENT REPAIRS OF STAIRWAY PROPERLY ORDERED IN THIS SLIP AND FALL CASE.

The Second Department determined plaintiff's motion to dismiss the third-party complaint was properly granted because the third-party action was commenced four years after the suit began and would unduly delay the main action. The Second Department also determined that Supreme Court properly ordered that defendants disclose information about post-accident repairs in this stairway slip and fall case. Defendants had not disclosed the identity of the party which exercised control over the stairway: " 'CPLR 1010 provides a safety valve for cases in which the third-party claim will unduly delay the determination of the main action or prejudice the substantial rights of any party'... . Where the record indicates that

a third-party plaintiff knowingly and deliberately delayed in commencing the third-party action, the Supreme Court acts within its discretion to dismiss the third-party complaint... . Contrary to the defendants' contentions, the court correctly granted the plaintiff's motion to dismiss the third-party complaint because the defendants deliberately and intentionally delayed commencing the third-party action for more than four years. 'CPLR 3101(a) requires full disclosure of all evidence material and necessary in the prosecution or defense of an action' ... . ' Evidence of subsequent repairs and remedial measures is not discoverable or admissible in a negligence case unless there is an issue of maintenance or control' ... . Contrary to the defendants' contentions, an issue exists as to the identity of the entity responsible for the structural maintenance and control of the stairway. Accordingly, the Supreme Court correctly directed the defendants to produce discovery concerning the post-accident repairs." ***Soto v. CBS Corp.*, 2018 N.Y. Slip Op. 00185, Second Dept 1-10-18**

PERSONAL INJURY, MUNICIPAL LAW.

NEITHER THE ABUTTING PROPERTY OWNER NOR THE CITY WERE ENTITLED TO SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE.

The Second Department determined neither the abutting property owner nor the city were entitled to summary judgment in this sidewalk slip and fall case. The property owner did not demonstrate it did not have a duty to maintain the sidewalk and it did not have constructive knowledge of the defect. The city demonstrated it did not have written notice of the defect but did not demonstrate it did not create the defect: "Approximately 1½ months prior to the incident, the defendant City of Long Beach had excavated a portion of the sidewalk and backfilled it with a temporary patch, cordoning off the area with safety barrels and yellow caution tape. At the time of the incident, the safety barrels and yellow caution tape were not present. ... With respect to [the property owner], '[g]enerally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk is placed on the municipality, and not on the owner of the abutting land' ... . 'The exceptions to this rule are when the landowner actually created the dangerous condition, made negligent repairs that caused the condition, created the dangerous condition through a special use of the sidewalk, or violated a statute or ordinance imposing liability on the abutting landowner for failing to maintain the sidewalk' ... . The Charter of the City of Long Beach imposes a duty on landowners to maintain and repair abutting sidewalk ... . The City's evidentiary submissions failed to eliminate triable issues of fact as to whether its work on the sidewalk immediately left it in a condition that was dangerous to pedestrians and bicyclists ... . Since the City did not establish its prima facie entitlement to judgment as a matter of law, the burden never shifted to the plaintiff to submit evidence sufficient to raise a triable issue of fact ...". ***Trela v. City of Long Beach*, 2018 N.Y. Slip Op. 00190, Second Dept 1-10-18**

THIRD DEPARTMENT

CRIMINAL LAW, JUDGES.

JUDGE SHOULD NOT HAVE ALLOWED DEFENDANT TO PLEAD TO A LESSER OFFENSE WITHOUT THE PROSECUTOR'S PERMISSION, HOWEVER NEITHER A WRIT OF PROHIBITION NOR A WRIT OF MANDAMUS WAS WARRANTED.

The Third Department determined the writ of prohibition against a judge for accepting a plea to a lesser offense without the prosecutor's permission was not warranted because the judge (the respondent) acknowledged the mistake. The court further determined it did not have the authority to grant the writ of mandamus, seeking vacation of the plea and reinstatement of the more serious charge, because the plea had already been entered and the conditional discharge sentence had been commenced: "Under CPL 220.10 (3), 'the defendant may, with both the permission of the court and the consent of the people, enter a plea of guilty of a lesser included offense.' 'Where the record shows that the prosecutor's consent to a plea is premised on a negotiated sentence and a lesser sentence is later deemed more appropriate, the People should be given the opportunity to withdraw their consent' ... . Respondent concedes in his brief that he committed a legal error in accepting Hernandez's plea to a reduced charge without petitioner's consent. The question therefore distills to whether a writ of prohibition or writ of mandamus is warranted given that Hernandez's guilty plea has already been accepted, she was already sentenced by respondent to, among other things, a one-year conditional discharge period and such period expired in November 2017. '[T]he extraordinary remedy of prohibition is only available where a body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction and there is a clear legal right to such relief' ... . Petitioner seeks a writ of prohibition to prohibit respondent from accepting guilty pleas to reduced charges in the future without his consent. Respondent, however, noted at the sentencing hearing that this was the first time that he had ever reduced a charge without petitioner's consent and that he did so 'under the circumstances of [the] case.' Given that the record does not indicate that respondent has undertaken such similar action in the past or has expressed an intention to do so in the future, and taking into account respondent's concession that his actions were erroneous, petitioner is not entitled to a writ of prohibition ...". ***Matter of Carnright v. Williams*, 2018 N.Y. Slip Op. 00206, Third Dept 1-11-18**

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

APPEAL OF SORA RISK ASSESSMENT NOT PROPERLY BEFORE THE APPELLATE DIVISION, COUNTY COURT NEVER ISSUED THE REQUIRED ORDER.

The Third Department determined the appeal of the SORA risk assessment was not properly before it because County Court never issued the required order: "County Court, in a bench decision, adopted the People's arguments regarding both the override and the assessment of additional points, denied defendant's request for a downward departure and classified defendant as a risk level three sex offender. ... County Court is statutorily required to 'render an order setting forth its determinations and the findings of fact and conclusions of law on which the determinations are based' ... . The resulting order 'must be in writing'... and, further, must be 'entered and filed in the office of the clerk of the court where the action is triable'... . The record before this Court does not reflect that County Court issued a written order or that any such order subsequently was entered and filed. Although County Court indicated that its bench decision would 'serve[] as the order of the [c]ourt,' a bench decision is neither a substitute for the required written order nor an appealable paper ... . Notably, neither the transcript of the court's bench decision nor the standard form designating defendant's risk level classification, the latter of which County Court signed and dated, contains the 'so ordered' language required 'so as to constitute an appealable order' ... . Absent evidence of the required written order, this appeal is not properly before us and must be dismissed ...". ***People v. Scott*, 2018 N.Y. Slip Op. 00203, Third Dept 1-11-18**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, CONSTITUTIONAL LAW.

PETITIONER COLLEGE STUDENT IS ENTITLED TO A NEW DISCIPLINARY HEARING, THE TESTIMONY AT THE HEARING BY THE COLLEGE'S TITLE IX COORDINATOR INCORRECTLY EXPLAINED THE MANNER IN WHICH CONSENT TO SEX CAN BE COMMUNICATED, DISSENTING JUSTICES ARGUED THE STUDENT WAS DENIED HIS RIGHT TO CROSS-EXAMINE THE REPORTING INDIVIDUAL AND THE DETERMINATION SHOULD BE ANNULLED AND EXPUNGED.

The Third Department, reversing SUNY Plattsburgh's dismissal of petitioner-student, over a two-justice partial dissent, determined that a new disciplinary hearing was required because the Title IX Coordinator's (Butterfly Blaise's) testimony at the hearing reflected a misunderstanding of how consent to sex can be communicated. The facts of the sexual encounter between petitioner and the "reporting individual," another student, were presented at the hearing by Blaise because, by statute, the reporting individual can decide whether or not to participate in the hearing. The dissenting justices argued that the petitioner was denied his due process right to cross-examine the reporting individual and the determination should be annulled and expunged. The majority found that the procedure employed by the college, including notice of the charges, comported with the controlling "Enough is Enough Law" and due process. The decision goes through all the arguments made by petitioner, which are substantive and well worth reading, but which cannot be fairly summarized here. With respect to the evidence of consent, the court wrote: "During the hearing, petitioner asked Blaise to define affirmative consent and she read the statutory definition, including that 'consent can be given by words or actions as long as those words or actions create clear permission regarding willingness to engage in sexual activity.' Petitioner then asked, 'So affirmative consent can be implied or referred [sic] from conduct?', and Blaise responded, '[O]nly if the direct question is: Can I have sex with you? So you must ask directly what it is that you want to do to that person. . . . And the answer affirmatively must be yes.' This explanation was incorrect. The error was compounded when petitioner next inquired whether the consent standard applied to both parties, and Blaise explained that the obligation applied to the person initiating the sexual activity. When petitioner asked, 'How do you define initiation?', Blaise explained 'that you initiated sexual intercourse by penetrating her.' This, too, was erroneous for the concepts of consent and initiation pertain to either verbal communication or the conduct between the participants, not simply the physical act of penetration." ***Matter of Jacobson v. Blaise*, 2018 N.Y. Slip Op. 00205, Third Dept 1-11-18**

FAMILY LAW.

LEAVING A 16 MONTH OLD CHILD UNATTENDED IN A BATHTUB WITH FOUR INCHES OF WATER CONSTITUTED NEGLECT, FAMILY COURT REVERSED.

The Third Department, reversing Family Court, determined mother's leaving unattended for several minutes a 16-month-old child in a bathtub with four inches of water constituted neglect. The child drowned: "In our view, this evidence was more than sufficient to establish a prima facie case of neglect. Fundamentally, a reasonably prudent person would not leave a 16-month-old child unattended in a bathtub filled with four inches of water for any appreciable amount of time ... . Through her own statement, respondent estimated that she was absent for 1 to 10 minutes. Doing so was 'intrinsically dangerous' and has resulted in a heartbreaking tragedy for this family ... . Where, as here, a prima facie case has been established, it became respondent's obligation to offer 'a reasonable and adequate explanation for how the child sustained the injury'... . Respondent opted not to testify and did not call any witnesses. Consequently, we conclude on the record before us that the petition should have been granted." ***Matter of Leah VV. (Theresa WW.)*, 2018 N.Y. Slip Op. 00201, Third Dept 1-11-18**

FORECLOSURE, CIVIL PROCEDURE.

2008 LETTER INFORMING DEFENDANT SHE WAS IN DEFAULT DID NOT ACCELERATE THE DEBT, THEREFORE THE STATUTE OF LIMITATIONS DID NOT BEGIN TO RUN AND THE CURRENT FORECLOSURE PROCEEDING IS TIMELY.

The Third Department determined a 2008 letter from the bank's counsel informing defendant she was in default did not expressly accelerate the debt. Therefore the statute of limitations did not begin to run in 2008 and the current proceeding is timely: " 'The six-year statute of limitations in a mortgage foreclosure action begins to run from the due date for each unpaid installment unless the debt has been accelerated; once the debt has been accelerated by a demand or commencement of an action, the entire sum becomes due and the statute of limitations begins to run on the entire mortgage' ... . .. The August 2008 letter advised defendant and Luma that they had violated the terms of the note and mortgage by failing to make monthly payments and that counsel had been retained 'to exercise all of [the loan servicer's] rights and remedies at law, and in equity, including, but not limited to, the right to sell the above captioned premises at a public sale.' The letter therefore left all legal and equitable avenues open, did not indicate that immediate payment was demanded and, indeed, went on to state that the debt's validity would not be assumed unless there was an absence of timely written objection to some or all of it. There was, moreover, neither an explicit demand for payment in the letter nor the use of the word 'accelerate.' " ***Bank of Am., Natl. Assn. v. Luma*, 2018 N.Y. Slip Op. 00214, Third Dept 1-11-18**

PERSONAL INJURY, TOXIC TORTS, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF'S FAILURE TO COMPLY WITH THE COURT'S DEADLINE FOR EXPERT DISCLOSURE IN THIS TOXIC TORTS CASE WARRANTED PRECLUSION OF PLAINTIFF'S EXPERT EVIDENCE AND SUMMARY JUDGMENT IN FAVOR OF DEFENDANT.

The Third Department, affirming Supreme Court's preclusion of plaintiff's (Colucci's) expert evidence and the grant of summary judgment to defendant, determined the failure of plaintiff to meet the deadline for expert disclosure warranted preclusion. Plaintiff had leased business space from defendant and alleged that exposure to sewage and mold at the premises caused health problems. Plaintiff did not disclose her expert, one of her treating physicians (Johanning), until a year after the discovery deadline imposed by Supreme Court. Defendant had timely submitted expert evidence opining there was no causal relationship between plaintiff's exposure to sewage and mold at the leased premises and plaintiff's health problems: "... [T]his Court has interpreted CPLR 3101 (d) (1) (i) as 'requiring disclosure of any medical professional, even a treating physician or nurse, who is expected to give expert testimony' ... . Thus, while Johanning was listed in Colucci's responses to defendant's bill of particulars as one of 28 treating physicians or medical providers, and medical treatment records for her were disclosed, this at most indicated to defendant that Johanning might have been called as an expert by plaintiffs; it did not obviate the need for plaintiffs to comply with CPLR 3101 (d) (1) (i) and Supreme Court's order by disclosing their intent to rely on him as an expert, as well as the substance of the facts and opinions to which he was expected to testify... . To that end, the expert disclosure statute requires, in relevant part, 'reasonable detail [of] the subject matter on which [the] expert is expected to testify, the substance of the facts and opinions . . . and a summary of the grounds for [the] expert's opinion' (CPLR 3101 [d] [1] [i]), none of which was timely disclosed to defendant ... . Notably, 'the burden of providing expert witness disclosure and setting forth the particular details required by the statute lies with the party seeking to utilize the expert; it is not opposing counsel's responsibility to cull through [copious medical records] to ferret out the qualifications of the subject expert, the facts or opinions that will form the basis for his or her testimony at trial and/or the grounds upon which the resulting opinion will be based' ... . Moreover, the record supports Supreme Court's conclusions that Johanning's expert affidavit, submitted for the first time in opposition to defendant's motion, offered substantially new medical and scientific theories not reflected in his medical records ... . Thus, the court providently precluded Johanning's expert affidavit and testimony." ***Colucci v. Stuyvesant Plaza, Inc.*, 2018 N.Y. Slip Op. 00211, Third Dept 1-11-18**

UNEMPLOYMENT INSURANCE, LABOR LAW.

CLAIMANT NOT ENTITLED TO PRESUMPTION OF AN EMPLOYER-EMPLOYEE RELATIONSHIP PURSUANT TO LABOR LAW § 511 WHICH IS AFFORDED TO PERFORMING ARTISTS, CLAIMANT IS PAID TO PROMOTE CALL-IN RADIO SHOWS BY CALLING DURING THE SHOWS, AN ACTIVITY THAT REQUIRES NO ARTISTIC TALENT.

The Third Department, reversing the appeal board, determined claimant was not entitled to the presumption of an employee-employer relationship afforded by Labor Law § 511, which specifically applies to the performing arts. Claimant is a "caller" paid to participate in radio call-in shows to promote the shows. The caller need have no artistic skill or talent. Therefore the Labor Law § 511 presumption did not apply: "In this case, as there is no dispute that the callers' services did not require artistic or technical skill or talent, we find that the statutory presumption for an employee in the performing arts has not been established. As such, we find that the Board's interpretation of the statute was erroneous and its decision must be reversed. Additionally, we note that only general information about the endeavors of the radio stations — which are

not deemed to be the employers of the callers — was provided, which was insufficient to support the Board's finding that such endeavors required an artistic or technical skill or talent to produce. Inasmuch as the Board did not address whether United [the employer] exercised sufficient direction and control over claimant and those similarly situated to establish an employer-employee relationship, we remit the matter for the Board's consideration." ***Matter of Minefee (United Stas. Radio Networks, Inc.--Commissioner of Labor)*, 2018 N.Y. Slip Op. 00210, Third Dept 1-11-18**

WORKERS' COMPENSATION.

SKIN CARE SPECIALIST WORKING FOR A SKIN CARE COMPANY WITH A DISPLAY IN A BLOOMINGDALE'S STORE WAS AN EMPLOYEE OF THE SKIN CARE COMPANY AND WAS ENTITLED TO BENEFITS, LATE NOTICE EXCUSED, CLAIMANT FELL ON THE WAY TO THE RESTROOM.

The Third Department determined the Workers' Compensation Board's finding that claimant, a skin care specialist and spokesmodel, was an employee of Task Essential, who had a display in a Bloomingdale's store. Claimant fell on the way to a restroom. The court rejected the argument that claimant was a special employee of Bloomingdale's and that recovery was precluded by late notice of the injury: "Claimant testified that his supervisor, who represented himself as an employee of Task Essential, set his schedule, which varied week to week and included working at two different stores. Claimant further explained that he received training for the position from his Task Essential supervisor and Task Essential informed him of a required dress code. Part of claimant's job entailed meeting sales goals, he was paid an hourly rate and he would ask permission from a Task Essential supervisor before leaving his post to use the restroom. Claimant explained that, after he fell, a Task Essential supervisor informed him that he could not leave because there was no one to cover the skin care station. According to claimant, his Task Essential supervisor would occasionally spot check him to observe his performance." ***Matter of Colamaio-Kohl v. Task Essential Corp.*, 2018 N.Y. Slip Op. 00213, Third Dept 1-11-18**

WORKERS' COMPENSATION.

CLAIMANT PROVED HE WAS EMPLOYED BY A COMPANY WHICH DID NOT HAVE WORKERS' COMPENSATION INSURANCE AND WHICH REFUSED TO APPEAR AT THE HEARING, GENERAL CONTRACTOR OBLIGATED TO PAY THE WORKERS' COMPENSATION AWARDS.

The Third Department affirmed the Workers' Compensation Board's findings that claimant, a construction worker, was employed by an uninsured company (George Villar/Atelier) that failed to appear at the hearing and that the general contractor (Omega) was responsible for payment of the workers' compensation awards: "... [C]laimant testified that he had been hired by Mullady [supervisor working for George Villar/Aletier] and worked at the construction site for about a year before the accident. Claimant explained that he identified Villar as his employer on his claim form because Mullady had informed him during his employment that Villar was the boss. Claimant testified that he witnessed Villar give cash to Mullady in order to pay claimant and others at the job site. Claimant also testified that if he had questions about the work assigned by Mullady or his supervisor, he would ask either of them or Villar, who was occasionally at the work site. According to claimant, Villar told him after the accident that he would pay the medical bills. Claimant was familiar with Villar as he had worked directly for him at various other work sites. With regard to testimony from the Omega representative, he testified that Omega performed construction management services at the construction site and obtained the construction permit for the project listing itself as the general manager. Other than indicating that Omega was paid for its services by Villar, the representative was unable to provide any further information regarding any contractors working at the construction site. Given the uncontroverted testimony of claimant, we find that the Board's decision that claimant was employed by Atelier is supported by substantial evidence ...". ***Matter of Joseph v. Atelier Consulting LLC*, 2018 N.Y. Slip Op. 00218, Third Dept 1-11-18**

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