June 22, 2018

CasePrepPlus

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COURT OF APPEALS

CIVIL PROCEDURE, CONTRACT LAW.

NEW YORK'S BORROWING STATUTE APPLIED TO THE CONTRACT WITH A CANADIAN COMPANY WHICH CALLED FOR THE CONTRACT TO BE 'ENFORCED' ACCORDING TO NEW YORK LAW, ONTARIO'S TWO-YEAR STATUTE OF LIMITATIONS RENDERED THE ACTION UNTIMELY.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined New York's borrowing statute, CPLR 202, applied to a contract with a Canadian company in which the parties agreed the contract would be "enforced" according to New York law. The borrowing statute required that Ontario's two-year statute of limitations controlled and the action was untimely: "The [agreement] contained the following choice-of-law provision: 'This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of New York.' * * * CPLR 202 provides: 'An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.' * * * Plaintiff argues that because the contract in this case specified that it would be 'enforced' according to New York law, the parties intended to apply New York's procedural law except for its statutory choice-of-law provisions, which, plaintiff alleges, includes CPLR 202. We conclude, however, that the mere addition of the word 'enforced' to the [agreement's] choice-of-law provision does not demonstrate the intent of the contracting parties to apply solely New York's six-year statute of limitations in CPLR 213 (2) to the exclusion of CPLR 202. Rather, the parties have agreed that the use of the word 'enforced' evinces the parties' intent to apply New York's procedural law. CPLR 202 is part of that procedural law, and the statute therefore applies here." ***2138747 Ontario, Inc. v. Samsung C&T Corp.*, 2018 N.Y. Slip Op. 04274, CtApp 6-12-18**

CIVIL PROCEDURE, SECURITIES, FRAUD.

THE MARTIN ACT CLAIMS IN THIS DECEPTIVE PRACTICES ACTION INVOLVING RESIDENTIAL MORTGAGE BACKED SECURITIES ARE TIME-BARRED UNDER THE THREE-YEAR STATUTE OF LIMITATIONS FOR STATUTORY VIOLATIONS, BUT THE EXECUTIVE LAW CLAIMS MAY NOT BE TIME-BARRED IF THEY ARE BASED SOLELY ON THE ELEMENTS OF COMMON LAW FRAUD SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over an extensive two-judge concurring opinion and an extensive dissent, determined that some of the claims in this deceptive-practices/fraud action involving residential mortgage backed securities may not be time-barred. The Appellate Division had held both the General Business Law (Martin Act) and Executive Law claims were subject to the three-year statute of limitations for statutory violations and were therefore untimely. The Court of Appeals agreed the Martin Act claims were time-barred but ruled the Executive Law claims may not be time-barred if they are based entirely on the elements of common law fraud subject to a six-year statute of limitations: "... [T]he Martin Act imposes numerous obligations — or 'liabilities' — that did not exist at common law, justifying the imposition of a three-year statute of limitations under CPLR 214(2). The broad definition of 'fraudulent practices,' as repeatedly amended by the Legislature and interpreted by the courts, encompasses 'wrongs' not cognizable under the common law and dispenses, among other things, with any requirement that the Attorney General prove scienter or justifiable reliance on the part of investors. * * * ... [W]hile the lower courts concluded that a six-year statute of limitations applied to defendants' Executive Law § 63(12) claim — regardless of whether the specific elements of common law fraud had been made out — that holding was not correct. Rather, it is necessary to examine whether the conduct underlying the Executive Law § 63(12) claim amounts to a type of fraud recognized in the common law and, if so, the action will be governed by a six-year statute of limitations ... . Although the parties raised various arguments with respect to this question, not all the issues were addressed or resolved by the lower courts. A remittal — which permits consideration of the question in the current procedural posture — is therefore appropriate. If it is determined that the prima facie elements of a common law cause of action were made out in this case, the Attorney General will be obliged to demonstrate each such element at the proof stage or the claim will be subject to dismissal as time-barred." ***People v. Credit Suisse Sec. (USA) LLC*, 2018 N.Y. Slip Op. 04272, Ct App 6-12-18**

CRIMINAL LAW, APPEALS, EVIDENCE.

FAILURE TO RAISE THE SPECIFIC OBJECTION ARGUED ON APPEAL AND FAILURE TO SPECIFICALLY JOIN IN AN OBJECTION BY CO-COUNSEL RENDERED THE OBJECTIONS UNPRESERVED FOR APPEAL, EVIDENCE OF GANG STRUCTURE PROPERLY ADMITTED TO SHOW DEFENDANT'S MOTIVE AND INTENT, AND TO PROVIDE BACKGROUND INFORMATION.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two judge dissenting opinion, determined defendant's objection to a juror who spoke out during the about defense counsel's repeated use of a racial slur was not preserved for appeal. Defense counsel did not make the specific objection relied upon on appeal and was silent when objections were made by another defense attorney. The court further held that references to gang structure in the prison where the assault occurred were admissible to show the defendant's motive and intent to join the assault: "To preserve an issue of law for appellate review, 'counsel must register an objection and apprise the court of grounds upon which the objection is based at the time' of the allegedly erroneous ruling or at any subsequent time when the court had an opportunity of effectively changing the same' ... . * * * We are unpersuaded, first, by defendant's argument that because his counsel referred to Juror Six as 'grossly unqualified,' he preserved his Buford claim that the trial court had to make an inquiry into the juror's ability to be impartial. What defendant ignores is that counsel's reference to Juror Six being grossly unqualified was raised solely in relation to his consistent position that the only way to protect defendant's right to a fair and impartial jury was to grant the specific remedy of a mistrial. Counsel argued vigorously that Juror Six had irreversibly tainted the entire jury—a defect in the process that would require more than the discharge of a single juror ... . That being the case, counsel's failure to join another codefendant's request for a Buford inquiry after the court denied the mistrial motion makes plain the singular course set by counsel. ... Defendant's alternative argument, that he preserved the issue for appellate review by way of his codefendant's objection, is similarly unpersuasive. The Court has, in a different context, rejected the proposition that an issue is preserved for appellate review, notwithstanding a defendant's failure to expressly present the matter to the trial court, merely because another party or codefendant protested or objected. * * * ... [T]he testimony elicited by the People about the Bloods was probative of defendant's motive and intent to join the assault on complainant, and provided necessary background information on the nature of the relationship between the codefendants, thus placing the charged conduct in context ... . The testimony was intended to explain why defendant and one of the codefendants were quick to join in the fight, as well as the gang-related meaning of the words complainant alleged that the codefendant used during and after the attack. In fact, very little of the investigator's testimony focused on sensational details about the Bloods. The testimony described how members are identified and briefly discussed how carrying out an act of violence on behalf of a member might allow another member to rise in the gang's hierarchy." ***People v. Bailey*, 2018 N.Y. Slip Op. 04383, CtApp 6-14-18**

CRIMINAL LAW, ATTORNEYS.

BRIEF QUESTIONING OF THE DEFENDANT ON A REPRESENTED MATTER WAS SEPARABLE AS A MATTER OF LAW FROM THE QUESTIONING ON AN UNREPRESENTED MATTER.

In a brief memorandum, reversing the Appellate Division, the Court of Appeals determined brief questioning of defendant on a matter on which defendant was represented by counsel was separable as a matter of law from the interrogation on an unrepresented matter. There was no discussion of the facts of the case: "... [T]he impermissible questioning of defendant on a represented matter was so brief, flippant, and minimal that it was discrete and fairly separable as a matter of law from the interrogation of defendant on an unrepresented matter (see People v. Cohen , 90 NY2d 632, 641 [1997])." ***People v. Silvagnoli*, 2018 N.Y. Slip Op. 04276, CtApp 6-12-18**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

ALTHOUGH DEFENDANT WAS REPRESENTED ON A MARIJUANA CHARGE, QUESTIONING ABOUT AN UNRELATED MURDER DID NOT VIOLATE DEFENDANT'S RIGHT TO COUNSEL, APPELLATE DIVISION SHOULD NOT HAVE SUPPRESSED DEFENDANT'S STATEMENT ABOUT THE MURDER.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined defendant's right to counsel was not violated when he was questioned about a murder while he was represented on an unrelated marijuana charge. Defendant was stopped for traffic violations and arrested when marijuana was found in the car he was driving, a black Hyundai with tinted windows. An attorney was assigned for the marijuana charge. A BlackBerry found in the car was subsequently traced to a robbery where a black Hyundai with tinted windows was seen. According to a witness to a shooting, unrelated to the robbery, the shooter arrived and sped away in a black Hyundai with tinted windows. Defendant, when he was represented only on the marijuana charge, was questioned about the robbery and the murder and admitted to being the get-away driver. Supreme Court allowed defendant's statement about the murder in evidence and defendant was convicted of murder. The Appellate Division held that the statement about the murder should have been suppressed because the robbery and the marijuana charge were related and Supreme Court had suppressed the statement about the robbery. The Court of Appeals held that the proper analysis required looking at the marijuana charge and the murder, not the marijuana charge and the robbery. Because the marijuana charge was completely unrelated to the murder,

questioning about the murder did not violate defendant's right to counsel: "Under *Cohen* [90 NY2d 632] the relevant comparison is between the unrepresented and the represented charges. The first category concerns whether 'questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel'... . The purpose of the rule is to protect the right to counsel once it has attached; if the questioning on the unrepresented charge will inevitably lead to statements about the represented charge, the statements should be suppressed. However, if the relationship between the unrepresented and the represented charges is insufficient, then 'discrete questioning [on the unrepresented charge] by a police officer mindful and respectful of the indelible attachment of defendant's right to counsel [on the represented charge] would not [] create[] any serious risk of incriminating responses as to the latter crime[]' ... . Thus, the question the Appellate Division should have considered is whether the murder charge was sufficiently related to the marijuana charge. No evidence in the record would support that claim; indeed, even [defendant] does not press it." ***People v. Henry*, 2018 N.Y. Slip Op. 04275, CtApp 6-12-18**

CRIMINAL LAW, EVIDENCE.

THERE IS NO ACTUAL INNOCENCE GROUND FOR VACATION OF A GUILTY PLEA UNDER CRIMINAL PROCEDURE LAW § 440.10 (1) (h).

The Court of Appeals, reversing the Appellate Division, over a concurring opinion and a two-judge dissent, determined defendant's motion to vacate her conviction (by guilty plea) on actual innocence grounds should not have been granted. Actual innocence, the court held, is not a ground for relief in this context. Defendant was a nurse who pled guilty to endangering the welfare of a disabled person. Defendant had given the severely disabled child a bath and the child apparently sustained third degree burns. In support of her motion to vacate, the defendant presented expert evidence, including biopsy testing, that the apparent burns were the result of an allergic reaction (TEN/SJS). Defendant had been sued civilly and won, despite being precluded from contesting liability: "The evidence at issue here was not newly discovered. The information regarding TEN/SJS and the existence of the biopsy testing were a part of the victim's medical records, and the possibility of obtaining a medical expert on behalf of defendant had been discussed with defense counsel before the guilty plea was entered. Since the evidence put forth in support of defendant's actual innocence claim was discoverable before the guilty plea had her attorney pursued that course of investigation, defendant's challenge to her conviction falls squarely within CPL 440.10 (1) (h) ... . Moreover, although defendant provided the biopsy results and an expert affidavit to support the conclusion that she was innocent of scalding the victim with hot water, that evidence only raises some doubt as to her guilt by setting up a battle of experts. It does not establish her factual innocence — particularly in light of the significant barrier presented by her inculpatory statements and guilty plea. ... Permitting a collateral attack on a guilty plea based on a claim of new evidence that contradicts the solemn admission of guilt entered during the course of a judicial proceeding free of constitutional error would have enormous ramifications to the efficacy of our criminal justice system. The legislature has not sanctioned such claims in CPL 440.10 with the exception of the production of DNA evidence demonstrating the identity of the actual assailant, and even that narrow exception has legislatively imposed procedural limitations ... . Defendant nonetheless asks us to judicially create this extraordinary path for a defendant who has pleaded guilty. We decline to do so. ... [W]here the defendant has been convicted by guilty plea, there is no actual innocence claim cognizable under CPL 440.10 (1) (h)." ***People v. Tiger*, 2018 N.Y. Slip Op. 04377, CtApp 6-14-18**

CRIMINAL LAW, EVIDENCE.

STATEMENTS ALLEGED TO EXCULPATE DEFENDANT DID NOT MEET THE CRITERIA FOR DECLARATIONS AGAINST PENAL INTEREST, DEFENDANT'S MOTION TO VACATE HIS CONVICTION PROPERLY DENIED.

The Court of Appeals, over an extensive three-judge dissenting opinion, determined that the alleged declarations of three witnesses who testified at the hearing on defendant's motion to vacate his conviction did not meet the criteria for declarations against penal interest. Therefore the statements were not admissible and the motion to vacate was properly denied. The decision is fact-specific and cannot be fairly summarized here. The defendant was convicted of kidnapping Allen, who has not been seen since she disappeared in 1994: "At the hearing defendant called as witnesses all three declarants of the hearsay statements proffered as admissions against penal interests, as well as additional witnesses who testified to inculpatory statements alleged to have been made by each of the declarants. The declarants denied making the admissions and any complicity in Allen's kidnapping. Nevertheless, enabled by the speculative nature of the disparate admissions containing few details, defendant pursued more than one theory of complicity at the hearing — attempting to establish that, either singly or in combination, the declarants were involved in the kidnapping or the murder or the disposal of Allen's body ... . * * * In order to be admissible under that exception, 'the following elements must be present: first, the declarant must be unavailable as a witness at [the hearing]; second, when the statement was made the declarant must be aware that it was adverse to his penal interest; third, the declarant must have competent knowledge of the facts underlying the statement; and, fourth, and most important, supporting circumstances independent of the statement itself must be present to attest to its trustworthiness and reliability' ... . [T]the record supports County Court's determination that the independent corroboration necessary for admissibility of the declarations against penal interest was not sufficient. The requisite independent evidence circumvents fabrication and augments the trustworthiness of the declaration. 'By imposing such a requirement, a balance

is struck between the interest of defendant to introduce evidence on his own behalf and the compelling interest of the State to preserve the integrity of the fact-finding process in this aspect of criminal prosecutions' ... . As we have explained, this determination of the reliability of proffered declarations against penal interest 'involves a delicate balance of diverse factors and is entrusted to the sound discretion of the trial court, which is aptly suited to weigh the circumstances surrounding the declaration and the evidence used to bolster its reliability. The crucial inquiry focuses on the intrinsic trustworthiness of the statement as confirmed by competent evidence independent of the declaration itself' ...". ***People v. Thibodeau*, 2018 N.Y. Slip Op. 04378, CtApp 6-14-18**

CRIMINAL LAW, EVIDENCE.

DEPRAVED INDIFFERENCE ASSAULT CONVICTION INVOLVING A SINGLE VICTIM AFFIRMED, DEPRAVED INDIFFERENCE ASSAULT NEED NOT FIT WITHIN THE NARROW EXCEPTIONS CARVED OUT FOR DEPRAVED INDIFFERENCE MURDER.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a concurring opinion, determined that defendant was properly convicted of depraved indifference assault in connection with the long-term abuse and serious injury inflicted on his live-in girlfriend. The court noted that there is no conflict between the intention to inflict serious injury and a finding of depraved indifference in assault cases (grave risk of death). The court further noted that the circumstances giving rise to depraved indifference assault need not fit into the narrow exceptions carved out for depraved indifference murder: "Here, the trial court instructed the jury ... that they could find defendant acted with depraved indifference to human life if, 'having a conscious objective not to kill but to harm, he engages in . . . a brutal, prolonged and potentially fatal course of conduct against a particularly vulnerable victim.' The failure of either party to object to the charge meant that 'the law as stated in that charge became the law applicable to the determination of the rights of the parties . . . and thus established the legal standard by which the sufficiency of the evidence to support the verdict must be judged'... . Thus, 'the legal sufficiency of defendant's conviction must be viewed in light of the court's charge as given without exception' ... . Viewed as such, the jury could reasonably conclude that the victim's injuries were so severely debilitating that the repeated trauma rendered her particularly vulnerable. In fact, the victim could barely move and speak before she lapsed into a coma. The People also presented sufficient evidence from which the jury could infer that the victim's injuries persisted for a prolonged period of time. * * * … [D]efendant is incorrect that depraved indifference assault must fit into one of the narrow exceptions for bringing depraved indifference murder charges in one-on-one killings. * * * ... [D]epraved indifference assault should not be constrained to the exceptions to the rule against charging depraved indifference murder in one-on-one killings." ***People v. Wilson*, 2018 N.Y. Slip Op. 04380, CtApp 6-14-18**

FAMILY LAW.

TERMINATION OF PARENTAL RIGHTS BASED UPON ABANDONMENT REVERSED, AGENCY DID NOT MEET ITS BURDEN OF DEMONSTRATING FATHER, WHO WAS INCARCERATED, FAILED TO COMMUNICATE WITH THE CHILD DURING THE SIX MONTHS PRIOR TO THE PROCEEDING.

The Court of Appeals, reversing the Appellate Division, in a brief memorandum decision, determined the petitioner agency did not meet its burden of demonstrating father, who was incarcerated, had abandoned his child: "An order terminating parental rights may be entered upon the ground that a child's parent 'abandoned such child for the period of six months immediately prior to the date on which the petition is filed in the court' ... . A child is 'abandoned' within the meaning of Social Services Law § 384-b, if the 'parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency' ... . Parents are presumed able to visit and communicate with their children and, although incarcerated parents may be unable to visit, they are still presumed able to communicate with their children absent proof to the contrary ... . The petitioner agency bears the burden of proving abandonment by clear and convincing evidence... . Here, petitioner's caseworker testified that respondent—who was incarcerated—did not visit with the child or communicate with the caseworker or other agency personnel in the six months preceding the filing of the abandonment petition. However, the record is bereft of evidence establishing that respondent failed to communicate with the child, directly or through the child's foster parent, during the relevant time period. Thus, petitioner did not meet its burden of demonstrating, by clear and convincing evidence, that respondent abandoned the child." ***Matter of Mason H. (Joseph H.)*, 2018 N.Y. Slip Op. 04384, CtApp 6-14-18**

FAMILY LAW, ADMINISTRATIVE LAW.

ADMINISTRATIVE LAW JUDGE'S MARKING AN ADMINISTRATION OF CHILDREN'S SERVICES REPORT AS 'INDICATED' FOR MALTREATMENT OF PETITIONER'S CHILD HAD A RATIONAL BASIS AND SHOULD STAND, APPELLATE DIVISION REVERSED.

The Court of Appeals, reversing the Appellate Division, over an extensive dissenting opinion, determined that the administrative law judge's (ALJ's) marking a NYC Administration for Children's Services (ACS) report as "indicated" for

maltreatment of petitioner's (Natasha's) child had a rational basis. Natasha had used her five-year-old child as a pawn in a shoplifting scheme. Natasha had an unblemished record and was pursuing a degree in early childhood education. The "indicated" designation will probably make it impossible for Natasha to find work in the childhood education field: "... [I]t was rational for the Administrative Law Judge to have concluded that the child was placed in imminent risk of impairment, constituting maltreatment ... , and that petitioner's actions are reasonably related to employment in the childcare field... . The act in question — specifically, using the child as a pawn in a shoplifting scheme — 'was sufficiently egregious so as to create an imminent risk of physical, mental[,] and emotional harm to the child' ... . There is imminent potential for physical confrontation during a theft from a department store monitored by security. Moreover, ... under the circumstances presented here, 'utilizing a child to commit a crime and teaching a child that such behavior is acceptable must have an immediate impact on that child's emotional and mental well-being,' particularly where, as here, the child is 'young [and] just learning to differentiate between right and wrong' ... . Likewise, the Administrative Law Judge rationally concluded that petitioner's actions are reasonably related to employment in the childcare field '[a]s a matter of common sense' ...". ***Matter of Natasha W. v. New York State Off. of Children & Family Servs.*, 2018 N.Y. Slip Op. 04379, CtApp 6-14-18**

LANDLORD-TENANT, ADMINISTRATIVE LAW.

TENANT'S HUSBAND HAD MOVED TO A NURSING HOME, DIVISION OF HOUSING AND COMMUNITY RENEWAL PROPERLY ONLY COUNTED TENANT'S PORTION OF THE COUPLE'S INCOME TO FIND HER ELIGIBLE FOR RENT CONTROL.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over an extensive dissenting opinion, determined the Division of Housing and Community Renewal (DHCR) properly counted only the resident's income, and not her husband's income, for purposes of her eligibility for rent control. Her husband had moved to a nursing home: "Petitioner's main contention is that because, under federal tax law, a joint tax return results in joint tax liability attributable to both filers ... , under the RCL [rent control law], tenant's federal AGI [adjusted gross income] cannot be apportioned and therefore her total annual income exceeds the income threshold. Petitioner offers no sound explanation why federal income tax liability should be outcome determinative of how DHCR interprets and applies the RCL. ... To be sure, RCL ... characterizes annual income as the federal AGI. The statute also provides that total annual income is calculated as the 'sum' of the annual incomes of all those 'who occupy the housing accommodation as their primary residence' ... . To read the statute as petitioner and the dissent suggest would mean that total annual income may include those persons who do not occupy the housing accommodation as their primary residence. 'Such a construction, resulting in the nullification of one part of the [statute] by another,' is impermissible, and violates the rule that all parts of a statute are to be harmonized with each other' ...". ***Matter of Brookford, LLC v. New York State Div. of Hous. & Community Renewal*, 2018 N.Y. Slip Op. 04381, CtApp 6-14-18**

MUNICIPAL LAW, ADMINISTRATIVE LAW.

NASSAU COUNTY PROPERLY DETERMINED A POLICE OFFICER WAS NOT ENTITLED TO INDEMNIFICATION FOR CIVIL DAMAGES STEMMING FROM A LAWSUIT BY AN ARRESTEE ALLOWED TO REMAIN IN JAIL AFTER THE OFFICER KNEW HE COULD NOT HAVE COMMITTED THE CRIME.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that Nassau County did not act arbitrarily and capriciously when it decided petitioner police officer was not entitled to indemnification for civil damages stemming from a law suit by an arrestee (Crews) who was allowed to remain incarcerated despite the police officer's knowledge Crews could not have committed the offense: "General Municipal Law § 50-l, the statute at issue here, authorizes Nassau County to defend and indemnify police officers named as defendants in civil actions or proceedings, providing indemnification from 'any judgment . . . for damages, including punitive or exemplary damages, arising out of a negligent act or other tort of such police officer committed while in the proper discharge of [the officer's] duties and within the scope of [the officer's] employment' ... . The statute declares that '[s]uch proper discharge and scope shall be determined by a majority vote of a panel . . . appointed by' various Nassau County officials — respondent Indemnification Board. The legislature, thus, left the determination of whether the statutory prerequisites are met to the discretion of the Board. In this case, we are essentially asked to determine the meaning of the word 'proper' in the phrase: 'proper discharge of [the officer's] duties.' Petitioner argues that the phrases 'proper discharge of [ ] duties' and 'scope of [ ] employment' are interchangeable in this statute, requiring only that the officer be engaged in police work to be entitled to indemnification. However, such an interpretation reads the word 'proper' out of the statute. The legislature's inclusion of this modifier indicates an intent to hold officers to a higher standard than mere performance of duty. Read literally, the statute permits the Board to consider the propriety of the officer's actions in determining whether defense and indemnification is appropriate, as it did here when it revisited its determination after learning petitioner concealed information that extended the pretrial detention of an innocent person." ***Matter of Lemma v. Nassau County Police Officer Indem. Bd.*, 2018 N.Y. Slip Op. 04382, CtApp 5-14-18**

PERSONAL INJURY, CIVIL PROCEDURE,

DAMAGES AWARD IN A NEGLIGENCE SUIT BROUGHT BY A POLICE OFFICER RECEIVING ACCIDENTAL RETIREMENT DISABILITY BENEFITS MUST BE OFFSET BY THOSE BENEFITS AS A COLLATERAL SOURCE PURSUANT TO CPLR 4545.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge dissent, determined that a damages award in a negligence suit brought by a police officer receiving accident disability retirement (ADR) benefits must be offset by those benefits as a collateral source pursuant to CPLR 4545: "The ... question presented ... is whether a retired New York City police officer's accident disability retirement (ADR) benefits are a collateral source that a court must offset against the injured retiree's jury award for future lost earnings and pension. We hold that ADR benefits operate to replace earnings during the period when the retiree could have been employed, absent the disabling injury, and then serve as pension allotments, and so a court must offset a retiree's projected ADR benefits against the jury award for both categories of economic loss. * * * The statutory and regulatory scheme governing ADR benefits, and the text and legislative intent of CPLR 4545 ... provide the basis for our conclusion that ADR benefits operate sequentially as payment for future lost earnings and pension benefits. Accordingly, on a motion pursuant to CPLR 4545, a court must apply ADR benefits, dollar-for-dollar, to offset the jury award for future lost earnings during the period they represent lost earnings, and future lost pension during the period they represent lost pension." ***Andino v. Mills*, 2018 N.Y. Slip Op. 04273, CtApp, 6-12-18**

FIRST DEPARTMENT

APPEALS.

SUPREME COURT PROPERLY CONSIDERED A RELEASE WHICH DID NOT EXIST AT THE TIME THE CASE WAS REVERSED ON APPEAL AND SENT BACK.

The First Department determined Supreme Court properly considered a release that defendant had signed after the matter had been reversed on appeal and before the case was heard on remittal: "While Supreme Court is powerless to change a remittitur from this Court, 'nevertheless, in order to avoid an obviously unjust result it may mold its procedure and adapt its relief to the exigencies of any new facts or conditions which were not before the [appellate court] when it made its original determination and entered its remittitur'... . Here, the release is a 'new fact' that was not considered by this Court, and Supreme Court properly determined that it would be unjust to ignore its existence and proceed with the litigation." ***Gramercy Park Residence Corp. v. Ellman*, 2018 N.Y. Slip Op. 04424, First Dept 6-14-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE UNDER LABOR LAW § 240(1) FOR PLAINTIFF'S FALL FROM A LADDER BASED ON CONTRACTUAL SAFETY RESPONSIBILITIES, AND QUESTION OF FACT WHETHER A SUBCONTRACTOR IS LIABLE AS A STATUTORY AGENT OF THE OWNER.

The First Department, modifying Supreme Court, determined there was a question of fact (1) whether one defendant, the general contractor Russco, could be liable under Labor Law § 240(1) for plaintiff's fall from a ladder based upon contractual safety responsibilities, and (2) whether another defendant, Ruggles, could be liable under Labor Law § 240(1) as a statutory agent of the owner exercising supervision and control over the work: "... [T]he contract ... provides that Russco [the general contractor] is responsible for 'taking all reasonable safety precautions to prevent injury or death to persons or damage to property' and that such responsibility extends 'to the protection of all employees on the Project and all other persons who may be affected by the Work in any way' ... . The project is defined in the contract as 'construction of all Tenant Improvements for a retail store.' Reading these contractual provisions together creates ambiguity as to whether Russco's site safety obligations extended to the signage and awning work that plaintiff was performing when his accident occurred. * * * The Labor Law § 240(1) claim should not be dismissed as against Ruggles. 'Labor Law § 240(1) imposes a nondelegable duty upon owners, general contractors, and their agents to provide proper protection to persons working upon elevated structures' ... . 'To be treated as a statutory agent, the subcontractor must have been delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury' ... . '[O]nce a subcontractor qualifies as a statutory agent, it may not escape liability by the simple expedient of delegating that work to another entity' ... . Ruggles is a proper Labor Law § 240(1) defendant because it was a statutory agent of Express, the owner of the project." ***White v. 31-01 Steinway, LLC*, 2018 N.Y. Slip Op. 04279. First Dept 6-12-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, MAKESHIFT LADDER SLID OUT FROM UNDER HIM.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff alleged a makeshift ladder slid out from under him. A co-worker's statement that plaintiff may have missed the last step did not refute plaintiff's statement that the ladder slid out from under him: "Plaintiff made a prima facie showing

of entitlement to partial summary judgment on the issue of liability on his Labor Law § 240(1) claim with his testimony that the makeshift ladder on which he was descending after detaching a crane cable from the top of an eight-foot C-box slid out from under him ... . In opposition, defendants failed to raise a triable issue of fact. The affidavit of plaintiff's coworker, who stated that '[he] observed [plaintiff] fall from the ladder after he appeared to have missed' the last step,' does not raise a triable issue as to whether plaintiff was the sole proximate cause of the accident, as it does not refute plaintiff's assertion that the ladder slid out from beneath him ...". ***Nolan v. Port Auth. of N.Y. & N.J.*, 2018 N.Y. Slip Op. 04293, First Dept 6-12-18**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE, PERSONAL INJURY.

PLAINTIFF WAS ENGAGED IN ALTERATION WHEN HE FELL FROM AN A FRAME LADDER AND WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, RECOVERY NOT PRECLUDED ON THE GROUND THAT PLAINTIFF WAS THE ONLY WITNESS OR ON THE GROUND OF COMPARATIVE NEGLIGENCE.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) action stemming from a fall from an A frame ladder. Plaintiff was engaged in "alteration" within the meaning of the statute. The fact that plaintiff was the sole witness to the action did not preclude summary judgment. The fact that plaintiff may have been comparatively negligent did not preclude summary judgment: "Partial summary judgment on the issue of liability was properly granted in favor of plaintiff in this action where plaintiff was injured when he fell from a six-foot A-frame ladder while performing work on the sprinkler system in defendant's building ... . According to plaintiff, as he was tightening a bolt, the ladder moved and he fell to the floor. Contrary to defendant's contention, the record shows that the work that plaintiff was engaged in at the time of his accident constituted an alteration within the meaning of section 240(1). Such work included reconfiguring the premises' sprinkler system to comply with the fire code and entailed, inter alia, cutting and removing pipes, relocating pipes and valves, and installing components ... . That plaintiff is the sole witness to the accident does not preclude summary judgment in his favor where nothing in the record contradicts his account or raises an issue of fact as to his credibility ... . Furthermore, any failure on plaintiff's part to ensure that his coworker had properly set up the ladder would, at most, constitute comparative negligence, a defense inapplicable to a Labor Law § 240(1) cause of action ...". ***Concepcion v. 333 Seventh LLC*, 2018 N.Y. Slip Op. 04422, First Dept 6-14-18**

MEDICAL MALPRACTICE, EVIDENCE.

EDUCATION LAW AND PUBLIC HEALTH LAW DID NOT PROHIBIT RELEASE OF THE IDENTITIES OF NONPARTY PARTICIPANTS IN A QUALITY ASSURANCE REVIEW INVOLVING PLAINTIFF DOCTOR.

The First Department determined the Education Law and Public Health Law did not prohibit the release of the identities of persons who participated in a quality assurance review involving plaintiff doctor: "Plaintiffs' claims in this suit are based on [Peconic Bay Medical Center's] alleged misrepresentations about the existence of an investigation and the filing of an AAR [adverse action report], and the AAR did not report plaintiff for malpractice but for resigning during an ongoing investigation ... . * * * ... [P]laintiffs' request to compel defendants to un-redact the identities of nonparty participants in the quality assurance review process should be granted. Education Law § 6527(3) and Public Health Law § 2805-m protect documents 'prepared by or at the behest of' a quality assurance committee ... . However, they do not protect the mere identities of participants." ***Brook v. Peconic Bay Med. Ctr.*, 2018 N.Y. Slip Op. 04432, First Dept 6-14-18**

PERSONAL INJURY, MUNICIPAL LAW.

BUS DRIVER REACTED TO AN EMERGENCY, NOT LIABLE FOR SUDDENLY APPLYING THE BRAKES.

The First Department determined the driver of a bus, Garcia, was not liable for suddenly applying the brakes pursuant to the emergency doctrine. A taxi had suddenly swerved into the bus's lane: "The motion court properly invoked the emergency doctrine in finding that no issues of fact exist as to defendants' negligence given plaintiff's failure in opposition to adduce any evidence tending to show that the bus operator, defendant Garcia, created the emergency or could have avoided a collision with the nonparty livery taxi by taking some action other than applying his brakes ... . The sudden unexpected swerving of the livery taxi into the bus's lane required Garcia to take immediate action ... . Garcia's reaction of pressing the brakes with enough force to prevent an impact between his bus and the taxi and swerving the bus to the right was a reasonable response to the emergency that was not of his own making ... . That Garcia was aware that taxis often cut buses off does not require a different result." ***Jones v. New York City Tr. Auth.*, 2018 N.Y. Slip Op. 04281, First Dept 6-12-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION TO EXTEND THE TIME TO SERVE THE SUMMONS AND COMPLAINT PROPERLY GRANTED, DIFFERENCE BETWEEN 'GOOD CAUSE' AND 'INTEREST OF JUSTICE' CRITERIA EXPLAINED.

The Second Department determined plaintiff's cross motion to extend the time to serve the summons and complaint was properly granted. Defendant doctor had retired and was no longer working at the place of business where the medical mal-

practice summons and complaint was served: "... [A]n attempt at service that later proves defective cannot be the basis for a 'good cause' extension of time to serve process pursuant to CPLR 306-b... . However, the more flexible 'interest of justice' standard accommodates late service that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant ... . Indeed, the court may consider diligence or lack thereof, along with any other relevant factor, in making its determination, including expiration of the statute of limitations, the potentially meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant ... . Here, several factors weighed in favor of granting the plaintiff's cross motion. The action was timely commenced, and the statute of limitations with respect to one of the two causes of action had expired when the plaintiff cross-moved for relief ... . The appellant also had actual notice of this action within 120 days after its commencement ... . Furthermore, an extension of time to serve the summons and complaint under CPLR 306-b in the interest of justice is available where, as here, 'service is timely made within the 120-day period but is subsequently found to have been defective' ... .Finally, we note that whether a plaintiff has demonstrated that he or she has a potentially meritorious cause of action is but one factor to be considered by a court in determining a CPLR 306-b motion ...". ***Estate of Fernandez v. Wyckoff Hgts. Med. Ctr.*, 2018 N.Y. Slip Op. 04306, Second Dept 6-13-18**

CIVIL PROCEDURE.

PLAINTIFF DID NOT DEMONSTRATE DILIGENT EFFORTS TO SERVE DEFENDANT BEFORE USING THE AFFIX AND MAIL PROCEDURE, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the complaint for failure to obtain personal jurisdiction should have been granted. Plaintiff used the affix and mail procedure and did not demonstrate that diligent efforts were made to serve by other means: "Affix and mail service pursuant to CPLR 308(4) is only valid where service under CPLR 308(1) by personal delivery or CPLR 308(2) by delivery to a person of suitable age and discretion 'cannot be made with due diligence' ... . This requirement must be 'strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received'... . Whether due diligence has been satisfied must be 'determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality' ... . Specifically, 'it must be shown that the process server made genuine inquiries about the defendant's whereabouts and place of employment' ... . Here, the submissions in support of the plaintiff's motion contained numerous inconsistent dates regarding when service was attempted and made upon the defendant. Even accepting the dates of attempted service claimed by the plaintiff, those attempts were 'made on weekdays during hours when it reasonably could have been expected that [the defendant] was either working or in transit to work'... . Moreover, there is no indication that the process server made any attempt to locate the defendant's place of employment so he could attempt to effectuate service there ... . Under these circumstances, the plaintiff failed to establish that he exercised due diligence in attempting to effectuate service pursuant to CPLR 308(1) or (2) before resorting to service pursuant to CPLR 308(4) ...". ***Faruk v. Dawn*, 2018 N.Y. Slip Op. 04307, Second Dept 6-13-18**

CIVIL PROCEDURE.

ABSENCE OF A TRANSLATOR'S AFFIDAVIT CONTRIBUTED TO DEFENDANT'S FAILURE TO MAKE OUT A PRIMA FACIE CASE FOR SUMMARY JUDGMENT.

The Second Department determined the defendant's motion for summary judgment was properly denied because the errata sheets attached to the deposition were not accompanied by a translator's affidavit. The defendant testified through a Spanish language interpreter: "... [T]he defendant testified at her deposition through a Spanish language interpreter. However, the errata sheets annexed to the transcript of the defendant's deposition testimony and the defendant's affidavit, which were both written in English, were not accompanied by a translator's affidavit executed in compliance with CPLR 2101(b). Therefore, those evidentiary submissions were facially defective and inadmissible ... . While the defendant submitted a translator's affidavit with her reply papers, that affidavit was unnotarized, and thus was not in admissible form ... . The defendant's remaining evidentiary submissions were insufficient to establish her prima facie entitlement to judgment as a matter of law on the applicability of the homeowner's exemption under the Labor Law ...". ***Gonzalez v. Abreu*, 2018 N.Y. Slip Op. 04309, Second Dept 6-13-18**

EDUCATION-SCHOOL LAW, PERSONAL INJURY, EVIDENCE.

SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION PLAYGROUND ACCIDENT CASE PROPERLY DENIED, PLAINTIFFS' MOTION FOR A NEGATIVE INFERENCE JURY CHARGE BASED UPON THE SCHOOL DISTRICT'S DESTRUCTION OF VIDEO SURVEILLANCE EVIDENCE PROPERLY GRANTED.

The Second Department determined the defendant-school district's motion for summary judgment in this negligent supervision case was properly denied. And plaintiffs' motion for an adverse or negative inference jury instruction based on the school district's destruction of video surveillance evidence was properly granted. Infant plaintiff, a fifth grader, fell from the top of a set of monkey bars while attempting a dangerous cartwheel to a handstand. Apparently he successfully did the stunt just before and fell on his second attempt. The school was aware that infant plaintiff needed some extra supervision

because of his past actions. The school preserved only the video of the failed second attempt of the stunt and nothing prior: "... [T]here are triable issues of fact as to whether the infant plaintiff's alleged prior conduct and his reputation warranted more appropriate supervision, or heightened supervision, and, if so, whether such supervision would have prevented the accident ... . The evidence submitted in support of the defendant's motion for summary judgment did not establish, prima facie, that the accident occurred in so short a span of time that even the most intense supervision could not have prevented it... . Additionally, the doctrine of primary assumption of risk is not an applicable defense to the facts herein ... . [T]he plaintiffs demonstrated that the defendant had an obligation to preserve surveillance footage of the moments leading up to the infant plaintiff's accident at the time of its destruction, but negligently failed to do so. Given the nature of the infant plaintiff's injuries and the immediate documentation and investigation into the cause of the accident by the defendant's employees, the defendant was clearly on notice of possible litigation and, thus, under an obligation to preserve any evidence that might be needed for future litigation ... . The defendant failed to meet this obligation. The defendant acted negligently in unilaterally deciding to preserve only 24 seconds of footage and passively permitting the destruction of the remaining footage, portions of which were undisputedly relevant to the plaintiffs' case." ***SM v. Plainedge Union Free Sch. Dist.*, 2018 N.Y. Slip Op. 04370, Second Dept 6-13-18**

EVIDENCE.

SURVEILLANCE VIDEO PROPERLY EXCLUDED, IT WAS NOT AUTHENTICATED.

The Second Department determined Supreme Court properly refuse to admit a surveillance video because it was not properly authenticated: " 'Testimony from [a] videographer that he [or she] took the video, that it correctly reflects what he [or she] saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape' ... . Where the videographer is not called as a witness, the video can still be authenticated with testimony that the video 'truly and accurately represents what was before the camera'... . Furthermore, '[e]vidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering' ... . Here, given the inability of the witness to testify regarding the editing of the master recording and the accuracy of the video excerpt, and his lack of personal knowledge as to the creation of the proffered disc and how it came into the possession of the plaintiff's attorneys, we agree with the court's determination that the plaintiff failed to properly authenticate the video excerpt ...". ***Torres v. Hickman*, 2018 N.Y. Slip Op. 04372, Second Dept 6-13-18**

FAMILY LAW, ATTORNEYS, APPEALS.

FAMILY COURT SHOULD NOT HAVE RELIEVED MOTHER'S COUNSEL WITHOUT NOTICE TO MOTHER, THEREFORE FAMILY COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT UPON MOTHER'S FAILURE TO APPEAR, BECAUSE THE DEFAULT JUDGMENT SHOULD NOT HAVE BEEN ENTERED, APPEAL WAS THE PROPER REMEDY.

The Second Department, reversing Family Court, determined Family Court should not have relieved mother's attorney as counsel and entered a default judgment on mother's failure to appear. Mother was not notified of her attorney's intent to withdraw and, therefore, Family Court should not have entered an order on mother's default. Because the order should not have been entered, an appeal, rather than a motion to vacate the default, was the proper remedy: "Generally, no appeal lies from an order made upon the default of the appealing party (see CPLR 5511 ...). Rather, the proper procedure is to move to vacate the default and, if necessary, appeal from any denial of that motion (see CPLR 5015[a][1] ...). Here, however, there was no proper order entered upon default. An attorney of record may withdraw as counsel only upon sufficient cause and upon notice to the client (see CPLR 321[b][2] ...). Indeed, a purported withdrawal without proof of proper notice to the client is ineffective ..., and a court may not enter a default order in the absence of a proper withdrawal ... . There is no indication on the record that the mother's attorney informed her that he was seeking to withdraw as counsel. Accordingly, the Family Court should not have relieved the mother's attorney as counsel or entered an order on the mother's default... . Inasmuch as no order was properly entered upon default, the mother's appeal is not precluded ... ". ***Matter of Menghi v. Trotta-Menghi*, 2018 N.Y. Slip Op. 04324, Second Dept 6-13-18**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD NOT HAVE DENIED THE PETITION RE THE CHILD'S SPECIAL IMMIGRANT JUVENILE STATUS WITHOUT HOLDING A HEARING TO DETERMINE WHETHER REUNITING THE CHILD WITH MOTHER WAS NOT VIABLE DUE TO NEGLECT OR ABANDONMENT.

The Second Department ruled that Family Court should have held a hearing to determine whether the child could be reunited with his mother in order to further determine whether to make the findings necessary for the child to apply for special immigrant juvenile status (SIJS): "… [B]ased upon our independent factual review ... , we find that the record establishes that the child meets the age and marital status requirements for special immigrant status, and the dependency requirement has been satisfied by the granting of the father's guardianship petition ... . Further, we determine that it would not be in the best interests of the child to be returned to El Salvador, where gang members had threatened to kill him and his sister ... . However, the record is insufficient to determine whether reunification with the mother is not viable due to parental neglect

or abandonment ... . Accordingly, we reverse the order, and remit the matter to the Family Court, Nassau County, for a hearing on the issue of whether reunification with the mother is not viable due to parental neglect or abandonment, and a new determination thereafter of the father's motion for the issuance of an order, inter alia, making specific findings so as to enable the child to petition for SIJS ...". ***Matter of A.M.G. v. Gladis A.G.*, 2018 N.Y. Slip Op. 04321, Second Dept 6-13-18**

FRAUD. CIVIL PROCEDURE.

SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD APPLIES TO A CONVERSION ACTION, ALTHOUGH THE FRAUD BEGAN IN 1998 PLAINTIFF COULD NOT HAVE BECOME AWARE OF IT UNTIL 2013, PLAINTIFF'S ACTION IS TIMELY.

The Second Department determined plaintiff's action for conversion and breach of a fiduciary duty was timely. Plaintiff was the beneficiary of a structured settlement with payments which were to begin in 1998 and continue for the rest of his life. Defendant, who was the custodian of the structured settlement while plaintiff was minor, did not inform the plaintiff of the settlement and used the funds for her own purposes. The Second Department held that conversion sounds in fraud. Therefore the six-year statute of limitations applied and the statute did not begin to run until plaintiff became aware of fraud in 2013: "Contrary to the defendant's contentions, since the cause of action for conversion is based upon fraud, it is governed by the statute of limitations period for fraud set forth in CPLR 213(8) ... . The limitations period for fraud under CPLR 213(8) also applies to the breach of fiduciary duty causes of action inasmuch as the allegations of fraud are essential to those claims ... . Pursuant to CPLR 213(8), 'the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.' 'A cause of action based upon fraud accrues, for statute of limitations purposes, at the time the plaintiff possesses knowledge of facts from which the fraud could have been discovered with reasonable diligence' ... . Here, the plaintiff established that he could not, with reasonable diligence, have discovered the fraud until 2013, when he learned for the first time that he was the beneficiary of a structured settlement from which he was entitled to receive millions of dollars in monthly and periodic lump-sum payments." ***Monteleone v. Monteleone*, 2018 N.Y. Slip Op. 04317, Second Dept 6-13-18**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, EVIDENCE.

PROOF OF MAILING OF THE REQUIRED NOTICE DEFICIENT, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action because the proof of mailing of the required notice did not meet the requirements of Real Property Actions and Proceedings Law (RPAPL) 1304: " … [T]he plaintiff failed to establish, prima facie, that it strictly complied with RPAPL 1304. '[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition' ... . Here, contrary to the plaintiff's contention, the 'affidavit of mailing' of a vice president for loan documentation of its loan servicer was insufficient to establish that the notice was sent to the defendant in the manner required by RPAPL 1304, as the loan servicer did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing ...". ***US Bank N.A. v. Sims*, 2018 N.Y. Slip Op. 04374, Second Dept 6-13-18**

MUNICIPAL LAW, PERSONAL INJURY.

BENCH TRIAL VERDICT REVERSED, COMMON CARRIER NOT LIABLE FOR BUS PASSENGER'S SLIP AND FALL ON BLACK ICE AFTER STEPPING OFF THE BUS.

The Second Department, reversing a bench trial verdict in Supreme Court, determined defendant transit authority was not liable for plaintiff's slip and fall on black ice upon exiting defendant's bus: "The defendant, as a common carrier, 'owe[d] a duty to alighting passenger[s] to stop at a place where [they] may safely disembark and leave the area' ... , and towards that end 'to exercise reasonable and commensurate care in view of the dangers to be apprehended' ... . However, whether the defendant has breached its duty to provide a passenger a safe place to alight from the bus will depend on whether the bus driver could have observed the dangerous condition from the driver's vantage point... . Here, there was no evidence that the bus driver was aware of or reasonably should have been aware of the ice in the roadway. The fact that it was cold and there was a pile of snow near the rear exit does not create a basis to conclude that the bus driver should have known of the dangerous condition ...". ***Guzman v. New York City Tr. Auth.*, 2018 N.Y. Slip Op. 04310, Second Dept 6-13-18**

MUNICIPAL LAW, PERSONAL INJURY.

MOTION TO AMEND NOTICE OF CLAIM TO CORRECT THE ADDRESS OF THE ACCIDENT TWO YEARS AFTER THE CLAIM ACCRUED PROPERLY DENIED, PLAINTIFF DID NOT SHOW DEFENDANT WAS NOT PREJUDICED BY THE WRONG ADDRESS.

The Second Department determined plaintiff's motion to amend the notice of claim, two years after the claim accrued, to add the correct address of the accident was properly denied. Plaintiff did not demonstrate the failure to provide the correct

address did not prejudice the NYC Housing Authority (defendant): "A motion for leave to amend a notice of claim may be granted provided that the error in the original notice of claim was made in good faith and the municipality has not been prejudiced thereby ... . Here, the plaintiff failed to meet her initial burden of demonstrating the absence of prejudice to the defendant arising from the plaintiff's incorrect description of the accident location... . The plaintiff relied solely on the transient nature of the condition that allegedly caused her to fall to support her contention that the defendant did not suffer prejudice. The plaintiff did not allege that there were any witnesses to the incident or to the condition complained of, that the plaintiff received any medical assistance at the site, or that the accident was reported to anyone so as to give the defendant actual knowledge of the essential facts constituting the claim within the statutory period or a reasonable time thereafter ...". ***Jenkins v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 04313, Second Dept 6-13-18**

MUNICIPAL LAW, IMMUNITY, PERSONAL INJURY.

NO SPECIAL RELATIONSHIP BETWEEN PLAINTIFF'S DECEDENT AND THE POLICE DEPARTMENT, PLAINTIFF'S DECEDENT WAS KILLED BY HER HUSBAND SHORTLY AFTER SHE REPORTED TO THE POLICE THAT HER HUSBAND HAD CONTACTED HER IN VIOLATION OF AN ORDER OF PROTECTION.

The Second Department determined no special relationship had been formed between the police department and plaintiff's decedent, who was killed by her husband after she alerted the police he had contacted her in violation of an order of protection. The husband had previously taken plaintiff's decedent and their two teenage daughters hostage and threatened them with knives and a shotgun. The police department was immune from suit: "Generally, 'a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection' ... . When a cause of action alleging negligence is asserted against a municipality, and the municipality is exercising a governmental function, the plaintiff must first demonstrate that the municipality owed a special duty to the injured person ... . The elements required to establish such a duty are: '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that, while the police endeavored to contact the husband in order to instruct him not to further communicate with the decedent, the police did not promise to arrest the husband and the decedent could not have justifiably relied upon assurances of police protection ...". ***Axt v. Hyde Park Police Dept.*, 2018 N.Y. Slip Op. 04298, Second Dept 6-13-18**

PERSONAL INJURY.

BURDENS OF PROOF IN SUMMARY JUDGMENT MOTIONS AND THE APPLICABILITY OF COMPARATIVE NEGLIGENCE AS AN AFFIRMATIVE DEFENSE CAREFULLY EXPLAINED IN THIS REAR-END COLLISION CASE INVOLVING THREE CARS.

In a rear-end collision case involving three cars and motions and cross motions for summary judgment, the Second Department carefully laid out the burdens of proof on summary judgment motions in this context, as well as the applicability of comparative negligence in this context. The plaintiff's car was stopped and was struck in the rear by the Ramos car. Ramos alleged the Nisanov car was on the shoulder and the collision happened when Ramos avoided collision with the Nisanov car. The Nisanov defendants alleged plaintiff was comparatively negligent. The court held that the plaintiff was entitled to summary judgment in the action against Ramos, and plaintiff was entitled to summary judgment dismissing the affirmative defense of the Nisamov defendants alleging plaintiff's comparative negligence. But plaintiff was not entitled to summary judgment in plaintiff's action against the Nisanov defendants: "Ramos's version of the accident raised a triable issue of fact as to whether Dayan Nisanov was free from fault in the happening of the accident... . Accordingly, we agree with the Supreme Court's determination to deny that branch of the Nisanov defendants' cross motion which was for summary judgment dismissing the complaint and all cross claims insofar as asserted against them on the ground that they were not at fault in the happening of the accident. ... Inasmuch as the deposition testimony of Dayan Nisanov and the plaintiff indicated that Dayan Nisanov was not negligent in the operation of his vehicle, while the deposition testimony of Ramos indicated that Dayan Nisanov was negligent in the operation of his vehicle, the plaintiff's submissions failed to eliminate all triable issues of fact as to whether Dayan Nisanov was negligent and, if so, whether any such negligence caused or contributed to the accident ... . Accordingly, the Supreme Court should have denied that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the complaint insofar as asserted against the Nisanov defendants ... . Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability... , the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence ...". ***Poon v. Nisanov*, 2018 N.Y. Slip Op. 04365, Second Dept 6-13-18**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

WHETHER TO PRESENT PSYCHIATRIC EVIDENCE IS A STRATEGIC DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT; DEFENSE COUNSEL DID NOT RELINQUISH HIS AUTHORITY TO DECIDE WHETHER TO REQUEST A MISTRIAL MERELY BY CONFERRING WITH THE DEFENDANT AND AGREEING WITH THE DEFENDANT'S REQUEST TO PROCEED; IT WAS NOT ERROR TO HANDCUFF DEFENDANT AND TO HAVE LAW ENFORCEMENT OFFICERS SEATED NEAR THE DEFENDANT DURING THE TRIAL.

The Third Department, in a full-fledged opinion by Justice Clark, determined: (1) whether to introduce psychiatric evidence that defendant suffered from Secure Housing Unit Syndrome (Grassian Syndrome) was a strategic decision for defense counsel, not defendant; (2) defense counsel did not relinquish his authority to decide whether to request a mistrial merely by conferring with the defendant and agreeing with the defendant's wish for the trial to proceed; (3) it was not error to handcuff the defendant during the trial and to have law enforcement officers seated near the defendant and in the gallery during the trial (defendant was on trial for allegedly attacking and stabbing a prison guard with an ice pick): "... [T]he decision of whether to present psychiatric evidence in furtherance of the affirmative defense of not criminally responsible by reason of mental disease or defect is a strategic decision involving the exercise of professional judgment, over which defense counsel retains ultimate decision-making authority ... . Additionally, the record reflects that defense counsel 'fully' investigated a possible psychiatric defense and, having done so, 'made 'a calculated trial strategy' to fashion a different defense' ... . Defense counsel's statements on the record do not demonstrate, as defendant argues, that he ceded his decision-making authority to defendant. Rather, the record reflects that defense counsel consulted with defendant and received his input on the matter before withdrawing his motion for a mistrial ... . County Court stated on the record that defendant had a 'clear record of violence both within and outside the prison' and that it was therefore not 'comfortable' with the security risks posed by allowing defendant to sit throughout the trial without restraints. Considering defendant's violent criminal history, as well as the fact that the present charges arose out of allegations that defendant attacked the victim in the hopes that he would incite retaliatory actions from correction officers that would result in his death, we find that County Court's stated security concerns provided a reasonable basis to require that defendant be restrained during the trial... . Nor do we find that defendant was deprived of a fair trial by County Court's determination to allow, as a security measure, two correction officers to sit near defendant throughout the trial and other law enforcement personnel to sit in the court's gallery ...". ***People v. Diaz*, 2018 N.Y. Slip Op. 04389, Third Dept 6-14-18**

CRIMINAL LAW, EVIDENCE.

PEOPLE SHOULD HAVE PROVIDED NOTICE OF BURGLARY VICTIM'S IDENTIFICATION OF DEFENDANT ON THE POLICE DEPARTMENT'S FACEBOOK PAGE AFTER THE VICTIM HAD BEEN GIVEN THE DEFENDANT'S NAME BY THE POLICE, ERROR HARMLESS HOWEVER.

The Third Department determined it was error to fail to provide notice to the defendant of an identification procedure involving the victim of the burglary, Febus. The error was deemed harmless, however: "Febus testified that approximately one week prior to the burglary, she answered a ringing doorbell to find a stranger who asked for a person who was unknown to her. The individual left before she could respond to his inquiry. She described the individual as an older black man with long hair who was carrying a satchel. Approximately 10 days after the burglary, Febus went to the police station and identified various objects that had been taken from her residence. While she was at the police station, she asked a police officer about the identity of the individual who had broken into her residence, and the officer provided defendant's name. She then asked the officer if she could see a picture of the individual, and the officer responded that it 'was online on the Albany Police Department's [Facebook page].' Febus testified that she returned home and accessed the Facebook page. Over defendant's objection, County Court permitted Febus to continue her testimony regarding her prior identification of defendant. In that regard, she testified that when she accessed the police department's Facebook page, she saw a number of mugshots and immediately identified defendant as the person who had knocked on her door approximately one week prior to the burglary. We are not presented with the issue of whether maintenance by a police department of a Facebook page or website with mugshot photos of arrested individuals — or referral of individuals to such a website — are, without more, police-initiated identification procedures because, in this case, the police officer also provided Febus with defendant's name when he told her that she could view a picture of the person who had been arrested for burglarizing her home on the police department's Facebook page. The fact that she had been provided with defendant's name could have influenced her identification of defendant when she subsequently viewed the Facebook page. This, in our view, was sufficient police involvement to invoke the notice requirement of CPL 710.30 (1) ... . Inasmuch as notice was not provided, County Court erred in permitting Febus to identify defendant as the person who came to her home prior to the burglary." ***People v. Cole*, 2018 N.Y. Slip Op. 04391, Third Dept 6-14-18**

INSURANCE LAW, CIVIL PROCEDURE, CRIMINAL LAW, PERSONAL INJURY.

ALTHOUGH THE INSURER COULD DISCLAIM COVERAGE FOR ANY INJURIES CAUSED BY THE INSURED ASSAILANT'S INTENTIONAL CRIMINAL ACTS UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL, THE INSURER COULD NOT DISCLAIM COVERAGE FOR ANY SUBSEQUENT INJURIES THAT MAY HAVE BEEN CAUSED BY THE ASSAILANT'S NEGLIGENCE.

The Third Department determined plaintiff insurer could not completely disclaim coverage of injuries suffered by the defendant at the insured home (owned by the McCabe's). McCabe was convicted of assaulting and strangling the defendant. Defendant alleges that after McCabe assaulted her she fell over a tripping hazard in the McCabe home and was injured in the fall. Although the insurer can properly disclaim coverage for any injuries inflicted by McCabe's intentional criminal conduct under the collateral estoppel doctrine, the insurer could not, at this early stage, disclaim coverage for any injuries that might have been caused by McCabe's negligence (tripping hazard, failure to seek medical care, etc.): "Plaintiff asserts that, to convict McCabe, the criminal jury must have disbelieved his version of events. It is possible, however, that the jury disbelieved only some portions of his testimony ... . The jury may have found it incredible that all of defendant's facial and head injuries were caused when she tried to walk on her own, fell over a raised threshold in the doorway and hit her head on a cinder block wall during that fall. It is also possible that the jury believed that McCabe slammed defendant's head into the ground or a wall, thereby causing some of her injuries, but the jury did not render any findings regarding what happened after the choking and slamming, such as whether defendant then got up, tried to walk and fell. To establish the convictions, it was unnecessary for the jury to have made findings regarding whether McCabe created a tripping hazard, allowed defendant to walk on her own after he had rendered her partially incapacitated or failed to seek medical help for her after the criminal assault. Hence, the issues as to insurance coverage and exclusions are not identical to the issues decided in McCabe's criminal trial, and defendants here did not have a full and fair opportunity in the criminal trial to address some of the issues regarding McCabe's negligence allegedly committed before and after the criminal assault. Plaintiff failed to demonstrate that there was no possible factual or legal basis to support a finding that some of defendant's injuries were unintended by McCabe, so as to bar coverage under the policy exclusion ... . Accordingly, collateral estoppel does not apply here, except as to the more narrow issues necessarily decided in the criminal trial, and plaintiff was not entitled to summary judgment or a declaratory judgment at this early stage of this coverage action ... " ***State Farm Fire & Cas. Co. v. Chauncey McCabe*, 2018 N.Y. Slip Op. 04416, Third Dept 6-14-18**

WORKERS' COMPENSATION LAW.

RECENT AMENDMENT TO THE WORKERS' COMPENSATION LAW APPLIES RETROACTIVELY, CLAIMANT WITH A PERMANENT PARTIAL DISABILITY WHO HAS INVOLUNTARILY WITHDRAWN FROM THE LABOR MARKET NEED NOT DEMONSTRATE A CONTINUED ATTACHMENT TO THE LABOR MARKET.

The Third Department determined a recent amendment to the Workers' Compensation Law applied retroactively and was properly applied to claimant's case. The amendment provides that a worker who has involuntarily withdrawn from the labor market with a permanent partial disability need not demonstrate a continued attachment to the labor market: "... [T]he Board panel ... issued an amended decision finding that claimant was not required to demonstrate an attachment to the labor market based upon a recent amendment to Workers' Compensation Law § 15 (3) (w) ... . That amendment states, in relevant part, that in cases such as claimant's, 'compensation . . . shall be payable during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market' ... ... [W]e find that the amendment is applicable here and relieves claimant from the need to demonstrate a continued attachment to the labor market. Although it is generally preferable to construe a statute in a prospective manner, a retroactive application is warranted if the statutory language expressly or by necessary implication so provides ...". ***Matter of O'Donnell v. Erie County*, 2018 N.Y. Slip Op. 04410, Third Dept 6-14-18**

WORKERS' COMPENSATION LAW.

DIFFERENCE BETWEEN A SCHEDULE LOSS OF USE AND NONSCHEDULE PERMANENT PARTIAL DISABILITY EXPLAINED.

The Third Department explained the difference between a schedule loss of use and a nonschedule permanent partial disability: "Workers' Compensation Law § 15 (3) contains a schedule of awards for a permanent partial disability resulting from a loss of specific body parts or functions, such as vision and hearing (see Workers' Compensation Law § 15 [3] [a]-[v]). Workers' Compensation Law § 15 (3) (w) pertains to 'all other cases of permanent partial disability' — i.e., those cases that are not amenable to a schedule award. Whether a schedule loss of use award or a nonschedulable permanent partial disability classification is appropriate constitutes a question of fact for the Board's resolution, and its determination will be upheld if supported by substantial evidence ... . A nonschedulable permanent partial disability classification, rather than a schedule loss of use award, 'is indicated where there is a continuing condition of pain or continuing need for medical treatment or

the medical condition remains unsettled' ... . [S]ubstantial evidence, in the form of the medical evidence that claimant suffers from RSD/CRPS, a chronic continuing pain of the face and the opinion that the ptosis of the eyebrow is worsening, supports the Board's determination that an award of a nonschedulable permanent partial disability pursuant to Workers' Compensation Law § 15 (3) (w), rather than a schedule loss of use award, is appropriate ...". ***Matter of Tobin v. Finger Lakes DDSO*, 2018 N.Y. Slip Op. 04413, Third Dept 6-14-18**

WORKERS' COMPENSATION LAW.

A CLAIMANT MAY NOT RECEIVE BOTH A SCHEDULE LOSS OF USE AWARD AND A NONSCHEDULE PERMANENT PARTIAL DISABILITY AWARD FOR INJURIES FROM THE SAME ACCIDENT, BUT BOTH INJURY CLASSIFICATIONS CAN BE CONSIDERED IN DETERMINING LOSS OF WAGE-EARNING CAPACITY.

The Third Department determined claimant cannot receive both a schedule loss of use (SLU) award and a nonschedule permanent partial disability award for injuries stemming from the same accident, but both classifications of injury can be considered in determining loss of wage-earning capacity: "The amount of an SLU award is based upon the body member that was injured and the degree of impairment sustained; it is not allocable to any particular period of disability and is independent of any time that the claimant might lose from work . By contrast, compensation for a permanent partial disability that arises from a nonschedule injury, i.e., an injury to a body member not specifically enumerated in [Workers' Compensation Law 15 (3)], is based on a factual determination of the effect that the disability has on the claimant's future wage-earning capacity (see Workers' Compensation Law § 15 [3] [w]). A claimant who sustains both schedule and nonschedule injuries in the same accident may receive only one initial award ... , because an SLU award and an award made for permanent partial disabilities are both intended to compensate a claimant for loss of wage-earning capacity sustained in a work-related accident and concurrent payment of an award for a schedule loss and an award for a nonschedule permanent partial disability for injuries arising out of the same work-related accident would amount to duplicative compensation ... . Nevertheless, all impairments sustained by a claimant, whether resulting from schedule or nonschedule injuries, must be considered in determining lost wage-earning capacity attributable to a nonschedule permanent partial disability classification ... . However, in the unique circumstance where no initial award is made based on a nonschedule permanent partial disability classification, a claimant is entitled to an SLU award ...". ***Matter of Taher v. Yiota Taxi, Inc.*, 2018 N.Y. Slip Op. 04414, Third Dept 6-14-18**

FOURTH DEPARTMENT

ANIMAL LAW.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG BITE CASE SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this dog bite case should have been granted: "It is well established that 'an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit' ... . 'A known tendency to attack others, even in playfulness, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant[] liable for damages resulting from such an act' ... . 'In contrast, normal canine behavior' such as barking and running around' does not amount to vicious propensities' ... . The evidence establishes that, on the day of the incident, plaintiff sent a text message to a group of people that included defendant, as she had on previous occasions, to inform them that she would be at the dog park with her dog, who often played with Kane [defendant's dog]. Immediately prior to the incident, plaintiff threw a ball for her dog, plaintiff's dog retrieved the ball and, as he had frequently done in the past, Kane ran alongside plaintiff's dog back toward plaintiff. Both dogs were running fast in plaintiff's direction and, when it appeared that Kane was not going to veer off to the side, plaintiff turned away, whereupon Kane allegedly struck her leg. Despite evidence that Kane may have clumsily run around the dog park and similarly made contact with another visitor on a prior occasion, we conclude that, unlike situations in which a dog purposefully jumps onto or charges at a person ... , '[Kane's alleged] act of running into plaintiff in the course of . . . playfully [running alongside another dog at a dog park] merely consisted of normal canine behavior that does not amount to a vicious propensity' ...". ***Long v. Hess*, 2018 N.Y. Slip Op. 04475, Fourth Dept 6-15-18**

CIVIL PROCEDURE, EMPLOYMENT LAW.

CLASS ACTION CERTIFICATION FOR EMPLOYEES ALLEGING DEFENDANT'S FAILURE TO PAY THE PREVAILING WAGE SHOULD NOT HAVE BEEN DENIED.

The Fourth Department, reversing Supreme Court, determined class certification under CPLR 901 for employees alleging defendant did not pay prevailing wages required by article I, § 17 of the New York Constitution and section 220 (3) of the La-

bor Law: "... [T]he court erred in determining that plaintiffs failed to establish the first and second CPLR 901 prerequisites, numerosity and commonality. Plaintiffs established the numerosity prerequisite by submitting evidence of approximately 350 class members at a minimum ... . Plaintiffs established the commonality prerequisite because one common legal issue dominates the claims of all putative class members, i.e., whether similarly situated employees who worked on public projects were deprived of the prevailing wages to which they were entitled... . Contrary to defendant's contention, the fact that the amount of damages will vary among the putative class members does not prevent this lawsuit from going forward as a class action ...". ***Vandee v. Suit-Kote Corp.*, 2018 N.Y. Slip Op. 04456, Fourth Dept 6-15-18**

CRIMINAL LAW.

ACQUITTAL ON SOME COUNTS DID NOT RENDER PROOF OF OTHER COUNTS LEGALLY INSUFFICIENT, SERVICE ELEMENT OF CRIMINAL CONTEMPT PROVEN BY DEFENDANT'S RECEIPT OF THE ORDER IN COURT.

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, rejected defendant's arguments that (1) the People failed to prove the "service of the order" element of criminal contempt, and (2) his acquittal on some counts of the indictment rendered the evidence legally insufficient for the counts on which he was convicted. "... [D]efendant argues only that the convictions on counts two and five are legally insufficient due to the jury's acquittals on the remaining counts. According to defendant, 'when the conduct that was plainly rejected by the jury is removed from consideration, there is nothing left to support the physical menace conviction [count two] or the conviction for engaging in conduct that created a substantial risk of serious physical injury [count five].' Put differently, 'the only conduct upon which defendant could be found guilty of the crimes for which he was convicted was smashing [his wife's] car windows with a metal pipe while she was inside it. Because the jury was unwilling to find that defendant engaged in that conduct,' defendant continues, 'the convictions must be reversed as unsupported by legally sufficient evidence.' ... [T]he mixed verdicts provide no basis to question the legal sufficiency of the convictions... . In fact, defendant's argument is a classic 'masked repugnancy' argument ... , and it suffers from the same premise error that dooms all 'masked repugnancy' arguments: it assumes that a jury's verdict on one count can be weaponized to attack the legal or factual sufficiency of its verdict on another count. But that is not the law. To the contrary, the Court of Appeals has repeatedly held that '[f]actual inconsistency [in a verdict]— which can be attributed to mistake, confusion, compromise or mercy—does not provide a reviewing court with the power to overturn a verdict' on legal sufficiency grounds ... . * * * ... [D]efendant says that the People failed to prove the so-called 'service element' of that crime, i.e., that the underlying protective order was 'duly served' upon him or that he had 'actual knowledge [thereof] because he . . . was present in court when [it] was issued' ... . Because the service element is phrased disjunctively — i.e., it is satisfied if the defendant violates either a 'duly served' protective order or a protective order of which he or she has 'actual knowledge' because of his or her presence in court ...) — the People need prove only one of the statutory alternatives beyond reasonable doubt ...". ***People v. Nichols*, 2018 N.Y. Slip Op. 04502, Fourth Dept 6-15-18**

CRIMINAL LAW.

DEFENDANT WAS NOT PRESENT IN THE COURTROOM WHEN HIS SENTENCE OF INCARCERATION WAS CHANGED, MATTER REMITTED FOR RESENTENCING.

The Fourth Department, remitting the DWI case for resentencing, determined defendant's sentence should not have been changed after defendant left the courtroom. The court further found that the five-year conditional discharge to monitor the ignition interlock device exceeded the maximum allowed term (three years): " '[D]efendants have a fundamental right to be present at sentencing' in the absence of a waiver' of that right ... , and here defendant did not waive his right to be present at sentencing. Thus, as the People correctly concede, the court erred in changing the sentence of incarceration after defendant left the courtroom inasmuch as a resentencing to correct an error in a sentence 'must be done in the defendant's presence' ...". ***People v. Perkins*, 2018 N.Y. Slip Op. 04472, Fourth Dept 6-15-18**

CRIMINAL LAW, EVIDENCE.

FAILURE TO INSTRUCT THE JURY ON TWO REMOTE LESSER INCLUDED OFFENSES WAS HARMLESS ERROR, JURY WAS INSTRUCTED ON THE HIGHEST LESSER INCLUDED OFFENSE AND CONVICTED DEFENDANT OF THE TOP COUNT OF THE INDICTMENT.

The Fourth Department, over a two-justice dissent, determined that the trial court's error in refusing the instruct the jury on manslaughter second and criminally negligent homicide was harmless error. The defendant was charged with murder and the trial court instructed the jury on manslaughter first degree as a lesser included offense. The jury convicted the defendant of both murder and manslaughter first. Because the jury convicted on the top count, and the jury was instructed on the top lesser included offense, the failure to instruct on the more remote lesser included offenses was deemed harmless error. The manslaughter first conviction was reversed as a lesser concurrent count: "As set forth by the Court of Appeals, 'where a court charges the next lesser included offense of the crime alleged in the indictment, but refuses to charge lesser

degrees than that, . . . the defendant's conviction of the crime alleged in the indictment forecloses a challenge to the court's refusal to charge the remote lesser included offenses' (People v. Boettcher, 69 NY2d 174, 180 [1987]). The premise underlying a determination of harmless error is that, when a jury convicts the defendant of the top (i.e., highest) charged offense and thereby excludes from the case the next lesser (i.e., intermediate) included offense, the verdict dispels any significant probability that the jury, had it been given the option, would have acquitted the defendant of both the highest and intermediate charged offenses and instead convicted the defendant of the even lesser (i.e., remote) included offense that was erroneously not charged ... . Thus, cases applying the analysis set forth in Boettcher hold that where the trial court charges the jury with the highest offense of murder in the second degree and the intermediate offense of manslaughter in the first degree, and the jury convicts the defendant of murder in the second degree, the defendant's challenge on appeal to the court's denial of a request to charge the remote offenses of manslaughter in the second degree and/or criminally negligent homicide is foreclosed, i.e., any error is harmless ...". ***People v. Mcintosh*, 2018 N.Y. Slip Op. 04455, Fourth Dept 6-15-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S EVIDENTIARY ARGUMENTS ARE VIEWED ON APPEAL THROUGH THE LENS OF THE JURY INSTRUCTIONS TO WHICH NO OBJECTIONS WERE MADE, NO NEED TO PRESENT SPECIFIC PROOF THE CAR DEALERSHIP WHICH WAS VANDALIZED WAS A PERSON (A CORPORATION IN THIS CONTEXT) WITHIN THE MEANING OF THE CRIMINAL MISCHIEF STATUTE, NO NEED TO PROVE THE PRECISE AMOUNT OF DAMAGE CAUSED BY THE DEFENDANT AS OPPOSED TO THE DAMAGE CAUSED BY ALL PARTICIPANTS, ORDERING RESTITUTION IN THE FULL AMOUNT OF THE DAMAGES, AS OPPOSED TO APPORTIONING THE DAMAGES AMONG ALL THE PARTICIPANTS, WAS NOT ERROR.

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, affirming defendant's criminal mischief conviction and the restitution order, looked at the evidentiary issues raised on appeal through the lens of the relevant jury instructions. Where there is no objection to the jury instructions, the proof required of the People is that which is laid out in the jury instructions. The indictment alleged that the defendant and several others vandalized cars at a dealership by scratching the cars with keys causing total damage in the amount of $40,000. On appeal defendant argued (1) the charged offense requires damage to property owned by a "person" and the People did not demonstrate that the car dealership was a "person" within the meaning of the statute, (2) the precise amount of damage attributable to the defendant was not proven, and (3) ordering defendant to pay restitution in the full amount of the damages was error. All of defendant's arguments were rejected: "The court told the jury that defendant must have damaged the property of "another person" — not 'another human being' — and it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals .... Indeed, the Court of Appeals has written that personhood is 'not a question of biological or natural' correspondence' ..., and we can 'presume[]' that the jurors had 'sufficient intelligence' to make [the] elementary logical inferences presupposed by the language of [the court's] charge' ... . In short, defendant's personhood argument effectively transforms an undefined but commonly understood term into an incorrectly defined term, and we decline to follow him down that path. ... [T]he jury was instructed — without objection — that '[i]f it is proven . . . that the defendant acted in concert with others, he is thus criminally liable for their conduct. The extent or degree of the defendant's participation in the crime does not matter' ... . Perhaps this instruction was inconsistent with section 20.15 ... but it still forecloses defendant's claim of factual insufficiency as to value. ... [T]he Court of Appeals previously upheld a restitution award that imposed the full value of the victim's loss on a single perpetrator, instead of apportioning the loss among the defendant and his accomplices ... — as defendant appears to seek here." ***People v. Graves*, 2018 N.Y. Slip Op. 04503, Fourth Dept 6-15-18**

CRIMINAL LAW, EVIDENCE.

AT THE SUPPRESSION HEARING THE PEOPLE DID NOT PROVE THE VALIDITY OF THE COMMUNICATIONS WITH THE ARRESTING OFFICERS ABOUT THE EXISTENCE OF AN ACTIVE WARRANT FOR DEFENDANT'S ARREST, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing the conviction by guilty plea and dismissing the indictment, determined the People did not present sufficient proof at the suppression hearing to allow the suppression court to find there was probable cause for defendant's arrest. After a traffic stop, defendant was arrested based upon information from the 911 Center and the Cortland Police Department about an active warrant for defendant's arrest in Cortland. Cocaine seized in a search incident to arrest was the basis for the instant charges against the defendant. The defendant specifically challenged the validity of the communications with the arresting officers concerning the warrant. At the suppression hearing, the People did not present the warrant or any witness with first-hand knowledge about the warrant. The cocaine should have been suppressed: "Despite defendant's explicit challenge to the reliability of the information justifying his arrest ... , the People did not produce the arrest warrant itself prior to the conclusion of the hearing ... . Instead, the People relied upon the officer's testimony concerning his communications with an unidentified person or persons at the 911 Center and his assumptions about how

the 911 Center confirmed the existence of an active and valid warrant. That testimony, however, rested 'on a pyramid of hearsay, the information having been passed from' the arresting officer to unidentified persons at the 911 Center and the Cortland Police Department and back to the officer... . 'In making an arrest, a police officer may rely upon information communicated to him by another police officer that an individual is the subject named in a warrant and should be taken into custody in the execution of the warrant . . . However, if the warrant turns out to be invalid or vacated . . . [,] or nonexistent . . . , any evidence seized as a result of the arrest will be suppressed notwithstanding the reasonableness of the arresting officer's reliance upon the communication' ... . Here, without producing the arrest warrant itself or reliable evidence that the warrant was active and valid, the People did not meet their burden of establishing that defendant's arrest was based on probable cause ...". ***People v. Searight*, 2018 N.Y. Slip Op. 04466, Fourth Dept 6-15-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED, PLAINTIFF FELL FROM A SCAFFOLD AND HAD NOT TIED OFF HIS LANYARD.

The Fourth Department, modifying Supreme Court, over a two-justice dissent, determined that defendant's motion for summary judgment on the Labor Law § 240(1) should not have been granted. There were questions of fact whether plaintiff's fall could have been prevented by an available safety device. Plaintiff was not tied off, but there was testimony he couldn't have accomplished the work if he were tied off with a six foot lanyard. Although a 25 foot lanyard was available, plaintiff fell 25 to 30 feet and the retractable lanyard may not have prevented the injury: " 'A violation occurs where a scaffold or elevated platform is inadequate in and of itself to protect workers against the elevation-related hazards encountered while assembling or dismantling that device, and it is the only safety device supplied or any additional safety device is also inadequate' ... . We conclude that defendants' own submissions raised triable issues of fact with respect to the Labor Law § 240 (1) claim. In support of their contentions that plaintiff's conduct was the sole proximate cause of his injuries, defendants submitted plaintiff's deposition testimony in which he testified that he chose to unhook his safety lanyard and detach the bridge scaffolding sheet without the benefit of the lanyard or other safety device. The six-foot lanyard given to him was not an adequate safety device, however, because plaintiff also testified that it was too short to permit plaintiff to reach the final clip anchoring the bridge scaffolding sheet, even if he had moved the fall arrest system cable to a location closer to that clip. Furthermore, although defendants submitted evidence that other safety devices were generally available on the work site, they failed to establish as a matter of law that an adequate safety device was present that would have prevented plaintiff 'from harm directly flowing from the application of the force of gravity to . . . [his] person' ... . For example, defendants failed to establish as a matter of law that a 20- or 25-foot lanyard, which appears to have been the next length available on the work site, would have prevented plaintiff's fall by virtue of the fact that it was retractable. It therefore cannot be concluded on this record that plaintiff's use of that alternative lanyard would have made any substantial difference in plaintiff's injuries ...". ***Martin v. Niagara Falls Bridge Commn.*, 2018 N.Y. Slip Op. 04452, Fourth Dept 6-15-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTIONS OF FACT ON THE LABOR LAW § 240(1), LABOR LAW § 241(6), AND COMMON LAW NEGLIGENCE CAUSES OF ACTION, PLAINTIFF WAS USING THE TOP HALF OF AN EXTENSION LADDER AND THE LADDER SLIPPED OUT FROM UNDER HIM.

The Fourth Department, modifying Supreme Court, determined neither party was entitled to summary judgment on Labor Law § 240(1), Labor Law § 241(6) and common law negligence causes of action stemming from plaintiff's use of the top half of an extension ladder that slipped out from under him. With respect to the common law negligence cause of action against the property owner, the court explained: "Where the injured worker's employer provides the allegedly defective equipment, the analysis turns on whether the defendant owner had the authority to supervise or control the work ... . Where, however, the defendant owner provides the allegedly defective equipment, the legal standard 'is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof' ... , because in that situation the defendant property owner 'is possessed of the authority, as owner, to remedy the condition' of the defective equipment ... . Contrary to defendants' contention, they failed to establish as a matter of law that they did not create the dangerous condition of the ladder or have either actual or constructive notice of it. Moreover, 'the absence of rubber shoes on a ladder is a visible and apparent defect,' evidence of which may be sufficient to raise a triable issue of fact on the issue of constructive notice' ...". ***Sochan v. Mueller*, 2018 N.Y. Slip Op. 04457, Fourth Dept 6-15-18**

MEDICAL MALPRACTICE, EVIDENCE, CIVIL PROCEDURE, PERSONAL INJURY.

MOTION TO SET ASIDE THE VERDICT IN THIS MEDICAL MALPRACTICE CASE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant's motion to set aside the verdict as against the weight of the evidence should not have been granted: " 'It is well established that [a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence'... . 'Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view' ... . Here, there was sharply conflicting expert testimony with respect to whether plaintiff's postoperative symptoms could have occurred without negligence on the part of defendant, and the jury was entitled to credit the testimony of defendants' experts and reject the testimony of plaintiff's expert ... . We conclude that the court erred in setting aside the verdict as against the weight of the evidence inasmuch as 'the jury had ample basis to conclude that plaintiff's postoperative condition was not attributable to any deviation from accepted community standards of medical practice by defendant' ... , and thus the jury's finding that defendant was not negligent was not 'palpably irrational or wrong' ...". ***Clark v. Loftus*, 2018 N.Y. Slip Op. 04473, Fourth Dept 6-15-18**

PERSONAL INJURY, EVIDENCE, INSURANCE LAW, VEHICLE AND TRAFFIC LAW.

DEFENDANT'S SUMMARY JUDGMENT MOTION IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, DEFENDANT MAY HAVE VIOLATED THE DUTY TO SEE WHAT SHOULD HAVE BEEN SEEN, AND PLAINTIFF'S FRACTURED FOOT CONSTITUTED A SERIOUS INJURY AS A MATTER OF LAW.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this vehicle-pedestrian traffic accident case should not have been granted. Plaintiff demonstrated she suffered a serious injury within the meaning of the Insurance Law (fractures in her foot). And defendant did not demonstrate plaintiff's negligence was the sole proximate cause of the accident: "Plaintiff commenced this negligence action seeking damages for injuries that she sustained when a vehicle operated by defendant struck her foot while she was walking her bicycle on the street beneath an overpass. We agree with plaintiff, as limited by her brief, that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint and denying that part of plaintiff's cross motion for partial summary judgment on the issue of serious injury. Viewing the evidence in the light most favorable to plaintiff and affording her the benefit of every reasonable inference ... , we conclude that defendant failed to meet his initial burden on his motion of establishing as a matter of law that plaintiff's negligence was the sole proximate cause of the accident ... . Defendant's own submissions raise triable issues of fact, including whether he violated his 'common-law duty to see that which he should have seen [as a driver] through the proper use of his senses' ... and his statutory duty to 'exercise due care to avoid colliding with any bicyclist[or] pedestrian' (Vehicle and Traffic Law § 1146 [a]). Finally, it is uncontested that plaintiff established as a matter of law on her cross motion that she sustained fractures in her foot as a result of the accident and, therefore, she is entitled to partial summary judgment on the issue of serious injury (see Insurance Law § 5102 [d])." ***Luttrell v. Vega*, 2018 N.Y. Slip Op. 04468, Fourth Dept 6-15-18**

PERSONAL INJURY, MUNICIPAL LAW.

MOTION FOR LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST A PUBLIC CORPORATION SHOULD NOT HAVE BEEN GRANTED FOR ONE OF TWO ACCIDENTS, CLAIMANT FAILED TO SHOW DEFENDANT HAD TIMELY ACTUAL KNOWLEDGE OF THE FIRST OF TWO ACCIDENTS.

The Fourth Department, modifying Supreme Court, determined that claimant's motion for leave to file a late notice of claim against defendant public corporation was properly granted for only one of two accidents. The Fourth Department held that the defendant did not have timely actual knowledge of the first accident because there was no evidence defendant was provided with the relevant accident report: "While we agree with respondent that claimant failed to establish a reasonable excuse for the delay ... , '[t]he failure to offer an excuse for the delay is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]' ... . [W]e agree with claimant that he established that respondent would not be substantially prejudiced by any delay in serving the notice of claim. '[B]ecause the injur[ies] allegedly resulted from . . . fall[s] at a construction site, it is highly unlikely that the conditions existing at the time of the accident[s] would [still] have existed' had the notice of claim been timely filed ... . [C]laimant failed to meet his burden of demonstrating that respondent had timely actual knowledge of the first accident. Despite having engaged in pre-action discovery, claimant is unable to provide any evidence that the incident report related to the first accident was ever transmitted to respondent, and there was no mention of the first accident in the construction closeout report submitted to respondent. Inasmuch as there is no evidence that respondent received timely actual knowledge of the occurrence of the first accident, respondent could not

have received timely actual knowledge of 'the injuries or damages' ' resulting therefrom ...". ***Matter of Szymkowiak v. New York Power Auth.*, 2018 N.Y. Slip Op. 04482, Fourth Dept 6-15-18**

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