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CasePrepPlus

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FIRST DEPARTMENT

CONTRACT LAW, ARBITRATION, CORPORATION LAW.

ALTHOUGH INDIVIDUAL DEFENDANTS, OFFICERS OR EMPLOYEES OF DEFENDANT CORPORATION, DID NOT SIGN THE AGREEMENT IN THEIR INDIVIDUAL CAPACITIES, THEY ARE ENTITLED TO ENFORCE THE ARBITRATION PROVISION OF THE AGREEMENT.

The First Department determined the individual defendants, officers or employees of the corporate defendant, are entitled to enforce the arbitration provision of the contract, even though they were not signatories: "The individual defendants, who were officers or employees of [defendant corporation] and did not sign the [agreement] in their individual capacities, are nevertheless entitled to enforce the arbitration provision, because any breach of the [agreement] would have to be the result of an action or inaction attributable to them. A rule allowing corporate officers and employees to enforce arbitration agreements entered into by the corporate principal 'is necessary not only to prevent circumvention of arbitration agreements but also to effectuate the intent of the signatory parties to protect individuals acting on behalf of the principal in furtherance of the agreement' ... . Further, even a nonsignatory may be estopped from avoiding arbitration where he knowingly accepted the benefits of an agreement with an arbitration clause ...". ***Huntsman Intl. LLC v. Albemarle Corp.*, 2018 N.Y. Slip Op. 04962, First Dept 7-3-18**

CIVIL PROCEDURE.

ALLEGED TORTIOUS ACTS DID NOT OCCUR IN NEW YORK, OUT OF STATE DEFENDANT DID NOT HAVE SUFFICIENT CONTACT WITH NEW YORK TO MEET DUE PROCESS STANDARDS, NO PERSONAL JURISDICTION.

The First Department noted that personal jurisdiction pursuant to CPLR 302(a)(3)(ii) stems from tortious acts which occur in New York, not financial effects felt in New York, and due process requires that an out-of-state defendant have minimum contacts with New York. Neither requirement was met here: "A plaintiff relying on CPLR 302(a)(3)(ii) must show that (1) the defendant committed a tortious act outside New York; (2) the cause of action arose from that act; (3) the tortious act caused an injury to a person or property in New York; (4) the defendant expected or should reasonably have expected the act to have consequences in New York; and (5) the defendant derived substantial revenue from interstate or international commerce ... . In New York, 'the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred' ... . Here, the 'original critical events' giving rise to plaintiff's injury were the 2012 and 2015 Transfers. As those transfers occurred outside of New York and did not involve New York assets, the situs of injury was not in New York... . That plaintiff felt economic injury in New York, alone, is an insufficient basis to confer jurisdiction. ... Furthermore, even if the elements of CPLR 302(a)(3)(ii) have been met, asserting personal jurisdiction would not comport with due process ... . To comport with due process, '[t]here must also be proof that the out-of-state defendant has the requisite minimum contacts' with the forum state and that the prospect of defending a suit here comports with traditional notions of fair play and substantial justice,' ... . The 'minimum contacts' requirement is satisfied where 'a defendant's conduct and connection with the forum State' are such that it should reasonably anticipate being haled into court there' ... . Under the 'effects test' theory of personal jurisdiction, where the conduct that forms the basis for the plaintiff's claims takes place entirely out of forum, and the only relevant jurisdictional contacts with the forum are the harmful effects suffered by the plaintiff, a court must inquire whether the defendant 'expressly aimed' its conduct at the forum ... . Here, defendants did not expressly aim their tortious conduct at New York, and the foreseeability that the alleged fraudulent conveyances would injure plaintiff in New York is insufficient ...". ***Deutsche Bank AG v. Vik*, 2018 N.Y. Slip Op. 04958, First Dept 7-3-18**

MUNICIPAL LAW. ADMINISTRATIVE LAW.

THE CONTROLLING STATUTE DOES NOT PROVIDE THAT THE CITY CAN SUE FOR DAMAGES FOR INJURY TO TREES, THE REGULATION WHICH PURPORTS TO ALLOW SUCH A SUIT DECLARED INVALID.

The First Department, reversing Supreme Court, determined the plaintiff city was not authorized to sue defendant for money damages for defendant's alleged injury to tress during sidewalk repair. Although a regulation allowed the suit, the controlling statute did not. The regulation was declared invalid: "The motion court erred in ruling that the City has the ca-

pacity to sue for the negligent destruction of its property. A municipality does not have a common-law right to bring suit; its right to sue, if any, 'must be derived from the relevant enabling legislation or some other concrete statutory predicate' ... . Rules of City of New York Department of Parks and Recreation (DPR) (56 RCNY) § 5-01(c) permits DPR to 'seek damages' against persons who 'cut, remove, or destroy' its trees without a permit ... . However, the relevant enabling legislation, which authorizes DPR to promulgate rules regarding the cutting, removal, and destruction of its trees, does not authorize a municipal right of action to recover money damages for injury to the trees (see New York City Charter § 533[a][9]; Administrative Code of the City of New York § 18-107[e]). 56 RCNY 5-01(c) is therefore 'out of harmony' with the statute, and we hold that it is invalid ...". ***City of New York v. Tri-Rail Constr., Inc.*, 2018 N.Y. Slip Op. 04954, First Dept 7-3-18**

SECOND DEPARTMENT

ATTORNEYS.

FEE-SHARING AGREEMENT VIOLATED JUDICIARY LAW 491 AND COULD NOT BE ENFORCED BY A COURT.

The Second Department determined the fee sharing agreement violated Judiciary Law 491 and could not be enforced by a court: "With respect to the merits of the appeal, Judiciary Law § 491 prohibits any person, partnership, or corporation from sharing any fee or compensation charged or received by an attorney-at-law, in consideration of having placed in the hands of such attorney-at-law a claim or demand of any kind ... . Under the purported fee-sharing agreement, the plaintiffs would provide the defendant attorneys with proprietary information regarding potential clients, investigate claims, interview potential plaintiffs, and otherwise assist with litigation. In exchange, the defendant attorneys would pay the plaintiffs 20% of their fee for each case. This purported fee-sharing agreement whereby the plaintiffs attempt to recover from the defendant attorneys is illegal, and the plaintiffs are proscribed from seeking the assistance of the courts in enforcing it ...". ***Ballan v. Sirota*, 2018 N.Y. Slip Op. 05014, Second Dept 7-5-18**

CIVIL PROCEDURE.

MOTION TO VACATE DEFAULT JUDGMENT MORE THAN A YEAR AFTER THE JUDGMENT WAS ENTERED SHOULD NOT HAVE BEEN GRANTED, ALTHOUGH THE COURT HAD THE POWER TO VACATE THE JUDGMENT IN THE INTEREST OF JUSTICE, DEFENDANT DID NOT OFFER A REASONABLE EXCUSE.

The Second Department, reversing Supreme Court, determined defendant nursing home's motion to vacate a default judgment, made more than a year after the default judgment, should not have been granted. The nursing home did not offer a reasonable excuse: "A defendant moving pursuant to CPLR 5015(a)(1) to vacate a default in appearing or answering the complaint must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action ... . 'Such motion must be made within one year after service of a copy of the . . . order with written notice of its entry upon the moving party' . '[A]lthough the Supreme Court has the inherent authority to vacate an order in the interest of justice even where the statutory one-year period under CPLR 5015(a)(1) has expired'... , here, the nursing home failed to demonstrate a reasonable excuse for its delay in moving to vacate the order ... . In any event, the nursing home's claim that its failure to appear or answer the complaint was caused by an internal mishandling of the pleadings was unsubstantiated and insufficient to constitute a reasonable excuse for its default ...". ***Hairston v. Marcus Garvey Residential Rehab Pavilion, Inc.*, 2018 N.Y. Slip Op. 05021, Second Dept 7-5-18**

CIVIL PROCEDURE.

MOTION TO VACATE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED, PLAINTIFF'S ATTORNEY'S ILLNESS WAS A REASONABLE EXCUSE FOR FAILURE TO APPEAR AT ORAL ARGUMENT, MERITORIOUS ACTION DEMONSTRATED, FIRST MOTION DENIED WITHOUT PREJUDICE, SECOND MOTION ON THE SAME GROUNDS WAS NOT, THEREFORE, PRECLUDED.

The Second Department, reversing Supreme Court, determined that the plaintiff's motion to vacate a default judgment entered when plaintiff did not appear at the argument on defendant's motion to dismiss should have been granted. Plaintiff's attorney's illness was a reasonable excuse. The court noted that, although only one motion to vacate a default judgment is usually allowed, because Supreme Court denied the first motion "without prejudice" the second motion on the same grounds was not precluded: "... [T]he plaintiff's excuse that its attorney failed to appear at oral argument due to illness, which excuse was corroborated by medical documentation, was reasonable under the circumstances presented ... . In addition, the plaintiff demonstrated a potentially meritorious opposition to [defendant's] motion ... . A party ordinarily is precluded from making a second motion to vacate a default on the same ground raised in a prior motion to vacate the default ... . However, because the Supreme Court denied the plaintiff's first motion to vacate 'without prejudice,' the plaintiff was not precluded from making a second motion to vacate its default on the same grounds raised in its prior motion." ***World O World Corp. v. Anoufrieva*, 2018 N.Y. Slip Op. 05075, Second Dept 7-5-18**

ENVIRONMENTAL LAW, LAND USE, ADMINISTRATIVE LAW.

PLANNING BOARD'S FINDING THE DEVELOPMENT PROJECT WOULD NOT HAVE SIGNIFICANT IMPACT ON THE ENVIRONMENT WAS ARBITRARY AND CAPRICIOUS, MATTER REMITTED FOR PREPARATION OF AN ENVIRONMENTAL IMPACT STATEMENT.

The Second Department, reversing Supreme Court, determined the planning board's finding that a multi-family housing project would not have a significant impact on the environment was arbitrary and capricious. The matter was remitted for preparation of an environmental impact statement: "... [T]he full Environmental Assessment Form (hereinafter EAF) prepared by the project sponsor indicated that the proposed action would affect, among other things, aesthetic and historic resources and the character of the existing community, and that the parcel's forestation would be reduced from 2.75 acres to .30 acres. In issuing its negative declaration, the Planning Board listed approximately 29 reasons supporting its determination. The Planning Board noted that the project would not significantly impact the adjacent Dwight Street-Hooker Avenue Historic District (hereinafter the historic district). However, in making that determination, the Planning Board merely relied upon a letter from the New York State Office of Parks, Recreations and Historic Preservation, which stated only that the proposed action would not have an adverse impact on the historic district. Such a conclusory statement fails to fulfill the reasoned elaboration requirement of SEQRA ... . With regard to the impact on vegetation or fauna, the EAF contemplates the reduction of the 3.4-acre parcel's forestation from 2.75 acres to .30 acres. However, the negative declaration inexplicably stated that '[t]he proposed action will not result in the removal or destruction of large quantities of vegetation or fauna.' In the context of this project, the level of deforestation is significant. In light of the foregoing, it is clear that the proposed action may have significant adverse environmental impacts upon one or more areas of environmental concern... ." Thus, the Planning Board's issuance of a negative declaration was arbitrary and capricious. ***Matter of Peterson v. Planning Bd. of the City of Poughkeepsie*, 2018 N.Y. Slip Op. 05049, Second Dept 7-5-18**

ENVIRONMENTAL LAW, LAND USE, ADMINISTRATIVE LAW.

PLANNING BOARD'S DENIAL OF A WETLAND CONTROL PERMIT AND SITE PLAN APPROVAL PROPERLY ANNULLED, THE DENIAL WAS A DEPARTURE FROM PRIOR DETERMINATIONS AND THE BOARD DID NOT SET FORTH FACTUAL REASONS FOR THE DEPARTURE.

The Second Department determined the town planning board's denial of petitioner's application for a wetland control permit and site plan approval was properly annulled by Supreme Court. The planning board's action departed from many prior determinations and the planning board did not set forth any factual reasons for the departure: "... '[A] local planning board has broad discretion in reaching its determination on applications . . . and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion'... . 'A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious' ... . Where an agency reaches contrary results on substantially similar facts, it must provide an explanation ... . 'An agency's failure to provide a valid and rational explanation for its departure from its prior precedent mandates reversal' regardless of whether the record otherwise supports the determination' ... . Here, the Planning Board failed to set forth any factual basis in the determination as to why it was departing from numerous prior determinations that, for example, permitted larger encroachments into wetland and wetland buffer areas and permitted encroachments of the same or similar type into those areas within the immediate vicinity of the petitioner's lot. The Planning Board's belated effort to provide such distinctions are not properly before this Court ...". ***Matter of Nicolai v. McLaughlin*, 2018 N.Y. Slip Op. 05046, Second Dept 7-5-18**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 AND DID NOT DEMONSTRATE IT HAD STANDING TO BRING THE FORECLOSURE ACTION, BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action. The bank did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304: "In moving for summary judgment, the plaintiff submitted the affidavit of Timeka J. Motlow, a representative of its loan servicer, who stated that '[t]he records I have reviewed indicate that the attached 90-day pre-foreclosure notice was mailed to [the defendant] at the property address of the real estate at issue herein and to the last know[n] address of the borrower(s).' However, Motlow did not have personal knowledge of the purported mailing and failed to make the requisite showing that she was familiar with the plaintiff's mailing practices and procedures, and therefore did not establish 'proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed' ... . Moreover, the plaintiff failed to establish, prima facie, that it had standing to commence the action ...". ***U.S. Bank N.A. v. Henderson*, 2018 N.Y. Slip Op. 05071, Second Dept 7-5-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, A HOMEOWNER WHOSE COMPANY HIRED DEFENDANT SUBCONTRACTOR TO WORK AT PLAINTIFF'S HOME, WAS A PROPER PLAINTIFF UNDER LABOR LAW §§ 240(1) AND 241(6), QUESTIONS OF FACT WHETHER DEFENDANT WAS IN CONTROL OF THE WORK SITE AND HAD BEEN DELEGATED SITE SAFETY RESPONSIBILITIES.

The Second Department determined plaintiff was a proper plaintiff pursuant to Labor Law §§ 240(1) and 241(6). Plaintiff owned a single family home and plaintiff's company hired defendant subcontractor to work on plaintiff's property. Plaintiff was inspecting defendant's work when he slipped and fill on oil which allegedly came from defendant's equipment. In addition, the Second Department determined there were questions of fact whether defendant had control of the work site and was delegated safety responsibilities: "Labor Law § 240(1) requires that persons 'employed in,' inter alia, the 'alteration' of a building be provided with proper protective devices. Labor Law § 241(6) requires contractors and owners and their agents who are performing excavation work to comply with the provisions of the Industrial Code to protect 'the persons employed therein or lawfully frequenting such places.' 'Employee' is defined in Labor Law § 2(5) as 'a mechanic, workingman or laborer working for another for hire.' A plaintiff who seeks to recover under Labor Law §§ 240(1) and 241(6) must show that he or she was both permitted to work on a building or structure and was hired by someone ... . Those provisions may apply to the president of the general contractor for the project, who is inspecting work performed by subcontractors ... . Inspecting the work on behalf of a general contractor is a protected activity covered by these Labor Law provision ... . Here, the plaintiff alleged that the defendant was working alone at the site and the plaintiff was merely on-site to inspect the progress of the work. The plaintiff further claims that he 'did not direct or control the work . . . and played no role in implementing safety procedures or taking safety measures,' since safety measures were in the exclusive control of the defendant. Thus, although the defendant does not own the property and did not appear to be acting as a general contractor, there are triable issues of fact as to whether the defendant could be liable under Labor Law §§ 240(1) and 241(6) on the ground that it had control of the work site and was delegated the duty to enforce safety protocols at the time the accident occurred." ***Eliassian v. G.F. Constr., Inc.*, 2018 N.Y. Slip Op. 05020, Second Dept 7-5-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER OPERATOR OF A SKATING RINK PROVIDED PROPER SUPERVISION AND THEREFORE WHETHER THE ASSUMPTION OF RISK DOCTRINE APPLIED, PLAINTIFF ALLEGED SHE WAS PUSHED TO THE ICE BY AN UNRULY SKATER.

The Second Department, reversing Supreme Court, determined the defendant town, owner-operator of a skating rink, did not eliminate all questions of fact about whether it provided proper supervision at the rink. Therefore there was a question of fact whether the doctrine of assumption of the risk applied. Plaintiff alleged she was pushed to the ice by an unruly skater: "Participants in sports or recreational activities 'will not be deemed to have assumed . . . unreasonably increased risks' … . 'Thus, where reckless behavior that is over and above the usual dangers inherent in the activity of skating is claimed to have caused the injury, the issue of whether the proprietor was negligent in supervising the skaters turns on whether the proprietor had sufficient notice of the allegedly reckless conduct so as to permit it to prevent the injury through the exercise of adequate supervision' ... . 'The duration and nature of the allegedly reckless conduct are factors that bear on this issue' ... . Here, the defendant failed to establish, prima facie, that the action was barred by the doctrine of primary assumption of risk ... . The defendant's submissions failed to eliminate all triable issues of fact as to whether the risk was unreasonably increased by the defendant's alleged failure to properly supervise the skaters such that the doctrine of primary assumption of risk would not apply ...". ***Laurent v. Town of Oyster Bay*, 2018 N.Y. Slip Op. 05028, Second Dept 7-5-18**

PERSONAL INJURY, MUNICIPAL LAW.

A TREE FELL ON THE CAR IN WHICH PLAINTIFF WAS A PASSENGER, TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, TOWN DID NOT DEMONSTRATE IT HAD INSPECTED THE TREE AND DID NOT DEMONSTRATE A LACK OF NOTICE OF THE CONDITION OF THE TREE.

The Second Department, reversing Supreme Court, determined the defendant town's motion for summary judgment in this tree-fall accident should not have been granted. Plaintiff alleged a tree near the roadway fell on the vehicle in which plaintiff was a passenger: "Municipalities have a duty to maintain their roadways in a reasonably safe condition, and this duty extends to trees adjacent to the road which could pose a danger to travelers ... . Municipalities also possess a common-law duty to inspect trees adjacent to their roadways ... Here, the Town did not establish its prima facie entitlement to judgment as a matter of law because it failed to demonstrate that it met its duty to inspect and maintain the subject tree, or that it lacked constructive notice of the alleged dangerous condition of the tree ...". ***Schillaci v. Town of Islip*, 2018 N.Y. Slip Op. 05070, Second Dept 7-5-18**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH DEFENDANT HOMEOWNER MAY HAVE REMOVED ICE AND SNOW FROM THE SIDEWALK, THERE WAS NO SHOWING THE REMOVAL EFFORTS EXACERBATED OR CREATED THE DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, HOMEOWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the defendant homeowner's motion for summary judgment in this snow-ice sidewalk slip and fall case should have been granted. Under the NYC Administrative Code the owner of a single-family residential home has no statutory duty to maintain the abutting sidewalk. Although there was evidence defendant removed ice and snow from the sidewalk, there was no showing the snow removal efforts exacerbated or created the dangerous condition: "While there is record evidence that the defendants may have engaged in snow removal efforts prior to the accident, the defendants cannot be held liable for the removal of snow and ice in an incomplete manner ... . Since the plaintiff failed to submit evidentiary facts to show that the defendants' snow removal efforts created or exacerbated an existing hazard, the defendants' motion for summary judgment dismissing the complaint should have been granted." ***Wise v. Filincieri*, 2018 N.Y. Slip Op. 05074, Second Dept 7-5-18**

THIRD DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, APPEALS.

ALTHOUGH, ON A PRIOR APPEAL, THE APPEALS COURT FOUND THAT AN OFFER OF PROOF OF PRIOR ACCIDENTS WAS INADEQUATE, AT THE SUBSEQUENT TRIAL THE COURT SHOULD HAVE CONSIDERED THE PLAINTIFF'S OFFER OF EVIDENCE OF PRIOR ACCIDENTS, THE APPELLATE RULING WAS NOT THE LAW OF THE CASE.

The Third Department, reversing Supreme Court, determined the evidentiary ruling in a prior appeal was not the law of the case and plaintiff's attempt to introduce the same type of evidence in the subsequent trial should have been considered on the merits: "This matter comes before us for a fourth time ... . In our most recent decision, we affirmed that part of an order of Supreme Court which, after granting a mistrial, precluded plaintiff from offering evidence of prior accidents in a second trial ... . Thereafter, plaintiff again moved to admit evidence of prior similar accidents or, in the alternative, for a hearing on the application. Supreme Court denied the motion, effectively concluding that our prior decision constitutes law of the case. Plaintiff now appeals. We reverse. The underlying motion in limine speaks to an evidentiary ruling and the law of the case doctrine generally speaks to questions of law, not discretionary rulings of the court ... . That said, we are mindful that '[a]n appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and] operates to foreclose reexamination of [the] question absent a showing of subsequent evidence or change of law'... . Although defendants contend otherwise, our previous decision was not a definitive ruling as to whether the conditions underlying the prior accidents that plaintiff seeks to admit were substantially similar to the accident at issue. To the contrary, we simply determined that the limited offer of proof that plaintiff then made was inadequate ... . As such, the subject motion should have been addressed on the merits ... ". ***O'Buckley v. County of Chemung*, 2018 N.Y. Slip Op. 05003, Third Dept 7-5-18**

CONTRACT LAW, INSURANCE LAW, FRAUD.

PLAINTIFF DID NOT KNOW HER LEG HAD BEEN BROKEN IN A CAR ACCIDENT AT THE TIME SHE SIGNED A RELEASE FOR $2500, HER COMPLAINT STATED CAUSES OF ACTION FOR INVALIDATING THE RELEASE BASED UPON MUTUAL MISTAKE AND FRAUDULENT INDUCEMENT, SUPREME COURT REVERSED.

The Third Department, reversing Supreme Court, determined plaintiff's complaint stated causes of action for invalidating a release based upon mutual mistake and fraudulent inducement. Plaintiff was injured in a car accident and apparently was told at the hospital that her leg was not broken. The insurer's adjuster went to plaintiff's home where she signed a release in return for $2500. Shortly thereafter plaintiff learned that her leg in fact was broken: "Although '[t]he signing of a clear and unambiguous release is a significant legal act that ordinarily binds the parties' ... as with any contract, it must be 'fairly and knowingly made and thus . . . may be set aside on the basis of fraud or mutual mistake' ... . While we make no determination as to the validity of the release or whether plaintiff may ultimately succeed in setting it aside at a later juncture due to the circumstances in which it was obtained, she has sufficiently alleged facts indicating that the parties were operating under a mutual mistake with respect to the fibula fracture at the time that the release was executed ... . Likewise, plaintiff sufficiently alleged a cognizable claim of fraudulent inducement in the procurement of the release, which constitutes a basis to deny the motion at this pre-answer phase ...". ***Fimbel v. Vasquez*, 2018 N.Y. Slip Op. 05001, Third Dept 7-5-18**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL INEFFECTIVE FOR FAILING TO MOVE TO DISMISS THE ACCUSATORY INSTRUMENTS ON SPEEDY TRIAL GROUNDS, CONVICTIONS REVERSED.

The Third Department reversed defendant's convictions and dismissed the accusatory instruments because defendant did not receive effective assistance of counsel. Counsel failed to move to dismiss the prosecution on the ground that defendant's right to a speedy trial had been violated. Had the motion been made, it would have succeeded: "Where, as here, a class A misdemeanor is the most serious offense of which a defendant is accused, the People have 90 days from the commencement of the criminal action to declare their readiness (see CPL 30.30 [1] [b]...). Compliance with this deadline is determined by 'computing the time elapsed between the filing of the first accusatory instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any post-readiness periods of delay that are actually attributable to the People and are ineligible for an exclusion' ... . Here, although the People declared their readiness 19 days after the accusatory instruments were filed and defendant was arraigned on the charges, they expressly stated at the subsequent appearance on February 9, 2015 that they were not ready for trial and sought an adjournment for the very purpose of trial preparation. The People did not thereafter declare their readiness until June 15, 2015, beyond the 90-day period. Thus, as the People acknowledge, defendant possessed a meritorious statutory speedy trial claim, and defense counsel's failure to raise it in a pretrial motion to dismiss deprived defendant of meaningful representation ...". ***People v. Smart*, 2018 N.Y. Slip Op. 04979, Third Dept 7-5-18**

CRIMINAL LAW, CONSTITUTIONAL LAW.

COUNTY COURT ABUSED ITS DISCRETION WHEN IT DECLARED A MISTRIAL AFTER ONLY A SHORT PERIOD OF DELIBERATIONS, JEOPARDY ATTACHED AND DEFENDANT CAN NOT BE REPROSECUTED.

The Third Department, reversing defendant's conviction by guilty plea and dismissing the indictment, determined the judge did not sufficiently explore alternatives before declaring a mistrial on the basis the jury was deadlocked. Therefore jeopardy attached the defendant's subsequent guilty plea was vacated: "Here, the jury had deliberated for a little over two hours — excluding a lunch recess — when County Court received a note from the jury stating that 'there appears not to be any way to a unanimous decision' and asking for guidance on how to proceed. Without consulting the parties for input on the appropriate response, County Court summoned the jury into the courtroom, noted that it had not been deliberating for very long, provided an Allen charge and asked the jury to resume deliberations and advise the court if it was unable to arrive at a verdict after a reasonable period of time. Fifty-one minutes after the jury had resumed deliberations, County Court recalled the jury back into the courtroom, on its own accord, and inquired whether the jury was still deadlocked. The foreperson confirmed that it was and, without seeking input from the People or defendant, County Court declared a mistrial. County Court erred in its recall of the jury by: (1) doing so without first apprising the People and defendant of its intent to do so and seeking their comment; (2) doing so only 51 minutes after it had instructed the jury to resume deliberations; (3) not exploring the possibility of a dinner break or an overnight recess upon learning of the continuing deadlock; and (4) not seeking input from the parties before declaring a mistrial upon learning of the continuing deadlock. Because a mistrial was not manifestly necessary under the collective circumstances, County Court abused its discretion in declaring a mistrial, jeopardy attached and the People were precluded from reprosecuting defendant on the indictment ... " ***People v. Wilson*, 2018 N.Y. Slip Op. 04982, Third Dept 7-5-18**

CRIMINAL LAW, DEBTOR-CREDITOR, CIVIL PROCEDURE.

EXECUTIVE LAW DOES NOT PROVIDE FOR THE CIRCUMSTANCE WHERE MORE THAN ONE CRIME VICTIM OBTAINS A JUDGMENT AGAINST THE ASSETS OF THE OFFENDER, HERE THE OFFICE OF VICTIM SERVICES PROPERLY PAID OUT THE ASSETS TO THE FIRST CRIME VICTIM WHO OBTAINED A JUDGMENT.

The Third Department determined the Office of Victim Services (OVS) properly paid out the assets of an incarcerated offender to the first crime victim to obtain a judgment. The statute does not provide for retaining assets for other crime victims who may subsequently obtain a judgment against the offender: " 'Executive Law § 632—a sets forth a statutory scheme intended to improve the ability of crime victims to obtain full and just compensation from the person(s) convicted of the crime' … by 'allow[ing] crime victims or their representatives to sue the convicted criminals who harmed them when the criminals receive substantial sums of money from virtually any source' and protecting those funds while litigation is pending ... . There is no doubt that OVS complied with its express obligations under the statute. The problem is that the statute provides no guidance as to how OVS is to respond where, as here, multiple crime victims seek to recover and the preserved assets of a convicted person are inadequate … . OVS viewed its response to be governed by the general rule that, '[w]here two or more . . . orders affecting the same interest in personal property or debt are filed, the proceeds of the property or debt shall be applied in the order of filing,' and acted to have the preserved assets released to satisfy the first judgment obtained by a victim … . ... The Legislature could have easily included language in Executive Law § 632-a that substituted a special rule of priority for the one set forth in CPLR 5234 (c), directed OVS to leave any provisional remedies in place until all victims had obtained judgments or created some mechanism for dividing the preserved assets between them. It did not

do so, and '[a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit' ...". ***Waldman v. State of New York*, 2018 N.Y. Slip Op. 05000, Third Dept 7-5-18**

CRIMINAL LAW, EVIDENCE.

EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DID NOT JUSTIFY ENTRY AND SEARCH OF DEFENDANT'S APARTMENT, CONVICTIONS REVERSED.

The Third Department reversed defendant's criminal contempt and violation of probation convictions because the evidence of the offenses was the fruit of an illegal entry and search of defendant's apartment. The attempt to justify the entry and search under the emergency exception to the warrant requirement was rejected. The police officer who entered defendant's apartment, Carmichael, apparently expected that a man named Collins would be in the apartment with defendant. There was an order of protection prohibiting contact between the defendant and Collins. "We conclude that Carmichael's testimony established that there was not an objectively reasonable basis for him to believe that there was an ongoing emergency in defendant's apartment that required immediate assistance to protect life or property. Carmichael was aware that defendant was no longer incarcerated. There was no evidence that defendant's apartment had been forcibly entered, nor was there any other indication of an ongoing crime or emergency. The low, muffled sound that he heard and the faint light that was seen through the window were consistent with an occupant watching television, a reasonable activity at that hour of night. ... The police had been advised that Collins had been seen in the vicinity of defendant's apartment during the evening in question, and they considered the possibility that he was at her apartment in violation of the order of protection. ... Further, even had Carmichael's initial entry been lawful, his subsequent search of defendant's apartment was not. A protective sweep is justified only when the police 'have articulable facts upon which to believe that there is a person present who may pose a danger to those on the scene' ...". ***People v. Sears*, 2018 N.Y. Slip Op. 04980, Third Dept 7-5-18**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH DEFENDANT WAS PRESENT IN A GARAGE WHERE METHAMPHETAMINE WAS BEING MANUFACTURED, THE EVIDENCE WAS INSUFFICIENT TO DEMONSTRATE SHE CONSTRUCTIVELY POSSESSED THE DRUGS, POSSESSION CONVICTION REVERSED AND INDICTMENT DISMISSED.

The Third Department reversed defendant's conviction of criminal possession of a controlled substance and dismissed the indictment. Defendant's presence in a garage where methamphetamine was being manufactured was not enough to support the People's theory she constructively possessed the drugs. The facts that defendant had admitted to using methamphetamine in the past and had recently purchased a legal allergy drug which can be used in the manufacture of methamphetamine did not demonstrate her exercise of dominion and control over the drugs in the garage: "As defendant was not found to be in physical possession of methamphetamine, the People proceeded against her on a theory of constructive possession. Thus, it was their burden to establish that she 'exercise[d] dominion or control' over the methamphetamine in the one-pot or the area where it was found (Penal Law § 10.00 [8]...) . Defendant's mere presence in the garage where the methamphetamine was found is not enough, standing alone, to establish dominion or control ... . There were no other indicators that defendant had dominion or control over the garage or of the property where it was located; she did not reside there, and there was no evidence that she had keys, kept belongings there or frequently spent time there ... . The People argue that the couch where defendant said she was napping was near the shelf where the one-pot containing methamphetamine was found ... , and they emphasize the one-pot's presence in plain view, the smoke and chemical odor noticed by the police officer and the presence in the garage of various substances and tools used to produce methamphetamine. However, knowledge of the presence of an illegal substance does not, without more, meet the People's burden to demonstrate that a defendant 'had the ability and intent to exercise dominion or control over the contraband' ...". ***People v. Yerian*, 2018 N.Y. Slip Op. 04981, Third Dept 7-5-18**

CRIMINAL LAW, EVIDENCE.

DVDs SUBMITTED BY THE VICTIM'S FAMILY MEMBERS HAD BEEN SUBMITTED BEFORE IN CONNECTION WITH WHETHER PETITIONER SHOULD BE GRANTED PAROLE, BECAUSE THE DVDs DID NOT PRESENT NEW EVIDENCE, THE PAROLE BOARD SHOULD NOT HAVE RESCINDED ITS DECISION TO SET A RELEASE DATE.

The Third Department, over a two-justice dissent, annulled the parole board's rescission of its decision setting a release date for petitioner. In 1979, when petitioner was 19, he stabbed and killed his 15-year-old friend. The board initially set a release date of August 2016. The victim's family then submitted two DVDs of statements by family members. Apparently the videos had been submitted before but were never made part of the file. Upon viewing the videos, the board rescinded its decision setting the release date. The Third Department found that the DVDs were not new evidence and therefore the rescission of the release date was not authorized: "Any alleged failure on respondent's part to consider these materials earlier — not due to a failure to communicate with victims or to offer them opportunities to provide statements, but solely as the apparent result of respondent's own inefficient filing system — cannot rationally be found to convert materials that had been provided to it 9 and 15 years before into new information that was not previously available or known. ... [O]ther challenges to parole rescission determinations based upon victim impact statements have exclusively involved new factual

information that had not previously been known to respondent because the victims either had not provided statements or had not been given opportunities to do so ... . Our review of the case law has revealed no other case involving a parole rescission decision that, as here, is based upon additional input from victims or family members who had previously submitted impact statements to respondent — much less multiple submissions of a thorough and extensive nature over many years. In rescinding petitioner's parole, respondent did not make the required finding that there was substantial evidence of 'significant information' that 'was not [previously] known by [respondent]' ...". ***Matter of Duffy v. New York State Bd. of Parole*, 2018 N.Y. Slip Op. 05002, Third Dept 7-5-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE EVIDENCE DEFENDANT ACTED AS AN ACCOMPLICE IN THE FATAL SHOOTING OF THE VICTIM WAS LEGALLY SUFFICIENT, THE CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE OF WEAKNESS OF THE EVIDENCE DEFENDANT KNEW OF THE SHOOTER'S INTENT TO KILL THE VICTIM, AS OPPOSED TO AN INTENT TO ROB OR ASSAULT.

The Third Department determined there was legally sufficient evidence to support defendant's conviction that he acted as an accomplice in the fatal shooting of the victim by another man, White-Span. In other words, the elements of the charged offense were supported by some credible evidence. Defendant's conviction was reversed, however, under a weight of the evidence analysis based on the weakness of the evidence that the defendant knew White-Span intended to kill the victim, as opposed to rob or assault the victim: " 'Despite the [necessary] elements being supported by some credible evidence, because a different [verdict] would not have been unreasonable, this Court must independently examine the evidence further, viewing it in a neutral light to see if the verdict is against the weight of the evidence'... . Even if we accept that the evidence proved beyond a reasonable doubt that White-Span intentionally caused the victim's death by shooting him and that defendant intentionally aided White-Span in locating and isolating the victim, the evidence does not prove beyond a reasonable doubt that defendant knew — before the shooting occurred — that White-Span planned to kill the victim, because defendant could have had other equally plausible reasons for wanting access to the victim, such as robbery or assault. ... In light of the People's failure to establish beyond a reasonable doubt that defendant shared White-Span's intent to kill the victim, the judgment of conviction must be reversed and the indictment against defendant dismissed ...". ***People v. Croley*, 2018 N.Y. Slip Op. 04984, Third Dept 7-5-18**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DESPITE RULING THAT NO EVIDENCE OF DEFENDANT'S REQUESTS TO TALK TO COUNSEL COULD BE PRESENTED, TWO TESTIFYING WITNESSES VIOLATED THAT RULING, BECAUSE THAT EVIDENCE CONFLICTED WITH THE DEFENSE STRATEGY A MISTRIAL SHOULD HAVE BEEN DECLARED, NEW TRIAL ORDERED.

The Third Department reversed defendant's conviction of felony leaving the scene of an accident and ordered a new trial. Defendant struck a pedestrian whose body came into defendant's car through the windshield. Defendant did not contact the police for over an hour. Prior to trial defense counsel obtained a ruling from the judge that the People could not introduce any evidence defendant sought to communicate with counsel. That ruling was violated twice by testifying witnesses: "Defendant's strategy at trial relied in large part upon the fact that she was not at fault in the accident but did witness the victim's body being propelled through her windshield and coming to rest inches away from her. She relied upon this state of affairs to contend that her failure to contact authorities was not because she was 'coldly calculating,' but because she was in shock and incapable of doing so. Defendant further questioned the proof supporting the People's hypothesis that she left the scene with her sister before the 911 call. Any indication that defendant sought to consult with counsel would undermine the foundation of this defense by prejudicially suggesting that she was conscious of guilt, rational enough to consider the question of counsel and, perhaps, capable of reporting the accident or taking steps to avoid doing so ... . In our view, [the] repeated violations of the pretrial ruling, in a case where defendant's capacity to act and her actions after the accident were in serious dispute, caused harm that could not be reliably dissipated. County Court therefore abused its discretion in declining to declare a mistrial ... and, inasmuch as we do not agree with defendant that the People deliberately acted to provoke a mistrial ... we remit for a new trial." ***People v. Lentini*, 2018 N.Y. Slip Op. 04983, Third Dept 7-5-18**

CRIMINAL LAW, EVIDENCE, EMPLOYMENT LAW, LABOR LAW.

INDICTMENT COUNTS ALLEGING FALSIFYING BUSINESS RECORDS RELATING TO PAYROLL AND THE EMPLOYMENT OF A MINOR IN VIOLATION OF THE LABOR LAW SHOULD NOT HAVE BEEN DISMISSED, LEGAL SUFFICIENCY CRITERIA EXPLAINED.

The Third Department, reversing County Court, determined there was sufficient evidence before the Grand Jury to support several counts dismissed by the motion court. The dismissed counts related to allegedly false information on business records about farm employees' hours and pay and the employment of a minor (a 14-year-old killed operating heavy farm equipment) in violation of the Labor Law: " 'To dismiss an indictment or counts thereof on the basis of insufficient evidence before a grand jury, a reviewing court must consider whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury' ... . 'In the context of grand jury proceedings,

'legal sufficiency means prima facie proof of the crimes charged, not proof beyond a reasonable doubt' ... . 'The reviewing court's inquiry is limited to 'whether the facts, if proven, and the inferences that logically flow from those facts supply proof of every element of the charged crimes,' and whether 'the [g]rand [j]ury could rationally have drawn the guilty inference' ... . * * * Viewed most favorably to the People, we find that the evidence before the grand jury provided a prima facie case of falsifying business records in the first degree and offering a false instrument for filing in the first degree. Although there was no proof that defendant himself compiled the relevant time sheets or submitted them to [the bookkeeper], the evidence established that employees reported their hours directly to defendant — who regularly paid them in cash off the books — and that defendant was solely responsible for the accuracy of the payroll information, personally certified the accuracy of two amended [the unemployment insurance] forms and instructed one of his employees to lie about the number of hours he worked. * * * '[W]here an indictment count incorporates by reference the statutory provision applicable to the crime intended to be charged, it has been repeatedly held that this is sufficient to apprise [a] defendant of the charge and, therefore, renders the count jurisdictionally valid' ... . Here, counts 14 and 15 of the indictment each begin by accusing defendant of the crime of prohibited employment of a minor in violation of Labor Law § 145, which provides that a knowing violation of a provision of article 4 of the Labor Law is punishable by a misdemeanor. While County Court correctly noted that Labor Law § 145 does not state a substantive offense, each count then goes on to specify the particular section of article 4 of the Labor Law which defendant is alleged to have violated, as well as the conduct forming the basis of the charges." ***People v. Park*, 2018 N.Y. Slip Op. 04985, Third Dept 7-5-18**

EDUCATION-SCHOOL LAW, NEGLIGENCE, CIVIL PROCEDURE.

ALTHOUGH PLAINTIFF'S FATHER'S PRIOR ATTEMPT TO MOVE FOR LEAVE TO FILE A LATE NOTICE OF CLAIM FAILED BECAUSE OF FLAWED SERVICE, PLAINTIFF, UPON TURNING 18, BECAUSE OF THE TOLLING STATUTE, MADE A TIMELY MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM WHICH SHOULD HAVE BEEN GRANTED, THE SCHOOL HAD TIMELY NOTICE OF THE BULLYING AND HARASSMENT, PLAINTIFF MADE A SHOWING THE SCHOOL SUFFERED NO PREJUDICE FROM THE DELAY, AND THE SCHOOL'S SHOWING OF PREJUDICE WAS SPECULATIVE.

The Third Department, reversing Supreme Court, determined that plaintiff's motion for leave to file a late notice of claim against her school based upon bullying and harassment should not have been denied. Before plaintiff turned 18, her father made a motion for leave to file a late notice of claim which was denied because of improper service. When plaintiff turned 18 she made the motion on her own behalf. Because the statute of limitations was tolled until plaintiff turned 18 (CPLR 208) her motion was timely. The Third Department determined the school had timely notice of the claim, plaintiff had introduced some evidence the school would not be prejudiced, meeting her burden, and the school's demonstration of prejudice was speculative and otherwise inadequate: "Here, our review of the record reveals that defendant had actual knowledge of the alleged harassment, intimidation and bullying within a reasonable time ... . [P]laintiff was initially required to 'present some evidence or plausible argument that supports a finding of no substantial prejudice'... . She did so by submitting the ... evidence that defendant knew of plaintiff's claims and was able to investigate at least one of the incidents shortly after it occurred, as well as screen images taken from defendant's website indicating that relevant school officials were still employed at the time of the motion. ... The burden thus shifted to defendant 'to rebut [plaintiff's] showing with particularized evidence' ... . In this regard, defendant's counsel asserted by affirmation that the incidents were no longer fresh in witnesses' memories as a result of the passage of time and that any witnesses 'would likely be children' who might have graduated or whose memories might have faded ... . However, a finding of substantial prejudice 'cannot be based solely on speculation and inference; rather, a determination of substantial prejudice must be based on evidence on the record' ...". ***Sherb v. Monticello Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 05004, Third Dept 7-5-18**

EMPLOYMENT LAW, UNIONS.

UNDER THE PUBLIC AUTHORITIES LAW, LAID OFF SEASONAL EMPLOYEES WHO HAD BEEN TRANSFERRED FROM THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION TO A PUBLIC BENEFIT CORPORATION WERE NOT ENTITLED TO REMAIN IN THE COLLECTIVE BARGAINING UNIT OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION WHEN REHIRED BY THE PUBLIC BENEFIT CORPORATION.

The Third Department determined a seasonal employee of a public benefit corporation who was laid off and re-hired was not entitled to stay with the collective bargaining unit to which he belonged before the lay-off. Petitioner had worked for the Department of Environmental Conservation (DEC) at a ski center. The ski center was transferred from the DEC to Olympic, a public benefit corporation. Under the Public Authorities Law petitioner was entitled to stay with the collective bargaining unit to which he belonged at the DEC. However, after the lay-off, under the terms of the relevant statute, petitioner was properly transferred to the Olympic bargaining unit (with decreased benefits): "This appeal turns on the meaning of the terms 'terminated' and 'ceases' within the context of Public Authorities Law § 2629 (2) (a). As neither word is defined in the Public Authorities Law and both are words of ordinary import, we interpret them in a manner consistent with 'their usual and commonly understood meaning' ... . Petitioner argues that a layoff is inconsistent with these definitions and merely constitutes a temporary interruption in a career. We disagree, in light of the express statutory provision that an em-

ployee whose employment 'is terminated or otherwise ceases, by any means' may not return to his or her prior collective bargaining unit upon subsequent rehire (Public Authorities Law § 2629 [2] [a] [emphasis added]). To interpret the language as petitioner urges would render the phrase 'by any means' superfluous ...". ***Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v. Olympic Regional Dev. Auth.*, 2018 N.Y. Slip Op. 04998, Third Dept 7-5-18**

FAMILY LAW.

ALTHOUGH MOTHER VIOLATED THE TERMS OF HER SUSPENDED JUDGMENT, FAMILY COURT SHOULD NOT HAVE TERMINATED HER PARENTAL RIGHTS WITHOUT A FINDING, BASED UPON A HEARING, THAT TERMINATION WAS IN THE BEST INTERESTS OF THE CHILD.

The Third Department, reversing Family Court, determined that although mother violated the terms of her suspended judgment, her parental rights should not have been terminated without a finding, based upon a hearing, that termination was in the best interests of the child: "A suspended judgment is intended to provide a parent who has permanently neglected his or her child with a brief period within which to become a fit parent that the child can be returned to in safety ... . 'A parent's noncompliance with the terms of the suspended judgment during this grace period, if established by a preponderance of the evidence, may end with revocation of the suspended judgment and termination of his or her parental rights'... . Family Court determined, and we agree, that numerous violations of the terms of the suspended judgment were established by a preponderance of the evidence. ... [V]iolations that could warrant a revocation of the suspended judgment and termination of parental rights do not automatically have that effect... . It is instead the best interests of the child, which is 'relevant at all stages of a permanent neglect proceeding, including at the revocation of a suspended judgment,' that determines the appropriate disposition ... . Family Court did not make a best interests finding and, absent hearing evidence relating to 'the child[]'s present circumstances and relationship with [respondent] and the effect upon the[] [child] of the termination of [respondent's] parental rights and [the child's] potential adoption,' it is unclear how Family Court could have done so ...". ***Matter of Cecilia P. (Carlenna Q.)*, 2018 N.Y. Slip Op. 04993, Third Dept 7-5-18**

FAMILY LAW, ATTORNEYS.

FAMILY COURT'S FAILURE TO CONDUCT A SEARCHING INQUIRY BEFORE ALLOWING FATHER TO PROCEED PRO SE REQUIRED REVERSAL, DESPITE FATHER'S BEING REPRESENTED WHEN THE HEARING CONTINUED.

The Third Department, reversing Family Court in this contempt and modification of custody proceeding, determined Family Court should not have allowed father to represent himself without first making an inquiry to ensure father understood the consequences of going forward without an attorney. Although Family Court informed father that he should obtain counsel because he was misconstruing the law, and father was represented when the hearing resumed, one of the witnesses examined by father pro se was not recalled for examination by father's attorney: " 'A waiver of the right to counsel must be explicit and intentional, and the court must assure that it is made knowingly, intelligently and voluntarily'... . Thus, the hearing court must 'perform a searching inquiry to determine whether a party is aware of the dangers and disadvantages of proceeding without counsel, which might include inquiry into the party's age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver' ... . Supreme Court erred by commencing the hearing without first ascertaining that the father was unequivocally waiving his right to counsel and, if so, conducting an inquiry into whether that waiver was knowingly, intelligently and voluntarily made ... . Although one of the two witnesses who testified while the father was pro se ultimately was recalled after the father obtained counsel, and was subjected to direct and cross-examination for a second time, the other witness — the caseworker — was not recalled and her testimony supported both of the mother's petitions. Furthermore, the violation of a party's statutory right to counsel 'requires reversal, without regard to the merits of the unrepresented party's position' and, therefore, we need not consider whether the mother would have succeeded on her modification petition absent the caseworker's testimony ...". ***Matter of Hensley v. DeMun*, 2018 N.Y. Slip Op. 04995, Third Dept 7-5-18**

FREEDOM OF INFORMATION LAW (FOIL).

DESPITE THE FACT THAT THE PETITION SEEKING REVIEW OF FREEDOM OF INFORMATION LAW (FOIL) REQUESTS WAS MOOT, PETITIONER HAD SUBSTANTIALLY PREVAILED AND WAS ENTITLED TO COSTS AND FEES, MATTER REMITTED.

The Third Department, modifying Supreme Court, determined petitioner was entitled to costs and fees associated with his FOIL request for information about the confidential informant in the case which led to petitioner's conviction and incarceration. The state police did not timely respond to petitioner's requests and eventually provided two police reports and a finding that the remainder of the requested information was exempt from disclosure. The "costs and fees" issue was still viable despite the fact that the proceeding was moot. The Third Department found that the petitioner had substantially prevailed and the state police had not met the time requirements associated with responding to petitioner's requests: "A court is authorized to award a petitioner 'reasonable [counsel] fees and other litigation costs reasonably incurred' where he or she has 'substantially prevailed' in the FOIL proceeding and, as relevant here, 'the agency failed to respond to a request or appeal

within the statutory time' ... . 'A petitioner 'substantially prevail[s]' under Public Officers Law § 89 (4) (c) when [he or she] 'receive[s] all the information that [he or she] requested and to which [he or she] is entitled in response to the underlying FOIL litigation'... , regardless of whether 'full compliance with the statute was finally achieved' in the form of disclosure, a certification that responsive documents were exempt from disclosure or some combination thereof ... . Significantly, the voluntariness of an agency's disclosure after the commencement of a CPLR article 78 proceeding will not preclude a finding that a litigant has substantially prevailed ...". ***Matter of Cobado v. Benziger*, 2018 N.Y. Slip Op. 04996, Third Dept 7-5-18**

INSURANCE LAW, ANIMAL LAW.

QUESTIONS OF FACT ABOUT WHETHER THERE WAS A MISREPRESENTATION BY THE INSURED ABOUT A PRIOR BITE BY A DOG, AND WHETHER THERE ACTUALLY WAS A PRIOR BITE, PRECLUDED SUMMARY JUDGMENT ON WHETHER A CANINE POLICY EXCLUSION APPLIED AND WHETHER THERE WAS A TIMELY DISCLAIMER.

The Third Department, reversing (modifying) Supreme Court, determined there were questions of fact whether the insured made a misrepresentation to the insurer and whether the insurer timely disclaimed coverage for a dog bite. There were questions of fact whether the insured was asked about a prior bite by the dog and gave a false answer, and whether there had actually been a prior bite by the dog which would trigger a policy exclusion: " 'When construing Insurance Law § 3420 (d), which requires an insurer to issue a written disclaimer of coverage for death or bodily injuries arising out of accidents 'as soon as is reasonably possible,' [the Court of Appeals has] made clear that timeliness almost always presents a factual question, requiring an assessment of all relevant circumstances surrounding a particular disclaimer[, and] cases in which the reasonableness of an insurer's delay may be decided as a matter of law are exceptional and present extreme circumstances' ... . 'The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage' ... . The insurer has an obligation not only to promptly provide notice of disclaimer once it has reached that decision, but to promptly investigate and reach a decision on whether to disclaim ... . [The insurer] argues that it was entitled to rely on [the insured's] statement that the dog had not previously bitten anyone. As noted above, there is a question of fact regarding whether [the insurer's] claims manager actually asked [the insured] if she knew of any prior biting events. If the claims manager never asked that question, the record evidence presents a triable issue of fact as to whether [the insurer] failed to conduct a reasonable and prompt investigation into the potential applicability of the canine exclusion ... . If the claims manager asked that question and received a negative answer, as she averred, then [the insurer] would be justified in relying on the representation by its insured ... ; however, given that the [insured] had owned the dog for only approximately one month, there would still be a triable question of fact regarding the reasonableness of [the insured's] investigation. As neither party established, as a matter of law, the reasonableness or unreasonableness of the delay in [the insured's disclaimer, neither party was entitled to summary judgment ...". ***Battisti v. Broome Coop. Ins. Co.*, 2018 N.Y. Slip Op. 04992, Third Dept 7-5-18**

MENTAL HYGIENE LAW.

SEX OFFENDER MANAGEMENT PROCEEDING IN THIS HIGH PROFILE CASE SHOULD BE CLOSED TO THE PUBLIC TO PROTECT THE IDENTITIES OF THE VICTIMS.

The Third Department determined the respondent's sex offender management proceeding should be held in a closed courtroom and the record should be sealed to protect the identities of the victims in this high profile sex offense case: "Here, Supreme Court has taken steps to preserve the victims' anonymity that include orders directing the media to withhold their names, sealing the trial record and granting anonymity to respondent. Nevertheless, our review of the factual details that may be discussed by petitioner's experts persuades us that, in this particular case, media coverage of a public trial could well lead to the identification of the victims in the media, on the Internet or by those who followed the high profile proceedings in the past. The risk is particularly acute in view of the online presence that permits many of today's media outlets to disseminate news beyond their subscribers and their local geographic area, in a form that may foster public discussion in comments or on social media, and which then remains permanently available. Generally, public policy disfavors 'limitations on public access to court proceedings' ... . However, the right to such access is not without limitation and 'must be balanced against other interests which might justify the closing of the courtroom to the public' ... . We note that Mental Health Law § 10.08 reflects the strong public policy in favor of protecting the confidentiality of victims of sex offenses by including provisions that prohibit or limit the disclosure of identifying information ... . Further, the controlling regulation cites 'the nature of the proceedings and the privacy of the parties' as factors that may justify closing the courtroom during civil management proceedings ... . Upon balancing the competing interests, we find that — in the limited and particular circumstances presented here — there is a significant risk that a public trial may compromise the anonymity of respondent's victims. Thus, good cause has been shown to close the courtroom to the public during respondent's civil management trial ...". ***Matter of State of New York v. John T.*, 2018 N.Y. Slip Op. 05012, Third Dept 7-5-18**

PERSONAL INJURY.

QUESTIONS OF FACT WHETHER CLUTTER AT A DAY CARE CENTER WAS A PROXIMATE CAUSE OF PLAINTIFF'S FALL AND WHETHER A BICYCLE RIDDEN BY A THREE-YEAR-OLD WAS A DANGEROUS INSTRUMENT REQUIRING SUPERVISION BY THE OPERATOR OF THE DAY CARE CENTER.

The Third Department, over a two-justice partial dissent, determined there were questions of fact about whether a cluttered area at a day care center was a proximate cause of plaintiff's falling and whether a bicycle ridden by a three-year-old was a dangerous instrument requiring supervision by the operator of the day care center. The plaintiff had picked up her infant when her three-year-old ran into her with the bicycle. Plaintiff alleged that, had the area not been cluttered with toys and furniture, she could have avoided falling. The dissenters argued that the bicycle was not a dangerous instrument and the negligent supervision cause of action failed as a matter of law: "Here, the actions of the three-year-old child were unquestionably the precipitating factor in plaintiff's accident. However, plaintiff explained that, after being struck by the bicycle, she attempted to regain her balance but was unable to because she was 'trapped' between a table and an ottoman and could not take a step in any direction without tripping on one of the various objects scattered about the porch. She further averred that, had the floor not been so cluttered with toys, objects and furniture, she would have been able to regain her balance before falling. Viewing this evidence in the light most favorable to plaintiff and affording her the benefit of every favorable inference that may be drawn therefrom ... , we find a triable issue of fact as to whether the condition of the porch was a proximate cause of plaintiff's injuries ... . As the Court of Appeals has explained, '[c]hildren might, at various points in their development, be permitted, and properly so, to use bicycles, lawn mowers, power tools, motorcycles, or automobiles, all of which are, in some contingencies, 'dangerous instruments'... . '[T]he determination of whether a particular instrument is dangerous 'depends upon the nature and complexity of the allegedly dangerous instrument, the age, intelligence and experience of the child, and his [or her] proficiency with the instrument'...". ***Pineiro v. Rush*, 2018 N.Y. Slip Op. 04994, Third Dept 7-5-18**

PERSONAL INJURY.

THE SCOPE OF A LANDOWNER'S DUTY TO KEEP PROPERTY IN A SAFE CONDITION IS MEASURED BY FORESEEABILITY, HERE A GRASSY PATH WAS CLEARED OF SNOW BY A SCHOOL CUSTODIAN, SO USE OF THE PATH WAS FORESEEABLE, HOWEVER THERE WAS A QUESTION OF FACT WHETHER THE PATH CONSTITUTED A DANGEROUS CONDITION.

The Third Department, reversing (modifying) Supreme Court, determined there was a question of fact whether a grassy path used to walk from a parking lot to a school building constituted a dangerous condition in this slip and fall case. The path had been cleared of ice and snow by a custodian but the plaintiff described the path as wet and muddy, as opposed to having ice and snow on it. There was a paved walkway to the school and there was testimony the grassy path should not have been cleared of snow: " 'As the party seeking summary judgment, defendant bore the initial burden of demonstrating that it had maintained the property in a reasonably safe condition and that it did not create or have actual or constructive notice of the specific allegedly dangerous condition that resulted in plaintiff's injury' ... . To that end, 'the scope of a landowner's duty is measured in terms of foreseeability' ... . 'Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated' ... . Here, the evidence shows that defendant created the path on which plaintiff fell and, therefore, the only valid inference is that it was foreseeable that people would use the path once it had been cleared... . Thus, defendant had a duty to maintain the path in a reasonably safe condition ... . However, whether 'a dangerous condition exists is generally a question for the jury' ... , unless 'only a single inference can be drawn from the undisputed facts' ... . The deposition testimony established that defendant's employee created the path, but there was no testimony regarding whether there was any additional maintenance. Also, although plaintiff testified that the path was wet and muddy, she could not recall if there was snow or ice on it. Therefore, a triable question of fact exists as to whether the path constituted a dangerous condition ...". ***Ellis v. Lansingburgh Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 05011, Third Dept 7-5-18**

PERSONAL INJURY, EMPLOYMENT LAW, CIVIL PROCEDURE.

PLAINTIFF ALLEGED HE WAS PUNCHED IN THE FACE BY A BAR EMPLOYEE AND SUED THE BAR FOR BREACH OF A DUTY TO KEEP THE PREMISES SAFE, WHICH WAS PROPERLY DISMISSED AS UNTIMELY, NEGLIGENT HIRING AND SUPERVISION, WHICH SHOULD NOT HAVE BEEN DISMISSED, AND VICARIOUS LIABILITY, WHICH ALTHOUGH INCONSISTENT WITH NEGLIGENT SUPERVISION, CAN BE PLED IN THE ALTERNATIVE.

The Third Department, reversing (modifying) Supreme Court determined plaintiff, who alleged he was punched in the face by defendant bar's employee (Bonawitz), properly pled causes of action against the bar for negligent hiring and supervision, as well as vicarious liability. Although vicarious liability requires the employee to be acting within the scope of his employment, and a negligent hiring and supervision cause of action requires that the employee act outside the scope

of employment, pleading inconsistent theories in the alternative is allowed. The court noted that the "breach of the duty to keep the premises safe" cause of action was properly dismissed because it constituted an attempt to plead vicarious liability for an intentional tort as negligence to avoid the one-year statute of limitations for intentional torts: "The second cause of action alleges that the employer defendants negligently hired and supervised Bonawitz. Supreme Court dismissed this cause of action based on cases holding that, '[g]enerally, where an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondent superior, and the plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training' ... . The rationale for this rule 'is that if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training' ... . As is apparent from these cases, however, this rule applies where the employee is alleged to have acted negligently, not intentionally. Plaintiff has adequately alleged that the employer defendants negligently hired, supervised and retained Bonawitz even though they knew or should have known of his propensity to assault or intentionally inflict harm on others ... . Moreover, the negligence of an employer is not transformed into intentional conduct simply because the employee's wrongful conduct was intentional ... . Thus, plaintiff's allegations of negligence were timely asserted within the applicable three-year statute of limitations (see CPLR 214 [5] ...). Plaintiff did not directly allege that Bonawitz was acting within the scope of his employment when he punched plaintiff. Even if such allegations were included, allegations of vicarious liability, though incompatible with a claim of negligent hiring and supervision, do not require dismissal because a plaintiff may plead inconsistent theories in the alternative ...". ***McCarthy v. Mario Enters., Inc.*, 2018 N.Y. Slip Op. 05006, Third Dept 7-5-18**

REAL PROPERTY.

DEFENDANT DEMONSTRATED CONTINUOUS SEASONAL USE OF A TRAIL WHICH CROSSED OVER ONTO PLAINTIFF'S LAND (TO GO AROUND TWO OBSTACLES) FOR 20 YEARS, DEFENDANT HAD A PRESCRIPTIVE EASEMENT OVER THE TWO CROSS-OVER PORTIONS OF THE TRAIL.

The Third Department determined defendant (TRD) had a prescriptive easement over two portions of a trail that crossed over onto plaintiff's land to go around obstacles. Seasonal use of the trail for hunting was deemed continuous use. The fact that the trail was not used for five years when the party (Csigay) who testified on behalf of the defendant was in the service (after 20 years of continuous use of the trail) did not constitute abandonment. The trail had been widened by a forester for logging. Supreme Court should have ordered defendant to restore those portions of the trail that are on plaintiff's land to the original width: "Contrary to plaintiff's argument, when we give the requisite deference to Supreme Court's factual findings and credibility determinations ... , we find that Csigay's unequivocal testimony with regard to his family's use of the entire skidder trail from 1982 to 2002 established TRD's claim for a prescriptive easement over the two crossover areas ... . The element of continuous use may be established where, as here, a party's predecessors used the property for the requisite 10 years ... . Although TRD's predecessors used the property primarily during the hunting season, such use did not negate the existence of a prescriptive easement because TRD established that the use was 'continuous and uninterrupted and commensurate with appropriate seasonal use' ... . Further, in the absence of sufficient evidence that plaintiff and TRD's predecessors shared a relationship 'of neighborly cooperation and accommodation' ... , we agree with the court's determination that plaintiff failed to meet its burden of establishing that the continuous use was permissive ... . Although the parties agree that the skidder trail was not used from 2002 to 2007, nonuse of an established easement does not equate to abandonment ... . Here, the record reveals no intent to abandon the skidder trail, only that Csigay stopped using it due to his military service." ***Auswin Realty Corp. v. Klondike Ventures, Inc.*, 2018 N.Y. Slip Op. 04997, Third Dept 7-5-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

PLAINTIFF'S CLAIM FOR TREBLE DAMAGES IN THIS TIMBER TRESPASS ACTION SHOULD NOT HAVE BEEN DISMISSED, THERE EXIST QUESTIONS OF FACT WHETHER DEFENDANT MADE ADEQUATE EFFORTS TO ENSURE IT HAD THE LEGAL RIGHT TO HARVEST THE TIMBER.

The Third Department, reversing (modifying) Supreme Court, determined that plaintiff's claim for treble damages in this timber trespass claim should not have been dismissed. There was a question of fact whether defendant made adequate efforts to ensure the timber was not taken from plaintiff's land: "Defendant concedes that it trespassed upon the subject property and cleared trees, rendering it liable (see RPAPL 861 ... . Accordingly, in order to avoid an award of treble damages, defendant was obliged to show by clear and convincing evidence that it 'had cause to believe . . . [that it had] a legal right to harvest' timber from the subject property (RPAPL 861 [2]...). Defendant endeavored to do so with the deposition of its vice-president, who stated that D'Assy represented that he had obtained permission from plaintiff to remove trees from the subject property. The vice-president acknowledged, however, that no efforts were made to confirm that D'Assy's account was correct. He further admitted that he did not recall if this conversation with D'Assy occurred before or after the actual trespass. The foregoing proof, particularly in view of the aim of RPAPL 861 to encourage timber harvesters to be more

diligent in preventing inadvertent timber trespass ... , is not at all clear as to whether defendant had a good faith basis for believing that it had permission from plaintiff to remove timber from the subject property at the time it did so. Defendant therefore failed to meet its initial burden of demonstrating the absence of 'factual questions with regard to whether plaintiff is entitled to treble damages pursuant to RPAPL 861' ... . Finally, plaintiff correctly points out that he is entitled not only to 'the stumpage value or $250 per tree, or both' for an unlawful taking' ... , but also reparations for 'any permanent and substantial damage caused to the land or the improvements thereon as a result of such violation' ... . Supreme Court, upon remittal, should consider all of those items in calculating its award of damages." ***DiSanto v. D'Assy*, 2018 N.Y. Slip Op. 05007, Third Dept 7-5-18**

FOURTH DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, CONTRACT LAW.

THE ARBITRATOR'S DECISION TO OVERLOOK AN INSTANCE OF TARDINESS (ONE MINUTE LATE DUE TO A DISABLED TRAIN BLOCKING TRAFFIC) WHICH OTHERWISE WOULD REQUIRE THE GRIEVANT'S TERMINATION WAS NOT IRRATIONAL AND DID NOT EXCEED THE ARBITRATOR'S ENUMERATED POWERS.

The Fourth Department, reversing Supreme Court, determined that the arbitrator's finding there was just cause to overlook the grievant's one-minute tardiness for work. The collective bargaining agreement (CBA) included an eight-step disciplinary procedure for tardiness. Essentially eight instances of tardiness led to termination. Grievant had seven instances of tardiness at the time she was one minute late. She was delayed by a disabled train and she had called 10 minutes before her starting time to say she might be late because of the train: "We agree with respondent that the arbitrator's award was not irrational. An award is irrational 'if there is no proof whatever to justify' it... , and '[a]n arbitration award must be upheld when the arbitrator offer[s] even a barely colorable justification for the outcome reached' ... . Here, there is a colorable justification for the arbitrator's determination. The attendance policy was a no-fault, straightforward progression of discipline that would be imposed for every incident of tardiness. Nevertheless, the CBA also had the 'just cause' provision, and the arbitrator concluded that strict adherence to the attendance policy could be rejected in exceptional cases. ... We also agree with respondent that the arbitrator did not exceed a specifically enumerated limitation on his power. The CBA provided that the arbitrator 'shall have no power or authority to add to, subtract from, modify, change, or alter any provisions of this Agreement.' Contrary to petitioner's contention, the arbitrator did not impose any new requirement upon petitioner before it could discipline its employees and thus did not add to or alter the CBA. As explained above, the arbitrator determined, under the specific facts of this case, that the penalty of termination could not be upheld. The arbitrator did not adopt any new rules that petitioner must follow in future disciplinary cases, and we therefore reject petitioner's slippery slope argument ... ". ***Matter of Lift Line, Inc. (Amalgamated Tr. Union, Local 282)*, 2018 N.Y. Slip Op. 05102, Fourth Dept 7-6-18**

ARBITRATION, MUNICIPAL LAW, ATTORNEYS, CIVIL PROCEDURE.

COURT EXCEEDED ITS AUTHORITY WHEN IT VACATED AN ARBITRATION AWARD, COURT DID NOT ACQUIRE PERSONAL JURISDICTION OVER A POLICE OFFICER SEEKING MUNICIPAL LAW § 207-c BENEFITS BECAUSE THE OFFICER NEVER AUTHORIZED THE UNION ATTORNEY TO REPRESENT HER.

The Fourth Department, reversing Supreme Court, over a dissent, determined Supreme Court exceeded its authority when it vacated an arbitration award and the court did not acquire personal jurisdiction over the police officer (Lee) seeking Municipal Law § 207-c benefits in another arbitration proceeding handled by a union lawyer: "Lee established that the court failed to acquire personal jurisdiction over her in the proceeding to confirm the arbitration award ... because the City never properly served her ... . Nor did the court acquire personal jurisdiction over Lee by the unauthorized appearance of the Union's attorney 'on behalf of Katherine Lee.' Contrary to the City's contention, there is no evidence that Lee expressly or implicitly authorized the Union's attorney to represent her at any stage of the proceedings. ... We further conclude that the court erred in sua sponte vacating its prior order and judgment, which confirmed the arbitration award ... , and directing further arbitration. ... A court has authority to 'vacate its own judgment for sufficient reason and in the interests of substantial justice' ... . That authority, however, is not unlimited... . 'A court's inherent power to exercise control over its judgments is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud,] mistake, inadvertence, surprise or excusable neglect' ... . In vacating the order and judgment, ... the court 'exceeded the narrow bounds within which courts are authorized to alter [arbitration] awards' ... . None of the bases in CPLR 7511 (b) or (c) for vacating or modifying an arbitration award applies to the arbitrator's failure to award the City a specific dollar amount for the value of benefits received by Lee, and the court had no power to disturb the award apart from the grounds set forth in those subdivisions ...". ***Matter of City of Syracuse (Lee)*, 2018 N.Y. Slip Op. 05077, Third Dept 7-6-18**

CRIMINAL LAW.

RESENTENCING IN SUPREME COURT AFTER CONVICTION IN COUNTY COURT WAS ILLEGAL.
The Fourth Department determined defendant, who had been convicted in County Court was illegally resentenced in Supreme Court: "We agree with defendant ... that he was illegally resentenced in Supreme Court after his trial was conducted in County Court. It is well settled that 'in order to remove a criminal action from County Court to Supreme Court, the Uniform Rules for the New York State Trial Courts require that such removal be authorized by the Chief Administrator and that it occur prior to the entry of a plea or commencement of trial' ... . Here, although the case was removed by the Chief Administrator, it did not occur prior to the commencement of trial. Thus, Supreme Court lacked authority to resentence defendant, thereby rendering the resentence illegal ...". ***People v. Williams*, 2018 N.Y. Slip Op. 05090, Fourth Dept 7-6-18**

CRIMINAL LAW.

SPECTATOR'S CLAIM JURORS REFERRED TO DEFENDANT AS A 'SCUMBAG' WAS NOT CREDIBLE, TRIAL JUDGE PROPERLY DECIDED A JUROR-BIAS (BUFORD) HEARING WAS NOT REQUIRED.
The Fourth Department, upon remittitur from the Court of Appeals, determined that the weight of the evidence supported the trial judge's conclusion a spectator's claim that jurors had referred to the defendant as a "scumbag" was not credible and therefore no juror-bias (Buford) hearing was required: "Upon exercising our factual review power, we conclude that the weight of the evidence supports the court's implicit factual determination that the spectator was not credible. Initially, we note that the better practice would have been for the court, when making its determination, to make specific factual findings regarding whether and why it found the spectator not credible, and to set forth its determination and the reasons for it. Nevertheless, in view of the evidence regarding the spectator's credibility, including the internal inconsistencies in her testimony as well as the differences between her description of the sequence of events and the court's record of the proceedings, and after according the requisite '[g]reat deference . . . to the fact[]finder's opportunity to view the witness[ ], hear the testimony and observe demeanor' ... , we conclude that the weight of the evidence supports the court's credibility determination. Consequently, the court 'was justified in finding the spectator incredible and therefore determining [that] the Buford inquiry was not required' ...". ***People v. Kuzdzal*, 2018 N.Y. Slip Op. 05099, Fourth Dept 7-6-18**

CRIMINAL LAW.

CONTRARY TO THE TRIAL JUDGE'S RULING, DEFENDANT HAD SATISFIED THE FIRST STEP OF A BATSON CHALLENGE TO THE PEOPLE'S STRIKING OF AN AFRICAN-AMERICAN PROSPECTIVE JUROR, THE BURDEN THEN SHIFTED TO THE PEOPLE TO ARTICULATE A NONDISCRIMINATORY REASON, THE MATTER IS SENT BACK FOR A DETERMINATION OF THE BATSON CHALLENGE USING THE CORRECT PROCEDURE.
The Fourth Department sent the case back for a determination of a Batson challenge to the People's use of peremptory challenge to strike an African-American prospective juror. The court had not used the correct procedure on first step. The Fourth Department held that defendant had satisfied the first step: "In order for the moving party to satisfy its burden at step one, it must 'show[ ] that the facts and circumstances of the voir dire raise an inference that the other party excused one or more jurors for an impermissible reason' ... . 'A defendant need not show [either] a pattern of discrimination' ... or, as the court stated here, 'a systematic approach by the prosecution.' Rather, a defendant may satisfy his or her burden under the first step by demonstrating that 'members of the cognizable group were excluded while others with the same relevant characteristics were not' or that the People excluded members of the cognizable group 'who, because of their background and experience, might otherwise be expected to be favorably disposed to the prosecution' ... . We conclude that defendant met his burden under step one by establishing that there is a basis in the record to infer that the People exercised the peremptory challenge in a discriminatory manner. Here, defense counsel explained to the court that the relevant prospective juror was the first African-American male 'that's been available without a [for]-cause' challenge and that the prospective juror provided answers during voir dire that were favorable to the prosecution, i.e., that the prospective juror had a number of family members in law enforcement, had a college degree and had at one time been robbed. Defense counsel thus implied that he could not ascertain from the prospective juror's answers a reason for the peremptory challenge other than racial bias. The court did not provide defense counsel with any further opportunity to develop that argument and, instead, interrupted defense counsel and concluded that a pattern of discrimination had not been established. Inasmuch as there is a basis in the record to infer that the People exercised the peremptory challenge in a discriminatory manner, we conclude that 'the burden shifted to the People to articulate a nondiscriminatory reason for striking the juror, and the court then should have determined whether the proffered reason was pretextual' ...". ***People v. Herrod*, 2018 N.Y. Slip Op. 05110, Fourth Dept 7-6-18**

CRIMINAL LAW, EVIDENCE.

IT WAS REVERSIBLE ERROR TO ALLOW EVIDENCE OF TWO FORGED CHECKS AT THE SECOND FORGERY TRIAL BECAUSE DEFENDANT HAD BEEN ACQUITTED OF THE CHARGES RELATED TO THOSE CHECKS IN THE FIRST TRIAL.

The Fourth Department, reversing County Court, determined that it was reversible error to allow the jury to hear evidence of two allegedly forged checks in the second forgery trial after defendant had been acquitted of the charges related to those checks in the first trial. The People were collaterally estopped from introducing evidence related to the acquittals: "At the new trial, notwithstanding that defendant was acquitted of the prior charged criminal conduct involving check numbers 61512 and 61519, the People were permitted to use those checks, over defendant's objection, in their case-in-chief as evidence of, inter alia, defendant's criminal intent and motive with respect to check number 61517. In instructing the jury concerning the purpose for which check numbers 61512 and 61519 could be considered, County Court referred to defendant's alleged involvement with those checks as 'uncharged conduct.' The court also instructed the jury: 'Regarding evidence of other crimes, there may have been evidence that on another occasion the defendant engaged in criminal conduct.' Defendant contends, inter alia, that the People were collaterally estopped at the new trial from using check numbers 61512 and 61519 as evidence with respect to count two involving check number 61517, and that the court committed reversible error in permitting such evidence. We agree. We conclude that it was improper for the court to characterize any evidence concerning defendant's alleged possession of forged checks numbered 61512 and 61519 as 'uncharged conduct' or 'criminal conduct.' Defendant in fact had been charged, tried, and acquitted of criminal possession of a forged instrument in the second degree with respect to those checks. We therefore further conclude that the People were collaterally estopped by the earlier verdict from presenting any evidence related to check numbers 61512 and 61519 at the new trial ... ". ***People v. Williams*, 2018 N.Y. Slip Op. 05089, Fourth Dept 7-6-18**

CRIMINAL LAW, EVIDENCE.

POLICE DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY AT THE TIME DEFENDANT WAS STOPPED ON THE STREET, SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing Supreme Court, determined the show up identification of the defendant should have been suppressed because the police did not have a reasonable suspicion of criminal activity at the time the police approached and stopped the defendant. The police responded to a 911 dispatch indicating three black men, one with a book bag, had robbed a taxi driver on State Street and were headed east. Within two or three minutes a police officer spotted three men dressed in black, one with a book bag walking on a street west of State Street. Two of the men fled, but defendant remained. After defendant was taken into custody he was identified by the victim in a showup procedure. The Fourth Department noted that the three men were half a mile from the area indicated by the unidentified 911 caller and did not appear to be out of breath. The court also noted the fact that two of the men fled was not enough to create a reasonable suspicion of criminal activity on defendant's part. The defendant also moved to suppress a cell phone that was found near where defendant was stopped. Denial of suppression was proper because there was no showing the phone was discarded because of unlawful conduct by the police. A new trial was ordered: "The necessary predicate for stopping and detaining defendant was that the officer have ' at least a reasonable suspicion that [defendant] ha[d] committed, [was] committing, or [was] about to commit a crime' ... . Here, even assuming, arguendo, that the as-yet unidentified 911 caller was reliable and had a sufficient basis of knowledge... , we conclude that the information available to the detaining officer did not provide reasonable suspicion to stop and detain defendant." ***People v. Spinks*, 2018 N.Y. Slip Op. 05103, Fourth Dept 7-6-18**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, EVIDENCE.

COLLEGE'S DISCIPLINARY DETERMINATION REGARDING A STUDENT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, DETERMINATION ANNULLED AND EXPUNGED.

The Fourth Department annulled the determination that a SUNY Buffalo student possessed weapons and engaged in harassment because of the poor quality of the proof, a seriously controverted hearsay statement: "We agree with petitioner that the record is devoid of any evidence, much less substantial evidence, to support respondent's determination... . Instead, respondent's determination rests exclusively on a 'seriously controverted' hearsay statement, and that does not, as a matter of law, constitute substantial evidence ... . We therefore annul the determination, grant the petition, and direct respondent to expunge all references to this matter from petitioner's school record ... . We decline respondent's invitation to remit this matter for a new hearing in light of its failure to transcribe the disciplinary hearing. Annulment and expungement is the prescribed remedy for an administrative determination that is unsupported by substantial evidence... , and it would be anomalous if respondent was afforded a new opportunity to establish petitioner's culpability based on its own procedural error in failing to transcribe the initial hearing." ***Matter of Hill v. State Univ. of N.Y. At Buffalo*, 2018 N.Y. Slip Op. 05104, Fourth Dept 7-6-18**

EMPLOYMENT LAW, CIVIL PROCEDURE.

PLAINTIFF STAFFING AGENCY WAS NOT ENTITLED, BASED UPON A BALANCING OF THE EQUITIES, TO A PRELIMINARY INJUNCTION ENFORCING A RESTRICTIVE COVENANT WHICH OSTENSIBLY PROHIBITED DEFENDANT FROM CONTINUING TO WORK AT THE HOSPITAL WHERE PLAINTIFF HAD PLACED HIM AFTER DEFENDANT TERMINATED HIS CONTRACT WITH PLAINTIFF.

The Fourth Department determined plaintiff staffing agency was not entitled to a preliminary injunction in this action to enforce a restrictive covenant which ostensibly prohibited defendant, for a period of time, from working at the hospital where plaintiff had placed him. Defendant had terminated his contract with plaintiff, contracted with a competitor staffing agency, and continued to work at the same hospital. Defendant demonstrated the alternatives to working at the same hospital would either require a 3 to 4 hour commute, or result in his not working at all while he renewed his credentials in Pennsylvania. Plaintiff alleged allowing defendant to continue to work at the hospital would damage its business model and lead to competitors taking away contracts. The Fourth Department noted that the harm to plaintiff would only occur if the court rules in its favor, not during the pendency of the action: "It is well settled that '[p]reliminary injunctive relief is a drastic remedy [that] is not routinely granted' ... . Moreover, '[i]n reviewing an order denying a motion for [a] preliminary injunction, we should not determine finally the merits of the action and should not interfere with the exercise of discretion by [the court] but should review only the determination of whether that discretion has been abused' ... . 'In order to establish its entitlement to a preliminary injunction, the party seeking the injunction must establish, by clear and convincing evidence, . . . three separate elements: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor' ...". ***Delphi Hospitalist Servs. LLC v. Patrick*, 2018 N.Y. Slip Op. 05100, Fourth Dept 7-6-18**

ENVIRONMENTAL LAW, MUNICIPAL LAW, ADMINISTRATIVE LAW.

PETITION SEEKING TO ANNUL A NEGATIVE DECLARATION UNDER THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) CONCERNING A TRUCK STOP PROJECT PROPERLY DISMISSED FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES, TOWN PLANNING BOARD DID NOT ACT ARBITRARILY AND CAPRICIOUSLY WHEN IT FAILED TO FOLLOW A LOCAL LAW WHICH CONFLICTED WITH SEQRA.

The Fourth Department determined petitioner did not exhaust administrative remedies before bringing a petition to annul the town's negative declaration under the State Environmental Quality Review Act (SEQRA) for a truck stop project. The court further found that the town planning board did not act arbitrarily and capriciously when it failed to follow a Local Law (which required an environmental impact statement (EIS)) because the Local Law conflicted with SEQRA and was therefore invalid: "... [W]e conclude that petitioner failed to exhaust its administrative remedies ... . The record establishes that the Planning Board, as the lead agency on the project, held a public hearing that petitioner's counsel attended, but during which he remained silent. Although petitioner made a FOIL request two days after the public hearing, that request did not alert the Planning Board of any specific concerns. ... 'A local law that is inconsistent with SEQRA' must be invalidated' ... . '[I]nconsistency has been found where local laws prohibit what would have been permissible under State law or impose prerequisite additional restrictions on rights under State law, so as to inhibit operation of the State's general laws' ... . Here, section 59-3 (A) of the Town Code provided that 'Type I actions are likely to have an effect on the environment and will, therefore, require the preparation of an environmental impact statement.' SEQRA, on the other hand, provides that, '[t]he lead agency must determine the significance of any Type I . . . action . . . [and,] [t]o require an EIS for a proposed action, the lead agency must determine that the action may include the potential for at least one significant adverse environmental impact' ... . Thus, Chapter 59 is inconsistent with SEQRA because SEQRA permits a negative declaration for Type I actions, whereas Chapter 59 effectively precluded a negative declaration in such actions." ***Matter of Pilot Travel Ctrs., LLC v. Town Bd. of Town of Bath*, 2018 N.Y. Slip Op. 05082, Fourth Dept 7-6-18**

FAMILY LAW, CIVIL PROCEDURE.

PETITION BY A FORMER ROMANTIC PARTNER SEEKING JOINT CUSTODY OF CHILDREN BORN TO RESPONDENT BASED UPON AN ALLEGED AGREEMENT TO RAISE THE CHILDREN AS A FAMILY SHOULD NOT HAVE BEEN DISMISSED BY THE REFEREE FOR FAILURE TO MAKE OUT A PRIMA FACIE CASE, THE REFEREE SHOULD NOT HAVE MADE CREDIBILITY DETERMINATIONS IN A MOTION PURSUANT TO CPLR 4401.

The Fourth Department reversed the dismissal, by a Referee, of the petition brought seeking joint custody of children born to respondent, with whom petitioner had had a romantic relationship, on the basis of an agreement that petitioner and respondent would raise the children as a family. The court noted that a dismissal pursuant to CPLR 4401 for failure to make out a prima facie case cannot take into account credibility determinations: "Petitioner commenced this proceeding seeking joint custody of, and visitation with, the five subject children, all of whom were born to respondent and conceived by the implantation of fertilized eggs. With respect to her standing to commence this proceeding, petitioner alleged that she and

respondent had previously been involved in a romantic relationship, and that they entered into an agreement to raise and co-parent the child that was alive when the parties met. Petitioner further alleged that, prior to the conception of the younger four children, the parties also agreed that respondent would conceive additional children and the parties would jointly raise them as a family. The Referee granted a hearing on the issue of petitioner's standing to seek custody of the children, at which petitioner's testimony was consistent with the petition. ... At the conclusion of petitioner's case, the Referee granted respondent's motion pursuant to CPLR 4401 to dismiss the petition. ... ... '[I]n determining a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom . . . The question of credibility is irrelevant, and should not be considered' ... . Here, the Referee made credibility determinations and weighed the probative value of the evidence in making a determination on the motion to dismiss. Consequently, we reverse the order, reinstate the petition and remit the matter to Family Court to determine, after a full hearing, whether petitioner, by clear and convincing evidence, has established with respect to the four younger children that she 'has agreed with the biological parent of the child[ren] to conceive and raise [them] as co-parents' ... , and whether, despite being a 'partner without such an agreement [she] can establish standing' with respect to the older child ...". ***Matter of deMarc v. Goodyear*, 2018 N.Y. Slip Op. 05095, Fourth Dept 7-6-18**

PERSONAL INJURY.

CONDUCT OF THE BUFFALO BILLS OR THE COUNTY OF ERIE AS THE OWNER OF THE FOOTBALL STADIUM WAS NOT THE PROXIMATE CAUSE OF AN UNPROVOKED CRIMINAL ASSAULT ON THE PLAINTIFF AT THE STADIUM, NEGLIGENCE ACTION PROPERLY DISMISSED.

The Fourth Department determined the action against the Buffalo Bills and the County of Erie, the owner of the football stadium where the Bills played, based upon an unprovoked attack on the plaintiff at the stadium, was properly dismissed: "Contrary to plaintiff's contention, the court properly determined that the conduct of the Bills and the County was not a proximate cause of his injuries. '[A]s an independent act far removed from [the allegedly negligent] conduct [of the Bills and the County], the [assailants' unprovoked] criminal assault broke the causal nexus [between such allegedly negligent conduct and plaintiff's injury]. The attack was extraordinary and not foreseeable or preventable in the normal course of events' ... . Indeed, '[i]t is difficult to understand what measures could have been undertaken to prevent plaintiff's injury except presumably to have had a security officer posted at the precise location where the incident took place or wherever [rival football fans] were gathered, surely an unreasonable burden' ... . We thus conclude that the court properly granted the motion of the Bills and the County and dismissed the amended complaint against them." ***Wrobel v. Doe*, 2018 N.Y. Slip Op. 05097, Fourth Dept 7-6-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT BUS COMPANY HAD NOTICE OF A PUDDLE OF HYDRAULIC FLUID ON THE FLOOR OF THE BUS IN THIS SLIP AND FALL CASE.

The Fourth Department noted that the cause of action alleging defendant bus company had notice of the presence of hydraulic fluid on the floor of the bus, which caused plaintiff to slip and fall, properly survived defendants' motion for summary judgment. There was a video from inside the bus which appeared to show that the puddle of fluid had been "tracked through" before plaintiff boarded the bus: " '[V]iew[ing] the evidence in the light most favorable to the party opposing the motion, [and] giving that party the benefit of every reasonable inference' ... , we conclude that there is a triable issue of fact because the evidence of the size of the puddle and that the puddle had been 'tracked through' before any passengers boarded the bus following the layover constitutes circumstantial evidence that would permit a jury to infer that the puddle had existed for a sufficient length of time for defendants to have discovered and remedied it ...". ***Mills v. Niagara Frontier Transp. Auth.*, 2018 N.Y. Slip Op. 05098, Fourth Dept 7-6-18**

PERSONAL INJURY, WRONGFUL DEATH, EMPLOYMENT LAW.

THE MEDICAL PROFESSIONALS INVOLVED WITH REVIEWING AN X-RAY OF PLAINTIFF'S DECEDENT'S CHEST ON BEHALF OF DECEDENT'S EMPLOYER DID NOT HAVE A DUTY TO INFORM THE DECEDENT OR HIS PHYSICIAN OF THE CANCER FINDINGS.

The Fourth Department, in a full-fledged opinion by Justice DeJoseph, reversing Supreme Court, determined that the medical professionals involved with review of an x-ray of plaintiff's decedent's chest on behalf of plaintiff's decedent's employer did not have a duty to report the findings to the decedent or decedent's physician. The mass that was seen on the x-ray apparently was cancer and plaintiff's decedent was not informed. He later asked his employer, NYSEG, about the findings but by then the cancer was incurable: "The chest x ray was performed at defendant Lockport Memorial Hospital and decedent signed a consent form prior to the procedure. The consent form provided, in pertinent part, the following: 'I, [decedent], understand that medical examinations done at this facility are for evaluation purposes for either employment

suitability or worker's compensation injury/illness treatment. The examinations done here are not intended to detect all underlying health conditions and do not replace the medical care provided by my personal physician. I hereby consent to the examination for the stated purposes or request the services stipulated of [WNYOM]. Furthermore, I understand that all medical information related to my ability to perform the functions of my job will be reported to the designated employer representatives at my place of employment.' ... 'The failure to communicate significant medical findings to a patient or his treating physician is not malpractice but ordinary negligence' ... . * * * [T]there is no dispute that defendants correctly interpreted the results of the x ray and timely conveyed the results to decedent's employer. Notably absent from the record is the identity or even existence of decedent's treating physician. Nor is there any indication that defendants were made aware of any treating physician. Furthermore, the consent form, executed by decedent, specifically indicated that decedent 'underst[oo]d that all medical information related to [his] ability to perform the functions of [his] job w[ould] be reported to the designated employer representatives at [his] place of employment.' There is also no dispute that defendants adhered to the requirements set forth in the consent form. We therefore conclude that ... there was no duty to decedent and, as stated by the Court of Appeals, '[w]e have been reluctant to expand a doctor's duty of care to a patient to encompass nonpatients. A critical concern underlying this reluctance is the danger that a recognition of a duty would render doctors liable to a prohibitive number of possible plaintiffs' ...". ***Kingsley v. Price*, 2018 N.Y. Slip Op. 05088, Fourth Dept 7-6-18**

REAL ESTATE, FRAUD.

THERE ARE QUESTIONS OF FACT WHETHER THE BROKER REPRESENTED BOTH SELLERS AND BUYER WITHOUT DISCLOSING THE DUAL REPRESENTATION, A BREACH OF A FIDUCIARY DUTY, AND THERE ARE QUESTIONS OF FACT WHETHER THE SELLERS WERE FRAUDULENTLY INDUCED BY THE BROKER TO ENTER THE PURCHASE AGREEMENT, BROKER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing (modifying) Supreme Court, determined there was a question of fact whether defendant real estate broker, JRMR, breached a fiduciary duty owed to the sellers of real property, and whether JRMR fraudulently induced the sellers to enter the purchase agreement. Although JRMR represented the sellers, emails between JRMR and the buyer raised a question of fact whether JRMR was acting on behalf of both the buyer and the sellers without disclosing the dual representation (a breach of a fiduciary duty): "It is well settled that, 'because of a broker's fiduciary duties, he [or she] has the affirmative duty not to act for a party whose interests are adverse to those of the principal, unless he [or she] has the consent of the principal given after full knowledge of the facts . . . Accordingly, he [or she] cannot act as agent for both seller and purchaser of property in a real estate transaction' ... . 'Where a broker's interests or loyalties are divided due to . . . [the] representation of multiple parties, the broker must disclose to the principal . . . the material facts illuminating the broker's divided loyalties'... . Indeed, '[a] failure to disclose any interest tending to influence the [broker] . . . constitutes a breach of [the broker's] fiduciary obligation and precludes [the broker] from recovering for services rendered' ... . * * * ... [The sellers'] evidence raised issues of fact whether [the broker] made misrepresentations to them concerning the value of their properties and the willingness of [the buyer] to purchase different property, and whether [the broker] knew of the falsity of those statements and made them with the intent to induce [the sellers'] reliance on them. [The sellers] also submitted evidence raising triable issues of fact whether they justifiably relied on [the broker's] misrepresentations and suffered damages as a result." ***Northland E., LLC v. J.R. Militello Realty, Inc.*, 2018 N.Y. Slip Op. 05078, Fourth Dept 7-6-18**

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