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FIRST DEPARTMENT

CONTRACT LAW. INSURANCE LAW. FINANCIAL INSTITUTION BOND.

The First Department reversed Supreme Court and determined a rider and an exclusion of coverage in a financial institution bond applied to the "Madoff" Ponzi scheme. The losses associated with the Ponzi scheme were therefore not covered by the bond. The rider covered loss resulting from dishonest acts of named persons (including Madoff) "solely" with respect to such persons' duties as an "outside investment advisor." Because the losses stemmed from Madoff's hybrid duties as both an "outside investment advisor" and a "securities broker," the rider did not cover the losses. In addition, a specific exclusion from coverage included losses caused by the dishonest acts of a non-employee securities broker (i.e., Madoff). **Jacobson Family Invs., Inc. v National Union Fire Ins. Co. of Pittsburgh, PA, 2015 NY Slip Op 05273, 1st Dept 6-18-15**

NEGLIGENCE. PERSONAL INJURY. MUNICIPAL LAW. GENERAL MUNICIPAL LAW. LABOR LAW. FIREFIGHTERS. GOVERNMENTAL IMMUNITY.

The First Department, recalling and vacating its decision and order dated March 3, 2015, determined the defendants' motion for summary judgment dismissing the plaintiff-fi efighte 's action based upon General Municipal Law 205-a and Labor Law 27-a was properly denied. The action alleged the city failed to provide fi efighters with personal ropes and, as a result, fi efighters were forced to jump from windows without ropes (resulting in injury and death). Labor Law 27-a requires employers to provide a place of employment free from recognized hazards. A question of fact was raised whether the failure to issue personal ropes resulted from the city's discretionary decision-making, and therefore is not subject to government-function immunity. **Stolowski v 234 E. 178th St. LLC, 2015 NY Slip Op 05099, 1st Dept 6-16-15**

SECOND DEPARTMENT

ANIMAL LAW. DOG-BITE. PERSONAL INJURY. STRICT LIABILITY. "HARBORING" AN ANIMAL. LIABILITY OF COTENANTS WHO "HARBORED" BUT DID NOT OWN THE DOG. "VICIOUS PROPENSITIES."

The summary judgment motions by co-tenants of the owner of a dog which injured plaintiff should have been denied. Although the co-tenants did not own the dog, there was a question of fact whether the co-tenants "harbored" the dog. The court further determined a joint trial including the co-tenants was proper. The meaning of "harboring" and the proof requirements for "vicious propensities" were explained: "... [W]e hold that cotenants can be held strictly liable for a vicious attack by dogs owned solely by another cotenant, provided that there is evidence that the cotenants participated in the care of the dogs in their household to a sufficient degree to support a finding that they joined with the dogs' owner in harboring the animals. * * * Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation ... . Once this knowledge is established, the owner or anyone harboring the animal faces strict liability ... . Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm ... .The owner or harborer of a dog with vicious propensities is not entitled to the benefit of the so-called "one free bite" rule ... . Even a dog which has not previously bitten or attacked may subject its owner or harborer to strict liability where its propensities are apparent ... . Knowledge of an animal's vicious propensities may also be discerned, by a jury, from the nature and result of the attack ..." . [internal quotation marks omitted] **Matthew H. v County of Nassau, 2015 NY Slip Op 05157, 2nd Dept 6-17-15**

ATTORNEYS. CHARGING LIEN. EXCESSIVE ATTORNEY'S FEE.

The Second Department reversed Supreme Court and ordered a hearing to determine whether respondents-attorneys had received all the fees they were entitled to. The attorneys had been paid nearly $54,000 by the plaintiff. Then plaintiff then entered a 40% contingency arrangement prior to trial. The case ultimately settled for $57,500 and plaintiff discharged the attorneys. **D'Ambrosio v Racanelli, 2015 NY Slip Op 05149, 2nd Dept 6-17-15**

CIVIL CONTEMPT.

In finding the motion to hold a party in civil contempt was properly denied (no clear and convincing evidence mandate in a subpoena was disobeyed), the Second Department explained the relevant law: "To find a party in civil contempt pursuant to Judiciary Law § 753, the applicant must demonstrate, by clear and convincing evidence, (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct ..." . [internal quotation marks omitted] **Korea Chosun Daily Times, Inc. v Dough Boy Donuts Corp., 2015 NY Slip Op 05161, 2nd Dept 6-17-15**

CIVIL PROCEDURE. CONVERSION OF MOTION TO DISMISS TO MOTION FOR SUMMARY JUDGMENT.

Supreme Court should not have converted the motion to dismiss to a motion for summary judgment without notice to the parties. Because the motion to dismiss was made after issue was joined, it should be treated as a motion for summary judgment. However, because none of the exceptions to the notice requirement applied, Supreme Court should not have determined the motion without giving the parties the opportunity to submit additional evidence. The matter was remitted for that purpose. The court explained: "Since the [defendants'] motion was made after issue was joined, the Supreme Court correctly determined that it should be treated as a motion for summary judgment pursuant to CPLR 3212 ... . However, the Supreme Court was required to give adequate notice to the parties' that the motion was being converted into one for summary judgment ..., unless one of the recognized exceptions to the notice requirement was applicable ... . Here, no such notice was given, and none of the recognized exceptions to the notice requirement is applicable ... . Neither the [defendants] nor the plaintiff made a specific request for summary judgment, nor did they "indicate that the case involved a purely legal question rather than any issues of fact ... . Further, the parties' evidentiary submissions were not so extensive as to make it unequivocally clear' that they were laying bare their proof' and deliberately charting a summary judgment course ... . Accordingly, the Supreme Court erred by, in effect, converting the [defendants'] motion pursuant to CPLR 3211(a)(3) to dismiss the complaint into one for summary judgment, and should not have searched the record and awarded summary judgment to the plaintiff ...". [internal quotation marks omitted] **JP Morgan Chase Bank, N.A. v Johnson, 2015 NY Slip Op 05159, 2nd Dept 6-17-15**

CIVIL PROCEDURE. CHANGE OF VENUE. IMPARTIAL TRIAL.

The plaintiff was employed by Supreme Court Queens County. For that reason, the Second Department determined Supreme Court properly granted the motion to change the venue from Queens County to Nassau County to avoid the appearance of impropriety. The court explained: "To obtain a change of venue pursuant to CPLR 510(2), a movant is required to produce admissible factual evidence demonstrating a strong possibility that an impartial trial cannot be obtained in the county where venue was properly placed ... . A motion to change venue pursuant to CPLR 510(2) is addressed to the sound discretion of the trial court and its determination should not be disturbed absent an improvident exercise of discretion ... . Under the circumstances of this case, including the evidence demonstrating that the plaintiff has been employed at the Supreme Court, Queens County, since 2001, first as a court office , and more recently as a senior court clerk, the Supreme Court providently granted the motions for a change of the venue of the action from Queens County to Nassau County, in order to avoid any appearance of impropriety ...". [internal quotation marks omitted] **Rutherford v Patel, 2015 NY Slip Op 05170, 2nd Dept 6-17-15**

CONTRACT LAW. INDEMNIFICATION AGREEMENT. GENERAL OBLIGATIONS LAW. LEASE. LANDLORD-TENANT.

An indemnification clause in lease/alteration agreements was unenforceable because it was not limited to the lessee's acts or omissions and because it did not make exceptions for the lessor's negligence (General Obligations Law 5-321) The court wrote: "Broad indemnification provisions ... which are not limited to the lessee's acts or omissions, and which fail to make exceptions for the lessor's own negligence, are unenforceable pursuant to General Obligations Law § 5-321 where [the relevant agreements] were not negotiated at arm's length by two sophisticated business entities..." . **Nolasco v Soho Plaza Corp., 2015 NY Slip Op 05164, 2nd Dept 6-17-15**

CONTRACT. QUANTUM MERUIT. ACCOUNT STATED.

The Second Department determined, in a breach of contract action, the quantum meruit and account stated causes of action should have been dismissed. No action for quantum meruit lies when a contract covers the subject matter of the dispute. An "account stated' cause of action cannot be used as another means to collect under a disputed contract. **Aquatic Pool & Spa Servs., Inc. v WN Weaver St., LLC, 2015 NY Slip Op 05137, 2nd Dept 6-17-15**

CRIMINAL LAW. RESTITUTION. SENTENCING.

County court's failure to pronounce the amount of restitution at sentencing survived waiver of appeal and required vacation of the sentences and remittal for that purpose. **People v Guadalupe, 2015 NY Slip Op 05206, 2nd Dept 6-17-15**

CRIMINAL LAW. RIGHT TO COUNSEL. ATTORNEY TOOK POSITION ADVERSE TO CLIENT.

The Second Department ordered that a hearing be held on defendant's motion to withdraw his guilty plea and that another lawyer be assigned. When defendant made his pro se motion to withdraw his plea, his attorney told the court there was no reason sentencing should not go forward. The attorney's taking a position adverse to the defendant's adversely affected the defendant's right to counsel. **People v King, 2015 NY Slip Op 05209, 2nd Dept 6-17-15**

EMPLOYMENT LAW. EXECUTIVE LAW. CIVIL SERVICE LAW. EMPLOYMENT DISCRIMINATION. DISABILTY DISCRIMINATION. ACCOMMODATION.

Plaintiff's employment with the Department of Correctional Services (DOCS) was terminated (after plaintiff injured her hand) on the ground that plaintiff had failed to demonstrate she was medically fit to return to work and had failed to provide a date by which she would return to full duty. The plaintiff challenged her proposed termination and sought reinstatement before the effective date of termination. The Second Department determined Supreme Court should not have granted summary judgment to the employer (DOCS). A question of fact had been raised about whether DOCS met its duty to consider accommodation for plaintiff's injury. The court wrote: "The employer has a duty to move forward to consider accommodation once the need for accommodation is known or requested" (9 NYCRR 466.11[j][4]). Viewing the evidence in the light most favorable to the nonmoving party ... , we find that the plaintiff's responses to the notice of proposed termination could reasonably have been understood as a request for accommodation, which DOCS rejected by terminating the plaintiff's employment based on her inability to return to work within the one year permitted under Civil Service Law § 71. Therefore, we conclude that the defendants failed to establish, prima facie, that they engaged in a good faith interactive process that assessed the needs of the plaintiff and the reasonableness of her requested accommodation ...". **Cohen v State of New York, 2015 NY Slip Op 05147, 2nd Dept 6-17-15**

EMPLOYMENT LAW. EXECUTIVE LAW. EMPLOYMENT DISCRIMINATION. HOSTILE WORK ENVIRONMENT. RETALIATION FOR OPPOSING DISCRIMINATORY CONDUCT.

Defendant-employer was entitled to summary judgment on plaintiff-employee's "hostile work environment" cause of action (allegedly offensive sex-related remarks) but was not entitled to summary judgment on plaintiff-employee's "retaliation for opposing discriminatory conduct" cause of action. Defendant was able to demonstrate the allegedly offensive remarks were isolated incidents which did not permeate the work environment. But a question of fact was raised about the "retaliation" cause of action. Plaintiff was terminated one day after the employer received a letter about the alleged discrimination from plaintiff's attorney. The Second Department explained the elements of "hostile work environment" and "retaliation for opposing discriminatory conduct" causes of action. **La Marca-Pagano v Dr. Steven Phillips, P.C., 2015 NY Slip Op 05162, 2nd Dept 6-17-15**

FAMILY LAW. CONTRACT LAW. PRENUPTIAL AGREEMENT MANIFESTLY UNFAIR.

The terms and the circumstances surrounding the signing of a prenuptial agreement supported the order setting the agreement aside. The court explained: "In general, New York has a strong public policy favoring individuals ordering and deciding their own interests through contractual agreements ... . However, this right is not and has never been without limitation ... . An agreement between spouses or prospective spouses should be closely scrutinized, and may be set aside upon a showing that it is unconscionable, or the result of fraud, or where it is shown to be manifestly unfair to one spouse because of overreaching on the part of the other spouse ... . Here, the plaintiff established her prima facie entitlement to judgment as a matter of law by demonstrating that the terms of the prenuptial agreement were manifestly unfair given the nature and magnitude of the rights she waived and in light of the vast disparity in the parties' net worth ... . The circumstances surrounding the signing of the agreement support a finding that the unfairness of the agreement was the product of the defendant's overreaching, including that the agreement was presented to the plaintiff two days before the wedding as "take-it or leave-it" when she had already moved in with her children to the marital home. In opposition, the defendant failed to raise a triable issue of fact ...". [internal quotation remarks omitted] **Smith v Smith, 2015 NY Slip Op 05171, 2nd Dept 6-17-15**

FAMILY LAW. FAMILY COURT ACT. EVIDENCE. HEARSAY.

Family Court properly refused to admit evidence of the child's out-of-court statements in an abuse and neglect proceeding because the statements were not corroborated. The Second Department explained: "A child's prior out-of-court statements may provide the basis for a finding of abuse or neglect, provided that these hearsay statements are corroborated so as to ensure their reliability ... . Any other evidence tending to support the reliability of the child's previous statements shall be sufficient corroboration (see Family Ct Act § 1046[a][vi]...). There is a threshold of reliability that the evidence must meet ... . The Family Court has considerable discretion to decide whether the child's out-of-court statements describing incidents of abuse or neglect have, in fact, been reliably corroborated ... . Here, the Family Court did not improvidently exercise its discretion in determining that the statements of the subject child Anthony W. were insufficient to corroborate the statements of the subject child Sally W. as to the alleged sexual abuse perpetrated upon her." **Matter of Gerald W. (Anne R.), 2015 NY Slip Op 05198, 2nd Dept 6-17-15**

FAMILY LAW. PATERNITY. EQUITABLE ESTOPPEL.

Family Court properly denied the petition to vacate an acknowledgment of paternity. Petitioner demonstrated his signing of the acknowledgment was based upon a mistake of fact. Although petitioner was not the child's biological father, the best interests of the child, with whom petitioner had lived from birth for six years, mandated denial of the petition. The court explained the relevant law: "A party seeking to challenge an acknowledgment of paternity more than 60 days after its execution must prove that it was signed by reason of fraud, duress, or material mistake of fact (see Family Ct Act § 516-a[b][ii]). If the petitioner meets this burden, the court is required to conduct a further inquiry to determine whether the petitioner should be estopped, in accordance with the child's best interests, from challenging paternity ...". **Matter of Luis Hugo O. v Paola O., 2015 NY Slip Op 05195, 2nd Dept 6-17-15**

FORECLOSURE. STANDING. POSSESSION OF NOTE OR ASSIGNMENT OF NOTE.

Standing to bring a foreclosure action is demonstrated either by possession of the note or an assignment of the note on the date the action is commenced: "In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced ... . Either a written assignment of the underlying note or the physical delivery of the note to the plaintiff, prior to the commencement of the action, is sufficient to transfer the obligation ...". **Emigrant Bank v Larizza, 2015 NY Slip Op 05151, 2nd Dept 6-17-15**

INSURANCE LAW. PERSONAL INJURY. ASSAULT AND BATTERY EXCLUSION OF COVERAGE.

The plaintiff was struck by a bar stool in a fight at the insured bar. Plaintiff was not involved in the fight and the assailant apparently did not intend to strike her. The Second Department determined the "assault and battery" exclusion in the bar's policy applied and the insurer (North Sea) was not obligated to defend and indemnify the insured bar. The fact that the plaintiff was not the intended target of the assault did not preclude the application of the exclusion. **Parler v North Sea Ins. Co., 2015 NY Slip Op 05166, 2nd Dept 6-17-15**

LABOR LAW. PERSONAL INJURY. HOMOWNER'S LIABILITY RE: PROVISION OF EQUIPMENT.

Supreme Court should not have granted summary judgment to the defendant homeowner. Plaintiff was using defendant's ladder when the ladder slipped and plaintiff fell. Plaintiff alleged the rubber feet on the ladder were totally destroyed. That allegation created a question of fact whether defendant provided dangerous or defective equipment to the plaintiff which caused plaintiff's injury. In response to defendant's argument that plaintiff could not explain the cause of the accident without resort to speculation, the court noted that the cause of an accident can be proven by circumstantial evidence (here the condition of the feet of the ladder and fact that the feet slipped). **Patrikis v Arniotis, 2015 NY Slip Op 05167, 2nd Dept 6-17-15**

LANDLORD-TENANT. RENT-STABILIZED APARTMENT. NONRENEWAL NOTICE. ACCEPTANCE OF UNSOLICITED RENT PAYMENTS AFTER NONRENEWAL NOTICE TO TENANT.

The acceptance of unsolicited rent payments after the lease for a rent-stabilized apartment had expired, and after the tenant had received the requisite nonrenewal notice, did not constitute a waiver of the intention not to renew. The court wrote: "... [W]e are asked to determine whether a landlord's acceptance of unsolicited rent in the "window period" between the expiration date of a lease and the commencement of a holdover proceeding nullifies a landlord's previous service of a notice of intention not to renew the lease. We conclude that the acceptance of unsolicited rent in these circumstances does not, by itself, demonstrate an intentional waiver of a previously served notice of intention not to renew the lease and, thus, does not vitiate that notice." **Matter of Georgetown Unsold Shares, LLC v Ledet, 2015 NY Slip Op 05185, 2nd Dept 6-17-15**

MUNICIPAL LAW. EQUITABLE ESTOPPEL. FORECLOSURE.

The doctrine of equitable estoppel is applied only rarely against municipalities. Here plaintiff alleged the four-month statute of limitations for redemption (re: a foreclosure action) passed because of a municipal employee's promise to hold papers submitted in support of an attempt at redemption. The court held that a promise made or advice given by a governmental employee will not give rise to equitable estoppel: "... [E]quitable estoppel is applied against a municipality performing governmental functions only in the rarest of cases ..., and "erroneous advice by a governmental employee will not give rise to an exception to the general rule"...". **Wilson v Neighborhood Restore Hous., 2015 NY Slip Op 05176, 2nd Dept 6-17-15**

MUNICIPAL LAW. TOWN LAW. CIVIL SERVICE LAW. EMPLOYMENT LAW. ABOLISHMENT OF POSITION.

The town did not act in bad faith when it abolished petitioner's position through the enactment of the town budget. The court explained the applicable law: "A public employer may abolish civil service positions to promote efficiency and economy, provided that the employer acts in good faith ... . Where a public employer has abolished a position, an employee challenging that determination has the burden of proving that the employer engaged in a bad faith effort to circumvent the

Civil Service Law ... . Bad faith may be demonstrated by evidence that a newly hired person performed substantially the same duties as the discharged employee ... . [W]hen there exists a triable issue of fact with regard to bad faith, a full hearing must be held ... . Here, contrary to the petitioner's contention, adoption of a municipal budget may properly serve, under certain circumstances, to abolish an employee's position ...". [internal quotation marks omitted] **Matter of Grant v Town of Lewisboro, 2015 NY Slip Op 05187, 2nd Dept 6-17-15**

MUNICIPAL LAW. GENERAL MUNICIPAL LAW. BIDDING FOR MUNICIPAL CONTRACTS. ADMINISTRATIVE LAW.

The respondent board (fi e district commissioners) had a rational basis for rejecting petitioner's bid for a radio dispatch system. As long as a rational basis for an administrative decision exists it must be upheld. A court may not substitute its own judgment. The court explained: "Here, the board identified three reasons for rejecting the petitioner's bid: (1) the petitioner did not demonstrate that it had a service location within 20 miles of the fi e district; (2) the petitioner offered to supply equipment which differed from the bid specifications; and (3) over the life of the contract, the monthly maintenance costs would render the petitioner's bid more expensive than [the winning bidder's]. Although the petitioner disagrees with the board's conclusions as to each of these points, any one of them would provide a rational basis for the rejection of the petitioner's bid." **Matter of Hello Alert, Inc. v East Moriches Fire Dist., 2015 NY Slip Op 05189, 2nd Dept 6-17-15**

NEGLIGENCE. PERSONAL INJURY. CIVIL PROCEDURE. DISCOVERY. PSYCHOLOGICAL TESTING.

Reversing Supreme Court, the Second Department determined the defendants' motion to compel plaintiff to submit to the administration of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2) should have been granted. Plaintiff amended the bill of particulars to allege she suffered from post-traumatic stress disorder (stemming from the underlying car accident). Plaintiff placed her mental condition in issue, and there was no showing the MMPI-2 would be invasive or harmful. **Peculic v Sawicki, 2015 NY Slip Op 05168, 2nd Dept 6-17-15**

NEGLIGENCE. PERSONAL INJURY. DUTY OF CARE.

The Second Department, finding that defendant's motion for summary judgment in a slip and fall case was properly granted, noted that in order for a defendant to be liable for a dangerous or defective condition on real property the liability must be predicated "upon ownership, occupancy, control, or special use of that property ...". Here no such factors were demonstrated (defendant denied the allegation that it acted as the property manager). **Reynolds v Avon Grove Props., 2015 NY Slip Op 05169, 2nd Dept 6-17-15**

NEGLIGENCE. PERSONAL INJURY. MEDICAL MALPRACTICE. ASSAULT AND BATTERY. INFORMED CONSENT. CIVIL PROCEDURE. MOTION TO DISMISS ACCOMPANIED BY EVIDENTIARY SUBMISSIONS.

Defendant was entitled to dismissal of the assault and battery cause of action, which was based on the allegation a hysterectomy was performed without plaintiff's consent. The evidence however demonstrated plaintiff signed a consent form, and thereby demonstrated that the "without consent" factual allegation was "not a fact at all." Plaintiff did, however raise a question of fact concerning the "lack of informed consent" cause of action. The court explained the elements of assault and battery in this context, the elements of a "lack of informed consent" cause of action, as well as how to handle a motion to dismiss for failure to state a cause of action which is accompanied by evidentiary submissions. **Thaw v North Shore Univ. Hosp., 2015 NY Slip Op 05173, 2nd Dept 6-17-15**

NEGLIGENCE. PERSONAL INJURY. MUNICIPAL LAW. GOVERNMENTAL IMMUNITY. GOVERNMENT FUNCTION. 911 RESPONSE. SNOW STORM. CLEARING STREETS.

The complaint against the city should have been dismissed under the doctrine of governmental immunity. Plaintiffs alleged the city was negligent in responding to a 911 call for an ambulance and was negligent in preparing for and responding to a snow storm (which blocked roads). Because the relevant acts or omissions related to government functions, and because no special relationship existed between the city and plaintiffs' decedent, the city was immune from suit. The Second Department provided a good explanation of the relevant law. **Cockburn v City of New York, 2015 NY Slip Op 05146, 2nd Dept 6-17-15**

NEGLIGENCE. PERSONAL INJURY. NEGLIGENT SUPERVISION. EDUCATION-SCHOOL LAW. MOTION TO SET ASIDE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE.

The plaintiff-student was sexually assaulted at school. The jury found the school was negligent in its supervision of its students, but that the negligence was not the proximate cause of plaintiff's injury. The Second Department determined the verdict was properly set aside as against the weight of the evidence. The issues of negligence and proximate cause were

inextricably interwoven, such that finding the negligence was not the proximate cause of injury was against the weight of the evidence. **Victoria H. v Board of Educ. of City of N.Y., 2015 NY Slip Op 05156, 2nd Dept 6-17-15**

NEGLIGENCE. PERSONAL INJURY. PROXIMATE CAUSE DETERMINED AS A MATTER OF LAW.

Reversing Supreme Court, the Second Department found that the proximate cause of the accident should have been determined as a matter of law and the complaint against the non-negligent driver should have been dismissed. The negligent driver violated the Vehicle and Traffic Law by attempting to make a left turn and crossing the lane in which the non-negligent driver was travelling. The non-negligent driver's car collided with negligent driver's car and then struck plaintiffs (pedestrians). Here it was clear that the negligent-driver's actions were the sole proximate of the plaintiffs' injury as a matter of law. **Velez v Mandato, 2015 NY Slip Op 05174, 2nd Dept 6-17-15**

NEGLIGENCE. PERSONAL INJURY. REAR-END COLLISIONS. SEQUENCE OF COLLISIONS.

The Second Department determined a question of fact had been raised about whether the middle driver in a three-car rear-end collision was negligent. Although the middle-car driver alleged she was struck from behind and pushed into the lead car, the third-car driver alleged the middle car struck the lead car before he struck the middle car. **Gavrilova v Stark, 2015 NY Slip Op 05153, 2nd Dept 6-17-15**

THIRD DEPARTMENT

DEFAMATION. ATTORNEYS. LITIGATION PRIVILEGE.

An action based upon the republication of an allegedly defamatory statement (made by a nonparticipant in the litigation) by an assistant attorney general in the course of a medical malpractice case was precluded by the absolute privilege afforded attorneys in matters related to litigation. The court explained: "Statements made by parties and their counsel in the context of a legal action or proceeding are protected by an absolute privilege so long as, by any view or under any circumstances, they are pertinent to the litigation ... . Allowing such statements or writings to form the basis of an action for defamation would be an impediment to justice, because it would hamper the search for truth and prevent making inquiries with that freedom and boldness which the welfare of society requires... . A liberal standard guides the inquiry of what is pertinent ... , and encompasses any statement that may possibly or plausibly be relevant or pertinent, with the barest rationality ... . Moreover, the burden rests with claimant to conclusively, and as a matter of law, establish the impertinency and the irrelevance of the statement ..." [internal quotation marks omitted] **McPhillips v State of New York, 2015 NY Slip Op 05242, 3rd Dept 6-18-15**

JURY TRIAL/ACCOUNTING. ACCOUNT STATED. EQUITIBALE RELIEF.

In an action involving former partners, plaintiffs sought an accounting, a declaration of defendant's share in the business, and money judgments for breach of contract and unjust enrichment. The Third Department determined Supreme Court properly held plaintiffs are entitled to a jury trial. The inquiry is whether the primary character of the case is legal or equitable. Here the primary character was the seeking of a monetary judgment: "... [W]e agree with Supreme Court that plaintiffs are entitled to a jury trial. In determining whether a party is entitled to a jury trial, the relevant inquiry is not whether an equitable counterclaim exists but whether, when viewed in its entirety, the primary character of the case is legal or equitable... . Here, plaintiffs seek equitable relief — an accounting of defendant's share of [the business] and an account stated between the parties — only for the purpose of determining the money judgment against defendant." [internal quotation marks omitted] **Staunton v Brooks, 2015 NY Slip Op 05248, 3rd Dept 6-18-15**

NEGLIGENCE. PERSONAL INJURY. MEDICAL MALPRACTICE. FORESEEABILITY. SUICIDE. INTERVENING ACT. SUPERSEDING CAUSE.

The Third Department affirmed summary judgment granted to defendant doctor (Skezas). Plaintiff alleged the doctor failed to properly diagnose and/or treat plaintiff's decedent's abdominal pain. Decedent was told by the doctor he may have cancer, which, if not treated, could be fatal within 6 to 12 months. The doctor set up an appointment for plaintiff's decedent with a specialist. Before seeing the specialist, plaintiff's decedent committed suicide. The Third Department determined plaintiff's decedent's suicide was not a foreseeable consequence of the actions ascribed to the doctor. The court explained: "An intervening act will be deemed a superseding cause and will serve to relieve [a] defendant of liability when the act is of such an extraordinary nature or so attenuates [the] defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant ... . Applying this rule to a person's intentional act of taking his or her own life, negligent conduct can only support liability for another person's suicide under certain circumstances and where suicide is a foreseeable consequence of such conduct ... . Here, Skezas did not practice psychiatry, decedent was not confined to Skezas' care and Skezas did not advise decedent to commit suicide. The possibility that decedent would choose to take his own life in the absence of any actual terminal cancer diagnosis and rather than taking advantage of the

second medical opinion — regarding a diagnosis and/or pain management — from the specialist that Skezas had secured for decedent is not a foreseeable consequence of the alleged negligent acts ...". [internal quotation marks omitted] **Stein v Kendal At Ithaca, 2015 NY Slip Op 05246, 3rd Dept 6-18-15**

REAL ESTATE. CONTRACT LAW. DEEDS. MERGER OF CONTRACT AND DEED. UNIFORM VENDOR AND PURCHASER RISK ACT (UVPRA). GENERAL OBLIGATIONS LAW.

After transfer of title, the purchaser alleged that the property had been damaged between the execution of the purchase contract and the transfer of title. The Third Department determined summary judgment was properly awarded the seller. The property was sold "as is" and the contract did not survive the transfer of title. Any rights granted purchaser under the Uniform Vendor and Purchaser Risk Act (UVPRA), which allows for rescission in some cases, were extinguished upon the transfer of title. The court explained: "Unless a land sale contract expressly provides otherwise, a vendor bears the risk of loss until legal title or possession has been transferred to the purchaser ... . However, a contract for the sale of real property merges with the deed and, as a result, the terms of the contract do not survive transfer of title unless the parties clearly specify otherwise ... . Here, the terms and conditions of the auction provided that the sale would be governed by the Uniform Vendor and Purchaser Risk Act (hereinafter UVPRA), which provides a purchaser with the right to rescind the sale contract or recover money paid toward the purchase price under certain circumstances (see General Obligations Law § 5-1311 [1] [a]). However, there was no indication that plaintiff's rights under the UVPRA would survive transfer of title. In fact, the terms and conditions provided that the property would be sold "as is" and that a purchaser would not have recourse against defendant for any defects stemming from the sale. Therefore, any rights that plaintiff may have asserted under the UVPRA were extinguished when title was transferred to plaintiff." **Burkins & Foley Trucking & Stor., Inc. v County of Albany, 2015 NY Slip Op 05252, 3rd Dept 6-18-15**

RETIREMENT AND SOCIAL SECURITY LAW. JUDICIARY LAW. SUPREME COURT JUSTICES. PENSIONS. STATUTORY INTERPRETATION.

Judges who reach the age of 70 and are "certificated to continue their services on the Supreme Court bench" are entitled to receive both their pensions and their judicial salaries. To hold otherwise violates the plain meaning of Retirement and Social Security Law 212(1), which reads: "any retired person may continue as retired and, without loss, suspension or diminution of his or her retirement allowance, earn [an amount not greater than statutorily prescribed] in a position or positions in public service." That same provision provides that "there shall be no earning limitations under the provisions of [Retirement and Social Security Law § 212] on or after the calendar year in which any retired person attains age [65]"... . **Matter of Loehr v Administrative Bd. of the Cts. of the State of N.Y.2015 NY Slip Op 05243, 3rd Dept 6-18-15**

TAX LAW. QUALIFIED EMPIRE ZONE ENTERPRISE (QEZE). GENERAL MUNICIPAL LAW. ADMINISTRATIVE LAW.

The Third Department deferred to the interpretation of a statute by the Tax Appeals Tribunal which found that petitioners were not entitled to Qualified Empire Zone Enterprise (QEZE) tax reduction credits and refundable Empire Zone (EZ) wage credits. The case turned on the Tribunal's definition of a business enterprise. The Tribunal determined the term refers to the taxable entity, not the legal entity. Because the interpretation of the relevant statute, Tax Law 14(a), involved knowledge and understanding of the underlying operational practices, the court deferred to the agency's determination. (In the usual case a court need not defer to an agency's interpretation of a statute). **Matter of Ayoub v Tax Appeals Trib. of the State of N.Y., 2015 NY Slip Op 05240, 3rd Dept 6-18-15**

WORKERS' COMPENSATION LAW. GENERAL MUNICIPAL LAW. MUNICIPAL LAW. PERSONAL INJURY.

The Third Department determined that a lien for attorney fees could be attached to Workers' Compensation benefits prior to reimbursing a municipality for benefits paid to the municipal employee pursuant to the General Municipal Law. Claimant corrections officer was injured on the job. Under General Municipal Law 207-c municipal employers are required to pay full wages to corrections officers injured in the performance of their duties. Workers' Compensation Law 30(3) provides that the amount of the payments made under the General Municipal Law shall be credited against any award of compensation pursuant to the Workers' Compensation Law. The municipality argued it was entitled to the entire amount paid to the employee and the amount should not be reduced by the attorney fees (a lien on the Workers' Compensation award). The Third Department disagreed. **Matter of McCabe v Albany County Sheriff's Dept., 2015 NY Slip Op 05236, 3rd Dept 6-18-15**

ZONING. STATUTORY INTERPRETATION. ADMINISTRATIVE LAW. RESIDENTIAL USE. AGRICULTURAL USE.

The village zoning board of appeals' interpretation of a zoning ordinance had a rational basis. Petitioner sought a ruling allowing him to keep chickens in a residential zone. Because "poultry husbandry" was specifically mentioned in the zoning ordinances as an agricultural use, and was not mentioned as an allowed residential use, the board's interpretation was

upheld as "neither irrational nor unreasonable." **Matter of Meier v Village of Champlain Zoning Bd. of Appeals, 2015 NY Slip Op 05245, 3rd Dept 6-18-15**

FOURTH DEPARTMENT

ARBITRATION. INSURANCE LAW.

An agreement to litigate the parties' entitlement to interest on a judgment did not constitute a waiver of the relevant insurance policy's arbitration clause. The issue whether the parties' claims are arbitrable, therefore, must be determined by the arbitrator, not the courts. The court explained: "Once the parties to a broad arbitration clause have made a valid choice of forum, as here, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator ... . This is not a situation in which the parties engaged in litigation to such an extent that they manifested a preference clearly inconsistent with [a] later claim that the parties were obligated to settle their differences by arbitration ... . Nor is this a situation in which the entire contract containing the arbitration provision has been cancelled or terminated, such that the designation of the arbitration forum for the resolution of disputes is no longer binding upon the parties ... . We thus conclude that the determination of the arbitrability of the parties' claims under the Policy should be made by an arbitrator." [internal quotation marks omitted] **Town of Amherst v Granite State Ins. Co., Inc., 2015 NY Slip Op 05352, 4th Dept 6-19-15**

BANKING LAW. JOINT BANK ACCOUNT. JOINT TENANCY WITH RIGHT OF SURVIVORSHIP. TRUSTS AND ESTATES.

Supreme Court erred in concluding a joint bank account was a joint tenancy with right of survivorship and granting the aspect of plaintiff's motion for summary judgment seeking half the funds in the account upon the death of the other party named on the account. There was no survivorship language in the account documents, and there was evidence tending to rebut any statutory presumption of a joint tenancy (i.e., evidence the account was created as a matter of convenience), **Harrington v Brunson, 2015 NY Slip Op 05309, 4th Dept 6-19-15**

COUNTY LAW. MUNICIPAL LAW. CIVIL PROCEDURE. DISCOVERY. NEGLIGENCE. PERSONAL INJURY.

The court did not abuse its discretion in ordering the further deposition of a county employee and the deposition of the Commissioner of Public Works concerning the maintenance of a section of the road where plaintiff's-decedent's car left the road and struck a pole. The employee's prior testimony was incomplete because he could not recall relevant information. And, although the county can determine who should be deposed on its behalf, the court can order the deposition of a specific witness where the plaintiff shows the witness previously produced did not have sufficient knowledge. **Black v Athale, 2015 NY Slip Op 05355, 4th Dept 6-19-15**

CRIMINAL LAW. MOLINEUX EVIDENCE (EVIDENCE OF PRIOR UNCHARGED OFFENSES). MOTIVE. INTENT. BACKGROUND INFORMATION.

Evidence of prior uncharged sexual abuse of the victim, which included actions attributed to the defendant in the charged offense (abuse when the victim was unconscious from alcohol intoxication), was properly admitted. The court found the uncharged crime evidence was admissible to prove intent and motive, and to provide background information about the nature of the relationship between the victim and defendant. The court explained: "Specifically, the disputed evidence was relevant to the issue whether defendant intended to commit the instant crime for the purpose of sexual gratification (see Penal Law §§ 130.00 [3]; 130.65 [2]), and to establish defendant's motive in providing a large quantity of alcohol to the victim. Consequently, the evidence in this case was not propensity evidence, but was probative of [defendant's] motive and intent to [sexually] assault his victim ... . Moreover, the evidence was also admissible under a more recently recognized Molineux exception, i.e., to provide[] necessary background information on the nature of the relationship between defendant and the victim ... and thus, we conclude that the court did not abuse its discretion in allowing the People to present the evidence at issue ..." . [internal quotation marks omitted] **People v Leonard, 2015 NY Slip Op 05314. 4th Dept 6-19-15**

CRIMINAL LAW. MOTION TO VACATE CONVICTION. EVIDENCE. HEARSAY. STATEMENT AGAINST PENAL INTEREST.

Defendant's motion to vacate his conviction should not have been granted. The hearsay statement which exonerated defendant did not meet the criteria for a statement against penal interest and should not have been admitted in evidence. In addition, the evidence was not newly discovered. Defendant did not provide the evidence at trial out of fear of retaliation by gang members. With respect to the statement against penal interest, the court explained: "Here, the court admitted the statement at the hearing as a declaration against penal interest, but it is well settled that [f]or a statement against penal interest to be admissible the interest compromised must be such as to all but rule out' motive to falsify, [and] the declarant must be conscious of the consequences of his statement at the time it is made . . . Those assurances of probative value, which might in a proper case substitute for cross-examination, were not present in this case …. Although a less stringent standard applies

where, as here, the declaration is offered by defendant to exonerate himself rather than by the People, to inculpate him …, none of the requirements was met here. To the contrary, the statement of the gang member was provided only after he was assured that he would not be prosecuted for any information that he provided, thus removing any indicia of reliability regarding that information." [internal quotation marks omitted] **People v Backus, 2015 NY Slip Op 05330, 4th Dept 6-19-15**

CRIMINAL LAW. SUPPRESSION OF STATEMENT. INSUFFICIENT BREAK BETWEEN WARNED AND UNWARNED STATEMENTS.

There was an insufficient break (10 minutes) between an "unwarned" inculpatory statement made by the defendant and a subsequent statement made after the Miranda warnings were given. The entire statement should have been suppressed. The court explained: "When, as part of a continuous chain of events, a defendant is subjected to custodial interrogation without Miranda warnings, any statements made in response as well as any additional statements made after the warnings are administered and questioning resumes must be suppressed ... . Where, however, there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning, his or her statements in response to renewed questioning after he or she has received Miranda warnings and waived his or her constitutional rights may be admitted ... . Here, the initial questioning by the second office , although brief, produced an inculpatory statement directly related to the instant crime... , and the second interrogation, which produced another inculpatory statement, occurred less than 10 minutes later and in the same location ... . Moreover, contrary to the People's contention, the record does not establish that a reasonable suspect in defendant's position would have perceived a marked change in the tenor of his engagement with [the] police ... . We thus conclude that it cannot be said that there was such a definite, pronounced break in the interrogation that defendant was returned to the position of one who was not under the influence of the initial improper questioning ...". [internal quotation marks omitted] **People v Walker, 2015 NY Slip Op 05313, 4th Dept 6-19-15**

CRIMINAL LAW. TEMPORARY DETENTION.

In affirming the conviction, the Fourth Department noted that placing the defendant in the back seat of a patrol car did not, under the circumstances, amount to a de facto arrest. Rather "the temporary detention of defendant was proper as 'part of a continuum of permissible police intrusions in response to escalating evidence of criminal activity'." **People v Howard, 2015 NY Slip Op 05350, 4th Dept 6-19-15**

EMPLOYMENT LAW. EXECUTIVE LAW. EMPLOYMENT DISCRIMINATION. EDUCATION-SCHOOL LAW. PREGNANCY. ADMINISTRATIVE LAW.

The Fourth Department affirmed Supreme Court's annulment of the New York Division of Human Rights' (SDHR's) fin - ing, without a hearing, there was no probable cause to believe the school district discriminated against the petitioner. Petitioner was not hired because of her anticipated absence due to pregnancy. The school district's stated reason for not hiring petitioner was that she was going to be unavailable to counsel students and there was concern about the resulting lack of continuity of counseling services for the students. However, the petitioner's unavailability was due to her pregnancy and discrimination could therefore be inferred. **Matter of Mambretti v New York State Div. of Human Rights, 2015 NY Slip Op 05384, 4th Dept 6-19-15**

FAMILY LAW. CUSTODY. EXPRESSED WISHES OF CHILD.

The Fourth Department, over a two-justice dissent, determined Family Court properly awarded custody to mother, despite the wishes of the adolescent child. The dissenters argued that great weight should have been given to the expressed wishes of the child. **Sheridan v Sheridan, 2015 NY Slip Op 05301, 4th Dept 6-19-15**

MUNICIPAL LAW. CIVIL SERVICE LAW. FIREFIGHTERS. INVOLUNTARY LEAVE. DIABETES. UNFIT FOR ACTIVE SERVICE AS A FIREFIGHTER.

A fi efighter was properly deemed unfit for active duty as a fi efighter because of his inability to manage diabetic symptoms. During the course of the decision, the Fourth Department determined that the city's failure to strictly comply with the notice requirements of the Civil Service Law rendered the involuntary leave imposed on petitioner a nullity (entitling him to back pay for the leave period). **Matter of Williams v Troiano, 2015 NY Slip Op 05318, 4th Dept 6-19-15**

NEGLIGENCE. PERSONAL INJURY. ASSUMPTION OF RISK. AIRPORTS. PILOTS.

Plaintiff-pilot's complaint should have been dismissed because the pilot, injured attempting to take off from a grass field, assumed the risk associated with a take-off from a wet field. The airport is a designated venue for the recreational activity of private aviation. Therefore the recreational use of the airport was a qualifying activity under the doctrine of primary assumption of the risk. The pilot was aware of the wet conditions prior to his attempt to take off. **Bouck v Skaneateles Aerodrome, LLC, 2015 NY Slip Op 05300, 4th Dept 6-19-15**

NEGLIGENCE. PERSONAL INJURY. DUTY OF CARE. SCOPE OF DUTY. FORESEEABILITY.

Plaintiff was injured in a plane crash which occurred as the pilot was attempting to pull a skydiver back into the plane. The hatch door opened unexpectedly on take-off and a skydiver, against the pilot's instructions, stood up and attempted to pull the door closed. Plaintiff had completed a one-hour skydiving course offered by defendant prior to the flight. Plaintiff alleged that defendant breached his duty to provide proper training for the pilot, instructors and other skydivers. The court determined defendant owed no duty of care to the plaintiff with respect to the unforeseeable conduct which occurred on the plane. The court explained: "The existence and scope of a duty of care is a question of law for the courts entailing the consideration of relevant policy factors ... . In making such a determination, the courts look to whether the relationship of the parties is such as to give rise to a duty of care . . . , whether the plaintiff was within the zone of foreseeable harm . . . and whether the accident was within the reasonably foreseeable risks ... . [T]he law draws a line between remote possibilities and those that are reasonably foreseeable because [n]o person can be expected to guard against harm from events which are . . . so unlikely to occur that the risk . . . would commonly be disregarded ...". [internal quotation marks omitted] **Tiede v Frontier Skydivers, Inc., 2015 NY Slip Op 05311, 4th Dept 6-19-15**

NEGLIGENCE. PERSONAL INJURY. MUNICIPAL LAW. GOVERNMENTAL IMMUNITY. COUNTY LAW.

Plaintiffs alleged that construction by the defendant-county caused snow to blow across the highway leading to the "white-out" which resulted in plaintiff's decedent's death in a collision. The Fourth Department determined the county was immune from suit because the relevant construction was a governmental, not proprietary, function, and the county did not owe a special duty to the plaintiffs. **Klepanchuk v County of Monroe, 2015 NY Slip Op 05323, 4th Dept 6-19-15**

NEGLIGENCE. NEGLIGENCE PER SE. VEHICLE AND TRAFFIC LAW. DAMAGES. PROPERTY DAMAGE. DEMOLITION COSTS.

In the course of a decision finding questions of fact precluded summary judgment, the Fourth Department explained the doctrine of negligence per se as it relates to a violation of the Vehicle and Traffic Law, and the recoverable damages when property damage requires demolition of a building which was rendered a safety hazard. The defendant-driver here struck plaintiff's building which was then destroyed by fi e. The cost of demolition, which the town had ordered because the building was a safety hazard, exceeded the fair market value of the building prior to the accident. The court noted that the demolition costs could be recoverable damages. The court further noted that only the "unexcused" violation of the Vehicle and Traffic Law constitutes negligence per se. Therefore the defendant's guilty plea to a Vehicle and Traffic Law violation could be excused by the jury if the jury determined the driver acted to avoid an object in the road. In that situation, the violation would only constitute "some evidence" of negligence. **Shaw v Rosha Enters., Inc., 2015 NY Slip Op 05305, 4th Dept 6-19-15**

NEGLIGENCE. PERSONAL INJURY. SIDEWALK DEFECT. DUTY TO MAINTAIN SIDEWALK IMPOSED BY ORDINANCE.

The existence of an ordinance imposing upon abutting property owners the duty to maintain the sidewalk created a question of fact whether defendant breached that duty. Apparently the defect was caused by a root from a tree on village property which defendant alleged he had no authority to disturb. The ordinance, however, did not include any exceptions to the duty to repair. The defect was not of such significance that summary judgment on liability as a matter of law was warranted. **Shatzel v 152 Buffalo St., Ltd., 2015 NY Slip Op 05333, 4th Dept 6-19-15**

TOWN LAW. MUNICIPAL LAW. TOWN BOARD. DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW. GOVERNMENTAL IMMUNITY. QUALIFIED IMMUNITY. ENVIRONMENTAL LAW. WETLANDS CONSTRUCTION.

The plaintiff had cleared the way for building on land which included wetlands by obtaining the necessary permits and waivers from the Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACE) when, without notice, the town board passed a resolution rescinding a previously issued sewer tap-in waiver and terminating the construction project. Among other theories, plaintiff sued under 42 USC 1983 (deprivation of property without due process of law) and won. On appeal the due process violation verdict was upheld. The Fourth Department explained the criteria for the due process cause of action and noted that the defendant town was not entitled to qualified immunity because the town board's actions violated plaintiff's constitutional rights. **Acquest Wehrle, LLC v Town of Amherst, 2015 NY Slip Op 05346, 4th Dept 6-19-15**

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