CasePrepPlus

October 28, 2015

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

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COURT OF APPEALS

ATTORNEYS.

MULTI-MILLION DOLLAR LEGAL MALPRACTICE ACTION STEMMING FROM COMMERCIAL MORTGAGE-BACKED SECURITIES DISMISSED.

The Court of Appeals, in an extensive opinion by Judge Rivera, determined a multi-million dollar malpractice action should have been dismissed. The law firm, Cadwalader, was hired by the plaintiff, Nomura, in connection with Nomura's commercial mortgage-backed securities investments. Cadwalader's role was to advise and confirm that Nomura's securitized commercial mortgage loans qualified as real estate mortgage investment conduit (REMIC) trusts. When a hospital which had been deemed REMIC-qualified by Cadwalader went bankrupt and defaulted on its loan, Nomura settled with the trustee for $67.5 million. Nomura then sued Cadwalader. The opinion is fact-specific and cannot be fairly summarized here. Based upon the facts and the evidence, the Court of Appeals determined Cadwalader demonstrated it had done what it was hired to do, and had exercised due diligence in fulfilling its limited obligations. Nomura failed to raise a question of fact to the contrary. Nomura, the court found, was seeking to impose duties upon Cadwalader which it had expressly reserved to itself. **Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 2015 NY Slip Op 07693, CtApp 10-22-15**

CIVIL PROCEDURE, MENTAL HYGIENE LAW.

PATIENT HELD IN A MENTAL HEALTH FACILITY AFTER THE COURT ORDER AUTHORIZING CONFINEMENT HAD EXPIRED WAS ENTITLED TO HABEAS CORPUS RELIEF PURSUANT TO CPLR ARTICLE 70.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissent, reversing the appellate division, determined that a patient, who was held in a mental health facility pursuant to a court order which the facility neglected to extend, was entitled to release pursuant to a CPLR article 70 habeas corpus proceeding. The hospital unsuccessfully argued that the only habeas corpus relief available to the patient was pursuant to Mental Hygiene Law § 33.15, which required an inquiry into the patient's mental state: "CPLR 7001 provides that article 70 applies to common-law and statutory writs of habeas corpus '[e]xcept as otherwise prescribed by statute' (CPLR 7001). However, nothing in the plain language of Mental Hygiene Law § 33.15 purports to limit the availability of the common-law writ in Mental Hygiene Law proceedings. Rather, section 33.15 enhances the efficacy of the writ of habeas corpus, as our case law dictates, and thereby ensures that patients are not committed and retained without due process of law. That is, Mental Hygiene Law § 33.15 allows patients to seek a writ of habeas corpus when they are being held pursuant to a court order but, nevertheless, believe they have sufficiently recovered from their mental illness so that their continued retention is unwarranted; in such cases, determining the legality of their retention would require an inquiry into their mental state. On the other hand, patients whose detention is otherwise unauthorized may proceed under the habeas corpus provisions of CPLR article 70 since the legality of their detention can be determined on the basis of, for example, whether the appropriate procedures have been followed, without the need for a hearing into their mental state." **People ex rel. DeLia v Munsey, 2015 NY Slip Op 07697, CtApp 10-22-15**

CONTEMPT (CIVIL).

WILFULNESS IS NOT AN ELEMENT OF CIVIL CONTEMPT; SUPREME COURT PROPERLY DREW A NEGATIVE INFERENCE FROM DEFENDANT'S INVOCATION OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

The Court of Appeals affirmed the finding of civil contempt re: an order in a matrimonial matter. The Court of Appeals determined Supreme Court properly drew a negative inference from defendant's invocation of his Fifth Amendment right against self-incrimination. The Court of Appeals rejected defendant's argument that "wilfulness" is an element of civil contempt: "[N]owhere in Judiciary Law § 753 [A] [3] is wilfulness explicitly set forth as an element of civil contempt (Judiciary Law § 753 [A] [3]...). Indeed the only mention of wilfulness for civil contempt is in § 753 [A] [1], which is not at issue in this case as it applies only to '[a]n attorney, counsellor, clerk, sheriff, coroner,' or someone otherwise selected or appointed for judicial or ministerial service. In contrast, Judiciary Law § 750, the criminal contempt provision, permits a court to impose punishment for criminal contempt only for 'wilful disobedience to its lawful mandate' (Judiciary Law § 750 [A] [3]...). This statutory language makes clear that where the legislature intended to require wilfulness, it knew how to do so, and any

omission of such element is intentional ... . Apart from the statute, this Court has not imposed a wilfulness requirement for civil contempt ...". **El-Dehdan v El-Dehdan, 2015 NY Slip Op 07579, CtApp 10-20-15**

CRIMINAL LAW.

SEXUAL CONDUCT THAT DOES NOT RISE TO THE LEVEL OF A SORA SEX OFFENSE MAY BE CONSIDERED UNDER THE "NUMBER OF VICTIMS" RISK FACTOR.

The "number of victims" risk factor (risk factor 3) under the Sex Offender Registration Act (SORA) properly includes "sexual conduct" that did not amount to SORA level sex offenses and which involved "webcam chats:" "Given that the Guidelines do not mention a SORA level offense in risk factor 3, but instead address the more general term, 'sexual conduct,' we agree with the People that the conduct does not have to amount to a SORA level offense in order to be considered. Furthermore, the child can still be a victim under risk factor 3 even though the defendant and the child were not in the same room, but were communicating through a webcam ...". **People v Izzo, 2015 NY Slip Op 07576, CtApp 10-20-15**

CRIMINAL LAW.

LOBBY OF PUBLIC HOUSING UNIT IS NOT "OPEN TO THE PUBLIC" WITHIN THE MEANING OF THE LAW OF TRESPASS.

The misdemeanor information charging defendant with second-degree criminal trespass was sufficient. The defendant was in the lobby of a public housing unit where a "no trespassing" sign was posted. When asked, the defendant said he did not reside in the building and could not identify any resident who had invited him. The court explained the elements of all three degrees of trespass and found that the lobby of a public housing unit is not "open to the public" within the meaning of the law of trespass: "Contrary to defendant's argument, the word 'public' in the phrase 'public housing' refers to ownership, not access. It is not the case that all property owned by the government is 'open to the public.' Certain areas of publicly-owned buildings may be restricted from public use by a locked door or a front desk, much like the common areas of privately-owned buildings ... . The presence of a 'No Trespassing' sign may also indicate that the common area of a publicly-owned building is not open to the public. Accordingly, we agree with the Appellate Term that it is possible for a person to enter or remain in a publicly-owned dwelling without license or privilege to do so." **People v Barnes, 2015 NY Slip Op 07577, CtApp 10-20-15**

CRIMINAL LAW.

POLICE WERE JUSTIFIED IN QUESTIONING DEFENDANT'S PRESENCE IN LOBBY OF AN APARTMENT BUILDING ENROLLED IN THE "TRESPASS AFFIDAVIT PROGRAM (TAP)."

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over an extensive dissenting opinion by Judge Rivera (in which Judge Lippman concurred), determined a police officer had the right to question defendant about his presence in the lobby of an apartment building. After defendant stated he did not live in the building and could not identify a resident who invited him there, he was arrested for trespass and a razor blade was seized from his pocket. The building was enrolled in the "trespass affidavit program (TAP)," which was described as a solicitation of police assistance for dealing with trespassers. The police officers entered the building to conduct a floor by floor search for trespassers. **People v Barksdale, 2015 NY Slip Op 07694, CtApp 10-22-15**

CRIMINAL LAW.

PREGNANT WOMAN NOT LIABLE UNDER THE RECKLESS MANSLAUGHTER STATUTE FOR DEATH OF BABY INJURED IN UTERO BUT SUBSEQUENTLY DELIVERED ALIVE BY CESAREAN SECTION.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over an extensive dissent, determined a pregnant woman could not be convicted of reckless manslaughter for the death of her baby following a head-on collision. Defendant was in the wrong lane and struck an on-coming car, killing the two occupants. Defendant consented to a cesarean section because the baby was in distress (due to the accident). The baby was born alive but subsequently died. Defendant was convicted of manslaughter for recklessly causing the baby's death. The Court of Appeals reversed noting that, had the baby died in utero, the baby would not have met the definition of "person" in the manslaughter statute: "Had the legislature intended to include pregnant women in the class of individuals who may be guilty of manslaughter in the second degree for reckless acts committed while pregnant, resulting in the eventual death of their child, it could clearly have done so. Moreover, had defendant's fetus died in utero, then, plainly, defendant could not have been prosecuted under the manslaughter statute because the fetus would not have fallen under the definition of a 'person' (Penal Law § 125.05 [1]; ...). * * * The imposition of criminal liability upon pregnant women for acts committed against a fetus that is later born and subsequently dies as a result of injuries sustained while in utero should be clearly defined by the legislature, not the courts. It should also not be left to the whim of the prosecutor. Conceivably, one could find it 'reckless' for a pregnant woman to disregard her obstetrician's specific orders concerning bed rest; take prescription and/or illicit drugs; shovel a walkway; engage in a contact sport; carry groceries; or disregard dietary restrictions. Such conduct, if it resulted in premature birth and subsequent death of the child, could result in criminal liability for the mother. At present, such conduct, if it caused a stillbirth, would not result in criminal

prosecution of the mother if the fetus died in utero. Any change in the law with regard to such matters would be within the province of the legislature. **People v Jorgensen, 2015 NY Slip Op 07699, CtApp 10-22-15**

DISCIPLINARY HEARINGS (INMATES).

ATTEMPT TO VIOLATE A PRISON RULE IS SUFFICIENT TO FIND A VIOLATION, INTENT IS IRRELEVANT.

The Court of Appeals affirmed the finding that the petitioner-inmate had violated the prison rule prohibiting the possession of loose stamps in the prison library. Petitioner argued he did not violate the rule because he was found in possession of the loose stamps outside of the library and he did not intend to violate the rule. However, the Court of Appeals determined an attempt to violate a prison rule is sufficient (petitioner acknowledged he was on his way to the library when the stamps were found) and the petitioner's intent was not an element of the offense: "Prison rules state explicitly that inmates who attempt 'to violate institutional rules of conduct . . . [are] punishable to the same degree as violators of such rules . . . . [and] may be cited for attempts . . . whether or not the text of an actual rule contains such term[]' (7 NYCRR 270.3 [b]). Petitioner testified during the disciplinary hearing that he was carrying the loose stamps while on his way to the law library. Thus, by his own admission, he is guilty of an attempt to violate the provision, and as a consequence Rule 113.22. Furthermore, whether petitioner was aware that he was in violation of a restriction on loose stamps is irrelevant because Rule 113.22 applies regardless of the inmate's intent." **Matter of Bottom v Annucci, 2015 NY Slip Op 07696, CtApp 10-22-15**

EMPLOYMENT LAW, MUNICIPAL LAW.

UNDER THE CIRCUMSTANCES PLAINTIFF COULD NOT STRICTLY COMPLY WITH THE WHISTLEBLOWER STATUTE BY COMPLAINING TO THE VERY PEOPLE INVOLVED IN THE WRONGFUL CONDUCT, PLAINTIFF ENTITLED TO BACK PAY AND PREJUDGMENT INTEREST FOR RETALIATORY DEMOTION.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, determined that plaintiff had complied with the whistleblower statute and was entitled to prejudgment interest on his award for retaliatory demotion. The statute, Civil Service Law § 75-b, requires that any allegedly wrongful act first be reported to the "appointing authority." However, in this case, the "appointing authority" was the very people plaintiff alleged committed the wrongful act. In this circumstance, plaintiff's complaints to his immediate superiors and then to the inspector general were deemed to comply with the statute. The Court of Appeals also reasoned that, because the purpose of the whistleblower statute is to make whistleblowers whole, the award of prejudgment interest under the statute is proper. **Tipaldo v Lynn, 2015 NY Slip Op 07698, CtApp 10-22-15**

ENVIRONMENTAL LAW, CONTRACT LAW.

ENVIRONMENTAL CLEAN-UP INDEMNIFICATION AGREEMENT BETWEEN SELLER AND BUYER OF PROPERTY TRIGGERED BY DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S "POTENTIALLY RESPONSIBLE PARTY" LETTER TO BUYER.

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined the environmental clean-up indemnification agreement between the seller (Pyne) and buyer (Remet) of property was triggered by the Department of Environmental Conservation's (DEC's) letter to Remet. Although the letter referred to Remet as a "potentially" responsible party (PRP), the letter required that Remet enter into a consent agreement (re: the clean-up) with the DEC or, if no consent agreement was executed within 30 days, pay for the clean-up done by the DEC: "The plain language of the governing contractual indemnity provision, together with the language of the PRP letter and the surrounding facts and circumstances, demonstrate that Remet was entitled to indemnification because it was 'required,' within the meaning of the sales agreement, to act in response to the PRP letter. The PRP letter stated that it pertained to an 'Urgent Legal Matter,' indicated that a prompt reply was 'necessary,' and set forth the consequences that would flow from Remet's refusal to act. Regardless of whether Remet was designated a potentially responsible party or a responsible party, the letter demanded either a consent order or payment, and any language indicating that Remet's response was voluntary must be read in terms of those demands. In other words, the PRP letter — by its terms — effectively marked the beginning of a 'legal' process against Remet pursuant to the ECL, in which DEC expressly sought recovery from Remet for any amounts expended in remediating the [the site]." **Remet Corp. v Estate of Pyne, 2015 NY Slip Op 07575, CtApp 10-20-15**

PERSONAL INJURY.

ANALYTICAL CRITERIA FOR DETERMINING WHETHER A DEFECT IS TRIVIAL EXPLAINED.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, tackled the topic of "trivial defects" in slip and fall cases. The court looked at three actions where the defect was deemed trivial, and reversed two of them. The court explained the analytical principles: "The repetition of the phrase 'not constituting a trap' in many Appellate Division opinions should not be taken to limit the means by which a plaintiff may demonstrate a question of fact concerning the hazard posed by a physically small defect. Liability does not 'turn[] upon whether the hole or depression, causing the pedestrian to fall, . . . constitutes "a trap" ' ... . The case law provides numerous examples of factors that may render a physically small defect actionable, including a jagged edge ...; a rough, irregular surface ...; the presence of other defects in the vicinity ...; poor light-

ing ...; or a location — such as a parking lot, premises entrance/exit, or heavily traveled walkway — where pedestrians are naturally distracted from looking down at their feet ... . Our survey of such cases indicates that the lower courts, appropriately, find physically small defects to be actionable when their surrounding circumstances or intrinsic characteristics make them difficult for a pedestrian to see or to identify as hazards or difficult to traverse safely on foot. Attention to the specific circumstances is always required and undue or exclusive focus on whether a defect is a 'trap' or 'snare' is not in keeping with [our precedent]." **Hutchinson v Sheridan Hill House Corp., 2015 NY Slip Op 07578, CtApp 10-20-15**

TAX LAW, FALSE CLAIMS ACT.

ATTORNEY GENERAL'S COMPLAINT AGAINST SPRINT STATED A CAUSE OF ACTION UNDER THE FALSE CLAIMS ACT RE: SALES TAX ON WIRELESS PHONE CALLS.

The Court of Appeals, in a full-fledged opinion by Judge Lippman, over a partial dissent, determined the attorney general's (AG's) complaint sufficiently stated a cause of action against Sprint, based upon the False Claims Act (FCA), alleging the knowing submission of false sales tax statements re: interstate and international wireless phone calls. The court succinctly stated its holding as follows: "(1) the New York Tax Law imposes sales tax on interstate voice service sold by a mobile provider along with other services for a fixed monthly charge; (2) the statute is unambiguous; (3) the statute is not preempted by federal law; (4) the Attorney General's (AG) complaint sufficiently pleads a cause of action under the New York False Claims Act (FCA)(State Finance Law § 187 et seq.); and (5) the damages recoverable under the FCA are not barred by the Ex Post Facto Clause of the United States Constitution." **People v Sprint Nextel Corp., 2015 NY Slip Op 07574, CtApp 10-20-15**

FIRST DEPARTMENT

ADMINISTRATIVE LAW, EDUCATION-SCHOOL LAW.

LOUD ARGUMENT WITH ANOTHER TEACHER IN FRONT OF STUDENTS DID NOT JUSTIFY AN UNSATISFACTORY RATING AND DISCHARGE OF PROBATIONARY TEACHER.

The First Department, over a dissent, determined the unsatisfactory rating (U-rating) for a probationary teacher lacked a rational basis and was arbitrary and capricious. Her termination, therefore, was based upon a deficiency in the review process which undermined its fairness. The U-rating and termination stemmed from a "loud" argument with another teacher in front of students. The majority concluded the evidence about the argument did not support a finding of insubordination and unprofessional conduct. The dissent argued there was a rational basis for the respondent's rulings and, under the principles of administrative law, the court was powerless to substitute its own judgment. **Matter of Mendez v New York City Dept. of Educ., 2015 NY Slip Op 07599, 1st Dept 10-20-15**

CIVIL PROCEDURE.

PREJUDICE WHICH WOULD PRECLUDE AMENDMENT OF AN ANSWER MUST STEM FROM A RIGHT LOST IN THE INTERIM BETWEEN THE ORIGINAL ANSWER AND THE APPLICATION TO AMEND.

The First Department, reversing Supreme Court, determined defendant (Environmental) should have been allowed to amend its answer to deny its employee (Tompkins) was acting within the scope of his employment when the accident at issue occurred. The court explained that plaintiff failed to demonstrate prejudice from the amendment, as the term "prejudice" is to be understood in this context: "A proper showing of prejudice must be traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add ... . Plaintiff has made no such showing. In her opposition before the motion court, plaintiff asserted that she would be prejudiced by the amendment because Environmental would be vicariously liable for the acts of [Thomas] Tompkins, if Tompkins was operating the vehicle within the scope of his employment. This is not the kind of significant prejudice necessary to deny an amendment to the pleading, as plaintiff would suffer the same 'prejudice' if Environmental had raised its scope-of-employment defense in its initial answer. [internal quotation marks omitted] **Williams v Tompkins, 2015 NY Slip Op 07598, 1st Dept 10-20-15**

CRIMINAL LAW.

POLICE DID NOT HAVE SUFFICIENT SUSPICION TO JUSTIFY TELLING DEFENDANT TO DROP A BAG HE WAS HOLDING, SUPPRESSION SHOULD HAVE BEEN GRANTED.

The police did not have a founded suspicion criminal activity was afoot when they directed defendant to drop a bag he was holding. Therefore, defendant's suppression motion should have been granted: "The police officers' initial approach and their intrusion upon defendant's freedom by directing that he drop the bag were unsupported by a founded suspicion that criminality was afoot necessary to the exercise of the common-law right to inquire ... . The officers approached defendant based solely on their observation of him carrying a shopping bag or gift bag that seemed rigid. While one officer testified

that, based on his experience, he thought it might be a "booster bag" used for shoplifting, he essentially described an ordinary shopping bag. Further, it was conceded that defendant was not free to leave at the time he was ordered to drop the bag and its use as a booster bag became apparent. Defendant's innocuous behavior in walking in and out of a store with the bag and his ensuing behavior did not justify further interference to obtain explanatory information ...". **People v Ties, 2015 NY Slip Op 07753, 1st Dept 10-22-15**

CRIMINAL LAW, EVIDENCE.

JUDICIAL NOTICE AND COLLATERAL ESTOPPEL RE: PHILIPPINE LAW AND A PHILIPPINE COURT ORDER IMPROPERLY APPLIED, HEARSAY PROPERLY ADMITTED.

In a prosecution stemming from the failure to pay tax on the sale of a painting, Supreme Court improperly took judicial notice of the law of the Philippines and improperly applied the doctrine of collateral estoppel (based upon a Philippine court order). The painting once belonged to Imelda Marcos when she was the First Lady of the Philippines. Under Philippine law, the painting allegedly should have been forfeited to the people of the Philippines. Defendant (with others) completed the sale of the painting for $32 million. The First Department vacated the conspiracy conviction because of the misapplication of Philippine law, but affirmed the criminal tax fraud and "filing a false instrument" convictions. In addition to discussing the misapplication of Philippine law and the doctrine of collateral estoppel, the First Department held that emails, although hearsay, were properly admitted to show conduct (not for the truth of the content) and newspaper articles, although hearsay, were properly admitted to show defendant knew the Philippine government was trying to recover the painting (state-of-mind exception). **People v Bautista, 2015 NY Slip Op 07589, 1st Dept 10-20-15**

PERSONAL INJURY.

PROOF OF JANITORIAL SCHEDULE INSUFFICIENT TO DEMONSTRATE LACK OF NOTICE OF DANGEROUS CONDITION.

The First Department, over an extensive dissent, determined proof of a janitorial cleaning schedule was not sufficient to demonstrate defendant's lack of notice of a dangerous condition. Defendant's motion for summary judgment should not have been granted: "Defendant building owner moved for summary judgment solely on the basis that it had neither actual nor constructive notice of the alleged dangerous condition, a missing drain cover in the building's laundry room. Defendant failed to meet its initial burden of demonstrating that it did not have constructive notice ... . Although the building superintendent testified that he routinely swept the laundry room every morning at 8:00 a.m. and performed daily inspections of the building, including the laundry room, at 11:00 a.m. and 8:00 p.m. each day, mere proof of a set janitorial schedule does not prove that it was followed on the day of the accident, or eliminate the issue of constructive notice in this case ... . The superintendent could not recall whether he had checked the laundry room on the day of the accident or offer any other evidence regarding the last time he inspected the laundry room prior to the accident ... . He explicitly stated that he did know whether the allegedly defective condition existed on that date." **Dylan P. v Webster Place Assoc., L.P., 2015 NY Slip Op 07600, 1st Dept 10-20-15**

TRUSTS AND ESTATES.

SECURITIES DID NOT PASS OUTSIDE THE ESTATE; REQUIREMENTS OF TRANSFER ON DEATH SECURITY REGISTRATION ACT (TODSRA) NOT MET.

The First Department, in a full-fledged opinion by Justice Gische, over a concurring opinion arguing the matter had already been determined by Surrogate's Court, determined a letter sent by decedent to Merrill Lynch did not meet the requirements of the Transfer on Death Security Registration Act (TODSRA) such that the securities account passed to the beneficiary outside the estate: "In order to take advantage of New York's [TODSRA] law, certain categories of owners may request that a security be registered in beneficiary form (EPTL 13-4.2). The institution holding the securities account, however, is not required to either offer or accept a request to register a security in beneficiary form (EPTL 13-4.8). It is only if the owner requests that a security be held in beneficiary form and the entity holding the security accepts the designation, that an enforceable contractual relationship is created between the owner and that registering entity, requiring the registering entity to act in accordance with the designation (EPTL 13-4.9). Under TODSRA, the registering entity has the sole right to establish the terms and conditions under which it will receive and implement requests to register securities in beneficiary form (EPTL 13-4.10), and TODSRA statutorily mandates that the registering entity have certain protections in the process (EPTL 13-4.8). A registering entity is not the owner of the security, but rather the person or entity that originates or transfers title to a security by registration, which includes a broker such as defendant (EPTL 13-4.1[i]). Thus, under the statute, it is perfectly clear that a unilateral action by an owner of a securities account to designate a beneficiary in the event of death is not by itself sufficient." **Arroyo-Graulau v Merrill Lynch Pierce, Fenner & Smith, Inc., 2015 NY Slip Op 07774, 1st Dept 10-22-15**

SECOND DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, MUNICIPAL LAW.

CRITERIA FOR WHETHER PUBLIC EMPLOYER/EMPLOYEE DISPUTE IS ARBITRABLE EXPLAINED.
The village's petition to stay arbitration was properly denied. The firefighters' union filed a grievance when the town decided to lay off six bargaining unit members and assign bargaining unit work to nonbargaining unit volunteers. Supreme Court determined the parties had agreed to arbitrate these matters in the collective bargaining agreement (CBA). The court explained the criteria for determining whether a public employer/employee dispute is arbitrable: "The determination of whether a dispute between a public sector employer and employee is arbitrable is subject to [a] two-prong test ... Initially, the court must determine whether there is any statutory, constitutional, or public policy prohibition against arbitrating the grievance ... . If there is no prohibition against arbitrating, the court must examine the parties' collective bargaining agreement and determine if they in fact agreed to arbitrate the particular dispute ... . Here, the petitioner argued that arbitration of layoffs of union-member firefighters is prohibited by public policy. Regarding a violation of public policy, a dispute is not arbitrable if a court can conclude without engaging in any extended factfinding or legal analysis that a law prohibit[s], in an absolute sense, [the] particular matters [to be] decided by arbitration ... . The petitioner failed to point to any law or public policy that would prohibit arbitration of the grievance. * * * The grievances were reasonably related to the general subject matter of the CBA and, therefore, the petitioner's management rights granted under Article XVII, and the question of the scope of the substantive provisions of the CBA [are] a matter of contract interpretation and application reserved for the arbitrator ...". [internal quotation marks omitted] **Matter of Village of Garden City v Local 1588, Professional Firefighters Assn., 2015 NY Slip Op 07672, 2nd Dept 10-21-15**

CORPORATION LAW.

COMPLAINT DID NOT SUFFICIENTLY ALLEGE DEMAND FOR BOARD'S ACTION WOULD BE FUTILE, CRITERIA EXPLAINED.
Supreme Court properly granted defendants' motion to dismiss the complaint for failure to state a cause of action. The complaint did not sufficiently allege efforts to have the board initiate the action or the reasons for not making that demand: "Such [d]emand is futile, and excused, when the directors are incapable of making an impartial decision as to whether to bring suit ... . Demand is excused because of futility when a complaint alleges with particularity (1) that a majority of the board of directors is interested in the challenged transaction, which may be based on self-interest in the transaction or a loss of independence because a director with no direct interest in the transaction is controlled by a self-interested director, (2) that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances, or (3) that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors ... . However, [t]o justify failure to make a demand, it is not sufficient to name a majority of the directors as defendants with conclusory allegations of wrongdoing or control by wrongdoers ... . Here, the plaintiffs failed to adequately plead that they made a sufficient demand, or that any demand would have been futile ...". [internal quotation marks omitted] **Taylor v Wynkoop, 2015 NY Slip Op 07643, 2nd Dept 10-21-15**

CRIMINAL LAW.

AMENDMENT OF DECISION AND ORDER DISMISSING INDICTMENT WAS PROPER.
The Second Department, over an extensive dissent, determined Supreme Court properly amended a decision and order which initially granted defendant's motion to dismiss the indictment on "speedy trial" grounds. The amended decision and order, which was issued a day after the initial decision and order, denied the motion with respect to three counts: "A court possesses inherent authority to rectify a prior error in dismissing an indictment ..., and where there is a clearly erroneous dismissal of an indictment or count thereof, it is unreasonable to foreclose a court from reconsidering its previous determination ..., even in the absence of a formal motion for leave to reargue by the People ... . Furthermore, under the facts of this case, there was no constitutional or statutory impediment to the court's power to promptly modify its prior determination to dismiss the indictment and to thereby correct the previous error ...". [internal quotation marks omitted] **People v Francis, 2015 NY Slip Op 07679, 2nd Dept 10-21-15**

CRIMINAL LAW.

PEOPLE V. PEQUE, WHICH REQUIRES THAT A DEFENDANT BE INFORMED OF THE IMMIGRATION CONSEQUENCES OF A GUILTY PLEA, IS NOT APPLIED RETROACTIVELY.
People v. Peque (22 N.Y.3d 168), which requires that defendants be informed of the immigration consequences of a guilty plea, is not applied retroactively: "The defendant's conviction became final prior to *People v Peque* (22 NY3d 168), in which the Court of Appeals held that courts were required to advise defendants of the deportation consequences of a plea of guilty. The defendant contends that *Peque* should be applied retroactively. This contention is without merit. Previously, in *Padilla v Kentucky* (559 US 356), the United States Supreme Court held that defense counsel were under a duty to advise noncitizen

defendants of the deportation risks of their pleas of guilty. It is now settled that the *Padilla* decision does not apply retroactively in state court postconviction proceedings ... . For the same reasons, we decline to give retroactive application to *Peque*, which, like *Padilla*, concerns the immigration consequences of a plea of guilty, and rather than going to the heart of a reliable determination of guilt or innocence, instead concentrates on the defendant's appreciation of the immigration consequences that may flow from an otherwise proper plea allocution ...". [internal quotation marks omitted] **People v Pena, 2015 NY Slip Op 07685, 2nd Dept 10-21-15**

CRIMINAL LAW.

JURY SHOULD HAVE BEEN INSTRUCTED ON INTOXICATION WHERE AN ELEMENT OF SOME OF THE CHARGED OFFENSES COULD HAVE BEEN NEGATED BY DEFENDANT'S INTOXICATION.

Defendant's convictions on some of the charges were reversed because the trial judge erroneously refused defendant's request for a charge on intoxication. There was sufficient evidence to support the conclusion defendant was highly intoxicated when he broke into two apartments from which nothing was stolen, which may have negated the intent element of some of the charges: "Although intoxication is not a defense to a criminal offense, evidence of intoxication may be offered by the defendant whenever it is relevant to negative an element of the crime charged (Penal Law § 15.25). An intoxication charge should be issued when, viewing the evidence in a light most favorable to the defendant, there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to an element on that basis ... . The evidence of intoxication in this case met this relatively low threshold ... . Contrary to the People's contention, the error was not harmless with respect to the defendant's convictions of burglary in the second degree and criminal mischief in the fourth degree. In order for an error to be harmless, among other things, the proof of the defendant's guilt must be overwhelming ... . Here, the proof of the defendant's intent as to the crimes of burglary in the second degree and criminal mischief in the fourth degree was not overwhelming ...". [internal quotation marks omitted] **People v Velez, 2015 NY Slip Op 07691, 2nd Dept 10-21-15**

FAMILY LAW.

UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE, THE NEGLECT ADJUDICATION SHOULD HAVE BEEN VACATED UPON COMPLIANCE WITH THE CONDITIONS OF THE SUSPENDED JUDGMENT.

Under the unique circumstances of this case, Family Court should have vacated its neglect adjudication after the parent complied with the conditions of the suspended judgment. The neglect was apparently based upon lead levels: "Although facts sufficient to sustain the petitions were established, neglect petitions may nevertheless be dismissed if 'the court concludes that its aid is not required on the record before it' (Family Ct Act § 1051[c]). Under the discrete circumstances of this case, the Family Court properly directed dismissal of the petitions after the expiration of the six-month suspended judgment period, as the aid of the court was no longer required. However, the court should have also exercised its discretion by directing that, upon the dismissal of the petitions, the adjudication of neglect shall be vacated (see Family Ct Act § 1061). As a general rule, a parent's compliance with the terms and conditions of a suspended judgment does not eradicate the prior neglect finding (see Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 1053 at 57). Here, however, there are a number of factors warranting the vacatur of the neglect findings. The parents' underlying conduct was aberrational in nature, the lead condition at the family home has been abated, the children's blood lead levels after the six-month suspended judgment period were within acceptable ranges, the parents fully complied with the conditions of the suspended judgment, there is no risk that the circumstances of lead exposure will recur, and there is no likelihood that these circumstances will warrant further judicial proceedings (see Family Ct Act § 1051[c]...). Accordingly, the Supreme Court should have directed that, upon the dismissal of the petitions, the adjudication of neglect shall be vacated." **Matter of Anoushka G. (Cyntra M.), 2015 NY Slip Op 07658, 2nd Dept 10-21-15**

FAMILY LAW, ATTORNEYS (RIGHT TO COUNSEL).

MOTHER NEVER WAIVED HER RIGHT TO COUNSEL IN CUSTODY PROCEEDINGS, DENIAL OF MOTHER'S PETITION FOR CUSTODY REVERSED.

The denial of mother's petition for custody (and the grant of father's petition) was reversed because mother was denied her right to counsel. Three attorneys assigned to represent mother had been relieved. Family Court refused to assign another attorney and told mother to hire an attorney or proceed pro se. Although Family Court informed mother of the dangers of representing herself, mother never formally waived her right to counsel. Mother represented herself in the custody proceedings: "The Family Court Act enumerates [e]ach of the persons [who] has the right to the assistance of counsel (Family Ct Act § 262[a]). One such person is the parent of any child seeking custody . . . in any proceeding before the court in which the court has jurisdiction to determine such custody (Family Ct Act § 262[a][v]...). [A]n indigent party has a right to assigned counsel in a Family Court custody proceeding ... . Where, as here, an indigent party has a right to assigned counsel, this entitlement does not encompass the right to counsel of one's own choosing ... . An application by an indigent person for the assignment of new counsel may be granted only upon [a] showing [of] good cause for a substitution ... . Good cause determinations are necessarily case-specific and therefore fall within the discretion of the trial court ... . * * * A party to a Family Court proceeding who has the right to be represented by counsel may only proceed without counsel if that party

has validly waived his or her right to representation ... . To determine whether a party is validly waiving the statutory right to counsel, the Family Court must conduct a searching inquiry to ensure that the waiver is unequivocal, voluntary, and intelligent ... . The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding is a denial of due process which requires reversal, regardless of the merits of the unrepresented party's position ... . Here, the record does not demonstrate that the mother waived her right to counsel ...". [internal quotation marks omitted] **Matter of Tarnai v Buchbinder, 2015 NY Slip Op 07671, 2nd Dept 10-21-15**

FAMILY LAW, IMMIGRATION LAW.

PARENTS' INABILITY TO PAY FOR JUVENILE'S EDUCATION DOES NOT CONSTITUTE THE ABUSE, NEGLECT OR ABANDONMENT REQUIRED FOR SPECIAL JUVENILE IMMIGRANT STATUS.

The motion for a finding that reunification with one or both of petitioner's parents was not viable (re: an application for special juvenile immigrant status) was properly denied. The relationship with the juvenile's parents in Guatemala had never broken down due to abuse, neglect or abandonment. The fact that the juvenile's parents could not afford to pay for the juvenile's education did not constitute abuse, neglect or abandonment: "Pursuant to 8 USC § 1101(a)(27)(J) ... and 8 CFR 204.11, a special immigrant is a resident alien who, inter alia, is under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a State or juvenile court. Additionally, for a juvenile immigrant to qualify for special juvenile immigrant status, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, or abandonment, or a similar basis found under State law (see 8 USC § 1101[a][27][J][i]), and that it would not be in the juvenile's best interests to be returned to his or her native country or country of last habitual residence (see 8 USC § 1101[a][27][J][ii]...). Here, the record reflects that Jeison was living with both of his parents in Guatemala until March 2012, when, with their consent, he traveled to the United States to escape gang violence and pursue his studies. After his arrival in the United States, Jeison began to reside with the petitioner, who provided him with food, clothing, and shelter, and Jeison remained in frequent contact with his parents. The inability of Jeison's parents, who live in poverty, to provide him with a college education, or with financial assistance, does not support a finding that his reunification with his parents was not viable due to parental abuse, neglect, abandonment, or a similar basis found under State law ...". **Matter of Jeison P.-C. (Conception P.), 2015 NY Slip Op 07665, 2nd Dept 10-21-15**

INSURANCE LAW, CONTRACT LAW.

UNAMBIGUOUS LIMITATION OF LIABILITY TO $10,000 SHOULD HAVE BEEN ENFORCED.

Summary judgment should have been granted to defendant insurer. A fire damaged school dormitories. The insurer paid for the repair but paid only $10,000 toward the more than $200,000 the school paid to relocate the students. The court determined that the policy was unambiguous and the $10,000 limit was properly applied to the relocation costs. The court explained the relevant analytical principles: "In construing policy provisions defining the scope of coverage pursuant to a policy of insurance, courts first look to the language of the policy ..., reading it in light of common speech and the reasonable expectations of a businessperson ..., and in a manner that leaves no provision without force and effect ... . The unambiguous terms of an insurance contract must be given their plain and ordinary meaning, and the interpretation of such terms is a question of law for the court ... . Where an agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity ... . However, if the terms of the policy are ambiguous, any ambiguity must be construed in favor of the insured and against the insurer ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law. The $10,000 limitation was at the end of the pertinent Additional Coverage section 5 titled Institutional Income and Extra Expense. The limitation stated that the most the defendant will pay under this Additional Coverage for Institutional Income and Extra Expense is $10,000, unless a higher limit is shown on the Declarations Page. There was no such higher limit shown on that page. Contrary to the plaintiff's contention, there was no ambiguity in this additional coverage." [internal quotation marks omitted] **Viznitz v Church Mut. Ins. Co., 2015 NY Slip Op 07648, 2nd Dept 10-21-15**

MUNICIPAL LAW, EMPLOYMENT LAW.

FORMER PARKING ENFORCEMENT OFFICER ENTITLED TO HEARING RE: WHETHER TOWN ABOLISHED HER CIVIL SERVICE POSITION IN BAD FAITH.

Petitioner was entitled to a hearing re: whether the town acted in bad faith in abolishing her position as a parking enforcement officer. Just prior to her termination, the town hired four parking enforcement officers who were not required to take the civil service examination: "In light of NY Constitution, article V, § 6, a public employer may abolish a civil service position when the discontinuance of the position would promote efficiency and economy, provided that the employer acts in good faith ... . The Court of Appeals has stated that [a] public employer may abolish civil service positions for the purpose of economy or efficiency, as long as the position is not abolished as a subterfuge to avoid statutory protection afforded civil servants before they are discharged ... . Where a public employer has abolished a civil service 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 ... . Here, it is undisputed that four new part-time parking enforcement officers were hired in 2011; one

of those employees was hired in October 2011, only a month before the petitioner was informed that her position would likely be abolished. Further, the Town and Town Board submitted no evidence as to whether the decision to abolish the petitioner's position was made by Town Board resolution, or by some other means. Pursuant to the doctrine of legislative equivalency, a civil service position created by a legislative act can only be abolished by a correlative legislative act ... . Here, the record does not indicate the specific mechanism by which the petitioner's position was abolished. Additionally, although the Town submitted some evidence showing that it undertook various cost-cutting measures in connection with its 2012 budget, the record contains no evidence as to any legislative or other deliberations underlying the determination at issue here." [internal quotation marks omitted] **Matter of Colabella v Town of Eastchester, 2015 NY Slip Op 07656, 2nd Dept 10-21-15**

PERSONAL INJURY, CIVIL PROCEDURE, CONTRACT LAW.

FORUM SELECTION AND TIME LIMITATION CLAUSES IN CRUISE SHIP TICKET ENFORCEABLE.

The forum selection and time limitation clauses in a Carnival cruise ship ticket were enforceable. The passenger's personal injury complaint was dismissed: "A contractual forum selection clause contained in a cruise passenger ticket is generally enforceable as long as it has been reasonably communicated to the passenger and does not violate notions of fundamental fairness, and the submission thereof constitutes documentary evidence that may provide a proper basis for dismissal of an action pursuant to CPLR 3211(a)(1) ... . Here, Carnival's submissions established that the plaintiffs' contract of carriage included a clause requiring that any disputes between the parties 'shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A. to the exclusion of the Courts of any other county, state or country.' Furthermore, the contract provided that an action to recover damages for personal injuries 'shall not be maintainable unless filed within one year after the date of the injury.' Carnival also established that the plaintiffs had a reasonable opportunity to review their tickets, and there is no allegation of fraud or overreaching ...". **Fritsche v Carnival Corp., 2015 NY Slip Op 07618, 2nd Dept 10-21-15**

PERSONAL INJURY, CIVIL PROCEDURE, DAMAGES.

INADEQUATE PAIN AND SUFFERING DAMAGES VERDICT PROPERLY SET ASIDE.

The jury's pain and suffering damages award in a slip and fall case was against the weight of the evidence and Supreme Court properly set the damages verdict aside: "After a trial on the issue of damages, the jury awarded the plaintiff the sum of $20,000 for past pain and suffering and $0 for future pain and suffering. The trial court correctly granted the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages, as that verdict was contrary to the weight of the evidence. The jury's determination that the plaintiff was not entitled to damages for future pain and suffering was inconsistent with the evidence that her shoulder injury was permanent in nature ... . The award for past pain and suffering was also contrary to the weight of the evidence, as it could not have been reached on any fair interpretation of the evidence ...". **Santana v Western Beef Retail, Inc., 2015 NY Slip Op 07639, 2nd Dept 10-21-15**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SCHOOL DISTRICT FAILED TO DEMONSTRATE IT DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF STUDENT'S POTENTIAL TO HARM OTHER STUDENTS.

The Second Department, over a dissent, determined the school district's motion for summary judgment was properly denied. The district failed to demonstrate it did not have actual or constructive notice of a student's potential for harming other students: "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision... . An injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act ... . * * * [The school district's] submissions failed to eliminate all triable issues of fact as to whether the School District had actual or constructive notice of the fellow student's potential for causing harm, and whether, under the circumstances, the School District provided adequate supervision during the field trip ...". [internal quotations marks omitted] **Lennon v Cornwall Cent. School Dist., 2015 NY Slip Op 07628, 2nd Dept 10-21-15**

PERSONAL INJURY, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

NEGLIGENT SUPERVISION AND RETENTION AND RESPONDEAT SUPERIOR CAUSE OF ACTION AGAINST CITY DEPARTMENT OF EDUCATION SHOULD NOT HAVE BEEN DISMISSED, COMPLAINT ALLEGED SEXUAL ABUSE OF STUDENT BY TEACHER.

The causes of action against the City of New York Department of Education (DOE) alleging negligent supervision and retention of a teacher, as well as liability based upon respondeat superior, should not have been dismissed. The complaint alleged the sexual abuse of a student by a teacher, Watts, over the course of two years. The DOE failed to demonstrate it did not have actual or constructive notice of the teacher's propensity for sexual abuse. Although the respondeat superior theory

did not apply to the teacher (who acted outside the scope of employment) other employees, who were acting within the scope of employment, may have been negligent: "Here, the moving defendants failed to establish, prima facie, that the DOE had no specific knowledge or notice of Watts' propensity to engage in the misconduct alleged in the complaint ... . * * * The Supreme Court also should have denied that branch of the moving defendants' motion which was for summary judgment dismissing the cause of action alleging liability based upon a theory of respondeat superior insofar as asserted against the DOE. 'Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment' ... . Here, the DOE may not be held liable under a theory of respondeat superior for the alleged misconduct committed by Watts, as it is undisputed that those acts were not committed in furtherance of the DOE's business and within the scope of Watts' employment ... . However, as the plaintiffs correctly contend, the complaint adequately alleged that other employees of the DOE were negligent in the performance of their respective duties, and that such negligence constituted a proximate cause of the infant plaintiff's injuries. In this regard, the moving defendants failed to establish, prima facie, that these other employees were not acting within the scope of their employment ..., that they were not negligent, or that any such negligence was not a proximate cause of the alleged injuries ...". **Nevaeh T. v City of New York, 2015 NY Slip Op 07642, 2nd Dept 10-21-15**

PERSONAL INJURY, EDUCATION-SCHOOL LAW, MUNICIPAL LAW.

NO "SPECIAL RELATIONSHIP" BETWEEN SCHOOL DISTRICT AND TEACHER INJURED BY STUDENT.

The absence of a special relationship between the city/school district and a teacher injured by a student required dismissal of the teacher's action. Although a special relationship exists between a school district and the minor students, a special relationship exists between a school district and a teacher only in limited circumstances: "A school district may not be held liable for the negligent performance of its governmental function of supervising children in its charge, at least in the absence of a special duty to the person injured ... . Although a school district owes a special duty to its minor students, that duty does not extend to teachers, administrators, or other adults on or off school premises ... . With regard to teachers, administrators, or other adults on or off school premises, a special relationship with a municipal defendant can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation ... . Here, as the Supreme Court correctly concluded, the school defendants established, prima facie, that they did not owe the plaintiff a special duty...". [internal quotation marks omitted] **Brumer v City of New York, 2015 NY Slip Op 07611, 2nd Dept 10-21-15**

ZONING, ADMINSTRATIVE LAW.

ZONING BOARD'S DETERMINATION LACKED A RATIONAL BASIS.

Supreme Court properly found the zoning board of appeals' (ZBA's) determination was not supported by the evidence and lacked a rational basis. The petitioners were denied permission to operate a concrete aggregate recycling business in an area where the processing of raw materials was prohibited. The zoning board denied the application on the ground that petitioners were going to process raw materials. However, petitioners denied that they would process raw materials and there was no evidence, other than rumor, to the contrary. The court explained the criteria for review of a zoning determination: "In a proceeding pursuant to CPLR article 78 to review a determination of a zoning board of appeals, judicial review is limited to ascertaining whether the action was illegal, arbitrary and capricious, or an abuse of discretion ... . Where, as here, a determination is made by a zoning board of appeals after a public hearing, the determination of the zoning board should be upheld if it has a rational basis supported by evidence in the record (see CPLR 7803[4] ...). * * * The key determination made by the ZBA … was that the petitioners intended to engage in activities that included the processing of raw materials on the site, despite the petitioners' repeated statements and assurances otherwise. The record is replete with instances where the petitioners disputed, as nothing more than baseless rumor and suspicion, the claim that they intended to engage in activities other than concrete aggregate recycling on the site. The record is also devoid of any evidence supporting the ZBA's conclusion that the petitioners would engage in activities other than those which were explicitly approved or permitted as of right under the zoning and planning ordinance in force prior ...". **Matter of Green Materials of Westchester v Town of Cortlandt, 2015 NY Slip Op 07659, 2nd Dept 10-21-15**

THIRD DEPARTMENT

CONSTITUTIONAL LAW.

SAFE ACT RESTRICTIONS ON OWNERSHIP OF ASSAULT RIFLES AND AMMUNITION FEEDING DEVICES CONSTITUTIONAL.

The Third Department, in a full-fledged opinion by Justice Devine, determined that the restrictions on ownership of assault rifles and ammunition feeding devices in the "SAFE Act" furthered the substantial, compelling, governmental interests in

public safety and crime prevention and, therefore, are constitutional: "We will accept, for purposes of discussion, that the SAFE Act substantially burdens the right to keep and bear arms so as to subject it to Second Amendment scrutiny ... . We will also assume, although it is debatable, that the weapons and feeding devices addressed by the SAFE Act are not the type of dangerous and exotic weaponry that merit no Second Amendment protection ... . The question accordingly becomes whether the challenged provisions survive intermediate scrutiny, namely, whether they bear[] a substantial relationship to the achievement of an important governmental objective ... . With regard to the objective pursued, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention ... . [Plaintiffs] provided no proof to call the well-established premise behind the challenged provisions into question, namely, that the governmental interest in public safety is substantially furthered by reducing access to weapons designed to quickly fire significant amounts of ammunition and the ammunition feeding devices required to hold that ammunition ... . Thus, we agree with Supreme Court that [t]he core prohibitions . . . of assault weapons and large-capacity magazines [contained in the SAFE Act] do not violate the Second Amendment...". [internal quotation marks omitted] **Schulz v State of New York Exec., Andrew Cuomo, Governor, 2015 NY Slip Op 07728, 3rd Dept 10-22-15**

CONTEMPT (CIVIL), FAMILY LAW.

THE PRECISE TERMS OF THE STIPULATION WERE NOT DEMONSTRATED TO HAVE BEEN VIOLATED, CONTEMPT FINDING IMPROPER.

The wife was improperly held in contempt re: a stipulation about refinancing the marital residence. The stipulation required that the wife make a good faith effort to refinance, but did not address the consequences of a failed attempt. By finding the wife in contempt for failing to refinance, the court improperly re-wrote the stipulation: "To sustain a civil contempt finding based upon the violation of a court order, it must be established that there was a lawful court order in effect that clearly expressed an unequivocal mandate, that the person who allegedly violated the order had actual knowledge of its terms, and that his or her actions or failure to act defeated, impaired, impeded or prejudiced a right of the moving party ... . Such violation, in turn, must be established by clear and convincing evidence ... . The decision of whether to hold in contempt a party who fails to comply with a court order rests within the court's sound discretion ... . Here, a review of the underlying order makes clear that Supreme Court found the wife to be in contempt of the parties' April 2012 stipulation based upon her failure to refinance the marital residence as agreed or otherwise take action to remove [the husband's] name from the existing mortgage. The parties' stipulation, however, did not require the wife to successfully refinance the marital residence and remove the husband's name from the existing mortgage; rather, the stipulation only imposed upon her the obligation to 'make a good faith effort to obtain [such] financing . . . and remove [the husband's] name from the mortgage within 45 days after receiving the [quitclaim deed].' Notably, the stipulation was silent as to the parties' respective rights and obligations in the event that the wife attempted — but did not actually succeed — in obtaining such financing ... and, by directing the sale of the marital residence in the event that the wife did not obtain refinancing within a specified time period, Supreme Court essentially revised the parties' agreement to supply a solution to a problem that, on the face of the agreement, the parties themselves apparently did not contemplate." [internal quotation marks omitted] **Howe v Howe, 2015 NY Slip Op 07709, 3rd Dept 10-22-15**

CRIMINAL LAW.

FLAWED PROCEDURE FOLLOWING "BATSON" CHALLENGES TO THE PROSECUTION'S EXCLUSION OF TWO NONWHITE JURORS REQUIRED REVERSAL.

Reversal and a new trial were necessary because of flaws in the procedure used following the "Batson" challenge of the prosecution's peremptory challenges to two nonwhite members of the jury panel. The judge denied the Batson challenges. The Third Department explained the correct procedure and the flawed procedure actually used: "A Batson challenge implicates a three-step process in which, '[a]t step one, "the moving party bears the burden of establishing a prima facie case of discrimination in the exercise of peremptory challenges" ... . "Once a prima facie showing of discrimination is made, the nonmovant must come forward with a race-neutral explanation for each challenged peremptory — step two" ... . The explanation at step two is "not required to be 'persuasive, or even plausible'; as long as the reasons for the challenges are 'facially neutral,' even 'ill-founded' reasons will suffice" ... , and determining whether the step two explanation is adequate is "a question of law" ... . If the nonmoving party provides an adequate explanation, "the burden then shifts back, at step three, to the moving party to persuade the court that reasons are merely a pretext for intentional discrimination" ... . This step is a factual issue in which the trial court has broad discretion in determining credibility ... . * * * [Here] there were important factual issues implicating credibility that needed to be resolved at step three. However … County Court ruled on the Batson application at the conclusion of step two.'" **People v Grafton, 2015 NY Slip Op 07701, 3rd Dept 10-22-15**

CRIMINAL LAW.

BROKEN SENTENCE PROMISE REQUIRED VACATUR OF THE GUILTY PLEA.

Defendant's guilty plea was induced by County Court's promise to impose a sentence of shock incarceration. At sentencing, County Court refused to order shock incarceration. Because the plea was induced by the broken promise, the plea was not

knowing and voluntary. The fact that neither the People nor County Court could guarantee defendant's participation in the shock incarceration program was deemed irrelevant: "We start with the principle that a trial court always 'retains discretion in fixing an appropriate sentence up until the time of sentencing' ... . However, when the court wishes to depart from a promised sentence, it must either honor the promise or give the defendant the opportunity to withdraw the guilty plea ... . Accordingly, '[a] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored' ... . Here, prior to defendant's guilty plea, County Court indicated its belief that defendant was eligible for shock incarceration and then unequivocally promised that it 'would order him into it.' When defendant specifically asked if shock incarceration was guaranteed, the court stated that it 'would order it absolutely' and that a failure on the part of prison authorities to admit him would 'defy an order of the [c]ourt.' Furthermore, defense counsel stated that he was recommending that defendant accept the plea agreement 'especially with a shock commitment.' Thus, regardless of the fact that 'neither County Court nor the People possessed the authority to guarantee [defendant's] participation' in the shock incarceration program ... , the record reflects that defendant, in accepting the plea, relied upon County Court's promise to do exactly that. Consequently, we find that defendant's plea was not knowing, voluntary and intelligent, and that, because County Court's promise to defendant cannot be honored as a matter of law, he is entitled to vacatur of his guilty plea ...". **People v Muhammad, 2015 NY Slip Op 07702, 3rd Dept 10-22-15**

CRIMINAL LAW.

"FOR CAUSE" CHALLENGE TO JUROR WHO SOCIALIZED WITH DISTRICT ATTORNEY SHOULD HAVE BEEN GRANTED, CONCEPT OF "IMPLIED BIAS" EXPLAINED.

A new trial was necessary because of the denial of a "for cause" challenge to a juror who socialized with the district attorney (the case was tried by an assistant district attorney). The court explained the concept of "implied bias" which is not easily "cured:" "A statement by a potential juror suggesting a possible bias can be cured, and the juror not excused, if the juror provide[s] unequivocal assurance that [he or she] can set aside any bias and render an impartial verdict based on the evidence ... . However, where, as here, the challenge for cause involves a juror's relationship with a trial participant, a so-called implied bias may be implicated which requires automatic exclusion from jury service regardless of whether the prospective juror declares that the relationship will not affect [his or] her ability to be fair and impartial ... . Of course, [n]ot all relationships . . . require disqualification . . . [and] [t]he frequency of contact and nature of the parties' relationship are to be considered in determining whether disqualification is necessary ... . As a practical matter, the trial court should lean toward disqualifying a prospective juror of dubious impartiality ... . Here, during voir dire, juror no. 3372 stated that her family was good friends with the family of the District Attorney. She added that she socialized with the District Attorney, including having him and his wife as dinner guests at her home, and she and her husband had dined as guests at the District Attorney's home. County Court nonetheless denied defendant's challenge for cause as to such juror." [internal quotation marks omitted] **People v Bedard, 2015 NY Slip Op 07703, 3rd Dept 10-22-15**

CRIMINAL LAW, EVIDENCE.

HEARSAY ALONE WILL NOT SUPPORT REVOCATION OF PROBATION, FAILURE TO PAY RESTITUTION WILL NOT SUPPORT REVOCATION OF PROBATION IF DUE TO AN INABILITY TO PAY.

In reversing the judgment revoking defendant's probation, the Third Department noted that hearsay alone cannot be the basis for revocation and failure to pay restitution will only support revocation if defendant has the ability to pay: "It is settled that, in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay ... . If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority ... . If, on the other hand, the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment ... . Here, there was neither an adequate inquiry into defendant's ability to pay nor a determination that his failure to pay was willful ... . Accordingly, the matter must be remitted for further proceedings to determine whether defendant's failure to make the required monthly restitution payments was willful and, if so, whether such failure, standing alone, serves as a valid basis for revocation of his probation and the imposition of a sentence of incarceration ...". **People v Songa, 2015 NY Slip Op 07704, 3rd Dept 10-22-15**

EMPLOYMENT LAW, MUNCIPAL LAW.

COMMUNITY COLLEGE RETALIATED AGAINST UNION FOR ITS ADVOCACY.

The Third Department upheld Supreme Court's finding that a community college (petitioner) retaliated against the union (NIEU) in violation of the Civil Service Law by refusing to hire union employees for second jobs (for which union members received overtime pay). The court explained the relevant analytical criteria: "To prove its claim that petitioner [community

college] engaged in an improper practice, NIEU was required to establish that it was engaged in activities protected by the Taylor Law (see Civil Service Law § 200 et seq.), that petitioner knew of these activities, and that it took the challenged action because of the activities ... . If the charging party proves a prima facie case of improper motivation, the burden of persuasion shifts to the party charged to establish that its actions were motivated by legitimate business reasons ... . Here, the parties agree that NIEU's advocacy on the overtime issue was a protected activity and that petitioner was aware of NIEU's advocacy. Their dispute focuses on whether petitioner's decision to stop hiring NIEU members for second jobs was improperly motivated." [internal quotation marks omitted] **Matter of Hudson Val. Community Coll. v New York State Pub. Empl. Relations Bd., 2015 NY Slip Op 07731, 3rd Dept 10-22-15**

FAMILY LAW.

CUSTODY SHOULD NOT HAVE BEEN AWARDED TO NONPARENT.

Custody of mother's child should not have been awarded to mother's sister. Mother was being treated for mental illness and had lost her home. The relationship between mother and sister was acrimonious. Mother, however, despite her difficulties, had tried to maintain her relationship with her child and the child was described as well-adjusted, doing well in school, and involved in activities. The court explained the heavy burden placed on a nonparent seeking custody: "'A determination of whether extraordinary circumstances exist takes into consideration such factors as the length of time the child has resided with the nonparent, the quality of the child's relationships with the parent and the nonparent, the prior disruption of the parent's custody, separation from siblings and any neglect or abdication of responsibilities by the parent' ... . Generally, such a finding is rare and exists where the extraordinary circumstances 'drastically affect the welfare of the child' ...". **Matter of Lina Y. v Audra Z., 2015 NY Slip Op 07708, 3rd Dept 10-22-15**

FAMILY LAW.

PETITIONER'S KNOWLEDGE THE CHILD WAS NOT HIS WHEN HE SIGNED THE PATERNITY ACKNOWLEDGMENT PRECLUDED VACATION OF THE ACKNOWLEDGMENT.

Petitioner, in his petition to vacate his acknowledgment of paternity, noted that he signed the acknowledgment in spite of his being aware the child was not his. Therefore, his signature was not procured by fraud and the petition did not state a ground for vacation: "Once 60 days have elapsed following the execution of an acknowledgment of paternity, the mother or acknowledged father may challenge that document in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof on the party challenging the voluntary acknowledgment ... . To establish material mistake of fact, a party must demonstrate that such mistake was truly material — i.e., substantial and fundamental to the nature of the [acknowledgment] — so as to entitle a party to void that document ... . To establish fraud, a petitioner must show that he or she justifiably relied on the respondent's fraudulent statements or representations at the time the acknowledgment of paternity was signed ... . Here, in his petition to vacate the acknowledgment of paternity, petitioner alleged that his signature was procured either by material mistake of fact or fraud based upon respondent's history of infidelity. However, the petition also explained that petitioner put his name on the birth certificate of the child despite all parties acknowledging that it was [another man's] child. Because petitioner's claim that he knew that he was not the father of the child negates a finding of fraud or material mistake of fact, as such findings are necessarily predicated on a lack of knowledge ... , petitioner failed to plead sufficient facts constituting fraud or material mistake of fact ...". [internal quotation marks omitted] **Matter of Joshua AA. v Jessica BB., 2015 NY Slip Op 07718, 3rd Dept 10-22-15**

FAMILY LAW.

AN "INTIMATE RELATIONSHIP" WITHIN THE MEANING OF FAMILY COURT ACT 812 DOES NOT NECESSARILY INVOLVE SEXUAL INTIMACY.

An "intimate relationship" (Family Court Act 812) must exist before one party to the relationship can petition Family Court seeking relief based upon family offenses. The Third Department determined Family Court should not have dismissed the petition on the ground that one party identified as heterosexual and the other as homosexual, indicating there was no sexual relationship. Sexual intimacy is not required to establish an "intimate relationship" under the Family Court Act. On the other hand, cohabitation, standing alone, is not enough. The matter was sent back for a determination (re: the existence of an "intimate relationship") applying he statutory factors. **Matter of Arita v Goodman, 2015 NY Slip Op 07719, 3rd Dept 10-22-15**

FAMILY LAW, EVIDENCE.

HEARSAY SUPPORTING CHILD ABUSE REPORT SERIOUSLY CONTROVERTED, REPORT EXPUNGED.

A report maintained by the central register of child abuse and maltreatment should have been amended to state it was "unfounded" and expunged. Mother brought an Article 78 petition to amend the report, which stated abuse was "indicated."

The Third Department found that the hearsay evidence in support of the report was seriously controverted by the petitioner's evidence, which included expert evidence about the cause of the child's broken leg: "To establish maltreatment, the agency was required to show by a fair preponderance of the evidence that the physical, mental or emotional condition of the child had been impaired or was in imminent danger of becoming impaired because of a failure by petitioner to exercise a minimum degree of care in providing the child with appropriate supervision or guardianship ... . As there is no dispute that the child suffered a broken leg, there can be no question that her physical condition was in fact impaired. Accordingly, our inquiry distills to whether the record supports a finding that such impairment was the result of petitioner's failure to provide appropriate supervision and guardianship. In this regard, the evidence against petitioner consisted primarily of the investigation progress notes, which summarized the caseworker's interviews with, among others, petitioner's son, the child's treating orthopedic surgeon and the child's geneticist. [T]here is no question that hearsay is admissible in expungement hearings and, if sufficiently relevant and probative, may constitute substantial evidence to support the underlying determination ... . That said, the substantial evidence standard is not satisfied where, as here, the hearsay evidence at issue is seriously controverted ...". [internal quotation marks omitted] **Matter of Gwen Y. v New York State Off. of Children & Family Servs., 2015 NY Slip Op 07710, 3rd Dept 10-22-15**

FREEDOM OF INFORMATION LAW.

RECORDS OF A POLICE INVESTIGATION OF A POLICE OFFICER WHO HAS BEEN TERMINATED ARE NOT "PERSONNEL RECORDS" SUBJECT TO EXEMPTION FROM DISCLOSURE PURSUANT TO THE "PERSONNEL RECORDS" PROVISION OF THE FREEDOM OF INFORMATION LAW.

The personnel records associated with the investigation of an off-duty police officer's involvement in a hit and run accident were generally exempt from disclosure pursuant to the Freedom of Information Law (FOIL) (as police "personnel records"). However, the investigation continued after the officer's employment was terminated. The records of the post-termination investigation were not "personnel records" and, therefore, were not exempt from disclosure under the "personnel records" provision. **Matter of Hearst Corp. v New York State Police, 2015 NY Slip Op 07729, 3rd Dept 10-22-15**

PERSONAL INJURY, MEDICAL MALPRACTICE.

ELDERLY PATIENT'S FALL FROM AN EXAMINING TABLE IMPLICATED A DUTY OF CARE WHICH TAKES INTO ACCOUNT THE PATIENT'S INFIRMITIES, ELDERLY AND INFIRM PATIENT'S FALL FROM AN EXAMINING TABLE SOUNDS IN MEDICAL MALPRACTICE, NOT ORDINARY NEGLIGENCE.

A new trial was necessary in a case stemming from 81-year-old plaintiff's decedent's fall from an examining table in a doctor's office. The Third Department found that the trial judge fashioned a jury instruction which erroneously included premises liability principles and erroneously failed to take into account the particular infirmities of plaintiff's decedent. In addition the trial court erroneously determined the case sounded in negligence, as opposed to medical malpractice: "Recovery in a premises liability action is predicated on ownership, occupancy, control or special use of [a] property where a dangerous or defective condition exists ... . Here, decedent neither alleged that [defendant's] liability arose from its ownership of dangerous or defective premises nor that any defects or dangerous conditions existed ... . Instead, decedent asserted that [defendant] was liable for the acts and omissions of its employees in failing to recognize the need for, or provide decedent with, adequate assistance and supervision — an analysis unrelated to the physical condition of the medical office or the legal principles underlying premises liability. … * * * It is well settled that a medical facility used by persons who may be ill, disabled or otherwise vulnerable ha[s] a duty to exercise reasonable care and diligence in safeguarding a patient, based in part on the capacity of the patient to provide for his [or her] own safety... . The degree of reasonable care is measured by the physical and mental infirmities of the patient[] as the [facility's] officials and employees know them ... . * * * The assessment of a patient's risk of falling as a result of his or her medical condition, and the patient's consequent need for assistance, protective equipment or supervision, are medical determinations that sound in malpractice." [internal quotation marks omitted] **Martuscello v Jensen, 2015 NY Slip Op 07711, 3rd Dept 10-22-15**

REAL PROPERTY, CIVIL PROCEDURE.

DISMISSAL OF CRIMINAL CASE DID NOT COLLATERALLY ESTOP CIVIL CASE BASED UPON SAME FORGED-DEED ALLEGATION, NO STATUTE OF LIMITATIONS APPLIES TO CASE BASED UPON FORGED-DEED ALLEGATION.

In an action based upon the allegation the signature on a deed was forged, the Third Department determined no statute of limitations applies to forged deeds which are void *ab initio* and the dismissal of a Spanish criminal case based upon the forged-deed allegation did not collaterally estop the New York civil action: "It is well established that dismissal of a criminal charge . . . does not generally constitute collateral estoppel in relation to a civil action because of the difference in the burden of proof to establish the factual issues ... . * * * …[P]laintiffs' action [should not] have been deemed time-barred by the statute of limitations. While the limitations period for a cause of action sounding in fraud is the greater of six years after the cause of action accrued or two years after it could have been discovered with reasonable diligence (see CPLR 213 [8]), the Court

of Appeals has recently held that this period does not apply when the particular species of fraud alleged is the forgery of a deed. The Court found that, unlike other fraud-based causes of action, a claim against a forged deed is not subject to a statute of limitations defense because of the clarity of our law that a forged deed is void ab initio, and that it is a document without legal capacity to have any effect on ownership rights ...". [internal quotation marks omitted] **Mazo v Mazo, 2015 NY Slip Op 07721, 3rd Dept 10-22-15**

SEPULCHER, RIGHT OF, GOVERNMENTAL IMMUNITY.

THE STATE'S "DONATE LIVE REGISTRY" (RE: CONSENT TO ORGAN DONATION) IS A GOVERNMENTAL, NOT PROPRIETARY, FUNCTION.

The Third Department, in a full-fledged opinion by Justice Peters, reversing the Court of Claims, determined the "donate life registry," which is based upon consent to organ donation indicated on driver's license renewal applications, was a governmental, not a proprietary, function. Therefore, the state may not be held liable for negligence with respect to organ donation absent a special relationship. No special relationship was alleged here. The lawsuit alleged claimant's mother did not consent to the donation of her organs and that the Department of Health negligently interpreted a drawn line on the renewal application as a signature. The Court of Claims had upheld the "violation of the right of sepulcher" cause of action. The opinion includes detailed discussions of the law surrounding governmental versus proprietary functions, as well as the nature of governmental involvement in organ donation: "Quintessential examples of purely governmental functions include police and fire protection ... and traffic regulation ... . On the other hand, a governmental entity acts in a purely proprietary capacity when it serves as a landlord by virtue of its ownership and maintenance of property ... . In determining where along the continuum a governmental entity's challenged conduct falls, it is necessary to examine the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred ... . * * * By establishing the Donate Life Registry and facilitating the identification of organ and tissue donors and the making of anatomical gifts through DMV applications and renewals, defendant is protecting and promoting the health and welfare of the public through the exercise of its general police powers. It is axiomatic that [p]rotecting health and safety is one of municipal government's most important duties...". [internal quotation marks omitted] **Drever v State of New York, 2015 NY Slip Op 07726, 3rd Dept 10-22-15**

TRUSTS AND ESTATES.

STATUTE OF LIMITATIONS FOR BREACH OF FIDUCIARY DUTY TOLLED UNTIL FIDUCIARY'S ROLES TERMINATED.

In an action against a fiduciary stemming from the distribution of an estate, Supreme Court determined the six-year statute of limitations applied to the breach of fiduciary duty cause of action and precluded any evidence from prior to 2007. The Third Department agreed that the six-year statute was the correct one, but held that the statute never started running because the fiduciary's roles were never terminated. Therefore pre-2007 evidence was not precluded: "Although New York law does not provide a single statute of limitations for breach of fiduciary duty claims [and] the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks ..., the parties do not dispute that a six-year period applies to these two remaining causes of action. However, the statute of limitations for a claim alleging a breach of fiduciary duty is tolled until there has been an open repudiation by the fiduciary or the relationship has otherwise been clearly terminated ...". **Matter of Therm, Inc., 2015 NY Slip Op 07732, 3rd Dept 10-22-15**

ZONING.

ZONING BOARD APPLIED AN INCORRECT DEFINITION OF A TERM IN A ZONING ORDINANCE, COURT HAS THE POWER TO IMPOSE ITS OWN INTERPRETATION AS A MATTER OF LAW.

The town's zoning board of appeals did not apply the correct definition of a "neighborhood place of worship" when it denied petitioner's application to convert a day spa to a "mikvah" in an area zoned for "neighborhood places of worship." Submitted papers demonstrated that immersion in the waters of a mikvah is a basic religious ritual for Orthodox Jews and involves the recitation of blessings or prayers. Because the matter necessitated the interpretation of the terms of a zoning ordinance, the court need not defer to the zoning board's interpretation: "The parties agree that the term 'neighborhood place of worship' is neither defined in the Town's zoning law, nor does it appear elsewhere in the Town's ordinances. The zoning law does provide, however, that '[w]ords not specifically defined shall have their ordinary dictionary meanings' (Town of Mamakating Zoning Code § 199-6 [A]). Thus, the pertinent inquiry distills to whether petitioner's proposed mikvah comports with the dictionary definition of a neighborhood place of worship. Although courts will ordinarily defer to a zoning board's interpretation of a local ordinance, when 'the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required' ... . The issue posed is susceptible to resolution as a matter of law by interpretation of the ordinance terms." **Matter of Winterton Props., LLC v Town of Mamakating Zoning Bd. of Appeals, 2015 NY Slip Op 07734, 3rd Dept 10-22-15**