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CasePrepPlus

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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

CONTRACT LAW, REAL ESTATE.

ACTION TO RESCIND A PURCHASE CONTRACT CONSTITUTED AN ANTICIPATORY BREACH OF THE CONTRACT WHICH RELIEVED SELLERS OF ANY FURTHER OBLIGATIONS AND ENTITLED SELLERS TO RETAIN THE DEPOSIT.
The First Department, in a full-fledged opinion by Justice Acosta, determined plaintiff-buyer's action to rescind a real estate purchase contract before the final closing date constituted an anticipatory breach which relieved defendants-sellers of any further obligations called for by the purchase contract, including the acquisition of development approvals. The case raised two questions of first impression: (1) whether a rescission action by a buyer constitutes an anticipatory breach or repudiation of a purchase contract; and (2) whether such a breach relieves the seller of having to demonstrate it was ready, willing and able to close on the closing date. Both questions were answered in the affirmative and the sellers were entitled to retain the deposit and certain additional fees called for by the contract. **Princes Point LLC v Muss Dev. L.L.C., 2016 NY Slip Op 00783, 1st Dept 2-4-16**

CRIMINAL LAW.

RIGHT TO TESTIFY BEFORE A GRAND JURY IS NOT A RIGHT RESERVED TO A DEFENDANT, IT IS A STRATEGIC DECISION TO BE MADE BY COUNSEL.
The First Department, in affirming defendant's conviction, noted that defendant was not deprived of a right to testify before the grand jury when his attorney, against defendant's wishes, withdrew the notice of intent to testify. The right to testify before the grand jury is not among the rights reserved to a defendant: "The court properly denied defendant's motion to dismiss the indictment, made on the ground that he was deprived of his right to testify before the grand jury when, against defendant's wishes, his counsel withdrew defendant's notice of intent to testify. We decline to revisit our prior holdings . . . that the right to testify before the grand jury is not among the rights reserved to a defendant, but is among the rights whose exercise is a strategic decision requiring 'the expert judgment of counsel' ...". **People v Cintron, 2016 NY Slip Op 00618, 1st Dept 2-2-16**

MENTAL HYGIENE LAW, EVIDENCE, APPEALS.

HEARSAY EVIDENCE OF CHARGES OF WHICH SEX OFFENDER WAS ACQUITTED AND CHARGES WHICH WERE DISMISSED SHOULD NOT HAVE BEEN CONSIDERED, NEW TRIAL ORDERED.
The First Department determined respondent sex offender was entitled to a new civil-commitment trial because the state's expert relied on sex-offense charges of which respondent was acquitted and other sex-offense charges which were dismissed. The acquittal was completely off-limits. And no evidence to demonstrate respondent had committed the dismissed offenses was presented. The court noted that, in order to preserve a challenge to the sufficiency of the evidence in these Mental Hygiene Law proceedings, a motion for a directed verdict must be made at the close of the state's proof. **Matter of State of New York v David S., 2016 NY Slip Op 00777, 1st Dept 2-4-16**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, VEHICLE AND TRAFFIC LAW.

SUBSTANTIAL EVIDENCE DID NOT SUPPORT REVOCATION OF PETITIONER'S DRIVER'S LICENSE FOR REFUSING TO SUBMIT TO A CHEMICAL BLOOD-ALCOHOL TEST; TROOPER DID NOT HAVE REASONABLE GROUNDS TO BELIEVE PETITIONER OPERATED HIS MOTORCYCLE UNDER THE INFLUENCE.
The Second Department annulled the determination by the Department of Motor Vehicles that petitioner's license was properly revoked for refusing to submit to a chemical blood-alcohol test. Petitioner had an accident while riding his motorcycle which, he alleged, was caused by a coyote running into his bike. No other vehicles were involved. The trooper who charged petitioner with driving while intoxicated did not witness the accident or conduct any sobriety tests. The trooper based the charge solely on detecting the odor of alcohol on petitioner's breath at the hospital two hours after the accident.

The Second Department determined substantial evidence did not support the department's finding the trooper had reasonable grounds to believe petitioner was operating the motorcycle while under the influence. **Matter of DeMichele v Department of Motor Vehs. of N.Y. State, 2016 NY Slip Op 00652, 2nd Dept 2-3-16**

ANIMAL LAW.

DOG BITE STRICT LIABILITY LAW SUCCINCTLY EXPLAINED, DOG OWNER'S CROSS MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

In this dog bite case, defendant dog owner's cross motion for summary judgment should have been granted. The Second Department explained the relevant law: "Aside from the limited exception . . . regarding a farm animal that strays from the place where it is kept . . . , which is not at issue here, 'New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal' ... . Thus, '[t]o recover upon a theory of strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner of the dog . . . knew or should have known of such propensities' ... . Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others ... . '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' ... . In support of their cross motion, the defendants made a prima facie showing of entitlement to judgment as a matter of law by demonstrating, via their affidavits, that they were not aware, and should not have been aware, that their dog had ever bitten anyone or exhibited any aggressive behavior prior to the subject attack ... . The defendants averred that they had no knowledge that their dog had ever acted in a hostile or an aggressive manner, and that it had never attacked, bitten, scratched, or otherwise acted in a violent or a belligerent manner towards any human or towards another dog prior to the subject incident ...". **Bueno v Seecharan, 2016 NY Slip Op 00706, 2nd Dept 2-3-16**

CONTRACT LAW.

QUESTIONS OF FACT WHETHER THERE WAS A MEETING OF THE MINDS AND WHETHER WRITINGS, INCLUDING AN EMAIL, SATISFIED THE STATUTE OF FRAUDS.

The Second Department, in a contract action, determined there were questions of fact precluding summary judgment in a contract action. The court explained the black letter law re: a "meeting of the minds" and writings, including emails, sufficient to satisfy the statute of frauds. With respect to the statute of frauds, the court wrote: "To satisfy the statute of frauds, an agreement 'need not be contained in one single document, but rather may be furnished by piecing together other, related writings' ... . Further, all of the terms of the contract 'must be set out in the various writings presented to the court, and at least one writing, the one establishing a contractual relationship between the parties, must bear the signature of the party to be charged' ... . 'An e-mail sent by a party, under which the sending party's name is typed, can constitute a [signed] writing for [the] purposes of the statute of frauds' ... . Here, the terms of the alleged agreement were set forth in various writings, including an email and an assignment signed by the plaintiff ...". **Agosta v Fast Sys. Corp., 2016 NY Slip Op 00699, 2nd Dept 2-3-16**

CORPORATION LAW, CONTRACT LAW, FRAUD.

LIABILITY OF MEMBERS OF A LIMITED LIABILITY COMPANY, PRECLUSION OF FRAUD AND NEGLIGENT MISREPRESENTATION CAUSES OF ACTION WHICH DUPLICATE BREACH OF CONTRACT ALLEGATIONS, AND CRITERIA FOR A RICO MAIL FRAUD CAUSE OF ACTION DISCUSSED IN SOME DEPTH.

In an action against a limited liability company alleging breach of contract and fraudulent inducement relating to the design, construction and marketing of a condominium, the Second Department included substantial discussions of, *inter alia*, the liability of members of limited liability companies, including the criteria for piercing the corporate veil in this context, the preclusion of fraud and negligent misrepresentation causes of action which are duplicative of breach of contract allegations, and the criteria for a RICO mail fraud cause of action. With respect to the liability of members of limited liability companies, the court explained: "[A] member of a limited liability company will not be held liable for the liabilities of the company solely by reason of being a member of the company or acting in such capacity or participating in the conduct of the business of the company (*see* Limited Liability Company Law § 609[a]). '[M]embers of limited liability companies, such as corporate officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business' ... . * * * A member of a limited liability company 'cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof' ... . '[A] party may seek to hold a member of an LLC individually liable despite this statutory proscription by application of the doctrine of piercing the corporate veil' ...". **Board of Mgrs. of Beacon Tower Condominium v 85 Adams St., LLC, 2016 NY Slip Op 00692, 2nd Dept 2-3-16**

DEFAMATION, APPEALS.

DEFAMATION CRITERIA FOR A PUBLIC FIGURE DESCRIBED; APPELLATE REVIEW POWERS IN PUBLIC FIGURE DEFAMATION ACTIONS EXPLAINED.

In affirming Supreme Court's denial of a motion to set aside the verdict in a defamation action, the Second Department explained the law as it relates to public figures (here plaintiff was a school superintendent) and the unique powers of the appellate courts in this context. The defamation verdict related to a remark on a website stating plaintiff had procured enhanced grades for his daughter: "The Constitution, as interpreted in the *New York Times* case, bars the plaintiff 'from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not' ... . Actual malice must be proved by 'clear and convincing evidence' ... . The Court of Appeals has recognized that '[t]he usual deference paid by courts to jury verdicts is inapplicable in cases subject to the *New York Times Co. v Sullivan* rule' ... . '[T]he appellate court must make a de novo review of the entire record, and determine whether the proof before the trial court supports the finding of actual malice with convincing clarity' ...". **Eastwood v Hoefer, 2016 NY Slip Op 00674, 2nd Dept 2-3-16**

FAMILY LAW.

DSS FAILED TO DEMONSTRATE DILIGENT EFFORTS TO STRENGTHEN PARENTAL RELATIONSHIP, TERMINATION OF FATHER'S PARENTAL RIGHTS REVERSED.

The Second Department, reversing Family Court, determined the Department of Social Services (DSS) did not make diligent efforts to strengthen the relationship between the father and the children before seeking termination of the father's parental rights on the ground of permanent neglect: "Here, DSS failed to meet its initial burden of demonstrating that it exercised diligent efforts to strengthen the parental relationship between the father and his children ... . DSS's evidence demonstrated that its caseworkers' focus was on the mother's relationship with the children, as she was the initial subject of the proceedings and the father was not a party thereto. Further, although the evidence adduced at the fact-finding hearing showed that the DSS caseworkers advised the father to seek unsupervised visitation with the children since the supervised visits were positive, the evidence also showed that DSS did not support such unsupervised visitation and was aware that the father's access to the children was limited by the order of protection. Moreover, although DSS scheduled supervised visits between the father and the children and provided the father with notices of regularly scheduled permanency hearings and service plan reviews, it did little more to determine the particular problems facing the father with respect to the return of his children and did not make affirmative, repeated, and meaningful efforts to assist him in overcoming these handicaps before it commenced these proceedings ... . Further, DSS's evidence demonstrated that the father satisfied all requests that DSS made of him, which included attending a parenting class and marriage counseling, and showed himself to be a loving and appropriate parent at the supervised visitation sessions." **Matter of Gabriel B. S.-P. (Anonymous) (Franklin S. (Anonymous)), 2016 NY Slip Op 00645, 2nd Dept 2-3-16**

FRAUD, CIVIL PROCEDURE, CONTRACT LAW.

FRAUD CAUSE OF ACTION STEMMING FROM THE SIGNING OF A DOCUMENT WITHOUT READING IT DISMISSED AS TIME-BARRED; RELEVANT STATUTES OF LIMITATIONS AND BURDENS OF PROOF EXPLAINED.

The Second Department determined plaintiff's cause of action for fraud was time-barred because it accrued when she signed the allegedly fraudulent document without reading it. The court explained the two statutes of limitations which apply to fraud and the related burdens of proof in a motion to dismiss: "Where a plaintiff relies upon the two-year discovery exception to the six-year limitations period, '[t]he burden of establishing that the fraud could not have been discovered prior to the two-year period before the commencement of the action rests on the plaintiff who seeks the benefit of the exception' * * * ... '[A]lthough "mere suspicion" will not substitute for knowledge of the fraudulent act . . . , a plaintiff may not "shut his [or her] eyes to facts which call for investigation" ' ... . Here, the gravamen of the plaintiff's complaint is fraud in the factum, that she was induced to sign documents without being advised of their contents ... . However, '[a] party who signs a document without any valid excuse for not having read it is conclusively bound[] by its terms' ... . In this case, the plaintiff admitted that she neither read nor inquired about the contents of the documents upon which she relies to establish the fraud before she signed them, yet she failed to proffer any valid excuse for her failure to do so. Under these circumstances, the plaintiff is conclusively presumed to have agreed to the terms of those documents . . . and, accordingly, cannot establish that she lacked knowledge from which she could have discovered the alleged fraud with reasonable diligence ...". **Cannariato v Cannariato, 2016 NY Slip Op 00650, 2nd Dept 2-3-16**

FRAUD, CIVIL PROCEDURE, REAL ESTATE.

AIDING AND ABETTING FRAUD CAUSE OF ACTION AGAINST TITLE INSURANCE COMPANY PROPERLY DISMISSED, THE ALLEGATIONS WERE CONCLUSORY WITH NO SUPPORTING DETAIL.

The Second Department determined a petition to set aside a deed was properly dismissed as against the title insurance company (Fidelity). Fidelity issued a policy to the purchaser of real property which was part of an estate. The petition al-

leged Fidelity aided and abetted fraud, in that the sale of the property was done without the consent of the administrator or Surrogate's Court. The Second Department held that, absent fraud, a third party could not sue Fidelity for negligence and the allegations of aiding and abetting fraud did not meet pleading requirements: " '[A] title company hired by one party is not, absent evidence of fraud, collusion, or other special circumstance, subject to suit for negligent performance by one other than the party who contracted for its services' ... . Contrary to the administrator's contention, the petition fails to state a cause of action against Fidelity to recover damages for aiding and abetting fraud ... . 'To plead a cause of action to recover damages for aiding and abetting fraud,' the pleading 'must allege the existence of an underlying fraud, knowledge of the fraud by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the fraud' ... . Here, the petition consists of bare, conclusory allegations, without any supporting detail, which do not meet the specificity requirements of CPLR 3016(b) to sufficiently plead the existence of an underlying fraud, knowledge thereof on the part of Fidelity, or substantial assistance in achievement of the fraud ...". **Matter of Woodson (Clarke), 2016 NY Slip Op 00698, 2nd Dept 2-3-16**

MORTGAGES, FORECLOSURE, DEBTOR-CREDITOR.

HOLDER OF SECOND MORTGAGE COULD PROPERLY SUE ONLY ON THE UNDERLYING DEBT WITHOUT BRINGING FORECLOSURE PROCEEDINGS.

The Second Department determined plaintiff bank, the holder of a second mortgage on defendant's residence to secure an equity loan, could sue to recover on the underlying debt, without bringing foreclosure proceedings. Because defendant's ownership and possession of his residence was not at risk in the lawsuit, the protections afforded a homeowner by the foreclosure procedure were not applicable: "Where a creditor holds both a debt instrument and a mortgage which is given to secure the debt, the creditor may elect either to sue at law to recover on the debt, or to sue in equity to foreclose on the mortgage (... *see generally* RPAPL 1301). Here, contrary to the Supreme Court's determination, the clear and unequivocal language of the parties' agreement did not limit the plaintiff's options to recover in the event of a default, and did not require that the plaintiff commence only a foreclosure action ... . Accordingly, the plaintiff was free to commence the instant action to recover damages, and the protections afforded to homeowners under the foreclosure laws are inapplicable to this action, since the defendant's ownership and possession of his residence are not at risk in this lawsuit." **Wells Fargo Bank, N.A. v Goans, 2016 NY Slip Op 00710, 2nd Dept 2-3-16**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

EXPERT AFFIDAVITS, SUBMITTED SOLELY ON THE ISSUE OF PROXIMATE CAUSE OF PLAINTIFF'S INJURIES, SHOULD HAVE BEEN ACCEPTED BY THE COURT, EVEN THOUGH THE EXPERTS WERE NOT QUALIFIED TO ASSESS WHETHER THE DEFENDANT CHIROPRACTOR DEVIATED FROM THE APPROPRIATE STANDARD OF CARE.

The Second Department, in a full-fledged opinion by Justice Dillon, determined affidavits by an orthopedist and a radiologist (Dr. Meyer and Dr. Coyne) submitted in support of defendant's motion for summary judgment should have been accepted by Supreme Court as admissible evidence of proximate cause of plaintiff's back injury, even though the orthopedist and radiologist were not qualified to offer an opinion on whether defendant chiropractor deviated from the appropriate standard of care. Supreme Court had rejected the affidavits on the ground the orthopedist and radiologist were not qualified to assess the level of care provided by the defendant chiropractor. However, the affidavits addressed only the issue of proximate cause, stating that plaintiff's injuries pre-dated the alleged negligent treatment by the chiropractor. Because the assessment of proximate cause was within the orthopedist's and radiologist's areas of expertise, the affidavits were admissible. However, the denial of the defendant's motion for summary judgment was affirmed because the defendant's affidavit stating he did not deviate from the proper standard of chiropractic care was conclusory. **Bongiovanni v Cavagnuolo, 2016 NY Slip Op 00638, 2nd Dept 2-3-16**

PERSONAL INJURY, MUNICIPAL LAW.

FAILURE TO ADDRESS THE CREATION-OF-THE-DEFECT THEORY OF RECOVERY REQUIRED DENIAL OF DEFENDANT-VILLAGE'S SUMMARY JUDGMENT MOTION.

The Second Department, in this slip and fall case, determined that the village's failure to address plaintiff's allegation that the village created the dangerous condition (a one-inch higher portion of a sidewalk) required the denial of the village's motion for summary judgment. [Another example of a defense summary judgment motion which did not affirmatively address every possible theory of recovery.] The court explained the relevant law: " '[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings' ... . The bill of particulars alleged that the Village affirmatively created the dangerous condition which caused the accident. Therefore, in order to establish its prima facie entitlement to judgment as a matter of law, the Village had to demonstrate, prima facie, both that it did not have prior written notice of the defect, and that it did not create the defect ... . The Village established, prima facie, that it did not have prior written notice of the defect, but it failed to establish, prima

facie, that it did not affirmatively create the alleged defect ... . Therefore, the burden never shifted to the plaintiff to submit evidence sufficient to raise a triable issue of fact." **McManus v Klein, 2016 NY Slip Op 00704, 2nd Dept 2-3-16**

REAL ESTATE.

BROKER NOT ENTITLED TO COMMISSION, MOTION TO SET ASIDE PLAINTIFF'S VERDICT SHOULD HAVE BEEN GRANTED.

The Second Department determined the motion to set aside the jury verdict finding plaintiff was entitled to a broker's commission for the sale of defendant's property should have been granted. The court explained the relevant criteria: "To prevail on a cause of action to recover a commission, the broker must establish (1) that it is duly licensed, (2) that it had a contract, express or implied, with the party to be charged with paying the commission, and (3) that it was the procuring cause of the sale ... . '[T]he duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until that is done his right to commissions does not accrue' ... . To establish that a broker was the procuring cause of a transaction, the broker must establish that there was 'a direct and proximate link, as distinguished from one that is indirect and remote, between the bare introduction and the consummation' ... . Where, as here, the broker is not involved in the negotiations leading up to the completion of the deal, the broker must establish that it 'created an amicable atmosphere in which negotiations proceeded or that [it] generated a chain of circumstances that proximately led to the sale' ... . * * * Here, there was no valid line of reasoning which could have led to the conclusion that the plaintiff was the procuring cause of the sale." **Douglas Elliman, LLC v Silver, 2016 NY Slip Op 00675, 2nd Dept 2-3-16**

THIRD DEPARTMENT

MUNICIPAL LAW, UNIONS, STATUTES.

POLICE DISCIPLINE PROPERLY CONTROLLED BY COLLECTIVE BARGAINING AGREEMENT, DESPITE STATUTORY PROVISION PLACING DISCIPLINE IN THE HANDS OF THE COMMISSIONER.

The Third Department determined that a provision of the Second Class Cities Law specifically allowed the statute to be superseded by subsequent statutes. The Second Class Cities Law placed police discipline in the hands of the commissioner. However, a subsequently enacted provision of the Civil Services Law (called the Taylor Law) required police discipline to be the subject of a collective bargaining agreement, absent conflicting legislation. The Taylor Law prevailed because of the "planned obsolescence" of the Second Class Cities Law statute. **Matter of City of Schenectady v New York State Pub. Empl. Relations Bd., 2016 NY Slip Op 00729, 3rd Dept 2-4-16**

FOURTH DEPARTMENT

ATTORNEYS, LEGAL MALPRACTICE.

LAW FIRM'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED, CRITERIA FOR LEGAL MALPRACTICE WHERE AN ACTION HAS BEEN SETTLED EXPLAINED.

The Fourth Department, reversing Supreme Court, determined defendant's counterclaim alleging legal malpractice in a divorce proceeding which was settled should have been dismissed. The court explained the malpractice criteria in an action which was settled: "Defendant contends, inter alia, that but for plaintiff's alleged negligence she would have received a more favorable result had she proceeded to trial. Generally, 'to recover damages for legal malpractice, a [client] must prove (1) that the [law firm] failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the [client] would have been successful in the underlying action had the [law firm] exercised due care' ... . In a legal malpractice action in which there was no settlement of the underlying action, it is well settled that, '[t]o obtain summary judgment dismissing [the] complaint . . . , a [law firm] must demonstrate that the [client] is unable to prove at least one of the essential elements of its legal malpractice cause of action' ... . A settlement of the underlying action does not, per se, preclude a legal malpractice action ... . Where, as here, however, the underlying action has been settled, the focus becomes whether 'settlement of the action was effectively compelled by the mistakes of counsel' ... . Where the law firm meets its burden under this test, the client must then provide proof raising triable issues of fact whether the settlement was compelled by mistakes of counsel, and '[m]ere speculation about a loss resulting from an attorney's [alleged] poor performance is insufficient' ... . Conclusory allegations that merely reflect a subsequent dissatisfaction with the settlement, or that the client would be in a better position but for the settlement, without more, do not make out a claim of legal malpractice ...". **Chamberlain, D'Amanda, Oppenheimer & Greenfield, LLP v Wilson, 2016 NY Slip Op 00841, 4th Dept 2-5-16**

CIVIL PROCEDURE, EVIDENCE.

MOTIONS TO SET ASIDE THE DEFENSE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD NOT HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The Fourth Department, reversing Supreme Court, determined that plaintiffs' motions to set aside the verdict as against the weight of the evidence should not have been granted. The issue was whether plaintiffs established "serious injury" in a car accident. The Fourth Department explained the criteria for setting aside a jury verdict: "It is well established that '[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence' ... . 'Although [t]hat determination is addressed to the sound discretion of the trial court, . . . if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury' ... . Furthermore, 'it is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses' ... . Here, we conclude that the court erred in setting aside the jury's verdict inasmuch as the jury was entitled to credit the testimony of defendant's witnesses and reject the testimony of plaintiffs' witnesses ... . Even assuming, arguendo, that plaintiffs established a prima facie case of serious injury, we nevertheless conclude that the jury was entitled to reject the opinions of plaintiffs' physicians ... . The jury's interpretation of the evidence was not 'palpably irrational' . . . , or 'palpably wrong' . . . , and the court therefore erred in granting plaintiffs' motions." **McMillian v Burden, 2016 NY Slip Op 00851, 4th Dept 2-5-16**

CRIMINAL LAW.

JURY INSTRUCTIONS ALLOWED CONSIDERATION OF A THEORY NOT ALLEGED IN THE INDICTMENT OR BILL OF PARTICULARS, CONVICTIONS REVERSED.

The Fourth Department reversed defendant's conviction on several counts charging sexual offenses because the jury instructions allowed consideration of theories not alleged in the indictment or bill of particulars. Therefore, it was not possible to determine whether an uncharged theory was a basis for the jury's verdict: "Although defendant did not object to the court's instructions and thus did not preserve his contention for our review, we conclude that 'preservation is not required' . . . , inasmuch as 'defendant has a fundamental and nonwaivable right to be tried only on the crimes charged,' as limited by either the bill of particulars or the indictment itself ... . Where the court's jury instruction on a particular count erroneously contains an additional theory that differs from the theory alleged in the indictment, as limited by the bill of particulars, and the evidence adduced at trial could have established either theory, reversal of the conviction on that count is required because there is a possibility that the jury could have convicted the defendant upon the uncharged theory ... . Indeed, such an error cannot be deemed harmless because it is impossible for an appellate court reviewing a general verdict to ascertain on which theory the jury convicted the defendant or whether the jury was unanimous with respect to the theory actually charged in that count ...". **People v Graves, 2016 NY Slip Op 00853, 4th Dept 2-5-16**

CRIMINAL LAW.

ANONYMOUS 911 CALL COUPLED WITH POLICE OFFICER'S OBSERVATIONS PROVIDED REASONABLE SUSPICION JUSTIFYING DETENTION OF THE DEFENDANT.

The Fourth Department determined an anonymous 911 call combined with the police officer's observations provided the officer with reasonable suspicion defendant had a weapon, justifying detention of the defendant: "Although 'a radioed tip may have almost no legal significance when it stands alone, . . . when considered in conjunction with other supportive facts, it may thus collectively, although not independently, support a reasonable suspicion justifying intrusive police action'... . Here . . . that 'additional support can . . . be provided by factors rapidly developing or observed at the scene' ... . The evidence at the hearing established that 'the report of the 911 caller was based on the contemporaneous observation of conduct that was not concealed' ... . Upon the officer's arrival, defendant was positioned at a bladed angle toward the officer with his hand in his waistband or sweatshirt pocket, 'common sanctuar[ies] for weapons' ...". **People v Williams, 2016 NY Slip Op 00789, 4th Dept 2-5-16**

CRIMINAL LAW, EVIDENCE.

STATEMENTS MADE AFTER ILLEGAL ARREST NOT SUPPRESSIBLE IF SUFFICIENTLY ATTENUATED.

In finding suppression of defendant's statements was properly denied, the Fourth Department explained that an illegal arrest will not require the suppression of statements if the statements were "sufficiently attenuated" from the arrest: "[E]ven assuming that defendant was illegally arrested, 'defendant's statements were sufficiently attenuated from the illegal arrest to be purged of the taint created by the illegality' ... . '[A] confession that is made after an arrest without probable cause is not subject to suppression if the People adequately demonstrate that the inculpatory admission was attenuated from the improper detention; in other words, it was acquired by means sufficiently distinguishable from the arrest to be purged of the illegality' ... . In determining whether there has been attenuation, courts must consider 'the temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the offi-

cial misconduct' ... . Here, defendant was not interrogated until almost 2½ hours after his arrest ... . He was given Miranda warnings prior to the interrogation, which is an 'important' attenuation factor ... . Before defendant was interrogated, a codefendant implicated defendant in at least one of the crimes, which constituted a significant intervening event and provided the police with probable cause ...". **People v Buchanan, 2016 NY Slip Op 00800, 4th Dept 2-5-16**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

POLICE HAD NO REASON TO DETAIN DEFENDANT-PASSENGER AFTER TRAFFIC TICKET ISSUED TO DRIVER, STATEMENTS SHOULD HAVE BEEN SUPPRESSED; PROSECUTORIAL MISCONDUCT REQUIRED A NEW TRIAL AS WELL.

In reversing defendant's conviction for criminal possession of a weapon, the Fourth Department determined a new trial was required because defendant's statements should have been suppressed, and because of prosecutorial misconduct. Defendant was a passenger in a car which was stopped for having a suspended registration. After the driver was given a ticket, defendant asked if he could leave. He was told by the police he could not leave until an inventory search of the car was completed. Defendant's statements were made subsequently. The Fourth Department held that, once the ticket was given to the driver, the police had no reason to detain defendant further. The Fourth Department addressed the prosecutorial misconduct in the interest of justice (despite the lack of preservation). With respect to prosecutorial misconduct, the court wrote: "During cross-examination, the prosecutor questioned the driver of the vehicle regarding an out-of-court conversation between them, asking her whether she came to his office … . * * * By challenging the witness with respect to the out-of-court conversation, the prosecutor both improperly interjected his personal opinion as to the truthfulness of the testimony and suggested to the jury that his own, unsworn version of events should be credited ... . … The prosecutor improperly denigrated defendant's case by referring to certain contentions as '[a]ll this nonsense,' made repeated non sequiturs . . . , and asserted that the defense was 'twisting things' and employing 'tricks' ... . The prosecutor . . . [called] the defense witnesses 'a cast of characters,' 'people com[ing] out of the woodwork,' and specifically [referred] to one witness as 'a piece of work.' The prosecutor accused the defense witnesses of lying, and also argued that one could not believe a certain witness who had a lawyer advising her while testifying, stating that he 'couldn't tell if those were her words or her lawyer's words when she was talking.' Not only did the prosecutor state his belief that witnesses had lied, he also alleged that the witnesses must have met secretly in order to plan and collude regarding their testimony. … [T]he prosecutor also engaged in misconduct on summation by suggesting that an acquittal would require the jury to find a conspiracy by law enforcement . . . , by improperly suggesting that defendant bore a burden of proof . . . , and by misstating a key point of law regarding detention incident to a traffic stop ...". **People v Porter, 2016 NY Slip Op 00852, 4th Dept 2-5-16**

ENVIRONMENTAL LAW.

PETITIONERS DID NOT HAVE STANDING TO SEEK ANNULMENT OF A NEGATIVE DECLARATION UNDER THE STATE ENVIROMMENTAL QUALITY REVIEW ACT (SEQRA); PETITIONERS DID NOT ALLEGE "ENVIRONMENTAL INJURY."

In an action seeking to annul a negative declaration under the State Environmental Quality Review Act (SEQRA), the Fourth Department determined the petitioners did not allege an environmental injury, and therefore did not have standing to bring the petition. The petition concerned the construction of an Erie Community College building on the Amherst campus. Apparently, the underlying basis for the petition was the fact that that the new construction was not in the city of Buffalo, but rather was in a suburb. The court explained that the "injuries" described by the petitioners, such as difficulty in commuting to the new location, were not the type of "environmental injury" contemplated by SEQRA: "Despite the responsibility of every citizen to contribute to the preservation and enhancement of the quality of the environment, there is a limit on those who may raise environmental challenges to governmental actions ... . Those seeking to raise SEQRA challenges must establish both 'an environmental injury that is in some way different from that of the public at large, and . . . that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA' ... . Here, petitioners failed to establish that they have suffered an environmental injury." **Matter of Turner v County of Erie, 2016 NY Slip Op 00806, 4th Dept 2-5-16**

MALICIOUS PROSECUTION, ABUSE OF PROCESS.

MALICIOUS PROSECUTION AND ABUSE OF PROCESS CAUSES OF ACTION NOT SUFFICIENTLY PLED.

In finding the pleading insufficient for malicious prosecution and abuse of process causes of action, the Fourth Department explained the flaws: "Where, as here, the underlying action is civil in nature, the party alleging a claim for malicious prosecution must allege a special injury ... . In the instant case, defendant 'fail[ed] to plead that the civil proceeding involved wrongful interference with [his] person or property' ... . Instead, defendant alleged damages amounting to 'the physical, psychological or financial demands of defending a lawsuit,' which is insufficient to constitute a special injury for a claim of malicious prosecution ... . To the extent that defendant contends that the second counterclaim is for abuse of process and not malicious prosecution, we conclude that it must still be dismissed as well. 'Insofar as the only process issued [here] was a summons, the process necessary to obtain jurisdiction and begin the lawsuit, there was no unlawful interference with [defendant's] person or property because the institution of a civil action by summons and complaint is not legally consid-

ered process capable of being abused' ... . Defendant alleges that plaintiff acted maliciously in bringing the action, but '[a] malicious motive alone . . . does not give rise to a cause of action for abuse of process ...". **Reszka v Collins, 2016 NY Slip Op 00807, 4th Dept 2-5-16**

PERSONAL INJURY, LANDLORD-TENANT.

DEFENDANT-LANDLORD SHOULD NOT HAVE BEEN GRANTED SUMMARY JUDGMENT IN THIS LEAD-PAINT-INJURY CASE, DEFENDANT FAILED TO AFFIRMATIVELY DEMONSTRATE, INTER ALIA, LACK OF ACTUAL OR CONSTRUCTIVE NOTICE.

The Fourth Department determined defendant-landlord should not have been granted summary judgment in this lead-paint-injury action. [The case presents another example of a defendant's failure to affirmatively address all possible theories of recovery in summary-judgment-motion papers.] Defendant failed to demonstrate, inter alia, the absence of a hazardous condition and her lack of actual or constructive notice of the condition. On the issue of constructive notice, the court wrote: "In Chapman, the Court of Appeals [92 NY2d 9] addressed constructive notice, writing that 'a triable issue of fact [on notice] is raised when [the evidence] shows that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment' (id. at 15). Here, it is undisputed that defendant retained a right of entry and assumed a duty to make repairs; that she knew that the residence was constructed before lead-based paint was banned; and that she knew that young children lived in the apartment." **Rodrigues v Lesser, 2016 NY Slip Op 00836, 4th Dept 2-5-16**