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FIRST DEPARTMENT

BANKING LAW, UNIFORM COMMERCIAL CODE.

INTERMEDIARY BANK OWES NO DUTY TO BENEFICIARY OF AN ELECTRONIC FUNDS TRANSFER WHICH WAS BLOCKED BY A GOVERNMENT ORDER.

The First Department, in a full-fledged opinion by Justice Friedman, reversing Supreme Court, dismissed the lawsuit by the intended beneficiary of an electronic funds transfer (EFT) against an intermediary bank which complied with a government order to freeze the transfer. The court held the intermediary bank owed no duty to the intended beneficiary and properly returned the funds to the originator's bank when the government order was lifted. An intermediary bank simply facilitates the transfer from the originator's bank to the beneficiary's bank: "[B]ased on the allegations of [the beneficiary's] complaint, . . . the originator's bank — rather than . . . the intended beneficiary of the failed EFT — was plainly 'the entity that passed the EFT on to . . . the [intermediary] bank where it . . . rest[ed]' . . . until the federal block was released. It follows that [the originator's bank] was 'the only entity with a property interest in the stopped EFT . . .' and that, upon the release of the block, [the intermediary bank] properly refunded [the originator's bank's] payment for the EFT pursuant to UCC 4-A-402(4), given that the EFT had long since been cancelled by operation of law under UCC 4-A-211(4). It also follows that, pursuant to UCC 4-A-212, [the beneficiary] has no claim against [the intermediary bank] with respect to this transaction. [The intermediary bank] owed nothing to . . . the beneficiary since an intermediary bank has no legal obligation to the beneficiary' ...". ***Receivers of Sabena SA v. Deutsche Bank A.G.*, 2016 N.Y. Slip Op. 05546, 1st Dept 7-14-16**

CRIMINAL LAW, APPEALS.

REQUIREMENT THAT NON-CITIZEN DEFENDANT BE INFORMED OF POSSIBILITY OF DEPORTATION APPLIES RETROACTIVELY TO DEFENDANT WHO ABSCONDED BEFORE APPEAL PERFECTED.

The First Department, over a two-justice dissent, determined the non-citizen defendant, whose direct appeal was pending when he absconded, was entitled to the protection afforded by *People v. Peque*, 22 N.Y.3d 168, which requires the court to inform the defendant deportation may follow a plea to a felony: "The issue here is whether a defendant whose case still is on direct appeal should be denied the benefit of the Court of Appeals' ruling in *People v Peque* . . . , which is rooted in federal constitutional law, because defendant absconded from parole before his attorney perfected this appeal. We conclude *Peque* should apply to defendant's case." ***People v. Tejeda*, 2016 N.Y. Slip Op. 05541, 1st Dept 7-14-16**

SECOND DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

DEFENDANT NOT INFORMED OF DEPORTATION CONSEQUENCES OF HIS PLEA, MOTION TO VACATE CONVICTION FOR INEFFECTIVE ASSISTANCE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his conviction because he was not informed his guilty plea would result in deportation should have been granted on "ineffective assistance" grounds. Defendant did not perfect an appeal. However, the motion to vacate was a valid vehicle because it depended in part on non-record matters: "Since the defendant's claim that he was deprived of the effective assistance of counsel involves a mixed claim that depends, in part, upon matter that would not appear on the record had there been a direct appeal from the judgment, his claims were properly presented in a motion pursuant to CPL 440.10 ... . Under the circumstances of this case, we find that the defendant established that he was deprived of the effective assistance of counsel, in that there was no 'strategic reason' . . . for his attorney's failure to advocate for a sentence that would result in the same overall aggregate prison time for the defendant, but which would have resulted in no mandatory immigration consequences ...". ***People v. Moore*, 2016 N.Y. Slip Op. 05509, 2nd Dept 7-13-16**

CRIMINAL LAW, EVIDENCE.

SHOW UP IDENTIFICATION WAS NOT UNDULY SUGGESTIVE AND SHOULD NOT HAVE BEEN SUPPRESSED.

The Second Department determined the show up identification 30 minutes after the crime was not unduly suggestive and should not have been suppressed: "Here, the People met their initial burden of establishing that the showup identification procedure, which was conducted within approximately 30 minutes of the crime and within three or four blocks of the crime scene, was reasonable under the circumstances and lacked undue suggestiveness ... . The defendants, in turn, failed to satisfy their ultimate burden of proving that the showup identification procedure was unduly suggestive and subject to suppression. Under the circumstances of this case, the mere presence of police, patrol cars, headlights, or other lighting at the scene of the identifications did not render the procedure unduly suggestive ...". ***People v. Huerta*, 2016 N.Y. Slip Op. 05508, 2nd Dept 7-13-16**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER'S TESTIMONY INCREDIBLE AND UNSUPPORTED BY ANY EVIDENCE, CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department reversed defendant's conviction as against the weight of the evidence, essentially finding the police officer's testimony incredible: "Here, an acquittal would not have been unreasonable, particularly in light of objective facts — including the arresting officer's failure to record the arrest in his memo book, his failure to call in the arrest, his failure to voucher the bandanas or masks, and the loss of the case folder containing the original of the defendant's written statement and signed Miranda waiver — all of which cast doubt on the arresting officer's credibility ... . Moreover, the defendant testified at trial to a completely different version of events, including that he and his companion were not wearing masks or bandanas and he did not possess a gun or any marihuana. The defendant's credibility was supported by the testimony of three character witnesses regarding his propensity for truthfulness, and no evidence was elicited to undermine the defendant's credibility. Notably, the defendant had no prior history of arrests and had been gainfully employed by the same employer for seven years. Further, the defendant's companion, who also had no history of prior arrests and had been gainfully employed for six years, testified to the same version of events as the defendant. Upon the exercise of our factual review power (*see* CPL 470.15), we find that the rational inferences which can be drawn from the evidence presented at trial do not support the conviction beyond a reasonable doubt ...". ***People v. Oneill*, 2016 N.Y. Slip Op. 05510, 2nd Dept 7-13-16**

FAMILY LAW.

NON-RELATIVE ALLEGED EXTRAORDINARY CIRCUMSTANCES REQUIRING A HEARING ON HER CUSTODY PETITION.

The Second Department, reversing Family Court, determined petitioner, a non-relative who regularly cared for the child, had made a showing of extraordinary circumstances sufficient to require a hearing on her petition for custody: "Although an individual who is unrelated to a child has no statutory right to seek custody . . . , a nonrelative may nevertheless be afforded standing to seek custody upon a showing of extraordinary factual circumstances ... . We conclude that, contrary to the determination of the Family Court, the evidence presented at the hearing compels a finding of 'extraordinary circumstances' ... . The petitioner sustained her burden of demonstrating extraordinary circumstances based upon, inter alia, the prolonged separation of the grandfather and the step-grandmother from the subject child, their lack of significant involvement in the child's life for a period of time, their failure to contribute to the child's financial support, and the strong emotional bond between the child and the petitioner ...". ***Matter of Cade v. Roberts*, 2016 N.Y. Slip Op. 05495, 2nd Dept 7-13-16**

FAMILY LAW.

HEARING SHOULD HAVE BEEN HELD TO DETERMINE WHETHER INTIMATE RELATIONSHIP PROVIDED FAMILY COURT WITH JURISDICTION OVER PETITION SEEKING ORDER OF PROTECTION.

The Second Department determined Family Court should have held a hearing to determine whether the court had jurisdiction over a petition for an order of protection based upon an "intimate relationship" between the subject of the proposed order of protection and the petitioner: "Although the statute expressly excludes a 'casual acquaintance' and 'ordinary fraternization between two individuals in business or social contexts' from the definition of 'intimate relationship' (Family Ct Act § 812[1][e]), 'the legislature left it to the courts to determine on a case-by-case basis what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e), based upon consideration of factors such as the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship' ... . '[T]he determination as to whether persons are or have been in an intimate relationship' within the meaning of Family Court Act § 812(1)(e) is a fact-specific determination which may require a hearing' ... . Here, in light of the parties' conflicting allegations as to whether they had an "intimate relationship" within the meaning of Family Court Act § 812(1)(e), the Family Court, prior to determining the respondent's motion, in effect, to dismiss, should have conducted a hearing on that issue ...". ***Matter of Singh v. DiFrancisco*, 2016 N.Y. Slip Op. 05504, 2nd Dept 7-13-16**

FAMILY LAW, EVIDENCE.

SUPPORT MAGISTRATE SHOULD NOT HAVE CONSIDERED MOTHER'S POST-HEARING SUBMISSION OF AFFIDAVITS AND EXHIBITS, FATHER DEPRIVED OF ABILITY TO CROSS-EXAMINE AND OBJECT TO EXHIBITS.

The Second Department determined father was entitled to a hearing on mother's petition to enforce college expense provisions of a stipulation of settlement. The support magistrate considered affidavits and exhibits submitted after the hearing by mother, depriving father of his right to cross-examine and object: "Family Court Act § 433(a) requires that a respondent 'shall be given opportunity to be heard and to present witnesses.' A hearing must consist of an adducement of proof coupled with an opportunity to rebut it ... . Here, the Support Magistrate erred in considering the mother's affidavits and unverified financial information, rather than testimony supported by appropriate documentary evidence, in determining the mother's petition ... . As the father was deprived of the opportunity to rebut the mother's affidavits and exhibits, the matter must be remitted to the Family Court ... for a new hearing and determination on the mother's petition ...". ***Matter of Hezi v. Hezi*, 2016 N.Y. Slip Op. 05498, 2nd Dept 7-13-16**

FAMILY LAW, IMMIGRATION LAW.

WHEN CHILD TURNED 21 WHILE GUARDIANSHIP AND SPECIAL IMMIGRANT JUVENILE STATUS PROCEEDINGS WERE PENDING, FAMILY COURT LOST JURISDICTION.

The Second Department, in a full-fledged opinion by Justice Sgroi, determined Family Court no longer had jurisdiction over a petition seeking guardianship and special findings to seek special immigrant juvenile status (SIJS) because the child turned 21 during the pendency of the proceedings: "[O]nce the subject child turned 21 years old, the Family Court no longer possessed authority to determine the guardianship petition. Furthermore, since dependency upon a juvenile court is a prerequisite for the issuance of an order making the declaration and specific findings to enable a child to petition for SIJS, the Family Court also properly denied the petitioner's SIJS motion." ***Matter of Maria C.R. v. Rafael G.*, 2016 N.Y. Slip Op. 05503, 7-13-16**

PERSONAL INJURY, CONTRACT LAW.

SNOW REMOVAL CONTRACTOR NOT LIABLE FOR SLIP AND FALL ON ICE, NO EVIDENCE CONTRACTOR CREATED OR EXACERBATED ICY CONDITION; FAILURE TO APPLY SALT NOT ENOUGH.

The Second Department, in a full-fledged opinion by Justice Dillon, resolving a question of first impression in the Second Department, determined a snow-removal contractor could not be held liable for plaintiff's slip and fall on ice without proof the icy condition was created or exacerbated by the contractor. Here, the contractor had plowed the snow on the same day as the slip and fall. Proof that the area was not salted was deemed insufficient: "We are called upon to determine, for the first time in this judicial department, whether a snow removal contractor may be found liable in a personal injury action under *Espinal v Melville Snow Contrs.* (98 NY2d 136) on the ground that the snow removal contractor's passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition. We find that liability cannot be imposed under such circumstances. * * * Absent [other] evidence, a determination that the failure to salt created or exacerbated the icy condition . . . would be speculative. Indeed, a failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a pre-existing ice condition from *improving* ...". ***Santos v. Deanco Servs., Inc.*, 2016 N.Y. Slip Op. 05489, 2nd Dept 7-13-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SCHOOL NOT LIABLE FOR OFF-CAMPUS ASSAULT.

The Second Department, over a dissent, determined plaintiff-student's complaint against the school was properly dismissed. Plaintiff was attacked by several alleged gang members shortly after leaving school grounds. The court held there was no evidence plaintiff was released by the school into a dangerous situation which the school had a hand in creating: "Here, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that the assault occurred at a time when the plaintiff was not on school property and no longer in the defendant's custody or under its control and was, thus, outside of the orbit of its authority ... . The defendant also demonstrated, prima facie, that the plaintiff was not released into a foreseeably hazardous setting that the defendant had a hand in creating ...". ***Diaz v. Brentwood Union Free Sch. Dist.*, 2016 N.Y. Slip Op. 05485, 2nd Dept 7-13-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SCHOOL NOT LIABLE FOR INJURY TO STUDENT DURING RECESS.

The Second Department, reversing Supreme Court, determined the defendant school could not be held liable for a student's injury during recess. There was adequate supervision. The student, who had a medical condition and was standing in an area where students were not allowed to play sports, was struck by a ball kicked by another student: " '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' ... . 'Schools are not insurers of safety, however, for they cannot reasonably

be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable for every thoughtless or careless act by which one pupil may injure another' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they provided adequate supervision to the infant plaintiff during recess . . . , and, in any event, that any alleged lack of supervision was not a proximate cause of the infant plaintiff's injuries ..." ***Perez v. Comsewogue School Dist.*, 2016 N.Y. Slip Op. 05488, 2nd Dept 7-13-16**

PROPERTY DAMAGE, GOVERNMENTAL IMMUNITY, PUBLIC UTILITIES.

PROVIDING ELECTRICITY IS A PROPRIETARY FUNCTION; LAWSUIT ALLEGING NEGLIGENT FAILURE TO CUT OFF POWER DURING HURRICANE SANDY ALLOWED TO PROCEED.

The Second Department, over a dissent, determined defendants Long Island Power Authority (LIPA) and National Grid Electric Services (NGES) were not protected by government-function immunity. The lawsuit alleged defendants were negligent in not cutting off electrical power during Hurricane Sandy, resulting in fires which damaged plaintiffs' property. The court held the defendants were performing proprietary, not governmental, functions and standards of ordinary negligence therefore applied: "[T]he provision of electricity is properly categorized as a proprietary function. The provision of electricity has traditionally been a private enterprise in this State, and the Legislature clearly created LIPA as a public authority to substitute for a private enterprise ... . * * * ... [T]he functions of electric utilities in the ordinary course of providing electricity and in responding adequately to a hurricane are both part of the proprietary core functions of their business. True, here, the appellants' actions, because of the size of LIPA's customer base, affected many people and many businesses. True, too, LIPA's response to the hurricane may have involved complex considerations. But every private electric utility in the region faced the same hurricane." ***Heeran v. Long Is. Power Auth. (LIPA)*, 2016 N.Y. Slip Op. 05486, 2nd Dept 7-13-16**

THIRD DEPARTMENT

CRIMINAL LAW.

DEFICIENT INQUIRY INTO WAIVER OF INSANITY DEFENSE.

The Third Department determined that the court's inquiry into whether the defendant understood the affirmative defense (insanity) he waived by pleading guilty was insufficient: "Defense counsel advised County Court during the plea colloquy that there were significant issues regarding defendant's mental state when he attacked the trooper and that, as a result, a psychiatrist had assessed whether defendant 'was unable to form the intent necessary' to commit the charged offenses ... . Defense counsel then represented that defendant had agreed to accept the proffered plea bargain because the psychiatrist opined that an insanity defense could properly be raised at trial, but that he would be unable to testify to a reasonable degree of medical certainty that defendant 'did not understand the nature and consequences of his actions or that his conduct was wrong' (*see* Penal Law § 40.15). County Court's response to those statements was limited to confirming that defendant had heard the representations of defense counsel, discussed those issues with him and believed that the plea agreement was 'a fair resolution.' The Court of Appeals has made clear, however, that 'question[s] to [a] defendant verifying that he [or she] discussed that defense with his [or her] attorney and opted not to assert it' are insufficient under these circumstances ...". ***People v. Green*, 2016 N.Y. Slip Op. 05515, 3rd Dept 7-14-16**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S MISCHARACTERIZATION OF DNA EVIDENCE, STANDING ALONE, WARRANTED REVERSAL FOR INEFFECTIVE ASSISTANCE.

The Third Department reversed defendant's murder conviction, finding defense counsel ineffective. Counsel's errors included: (1) failure to object to the prosecutor's mischaracterization of DNA evidence found on defendant's clothes (this failure alone warranted reversal); (2) failure to object to irrelevant evidence about the victim's demeanor, education, behavior as a mother, etc. (evidence from as far back as 1998), and an inept summation which misstated the burden and standard of proof and acknowledged the possibility defendant committed the crime: "[The DNA expert] testified . . . that there were not enough alleles or DNA data to say conclusively that the victim's DNA was present. Nevertheless, during summation, the prosecutor repeatedly mischaracterized [the expert's] testimony and the DNA results by stating multiple times that the victim's DNA was on the sweatshirt. Specifically, the prosecutor initially stated that 'on that sweatshirt is [defendant's] wife's DNA.' Later, when discussing [the expert's] DNA report, the prosecutor incorrectly stated that the report 'shows that [the victim's] DNA was on that area where the bloody spot is.' Even if this last statement could be viewed as asking the jury to make an inference from the evidence at trial, the prosecutor again misstated the testimony by saying, 'We have the forensic people who say[] . . . [the victim's] DNA is on that sweatshirt, to some degree.' Defense counsel made no objections to such characterization of the testimony or DNA analysis." ***People v. Ramsaran*, 2016 N.Y. Slip Op. 05520, 3rd Dept 7-14-16**

CRIMINAL LAW APPEALS.

FAILURE TO CONTEST PROSECUTOR'S RACE-NEUTRAL REASONS FOR STRIKING JURORS RENDERED THE ISSUE UNPRESERVED FOR APPEAL.

The Third Department, over a two-justice dissent, determined defense counsel's failure to contest the prosecutor's race-neutral reasons for striking jurors rendered the issue unpreserved for appeal: "Following the People's step-two proffer, County Court denied the *Batson* challenge, without any attempt to respond or protestation registered by defendant. Now, on appeal, defendant contends for the first time that County Court erred in failing to conduct a step-three inquiry. However, '[b]y accepting the People's explanation without any additional objection at a time [when] it could have been addressed, defendant failed to preserve' this contention for our review . . . , and we decline to exercise our interest of justice jurisdiction ... . In reaching this conclusion, we reaffirm the importance of both the trial court's attention to each articulated, sequential step of the *Batson* inquiry, and counsel's 'attention to placing their objections on the record so they may be addressed by the court' ... . Indeed, 'whatever procedural problems may exist in a Batson inquiry, the overriding concern is that a properly preserved question regarding the ultimate issue of discrimination is meaningfully addressed' ...". ***People v. Acevedo*, 2016 N.Y. Slip Op. 05517, 3rd Dept 7-14-16**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF PRIOR SIMILAR CRIME SHOULD NOT HAVE BEEN ADMITTED, CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, determined evidence of a prior sexual assault, factually similar to the charged offenses, should not have been admitted in the People's direct case. The victim of the prior assault testified in detail about it. The Third Department held that the prejudicial effect of the prior assault outweighed its probative value, irrespective of whether the evidence fit any *Molineux* exception to the rule excluding evidence of prior crimes: " '[E]vidence of uncharged crimes or prior bad acts may be admitted where they fall within the recognized *Molineux* exceptions — motive, intent, absence of mistake, common plan or scheme and identity — or where such proof is inextricably interwoven with the charged crimes, provides necessary background or completes a witness's narrative and, further, the trial court determines that the probative value of such evidence outweighs is prejudicial effect' ... . Here, even assuming, without deciding, that the previous victim's testimony at trial and the corresponding photographs fall within one or more of the aforementioned *Molineux* exceptions, we agree with defendant that the prejudicial effect of such evidence far outweighs its probative value and, therefore, the People should not have been permitted to introduce such evidence on their case-in-chief." ***People v. Ward*, 2016 N.Y. Slip Op. 05518, 3rd Dept 7-14-16**

CRIMINAL LAW, EVIDENCE.

SEARCH OF CLOSED CONTAINER AFTER DEFENDANT HAD BEEN ARRESTED AND HANDCUFFED NOT JUSTIFIED BY EXIGENT CIRCUMSTANCES, CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, determined the police did not have justification for searching defendant's duffel bag and the evidence seized from the bag should have been suppressed. Defendant was arrested in his residence on an outstanding warrant. The defendant was handcuffed when the duffel bag was retrieved by a police officer (Gillis) from behind the couch: "The People failed to establish the existence of exigent circumstances justifying the search of defendant's duffel bag. Gillis testified that the bag was still against the wall when defendant was handcuffed and personally searched pursuant to the outstanding warrant, and Gillis had to physically retrieve the bag from behind the couch in order to search it. In addition, the officers had searched the residence prior to arresting defendant and did not find any evidence of drug activity or paraphernalia, the owner told Gillis that there was nothing illegal in the apartment and defendant denied that there was contraband in the bag when questioned about its contents. Thus, the search of the subject bag was improper and its contents — namely, crack cocaine, cell phones and train tickets — should have been suppressed ...". ***People v. Ortiz*, 2016 N.Y. Slip Op. 05521, 3rd Dept 7-14-16**

FAMILY LAW, EVIDENCE.

HEARSAY EVIDENCE OF CHILD'S STATEMENT NOT CORROBORATED, CUSTODY MODIFICATION PETITION SHOULD NOT HAVE BEEN GRANTED.

The Third Department reversed Family Court, finding that the hearsay evidence of the child's statement father had touched her were not corroborated and therefore could not form the basis of a modification of custody: "The corroboration requirement is not demanding and may be 'satisfied by any other evidence tending to support the reliability of the [child's] previous statements' . . . , but mere 'repetition of an accusation' will not suffice ... . The proof here did not rise above repetition to include additional evidence such as expert testimony that the child's behavior or her statements were consistent with abuse, physical evidence of abuse, or the sworn testimony or in camera statements of the child herself ...". ***Matter of Leighann W. v. Thomas X.*, 2016 N.Y. Slip Op. 05522, 3rd Dept 7-14-16**

FREEDOM OF INFORMATION LAW (FOIL)

COURT MAY NOT PROHIBIT DISCLOSURE ON A GROUND NOT RAISED IN OPPOSITION TO DISCLOSURE.

The Third Department, finding Supreme Court should have allowed disclosure of some of the requested documents, noted that a court cannot justify withholding documents on grounds not raised in opposition to disclosure: "A court is limited to considering only those exemptions to disclosure that are invoked by the party from whom disclosure is sought ... . Accordingly, the court should not have relied on a justification for withholding documents . . . that was not raised by respondent." ***Matter of Rose v. Albany County Dist. Attorney's Off.*, 2016 N.Y. Slip Op. 05536, 3rd Dept 7-14-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

COMPARATIVE NEGLIGENCE JURY INSTRUCTION SHOULD NOT HAVE BEEN GIVEN BECAUSE PLAINTIFF'S ALLEGED NEGLIGENCE OCCURRED PRIOR TO THE ALLEGED MEDICAL MALPRACTICE.

The Third Department reversed the damages verdict in this medical malpractice action because of an erroneous comparative negligence jury instruction. Plaintiff, while at defendant hospital, has a seizure after he was given hot coffee. Plaintiff was burned when the coffee spilled on him. Although the comparative negligence instruction was appropriate with regard to whether plaintiff should have been given coffee, it was not appropriate with regard to the treatment for the burns: "A comparative negligence instruction is appropriate when there is evidence that a plaintiff may share responsibility for harm that was inflicted as a result of a defendant's medical malpractice ... . However, no comparative negligence instruction should be given when a plaintiff's alleged negligence preceded the alleged medical malpractice and is not otherwise alleged to have contributed to the harm resulting from the malpractice. A plaintiff's prior conduct 'is not relevant, since the defendant's liability extends only to that portion of [the plaintiff's] injuries attributable to the defendant's malpractice' ... . Here, although there was evidence from which the jury could have found that plaintiff shared responsibility for the initial coffee spill, defendant made no claim at trial that plaintiff had any such shared responsibility for defendant's subsequent deviations from the accepted standard of care in treating plaintiff's injuries, nor was there any evidence adduced at trial from which the jury could have found that plaintiff shared such responsibility ...". ***Vallone v. Saratoga Hosp.*, 2016 N.Y. Slip Op. 05526, 3rd Dept 7-14-16**

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