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COURT OF APPEALS

CIVIL PROCEDURE, BANKING LAW.

FOREIGN DEFENDANTS' USE OF A NEW YORK CORRESPONDENT BANK ACCOUNT IN A SWISS BANK PROVIDED JURISDICTION OVER A LAWSUIT AGAINST THE BANK BY A SAUDI NATIONAL.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a three-judge dissent and a concurrence, reversing Supreme Court, determined money-laundering transactions using a correspondent bank account in a New York branch of a Swiss bank provided jurisdiction over a lawsuit involving foreign parties. The individual plaintiff is a Saudi resident and co-owner of plaintiff corporation which builds oil rigs. Plaintiffs alleged three of its employees received bribes and kickbacks which were then deposited in defendant-bank (Pictet, based in Geneva) using a correspondent bank account in New York State: "We conclude that defendants' use of the correspondent bank accounts was purposeful and that plaintiffs' aiding and abetting and conspiracy claims arise from these transactions. ... [T]he requirements of CPLR 302 (a)(1) are satisfied where the quantity and quality of contacts establish a 'course of dealing' with New York, and the transaction and claim are not 'merely coincidental' ... . * * *... [T]he defendants actively used a correspondent bank to further a scheme that caused harm. ... [T]he defendants' use of the New York account to transfer money provided the employees with the 'laundered' profits from the bribery and kickback scheme. Also, ... defendants used the correspondent account in New York 'to move the necessary' money ... . * * * Here, the money laundering could not proceed without the use of the correspondent bank account, and, as plaintiffs argue, their claims require proof that the bribes and kickbacks were in fact paid." ***Rushaid v. Pictet & Cie*, 2016 N.Y. Slip Op. 07834, CtApp 11-22-16**

CRIMINAL LAW.

NOT ADMINISTERING THE DWI COORDINATION TESTS TO DEFENDANT BECAUSE OF A LANGUAGE BARRIER DID NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two-judge dissent, determined the failure to administer coordination tests in a DWI case because of a "language barrier" did not violate equal protection or due process. In this case the defendant was of Hispanic origin and spoke Spanish. The requirement that the tests be administered in English was deemed facially neutral and not directed at a suspect class, and the state was deemed to have a substantial interest in avoiding the cumbersome requirement that an arresting officer administer the tests in the arrestee's language: "The challenged policy withstands rational basis review. Both the NYPD and the public have a substantial interest in ensuring the reliability of coordination tests, and the clarity of the instructions is crucial to the reliability of the results. Indeed, the record makes clear that coordination tests are designed not only to assess a suspect's 'motor skills in completing the specific tasks,' but also to evaluate the suspect's 'capacity to [] follow instructions.' But coordination tests are uniquely ill-suited for administration via translation; they are generally lengthy—containing thirty lines of instructions—and require contemporaneous demonstration and explanation of the tasks to be performed. * * * ... [T]he implicated State interests are substantial. The State has a clear interest in avoiding the cumbersome and prohibitively expensive administrative and fiscal burdens of providing the requested translation services. The State also has a strong interest in ensuring the accuracy of physical coordination tests, and the use of translated instructions — either through qualified interpreters or through multilingual officers — could compromise the test's reliability. Given the substantial State interests involved, defendant's due process claim must be rejected ...". ***People v. Aviles*, 2016 N.Y. Slip Op. 07836, CtApp 11-22-16**

CRIMINAL LAW.

TOWING OF DEFENDANT'S CAR (AND INVENTORY SEARCH) AFTER DEFENDANT'S ARREST FOR SHOPLIFTING WAS CONSISTENT WITH POLICE DEPARTMENT'S WRITTEN POLICY.

The Court of Appeals, over a dissent, determined the police properly towed defendant's car (which resulted in an inventory search) after defendant's arrest for shoplifting. The towing of the car was consistent with the provisions of the police department's written policy: "... [T]he police officers' decision to tow defendant's vehicle, which was parked in the same parking lot in which defendant was arrested, was properly made in accordance with 'standard criteria' set forth in the police department's written policy ... . Those criteria, among other things, limit an officer's discretion to tow a vehicle upon a

driver's arrest to situations in which such action is necessary to ensure the safety of the vehicle and its contents and where releasing the vehicle to an owner or designee is not otherwise appropriate. Upon defendant's arrest, the vehicle would have been left unattended indefinitely in the complainant's private parking lot, which had a history of vandalism, and the complainant requested that the police remove the vehicle. In our view, the officers' decision to tow the vehicle was, therefore, consistent with a community caretaking function ... . Moreover, there is no indication that the officers suspected that they would discover evidence of further criminal activity in defendant's vehicle, or that they towed the vehicle for that purpose ...". ***People v. Tardi*, 2016 N.Y. Slip Op. 07822, CtApp 11-21-16**

CRIMINAL LAW, ATTORNEYS.

CONSECUTIVE/CONCURRENT SENTENCING RULES EXPLAINED IN SOME DETAIL, TELLING DEFENDANT HE COULD RECEIVE CONSECUTIVE SENTENCES FOR ATTEMPTED FELONY MURDER AND THE UNDERLYING FELONY (ROBBERY) DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE.

The Court of Appeals, in an opinion by Judge Abdus-Salaam, resolving two appeals stemming from the same incident, over a three-judge dissent in the "sentencing" appeal, affirmed the defendant's conviction, finding that the concurrent/consecutive sentencing rules were properly applied, and the *Alford* plea was not tainted by erroneous information provided by defense counsel. Defendant, during the course of an armed robbery of several victims in a park, discharged a weapon, grazing one of the victims. Defendant was charged with robbery, attempted robbery and attempted first degree felony murder. The court noted that the Appellate Division here (Fourth Department) found that consecutive sentences for felony murder and the underlying felony could have been imposed (not the case here). while two other departments have held such sentences must be concurrent. The Court of Appeals did not address that issue because it was raised in a reply brief: "In *People v. Laureano*, we explained that when 'determining whether concurrent sentences are required, the sentencing court must first examine the statutory definitions of the crimes for which defendant has been convicted' (87 NY2d at 643). The court must then determine 'whether the actus reus element is, by definition, the same for both offenses (under the first prong of the statute), or if the actus reus for one offense is, by definition, a material element of the second offense (under the second prong)' (id.). The court must focus on actus reus rather than mens rea '[b]ecause both prongs of Penal Law § 70.25 (2) refer to the 'act or omission' . . . that constitutes the offense' ... . If a defendant's acts or omissions do not fit under either prong of the statute, 'the People have satisfied their obligation of showing that concurrent sentences are not required' ... . When there 'is some overlap of the elements of multiple statutory offenses,' courts retain discretion to impose consecutive sentences 'if the People can demonstrate that the acts or omissions committed by the defendant were separate and distinct acts' ... , even 'though they are part of a single transaction' ...". ***People v. Couser*, 2016 N.Y. Slip Op. 07831, CtApp 11-22-16**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE VICTIM DID NOT DIE FROM ASSAULT RELATED INJURIES, THE MEDICAL EXAMINER'S OPINION THE VICTIM WOULD NOT HAVE DIED FROM CARDIOVASCULAR DISEASE HAD HE NOT BEEN ASSAULTED WAS SUFFICIENT TO SUPPORT A FELONY MURDER CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a dissent, reversing the Appellate Division, determined the evidence was sufficient to support the defendant's felony murder conviction. The victim was found dead two days after an assault which fractured facial bones. The medical examiner testified the facial injuries were not the cause of death. But the medical examiner, noting the victim's obesity and enlarged heart, offered an opinion that the victim would not have died from cardiovascular disease had he not been assaulted: "Here, the medical examiner's testimony, in conjunction with the crime scene evidence, established a sufficient causal connection between defendant's infliction of blunt force trauma injuries during the violent home invasion and the victim's death. Specifically, the medical examiner testified that '[s]tress of any kind can hasten a person's demise by cardiovascular disease' and that, here, the stress caused by the injuries inflicted by defendant, 'given [the victim's] underlying heart disease[,] led to his death.' That testimony, along with the crime scene evidence that defendant's beating of the victim was severe and immediate in its consequences, 'was sufficient to prove that defendant's conduct 'set in motion and legally caused the death of' the victim ... . Thus, the jury could have reasonably concluded that defendant's conduct was an actual contributory cause of the victim's death. With respect to foreseeability of the death, the People must prove 'that the ultimate harm is something which should have been foreseen as being reasonably related to the acts of the accused' ... . In this case, defendant violently attacked the victim, in his home, breaking his jaw and leaving him on the floor in a blood-spattered room where he was found dead. From all of the evidence and the circumstances surrounding this violent encounter, the proof was sufficient to permit the jury to conclude that the victim's heart failure, induced by the extreme stress and trauma of such a violent assault, was a directly foreseeable consequence of defendant's conduct ...". ***People v. Davis*, 2016 N.Y. Slip Op. 07818, CtApp 11-21-16**

CRIMINAL LAW, EVIDENCE.

HEARSAY STATEMENT BY BYSTANDER WHO OBSERVED DEFENDANT PROPERLY ADMITTED AS A PRESENT SENSE IMPRESSION.

The Court of Appeals determined a (hearsay) spontaneous statement made by a bystander to a police officer about defendant's attempt to get into the back of a FedEx truck was properly admitted as a present sense impression: "We hold that the statement was properly admitted as a present sense impression. That exception to the hearsay rule allows the admission of 'spontaneous descriptions of events made substantially contemporaneously with the observations . . . if the descriptions are sufficiently corroborated by other evidence' ... . Here, the woman's statement was made to the officer immediately after the event she described and before she had an opportunity for studied reflection. The officer's own observations sufficiently corroborated her description to allow its admission at trial ...". ***People v. Jones*, 2016 N.Y. Slip Op. 07820, CtApp 11-21-16**

CRIMINAL LAW, MUNICIPAL LAW.

SYRACUSE NOISE ORDINANCE PROHIBITING MUSIC LOUD ENOUGH TO BE HEARD 50 FEET FROM A PERSON'S CAR IS NOT UNCONSTITUTIONALLY VAGUE.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the Syracuse Noise Ordinance was not unconstitutionally vague and therefore defendant was properly stopped in his vehicle based upon a violation of the ordinance: "Syracuse Noise Ordinance section 40-16 (b) is sufficiently definite to put a person on notice that playing music which can be heard over 50 feet from such person's car on a public road, in a manner that would annoy or disturb 'a reasonable person of normal sensibilities' is forbidden conduct and the objective standard affords police sufficiently 'clear standards [for] enforcement' ...". ***People v. Stephens*, 2016 N.Y. Slip Op. 07819, CtApp 11-21-16**

ENVIRONMENTAL LAW.

NEW YORK DEPARTMENT OF STATE PROPERLY DETERMINED ENTERGY'S APPLICATION TO RENEW LICENSES TO OPERATE NUCLEAR REACTORS AT INDIAN POINT FOR ANOTHER 20 YEARS WAS SUBJECT TO A CONSISTENCY REVIEW UNDER THE COASTAL MANAGEMENT PLAN.

The Court of Appeals, in a full-fledged opinion by Judge Abdus-Salaam, reversing the Appellate Division, determined the New York Department of State's ruling that Entergy was required to undergo a Coastal Management Plan (CMP) consistency review of its application to renew licenses to operate nuclear reactors at Indian Point for another 20 years was rational: "... [A]side from Department of State's interpretation of the specific language of the exemptions (to a CMP review), it is plain that these narrow exemptions for projects that had final environmental impact statements completed prior to the adoption of the CMP do not apply to re-licensing. Entergy's current application for a license to operate the Indian Point nuclear reactors for an additional 20 years is a new federal action, involving a new project, with different impacts and concerns than were present when the initial environmental impact statements were issued over 40 years ago. Thus, just as renewal of a license to operate a nuclear power plant triggers the requirement that the NRC [Nuclear Regulatory Commission] produce a supplemental environmental impact statement (see 10 CFR § 51.20), both the Coastal Zone Management Act and the CMP require consistency review for re-licensing of nuclear facilities. The Department's position that the Indian Point reactors are not forever exempt from consistency review under the CMP, is reasonable. In sum, the Department of State's interpretation of the exemptions in the Coastal Management Program, and its conclusion that Entergy's application to re-license the nuclear reactors at Indian Point is subject to consistency review are rational, and must be sustained." ***Matter of Entergy Nuclear Operations, Inc. v. New York State Dept. of State*, 2016 N.Y. Slip Op. 07821, CtApp 11-21-16**

LABOR LAW.

PLAINTIFF WHO FELL FROM A-FRAME LADDER AFTER AN ELECTRICAL SHOCK NOT ENTITLED TO SUMMARY JUDGMENT ON THE LABOR LAW 240 (1) CAUSE OF ACTION.

The Court of Appeals, reversing (modifying) the Appellate Division, determined plaintiff was not entitled to summary judgment on his Labor Law 240 (1) cause of action. Defendant fell from an A-frame ladder after receiving an electrical shock: "Plaintiff is not entitled to summary judgment under Labor Law § 240 (1). While using an A-frame ladder, plaintiff fell after receiving an electrical shock. Questions of fact exist as to whether the ladder failed to provide proper protection, and whether plaintiff should have been provided with additional safety devices ...". ***Nazario v. 222 Broadway, LLC*, 2016 N.Y. Slip Op. 07823, CtApp 11-21-16**

MUNICIPAL LAW.

IN AWARDING A COUNTY CONTRACT TO A PRIVATE BUS COMPANY, THE COUNTY'S DEVIATION FROM A FORMULA DESCRIBED IN ITS REQUEST FOR PROPOSALS WAS ARBITRARY AND CAPRICIOUS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing Supreme Court, over a two-judge dissent, determined that defendant county was required to use the formula outlined in its request for proposals (RFP) when evaluating bids for county contracts (here involving use of private bus services). The county included one formula in the RFP and used

a different formula in awarding the contract: "Here, the County deviated from the criteria specified in its RFP when it evaluated the proposals received pursuant to its request. The emphatic language used in the RFP's paradigm of a percentage to points ratio—stating that if a 10% cost difference exists between the lowest offeror and the next lowest, then the latter "will have 2 points deducted from the maximum score of 20"—makes clear that the "example" was meant to explain that a percentage to points ratio is one in which a one percent cost difference translates to one percent of the total number of points allocated to cost. Instead, the County used a 2-point deduction for every 4% difference in price. Applying this new formula, a one percent cost difference corresponded to 2.5%, rather than one percent, of the number of points assigned to cost. The County abandoned the cost formula it had promised to apply and instead created a new formula that disfavored ACME. This was arbitrary and capricious ...". ***Matter of ACME Bus Corp. v. Orange County*, 2016 N.Y. Slip Op. 07835, CtApp 11-22-16**

PERSONAL INJURY, MUNICIPAL LAW, WORKERS' COMPENSATION LAW.

IN A CITY WHICH DOES NOT PROVIDE WORKERS' COMPENSATION BENEFITS FOR ITS POLICE OFFICERS, AN OFFICER RECEIVING BENEFITS PURSUANT TO GENERAL MUNICIPAL LAW 207-c IS NOT BARRED FROM SUING FOR GENERAL MUNICIPAL LAW 205-e BENEFITS.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a dissent, reversing the Appellate Division, determined a police officer who receives benefits under General Municipal Law 207-c is not barred from suing for benefits under General Municipal Law 205-e in a city which does not provide workers' compensation benefits. The officer her alleged asbestos-related injury caused by the building which housed the police station: " 'In addition to any other right of action or recovery under any other provision of law,' section 205-e permits police officers to bring tort claims for injuries sustained 'while in the discharge or performance at any time or place of any duty imposed by . . . superior officers' where such injuries occur 'directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments' (General Municipal Law § 205-e [1]). Separately, section 207-c 'provides for the payment of the full amount of regular salary or wages' along with payment for medical treatment and hospital care, 'to a police officer or other covered municipal employee who is injured 'in the performance of his [or her] duties' or is taken ill 'as a result of the performance of [such] duties' * * * ... [W]e reject the City's argument, also adopted by the dissent, that General Municipal Law § 207-c benefits can be equated to workers' compensation benefits for purposes of interpreting the proviso contained in General Municipal Law § 205-e [FN2]. The language of section 205-e prohibits only recipients of workers' compensation benefits from commencing suit against their employers; it does not, by its terms, bar the commencement of suits by recipients of section 207-c benefits—which we have repeatedly recognized to be separate and distinct from workers' compensation benefits. In fact, section 205-e states that the right contained therein is '[i]n addition to any other right of action or recovery under any other provision of law' (General Municipal Law § 205-e [1])." ***Matter of Diegelman v. City of Buffalo*, 2016 N.Y. Slip Op. 07817, CtApp 11-21-16**

WORKERS' COMPENSATION LAW.

SPECIAL DISABILITY FUND CAN BE COMPELLED BY COURT ORDER TO CONSENT, NUNC PRO TUNC, TO A THIRD-PARTY SETTLEMENT.

The Court of Appeals, reversing Supreme Court, determined the Workers' Compensation carrier could seek a court order compelling the Special Disability Fund to consent to a settlement with a third-party. Here the carrier agreed to the settlement and the carrier then sought retroactive consent from the Special Disability Fund, which refused: "Here, as required by section 29, the injured employee sought and obtained Ace Fire's approval prior to entering the settlement of the third-party action. Ace Fire, however, did not seek the Special Disability Fund's written approval prior to settlement. When Ace Fire sought the Special Disability Fund's retroactive consent, the Fund refused, asserting that Ace Fire had forfeited its right to reimbursement. Ace Fire then commenced this proceeding asking Supreme Court to compel the Special Disability Fund's consent nunc pro tunc under Workers' Compensation Law § 29 (5). We have repeatedly recognized 'that a statute . . . must be construed as a whole and that its various sections must be considered together and with reference to each other' ... . The language in section 29 (1) establishing what entities may be deemed lienors is essentially identical to the language in section 29 (5) referring to the entities whose consent to settlement is required and, if not obtained, can be compelled upon application to the court—i.e., the 'person, association, corporation, or insurance carrier liable to pay' compensation benefits. Here, the parties do not dispute that the consent of the Special Disability Fund to settlement of the employee's third party action was required. Thus, assuming, for purposes of this appeal, that the Special Disability Fund is a lienor whose consent to settlement is required under Workers' Compensation Law § 29 (1), we conclude that the carrier may seek to obtain the Fund's consent from Supreme Court nunc pro tunc under section 29 (5). There is no principled basis for concluding that the Special Disability Fund's consent is required as a lienor under one portion of the statute, but that the failure to obtain it cannot be cured, as it can for other lienors, under the same statute." ***Ace Fire Underwriters Ins. Co. v. Special Funds Conservation Comm.*, 2016 N.Y. Slip Op. 07833, CtApp 11-22-16**

FIRST DEPARTMENT

PERSONAL INJURY, EVIDENCE.

ALLOWING IN EVIDENCE INTERNAL RULES WHICH IMPOSED A HIGHER STANDARD OF CARE THAN REQUIRED BY THE COMMON LAW WAS REVERSIBLE ERROR.

The First Department determined a new liability trial was necessary in a personal injury case because of erroneous evidentiary rulings. The trial court allowed into evidence internal rules (apparently dealing with the operation of a subway train) which imposed a higher standard of care than that required by the common law: "The court erred in admitting into evidence portions of defendant's internal rules, which imposed a higher standard of care than required by common law ... . Moreover, the prejudice to defendant was heightened by plaintiff's expert's reading of those internal rules to the jury. The court also erred in allowing plaintiff's counsel to question defendant's train operator about his discussions with counsel." ***Sebhat v. MTA N.Y. City Tr.*, 2016 N.Y. Slip Op. 07872, 1st Dept 11-22-16**

SECOND DEPARTMENT

APPEALS.

APPELLATE COURT MAY VACATE A JUDGMENT OR ORDER IN SOME CIRCUMSTANCES, EVEN WHERE THE APPEAL IS MOOT.

The Second Department explained when an order of judgment can be vacated by an appellate court, even though the appeal has been rendered moot: " 'While it is the general policy of New York courts to simply dismiss an appeal which has been rendered academic, vacatur of an order or judgment on appeal may be an appropriate exercise of discretion where necessary in order to prevent a judgment which is unreviewable for mootness from spawning any legal consequences or precedent' ...". ***Markowits v. Friedman*, 2016 N.Y. Slip Op. 07933, 2nd Dept 11-23-16**

CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE DECLARATORY JUDGMENT PORTION OF THIS HYBRID ARTICLE 78/DECLARATORY JUDGMENT ACTION BECAUSE NO MOTION FOR SUMMARY DETERMINATION OF THAT PORTION OF THE PROCEEDING HAD BEEN MADE.

The Second Department reversed the dismissal of a petition because a question of fact had been raised about the adequacy of notice of a tax lien. The Second Department also reversed the dismissal of the declaratory judgment portion of this hybrid Article 78/declaratory judgment action because no motion had been made for summary determination of declaratory judgment request: " 'In a hybrid proceeding and action, separate procedural rules apply to those causes of action which are asserted pursuant to CPLR article 78, on the one hand, and those which seek to recover damages and declaratory relief, on the other hand. The Supreme Court may not employ the summary procedure applicable to a CPLR article 78 cause of action to dispose of causes of action to recover damages or seeking a declaratory judgment ... . 'Thus, where no party makes a request for a summary determination of the causes of action which seek to recover damages or declaratory relief, it is error for the Supreme Court to summarily dispose of those causes of action' ... . Here, since no party made such a motion, the Supreme Court should not have summarily disposed of the cause of action that sought declaratory relief, and the matter must be remitted to the Supreme Court, Nassau County, for further proceedings on that cause of action ...". ***Matter of East W. Bank v. L & L Assoc. Holding Corp.*, 2016 N.Y. Slip Op. 07956, 2nd Dept 11-23-16**

CIVIL PROCEDURE.

NEW YORK DID NOT HAVE JURISDICTION OVER DEFENDANT IN THIS SUIT SEEKING PAYMENT OF A PROMISSORY NOTE, DEFENDANT HAD NO CONNECTION WITH NEW YORK OTHER THAN A NEW YORK AGENT OVER WHICH DEFENDANT EXERCISED NO CONTROL AND A NEW YORK CHOICE OF LAW PROVISION IN THE SUBSCRIPTION AGREEMENT.

In a lengthy opinion by Justice Austin, too detailed to be fairly summarized here, the Second Department determined a New York agent (Kraft) which acted on the investors', including defendant's, behalf, but over which the defendant exercised no control, and a subscription agreement with a New York choice of law provision were insufficient, under the facts, to confer jurisdiction of New York courts over the lawsuit. The lawsuit sought payment on a note which was related to defendant's investment in an oil and gas joint venture (AIV). Defendant resided in Illinois, the note was executed in Illinois, and defendant did not transact any business in New York: "Here, the defendant did not personally transact business in New York, and the complaint does not contain any allegations that he did so ... . After the defendant executed the Subscription Agreement and the note in Illinois, the only acts connecting him to New York with respect to his investment in AIV were sending one letter in December 1997 to representatives of AIV and engaging in a telephone conversation with representatives of AIV ...

. Moreover, no meetings were held in New York between the defendant and the plaintiffs ... . Even though CPLR 302(a) is a single-act statute, contrary to the plaintiffs' contention, the defendant's act of appointing Kraft, a corporation that maintains its principal office in New York, as his attorney-in-fact upon investing in the joint venture is not sufficient to invoke jurisdiction. * * * Accepting the plaintiffs' assertions that Kraft executed business orders and drilling and operating agreements and collected and distributed monies on the defendant's behalf in New York State, and that knowledge of and consent to Kraft's actions were established by the Subscription Agreement, which appointed Kraft as his attorney-in-fact with regard to these transactions, the defendant's lack of control undermines a finding of an agency relationship." ***America/International 1994 Venture v. Mau*, 2016 N.Y. Slip Op. 07915, 2nd Dept 11-23-16**

CRIMINAL LAW, EVIDENCE.

UNDER THE FACTS, ERROR TO ALLOW EVIDENCE OF DEFENDANT'S FACEBOOK COMMENT AND GANG AFFILIATION AS SANDOVAL EVIDENCE.

Although the errors were deemed harmless, the Second Department noted that allowing, as Sandoval evidence, a comment posted by defendant on Facebook and evidence of defendant's gang affiliation was improper under the facts: "The Supreme Court erred, in its Sandoval ruling ... , in permitting the People to elicit testimony from the defendant regarding a comment posted on his Facebook page, since the comment was not probative of the defendant's credibility ... . The Supreme Court further erred in permitting the People to elicit testimony from certain witnesses regarding the defendant's alleged gang affiliation and involvement in a prior violent incident. Contrary to the People's contention and the Supreme Court's conclusion, the defendant did not introduce evidence that could properly be construed as character evidence and, thus, it was improper to permit the People to elicit evidence as to the defendant's alleged prior bad acts on that basis ... . In addition, the Supreme Court improperly modified its Sandoval ruling by permitting the prosecutor to question the defendant regarding his alleged gang affiliation and the prior violent incident, as the defendant did not 'open the door' to the otherwise precluded evidence ...". ***People v. Borgella*, 2016 N.Y. Slip Op. 07972, 2nd Dept 11-23-16**

CRIMINAL LAW, EVIDENCE.

DEFENDANT, WHO WAS CHARGED WITH POSSESSION OF A WEAPON, SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE THE ARRESTING OFFICER ABOUT A CIVIL LAWSUIT WHICH ALLEGED THE OFFICER FABRICATED A WEAPONS CHARGE.

The Second Department determined prohibiting the cross-examination of a police officer about a federal lawsuit which alleged the officer fabricated a weapons charged was reversible error. Defendant was arrested by the officer and charged with possession of a weapon allegedly found by the officer in the seat of the car where defendant was sitting: "The Court of Appeals has held that law enforcement witnesses should be treated in the same manner as any other prosecution witness for purposes of cross-examination and that civil allegations of misconduct in a federal lawsuit filed against a law enforcement agent are favorable to a defendant as impeachment evidence insofar as such allegations bear on a law enforcement officer's credibility as a witness ... . Furthermore, there is no prohibition against cross-examining a witness, including a police officer, about bad acts that have never been formally proven at a trial ... . In cross-examining a law enforcement witness, the same standard for good faith basis and specific allegations relevant to credibility applies, as does the same broad latitude to preclude or limit cross-examination ... . Counsel must first present a good faith basis for inquiring, namely the lawsuit relied upon. Second, specific allegations from the lawsuit that are relevant to the credibility of the law enforcement witness must be identified. Third, the trial judge must exercise discretion in assessing whether inquiry into such allegations would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties ...". ***People v. Enoe*, 2016 N.Y. Slip Op. 07977, 2nd Dept 11-23-16**

DEFAMATION, PRIVILEGE.

STATEMENT IN SUMMONS WITH NOTICE ABSOLUTELY PRIVILEGED.

The Second Department determined the statement in a summons with notice alleging a mortgage was obtained by fraud was protected by judicial-proceedings privilege: "Generally, statements made at all stages of a judicial proceeding in communications among the parties, witnesses, counsel, and the court are accorded an absolute privilege, as long as the statements may be considered in some way 'pertinent' to the issue in the proceeding ... . This privilege, or 'immunity' ... , applies to statements made in or out of court, on or off the record, and regardless of the motive with which they were made ... . The test of pertinency to the litigation is extremely liberal, so as to embrace anything that may possibly or plausibly be relevant or pertinent ... . The purpose of the privilege is to allow the parties, witnesses, and attorneys in a litigation to communicate freely without fear of defamation litigation ...". ***Weinstock v. Sanders*, 2016 N.Y. Slip Op. 07947, 2nd Dept 11-23-16**

FAMILY LAW.

QUESTION OF FACT RAISED ABOUT WHETHER A SEPARATION AGREEMENT WAS UNCONSCIONABLE.

The Second Department determined summary judgment should not have been granted enforcing the parties' separation agreement. Defendant had raised a question of fact about whether the agreement was unconscionable: "Under the terms

of the separation agreement, the defendant relinquished all of the property rights that he acquired during the marriage, including any interest that he may have had in the plaintiff's partnership interest in a neurological practice and the parties' four properties in Florida, as well as any spousal maintenance. Given the vast disparity in the parties' earnings, the evidence that the defendant had no assets of value, and the defendant's documented medical condition which inhibits his future earning capacity, the defendant's submissions were sufficient to create an inference that the separation agreement was unconscionable ... . In addition, the defendant's evidence indicating that the plaintiff sold almost $1 million in securities in the months preceding his execution of the separation agreement, the value of which were not accounted for in the list of her bank and brokerage accounts therein, raises a triable issue of fact as to whether the plaintiff concealed assets ... . Under these circumstances, the Supreme Court should have exercised its equitable powers and directed further financial disclosure, to be followed by a hearing to test the validity of the separation agreement ...". ***Gardella v. Remizov*, 2016 N.Y. Slip Op. 07924, 2nd Dept 11-23-16**

FRAUD, CONTRACT LAW, ARBITRATION.

ELEMENTS OF AIDING AND ABETTING FRAUD EXPLAINED, WHEN FRAUD IN THE INDUCEMENT CAN INVALIDATE AN ARBITRATION CLAUSE EXPLAINED (NOT THE CASE HERE).

The Second Department, finding that a cause of action for aiding and abetting breach of contract does not exist, explained the elements of aiding and abetting fraud. The court further found that the arbitration clause was not invalidated by allegations of fraud in the inducement: "There is no cause of action for aiding and abetting a breach of contract ... . To recover for aiding and abetting fraud, the plaintiff must plead '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' ... . 'Substantial assistance' requires an affirmative act on the defendant's part ... . '[T]he mere inaction of an alleged aider or abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff' ... . * * * The plaintiffs contend that the arbitration agreement is invalid because it was fraudulently induced. However, a broad arbitration provision is separable from the substantive provisions of a contract such that the agreement to arbitrate is valid even if the substantive provisions of the contract were induced by fraud ... . 'The issue of fraud in the inducement affects the validity of the arbitration clause only when the fraud relates to the arbitration provision itself, or was part of a grand scheme that permeated the entire contract' ... . 'To demonstrate that fraud permeated the entire contract, it must be established that the agreement was not the result of an arm's length negotiation, or the arbitration clause was inserted into the contract to accomplish a fraudulent scheme' ...". ***Markowits v. Friedman*, 2016 N.Y. Slip Op. 07932, 2nd Dept 11-23-16**

PERSONAL INJURY.

A SMOOTH SLIPPERY SURFACE, STANDING ALONE, WILL NOT SUPPORT A CAUSE OF ACTION FOR NEGLIGENCE IN A SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined defendant was entitled to summary judgment in a slip and fall case. The court noted that a smooth surface which is slippery, standing alone, does not raise a question of fact: "The plaintiffs commenced this action, alleging that the defendants had negligently applied wax to the staircase, making it dangerously slippery. The defendants moved for summary judgment dismissing the complaint, and the Supreme Court denied the motion. We reverse. During the injured plaintiff's deposition, the transcript of which was submitted in support of the defendants' motion, he testified that he did not see any foreign substance, liquids, or other slippery substance on the steps, either before or after the subject accident. '[I]n the absence of evidence of a negligent application of floor wax or polish, the mere fact that a smooth floor may be slippery does not support a cause of action to recover damages for negligence'... . Here, in support of their motion for summary judgment dismissing the complaint, the defendants submitted evidence sufficient to establish their prima facie entitlement to judgment as a matter of law dismissing so much of the complaint as was based on the defendants' alleged negligent application of wax or polish to the subject staircase ...". ***Kapoor v. Randlett*, 2016 N.Y. Slip Op. 07927, 2nd Dept 11-23-16**

THIRD DEPARTMENT

CONTRACT LAW.

DIFFERENCE BETWEEN A DESIGN SPECIFICATION CONSTRUCTION CONTRACT AND A PERFORMANCE SPECIFICATION CONSTRUCTION CONTRACT EXPLAINED.

The Third Department determined the contract between plaintiff contractor and property-owner defendant was a design specification contract, as opposed to a performance specification contract. Therefore plaintiff contractor could not be held responsible for defects in materials, methods or design, which were the responsibility of the property owner: "In contrast to a performance specification contract, which affords a contractor the freedom to choose the materials and methods employed to achieve a specified result, a design specification contract requires a contractor to use the materials, methods and design dictated by the owner, without bearing any 'responsibility if the design proves inadequate to achieve the intended result' ...

. In other words, when there is a design specification contract, a contractor follows the architectural plans and specifications provided by an owner, and the contractor will not be responsible for the consequences of defects in such plans and specifications or be prevented from recovering contractually-agreed upon payments for work completed in compliance with them ... . Whether a construction contract is one of performance or design specification turns on the language of the contract as a whole, with consideration given to factors such as 'the nature and degree of the contractor's involvement in the specification process, and the degree to which the contractor is allowed to exercise discretion in carrying out its performance' ...". ***CGM Constr., Inc. v. Sydor*, 2016 N.Y. Slip Op. 07895, 3rd Dept 11-23-16**

CRIMINAL LAW, ATTORNEYS.

CRITERIA FOR INQUIRY INTO DEFENDANT'S REQUEST TO REPRESENT HIMSELF EXPLAINED, NOT MET HERE.
The Third Department, reversing defendant's conviction, determined the trial judge did not use the right criteria in denying defendant's request to represent himself: "County Court inquired into defendant's background, emphasized the importance of having counsel represent him, cautioned against the dangers of representing himself and tested defendant's skill as an advocate with several evidentiary questions. The issue, however, is not the extent of defendant's legal knowledge, but his capacity to knowingly waive the right to counsel ... . In denying the request, County Court essentially ruled that it was not in defendant's best interest and that the application was untimely, without expressly addressing defendant's capacity to waive his right to counsel. Since defendant's request was made prior to the commencement of trial, it was unquestionably timely ... . Moreover, we are satisfied that defendant, who informed the court that he had obtained his GED and engaged in paralegal studies for a year, and was described by the court as 'bright' and 'articulate,' competently, intelligently and voluntarily waived his right to the counsel." ***People v. Poulos*, 2016 N.Y. Slip Op. 07879, 3rd Dept 11-23-16**

CRIMINAL LAW, ATTORNEYS.

FAILURE TO MOVE TO SUPPRESS STATEMENT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.
The Third Department determined, under the facts, defendant's counsel was ineffective in failing to move to suppress defendant's statement, which was made after 26 hours of interrogation: "... '[C]ounsel had everything to gain and nothing to lose by moving to suppress the [oral statements]' ... . This is not to say that counsel must always seek to suppress evidence, and we reiterate that counsel is not ineffective for failing to make meritless motions ... . Under the circumstances of this case, however, had counsel taken steps to suppress statements from the interrogation, the potential upside would have been the exclusion of the inconsistent statements ... . Another potential gain would have been a basis to exclude the seized physical evidence obtained by the search warrants inasmuch as these warrants were secured, in part, by information obtained from defendant's interrogation ... . Indeed, with respect to this physical evidence, counsel recognized that, by not seeking to suppress the physical evidence on which blood had been found, he had to explain the blood's presence to the jury. He further admitted that the People's case would have been weaker had this physical evidence been excluded. While we do not pass on whether counsel would have been ultimately successful in suppressing either defendant's oral statements or the seized physical evidence, we do conclude that a colorable basis existed for seeking suppression. Given the potential benefit in doing so, we discern no strategic or legitimate reason to let any of this crucial evidence come in unabated at trial ...". ***People v. Zeh*, 2016 N.Y. Slip Op. 07881, 3rd Dept 11-23-16**

CRIMINAL LAW, EVIDENCE, APPEALS.

JURY SHOULD HAVE BEEN INSTRUCTED A WITNESS WAS AN ACCOMPLICE AS A MATTER OF LAW (REQUIRING CORROBORATION OF THE WITNESS' TESTIMONY), REQUEST FOR ACCOMPLICE INSTRUCTION DURING JURY DELIBERATIONS PRESEVED THE ISSUE FOR APPEAL.
The Third Department, reversing defendant's conviction, determined the jury should have been instructed a witness (Perkins) was an accomplice as a matter of law. The defendant was charged and convicted of tampering with evidence (attempting to dispose of a jacket allegedly worn when defendant committed murder). It was alleged defendant instructed Perkins to get rid of his boots. The court noted that defendant's request for the instruction, made during deliberations in response to a jury note, preserved the issue for appeal: "Perkins' testimony established that she picked defendant up at the same location that the jacket was later found and she subsequently disposed of defendant's boots pursuant to his direction. In addition, she was arrested the same day as defendant, was charged with a felony, entered into a cooperation agreement with the People and, pursuant to that agreement, pleaded guilty to a misdemeanor in exchange for her truthful testimony against defendant. When defendant requested the accomplice charge, he stated that Perkins had pleaded guilty to 'obstructing governmental administration . . . in exchange for not being prosecuted for tampering.' In light of this, we find that Perkins was an accomplice as a matter of law 'since [s]he could have been (and was) charged with a crime 'based upon some of the same facts or conduct' upon which the charge[] against defendant [was] based ...". ***People v. Whyte*, 2016 N.Y. Slip Op. 07880, 3rd Dept 11-23-16**

FAMILY LAW.

FATHER DOES NOT HAVE A RIGHT TO A TRANSCRIPT OF *LINCOLN* HEARING.

The Third Department, in rejecting father's request of a transcript of a *Lincoln* hearing (in a custody matter), explained why children's testimony in a *Lincoln* hearing must be kept confidential: "A child's testimony in a *Lincoln* hearing in a proceeding pursuant to Family Ct Act article 6 is not akin to the testimony that may be taken from a child in proceedings pursuant to Family Ct Act article 10. In an article 10 proceeding, an adversarial relationship may exist between the child and the accused parent. As the child's testimony may be the sole basis for a finding of abuse or neglect, the parent's due process rights are implicated. Although there are circumstances in which a child's testimony in such a proceeding may be obtained in camera or outside the presence of the respondent parent, this must be carefully balanced with the rights of the accused parent ... . By clear contrast, in a Family Ct Act article 6 proceeding, in which a *Lincoln* hearing may be conducted, such a hearing serves entirely different, nonadversarial purposes, and a parent's constitutional rights are not implicated. The purpose of a *Lincoln* hearing is not primarily evidentiary; it is instead to assist the court in making the determination of what serves the best interests of the child. The *Lincoln* hearing is allowed as a manner of directly ascertaining the child's wishes and may also serve to corroborate information that has been adduced on the record during the course of the fact-finding hearing ... . '[T]he right to confidentiality during a *Lincoln* hearing belongs to the child and is superior to the rights or preferences of the parents' ...". ***Matter of Heasley v. Morse*, 2016 N.Y. Slip Op. 07883, 3rd Dept 11-23-16**

FAMILY LAW.

DERIVATIVE NEGLECT FINDING REVERSED.

The Third Department, reversing Family Court, determined the derivative neglect was not supported by the evidence: "Here, the proof relied upon by petitioner to support its claim of derivative neglect—namely, 1999 and 2010 indicated hotline reports involving different children—was insufficient to support a finding of derivative neglect. Neither the 1999 report nor the 2010 report resulted in a finding of neglect against respondent ... . Moreover, the conduct that formed the basis for each of the indicated reports failed to demonstrate that respondent's understanding of the responsibilities accompanying parenthood were fundamentally flawed at the time of this proceeding ... . In addition to its remoteness, the 1999 report was made against the biological parents of the child who was the subject of the report, as well as respondent, who was temporarily residing with the biological parents of the child at the age of 18, and did not conclusively establish which of the three adults had engaged in the conduct giving rise to the indicated findings. The 2010 report was indicated against respondent and his then-paramour for inadequate guardianship based on the children witnessing domestic violence, conduct that may not necessarily form the basis for a neglect finding ... . Accordingly, inasmuch as petitioner failed to satisfy its burden of proof, Family Court's finding of neglect cannot stand." ***Matter of Choice I. (Warren I.)*, 2016 N.Y. Slip Op. 07899, 3rd Dept 11-23-16**

FAMILY LAW, EVIDENCE.

INADVERTENT RECORDING OF A CONVERSATION BETWEEN MOTHER AND CHILD SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE, NO TESTIMONY THE RECORDING WAS NOT ALTERED AND NO EVIDENCE OF CHAIN OF CUSTODY.

The Third Department determined the inadvertent recording of a conversation between mother and child in this custody proceeding should not have been admitted in evidence. Although mother testified the recording capture her and the child's voices, she did not testify the recording had not been altered: " 'The predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered. Absent such proof, the [witness's] concession that the voice on the tapes is his or hers and that he or she recalls making some of the statements on the tapes does not exclude the possibility of alteration and, therefore, does not sufficiently establish authenticity to make the tapes admissible'... . The foundation laid for the introduction of the recording into evidence was the mother's testimony that the telephone call was made by the child using the mother's cell phone, the voices on the recording were hers and the child's, she listened to the recording '[q]uite a few' times and her friend, Amanda Coon, was present when the recording was made. After this testimony, Family Court admitted the recording into evidence. The mother's testimony was insufficient to authenticate the recording because she did not testify as to whether or not the recording was the complete and unaltered conversation between her and the child, and 'there was no attempt to offer proof about who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody' ...". ***Matter of Williams v. Rolf*, 2016 N.Y. Slip Op. 07884, 3rd Dept 11-23-16**

MEDICAID.

TRANSFERS MADE DURING 60-MONTH LOOK-BACK PERIOD WERE NOT MADE IN ANTICIPATION OF THE FUTURE NEED FOR MEDICAL ASSISTANCE, DETERMINATION OF THE DEPARTMENT OF HEALTH ANNULLED.

The Third Department, reversing the Department of Health, determined petitioner rebutted the presumption certain property transfers made during the 60-month look-back period were motivated by the future need to qualify for medical as-

sistance: "Considering the medical evidence in light of the substantiated testimony that the transfers were made for the purpose of assisting in the purchase of a home for the grandson's use, as well as the evidence that the transfers took place several years before decedent applied for assistance and that she retained most of her assets thereafter, we find that the presumption was successfully rebutted. The determination by DOH was not supported by substantial evidence and must be annulled ...". ***Matter of Collins v. Zucker*, 2016 N.Y. Slip Op. 07897, 3rd Dept 11-23-16**

MENTAL HYGIENE LAW, APPEALS.

CRITERIA FOR EXCEPTION TO THE MOOTNESS DOCTRINE EXPLAINED, INVOLUNTARY TREATMENT ORDER REVERSED.

The Third Department, in a full-fledged opinion by Justice Lynch, reversing Supreme Court, determined petitioner psychiatric hospital did not present sufficient evidence to support an order permitting involuntary treatment of respondent for schizophrenia. The Third Department heard the appeal as an exception to the mootness doctrine (the involuntary treatment order had already expired): "The exception to the mootness doctrine applies where an issue (1) could readily recur, (2) will typically evade review, (3) is of public importance and (4) represents a substantial and novel issue yet to be decided by this Court ... . As pointed out in respondent's brief, there were 322 applications for authorization to forcibly treat patients who are within the Third Department during 2014—a contention that adequately demonstrates that proceedings of this nature will readily recur. Since the duration of these orders is tied into the treatment of the patient, who may, as here, be discharged before an appeal is even perfected, we agree that these proceedings do typically evade review ... . And, certainly, the proceeding is of public importance because it implicates a patient's 'fundamental liberty interest to reject antipsychotic medication' ... . * * * What we find significant and novel here is how that standard is to be met by a petitioner and applied by the trial court with respect to the formulation of a medication treatment plan, and, for that reason, we will address the merits of the appeal .. . The fundamental flaw established by this record is that the scope of medications authorized by Supreme Court was overbroad—a flaw conceded by petitioner. The order actually authorized the use of 28 various medications, including medications for symptoms and illnesses that respondent did not have. ... This point implicates the secondary problem presented in that Supreme Court failed to make specific findings on the record as to respondent's capacity and the viability of the treatment plan." ***Matter of Lucas QQ. (Lucas QQ.)*, 2016 N.Y. Slip Op. 07904, 3rd Dept 11-23-16**

MUNICIPAL LAW.

CAUSE OF ACTION ALLEGING NEGLIGENT MAINTENANCE OF A SEWER SYSTEM SHOULD NOT HAVE BEEN DISMISSED.

The Third Department determined an action alleging negligent maintenance of a sewer system should not have been dismissed. The court noted that the written notice requirement (a common prerequisite for municipal liability) applies to defects in roads and sidewalks, etc. and does not apply to subsurface structures: "It is settled that a municipality is under a continuing duty to maintain and repair its sewage and water systems ... , and this duty is independent of the duty not to create a dangerous or defective condition ... . '[T]he breach of this ongoing duty is the 'event' that forms the basis for the claim' for purposes of General Municipal Law § 50-i ... . Thus, defendant's negligence, if any, in failing to maintain or repair its water and/or sewage system constitutes a continuing wrong that gives rise to a new cause of action for each injury that occurred ... . Plaintiff's recoverable damages, however, are limited 'to those caused by the alleged unlawful acts sustained within 90 days preceding the date of filing of the notice of claim' ...". ***461 Broadway, LLC v. Village of Monticello*, 2016 N.Y. Slip Op. 07905, 3rd Dept 11-23-16**

MUNICIPAL LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER COUNTY NEGLIGENT IN FAILING TO REVIEW INMATE'S PAST RECORD OF VIOLENT BEHAVIOR, INMATE ASSAULTED PLAINTIFF.

The Third Department, reversing Supreme Court, determined there was question of fact whether the county defendants were negligent in failing to determine whether an inmate was violent. Plaintiff was assaulted by the inmate and alleged the county should have reviewed the inmate's past record of violent behavior: "Correction Law § 500-b (7) (a) states that the reviewing officer 'shall exercise good judgment and discretion and shall take all reasonable steps to ensure that the assignment of persons to facility housing units' advances the safety and security of all inmates and that of the facility in general. The statute enumerates a number of factors to consider in that analysis, but an inmate's history of assaultive behavior or his or her prior prison disciplinary history are not among them ... . The statute further lacks a specific requirement that the reviewing officer obtain all records pertaining to an inmate, instead directing a review of whatever 'relevant and known' records are 'accessible and available' (Correction Law § 500-b [7] [c] [3]). The statute accordingly creates a 'possibility of exceptions . . . significant enough to justify a case-by-case determination of negligence without the automatic imposition of negligence under the negligence per se doctrine,' although a failure to obtain specific records could well constitute evidence of negligence in a given case ...". ***Wassmann v. County of Ulster*, 2016 N.Y. Slip Op. 07907, 3rd Dept 11-23-16**

MUNICIPAL LAW, PERSONAL INJURY.

CAUSE OF ACTION ALLEGING NEGLIGENT FAILURE TO INSTALL A GUARDRAIL SHOULD NOT HAVE BEEN DISMISSED.

The Third Department determined plaintiff's action alleging defective design and construction of a highway should not have been dismissed. Plaintiff's car slid on ice and snow and went off the road. Plaintiff alleged a guardrail should have been installed. The court noted that the written notice requirement did not apply to the guardrail allegation: "A municipality has a nondelegable duty to the public to construct and maintain its roads in a reasonably safe condition, and this duty extends to furnishing and maintaining adequate barriers or guardrails where appropriate ... . To that end, a municipality is under no obligation to upgrade its roads that complied with design standards when they were built merely because the standards were subsequently upgraded ... . We conclude that defendant failed to establish that the design of the road comported with the applicable standards at the time that County Road 113 was constructed. County Road 113, over which defendant admitted ownership, was constructed in the late 1940s. Defendant's engineering expert did not identify what standards were in effect at the time that County Road 113 was designed or constructed ... . Rather, defendant's expert cited to the Department of Transportation Highway Design Manual in concluding that there was little justification for the placement of a guardrail at the location of [the] accident. This manual, however, was published in the 1970s and, therefore, does not apply to County Road 113." ***Fu v. County of Wash.*, 2016 N.Y. Slip Op. 07910, 3rd Dept 11-23-16**

MUNICIPAL LAW, IMMUNITY.

FIRE REKINDLED AFTER FIRE DEPARTMENT PERSONNEL ASSURED PLAINTIFFS THE FIRE WAS OUT, NEGLIGENCE CAUSE OF ACTION AGAINST THE CITY SHOULD NOT HAVE BEEN DISMISSED, QUESTION OF FACT WHETHER THERE WAS A SPECIAL RELATIONSHIP BETWEEN CITY AND PLAINTIFFS.

The Third Department determined the action against the city alleging negligence resulting in the destruction of plaintiffs' property by fire should not have been dismissed. Fire department personnel told the plaintiffs the fire had been extinguished and that it was safe to reenter. However the fire rekindled. The Third Department held that there was a "special relationship" between the city and the plaintiffs stemming from the assurances the fire was out: "To establish a special relationship, plaintiffs were required to show: '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking' ...". ***Trimble v. City of Albany*, 2016 N.Y. Slip Op. 07912, 3rd Dept 11-23-16**

MUNICIPAL LAW, IMMUNITY.

NO VARIANCE REQUIRED TO ALLOW CHURCH PROPERTY TO BE USED TO HOUSE HOMELESS PERSONS.

The Third Department, reversing Supreme Court, determined the proposed use of church property to house homeless persons did not require a variance: "Strictly religious uses and activities are more than prayer and sacrifice and all churches recognize that the area of their responsibility is broader than leading the congregation in prayer. . . . To limit a church to being merely a house of prayer and sacrifice would, in a large degree, be depriving the church of the opportunity of enlarging, perpetuating and strengthening itself and the congregation ... . To that end, '[s]ervices to the homeless have been judicially recognized as religious conduct' ...". ***Matter of Sullivan v. Board of Zoning Appeals of City of Albany*, 2016 N.Y. Slip Op. 07911, 3rd Dept 11-23-16**

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