CasePrepPlus

January 4, 2017

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

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

FIRST DEPARTMENT

INSURANCE LAW, FAIR CREDIT REPORTING ACT.

DAMAGES UNDER THE FAIR CREDIT REPORTING ACT ARE NOT PENALTIES, INSURANCE POLICY EXCLUSION OF COVERAGE FOR PENALTIES DID NOT APPLY.

The First Department rejected plaintiff insurer's argument that it was not required to pay the cost of its insured's settlement of a class action claim under the Fair Credit Reporting Act (FCRA) because the settlement constituted a penalty (not covered by the policy) rather than compensatory damages: "To make out a claim under the FCRA (15 USC § 1681 et seq.), the complaint must allege, inter alia, injury in fact, a 'concrete and particularized' and 'actual or imminent' 'invasion of a legally protected interest,' i.e., the statutory right to the fair handling of the plaintiff consumer's credit information ... . The remedy for 'willful' failure to comply with a requirement of the statute is 'any actual damages sustained by the consumer by the failure or damages of not less than $100 and not more than $1,000,' and 'such amount of punitive damages as the court may allow,' as well as costs and reasonable attorneys' fees ... . Since the consumer must elect the option of either actual or statutory damages, and may also recover punitive damages, it is reasonable to infer, as the motion court did, that the actual and the statutory damages serve the same purpose ... . Moreover, the statute provides separately for a civil penalty (recoverable by the Federal Trade Commission) ... . Plaintiff argues that the limitation of damages to a 'willful' violation of the statute evinces a legislative intent to penalize intentional misconduct, rather than compensate for actual damages sustained, but this is not so, since willfulness as a statutory condition of civil liability 'cover[s] not only knowing violations of a standard, but reckless ones as well' ... . Thus, it is clear that Congress intended the statutory damages provided for by the FCRA to be compensatory and not a penalty ...". ***Navigators Ins. Co. v. Sterling Infosystems, Inc.*, 2016 N.Y. Slip Op. 08941, 1st Dept 12-29-16**

INSURANCE LAW, MUNICIPAL LAW, PERSONAL INJURY.

INSURER OF COMPANY UNDER CONTRACT TO MAINTAIN STREET LIGHTING AND TRAFFIC CONTROL DEVICES HAD A DUTY TO DEFEND THE CITY IN PERSONAL INJURY SUITS ALLEGING INADEQUATE LIGHTING AND MALFUNCTIONING TRAFFIC CONTROL DEVICES.

In a decision too lengthy and fact-specific to fairly summarize here, the First Department determined whether the insurance company which insured a company that maintained street lighting and traffic control devices under a contract with the Bronx had a duty to defend against personal injury suits brought against New York City. The city was named an additional insured in the policies. The personal injury suits alleged improper street lighting, malfunctioning traffic control devices, and, in one case, injury from a falling traffic control device. A duty to defend was found in four of the five lawsuits. The court explained the applicable law as follows: "On a summary judgment motion in a case involving an insurance contract or policy, '[t]he evidence will be construed in the light most favorable to the one moved against' ... . The insured, however, has the burden of showing that an insurance contract covers the loss for which the claim is made ... .The applicable standard holds that the duty to defend arises when at least one of two alternate criteria are met. 'A duty to defend exists whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage, or where the insurer has actual knowledge of facts establishing such a reasonable possibility' ...". ***City of New York v. Wausau Underwriters Ins. Co.*, 2016 N.Y. Slip Op. 08932, 1st Dept 12-29-16**

SECURITIES, CONTRACT LAW.

RE TIMELINESS OF CLAIMS ALLEGING DEFECTIVE MORTGAGES UNDERLYING RESIDENTIAL MORTGAGE BACKED SECURITIES, WHERE THE CONTRACT CALLS FOR TIMELY NOTICES OF BREACH, NO NOTICE OF BREACH REQUIRED WHERE DEFENDANT ITSELF DISCOVERS THE DEFECTIVE MORTGAGE.

The First Department, in a full-fledged opinion by Justice Gische, over a dissent, ruled on the timeliness of claims that defendant, GreenPoint Mortgage Funding, had breached representations and warranties regarding the quality of mortgages underlying residential mortgage backed securities (RMBS). The court determined the claims were timely with regard to defective mortgages discovered by the defendant itself, despite the absence of notices of breach. But the claims were not timely with respect to the defective mortgages discovered by the plaintiff but for which no timely notices of breach were provided:

"The issues before us are related to the contractual requirement and sufficiency of notices of breach (breach notice). We consider whether a breach notice is required when the underlying contract claim is based upon a defendant's independent discovery or knowledge of the nonconforming mortgages. We also consider whether an otherwise late breach notice can relate back in time to the commencement of the underlying action in order to avoid dismissal. ... [W]e hold that the breach of contract claims based upon defendant's alleged independent discovery or likely knowledge of nonconforming mortgage loans do not require breach notices to be sent before an action may be brought. We further hold that the doctrine of relation back does not save claims that do require that a breach notice be sent as a precondition to bringing an action." ***U.S. Bank N.A. v. GreenPoint Mtge. Funding, Inc.*, 2016 N.Y. Slip Op. 08968, 1st Dept 12-29-16**

SECOND DEPARTMENT

CIVIL PROCEDURE.

AN ORDER IS NOT ABANDONDED PURSUANT TO 22 N.Y.C.R.R. 202.48 UNLESS THE ORDER DIRECTS THAT IT BE SETTLED OR SUBMITTED FOR SIGNATURE.

The Second Department, reversing Supreme Court, determined dismissal of a motion to enter a default judgment as abandoned pursuant to 22 N.Y.C.R.R. 202.48(b) was improper because the underlying order did not direct that it be settled or submitted for signature: "The Supreme Court incorrectly, sua sponte, dismissed the action as abandoned pursuant to 22 NYCRR 202.48(b) because ... its determination of the plaintiff's 2014 motion did not expressly direct that the proposed judgment or order be settled or submitted for signature (see 22 NYCRR 202.48[a]; Funk v. Barry, 89 NY2d 364, 367)." ***HSBC Bank USA, N.A. v. Moley*, 2016 N.Y. Slip Op. 08844, 2nd Dept 12-28-16**

CIVIL PROCEDURE, MUNICIPAL LAW.

DEFENDANTS' SUMMARY JUDGMENT MOTION WAS PREMATURE, PLAINTIFF ENTITLED TO DISCOVERY TO FLESH OUT RELATIONSHIP AMONG PARTIES, RELATION-BACK DOCTRINE ALLOWED AMENDMENT OF COMPLAINT TO ADD PARTY, NOTICE OF CLAIM REQUIRED FOR SUIT AGAINST LONG ISLAND POWER AUTHORITY.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this rear-end collision case was premature. The truck which struck plaintiff's vehicle was registered to Long Island Power Authority (LIPA) but the driver was an employee of National Grid, which was under contract with LIPA. Plaintiff never served a notice of claim on LIPA, as required by the Public Authorities Law and the General Municipal Law. The Second Department held that plaintiff was entitled to discovery concerning the relationship between LIPA and National Grid, and further held that the relation-back doctrine allowed the amendment of the complaint to add National Grid as a defendant: "A party who contends that a motion for summary judgment is premature must 'demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant' ... . In opposition to the defendants' motion for summary judgment, the plaintiff demonstrated that the defendants had not revealed that, at the time of the subject accident, the defendant driver was actually employed by National Grid LLC, and not LIPA, until the defendants filed their summary judgment motion. The award of summary judgment dismissing the complaint insofar as asserted against the defendant driver was therefore premature, inasmuch as substantial discovery with respect to the relationship between the National Grid LLC and the defendant driver, as well as the nature of the business the defendant driver was conducting at the time of the subject accident, remains outstanding ...". ***Marrone v. Miloscio*, 2016 N.Y. Slip Op. 08856, 2nd Dept 12-28-16**

CRIMINAL LAW, ATTORNEYS.

PROSECUTORIAL MISCONDUCT REQUIRED REVERSAL, DETAILED EXPLANATION OFFERED.

The Second Department reversed defendant's conviction solely on the basis of prosecutorial misconduct. The court offered a detailed explanation of the misconduct: " '[I]n summing up to the jury, [the prosecutor] must stay within the four corners of the evidence and avoid irrelevant and inflammatory comments which have a tendency to prejudice the jury against the accused' ... . Here, during that summation, the prosecutor directly attacked defense counsel's role and his integrity. * * * The prosecutor also improperly referenced facts not in evidence in order to call for speculation by the jury ... and misstated critical testimony provided by a defense witness, alleging that certain facts were 'undisputed' when in fact they were disputed ... . The prosecutor improperly appealed to the jury's sympathy and generalized fear of crime by asserting that the defendant possessed a loaded gun while families and children from the '20 residential buildings' were 'everywhere' having 'cookouts' and celebrating the Fourth of July, and that because the various police officers 'did their jobs,' 'fortunately, nothing happened.' These comments implied to the jury that the defendant intended to commit crimes with which he was not charged ... . Furthermore, immediately upon praising the police officers who 'did their jobs,' the prosecutor turned to the jury and advised that '[n]ow it's your turn to uphold your oaths as jurors and do your jobs' by finding the defendant guilty. This type of 'safe streets' argument is inflammatory and has repeatedly been disapproved by the courts ... . The prosecutor

also compared the defendant's in-court demeanor and appearance to how he appeared on the night of his arrest in order to argue that the jury should not be fooled into considering him a 'gentleman' ... . The prosecutor went so far as to point to the defendant's precinct photo and stated that his appearance there represented his 'true colors.' " ***People v. Brisco*, 2016 N.Y. Slip Op. 08878, 2nd Dept 12-28-16**

CRIMINAL LAW, EVIDENCE.

VIOLATION OF SANDOVAL RULING REQUIRED A NEW TRIAL, DEFENDANT DID NOT OPEN THE DOOR TO THE IMPROPER QUESTIONS.

The Second Department determined the prosecutor's violation of the *Sandoval* ruling required reversal. Defendant was charged with attempted burglary. The court ruled the defendant could be cross-examined about petit larceny and burglary convictions, but only to the extent he could be asked about an unspecified misdemeanor and fan unspecified felony conviction. When defendant testified he was repeatedly asked whether he had ever walked into a building which was closed to the public. The Second Department held that defendant had not opened the door to that line of questioning: "Defendants who take the witness stand, like other witnesses, place their credibility in issue and, thus, may be cross-examined about past criminal or immoral acts relevant to their credibility ... . The policy underlying Sandoval is that the accused has the right to make an informed choice concerning whether he or she should take the witness stand ... . Thus, in the interest of fairness, a trial court's authority to change its Sandoval ruling is limited once the defendant has decided to testify in good-faith reliance on the court's pretrial ruling ... . The defendant in this case was denied that right when, after making what he believed to be an informed judgment and taking the witness stand, the Supreme Court implicitly changed the ruling upon which he relied by allowing the prosecutor to continue her course of prejudicial questioning despite repeated objections from defense counsel. The court's implicit change in its ruling after the defendant had already taken the witness stand deprived the defendant of a fair trial ..." ***People v. Mohamed*, 2016 N.Y. Slip Op. 08885, 2nd Dept 12-28-16**

CRIMINAL LAW, EVIDENCE.

EMERGENCY DOCTRINE DID NOT JUSTIFY ENTRY INTO HOME, EXPLOSIVES, DRUGS, GUNS, FORGED CURRENCY SUPPRESSED.

The Second Department, reversing defendant's conviction and dismissing the indictment, determined the emergency doctrine did not justify entrance into the home where hand grenades, guns, forged gun permits, explosives, marijuana and forged currency were seized. The police had responded to a silent alarm and found defendant working on a car outside the home. After questioning the defendant, the defendant unlocked the door of the home (to show the police he had keys to the home). When the defendant attempted to go inside and shut the door, the police pushed their way in and saw two hand grenades and a gun: "In the evaluation of whether a warrantless entry was justified under the 'emergency doctrine,' the evidence must establish as a threshold matter that the police had 'an objectively reasonable basis for believing that a person within [the house] is in need of immediate aid' ... . Under the Fourth Amendment, the officers' subjective belief is irrelevant: '[a]n action is reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed objectively, justify [the] action' ... . Here, the evidence at the suppression hearing fell short of the required threshold showing because it did not establish that the circumstances known to the police when they entered the house supported an objectively reasonable belief that entry was needed to render emergency assistance to an injured occupant or to protect an occupant from imminent injury ...". ***People v. Ringel*, 2016 N.Y. Slip Op. 08887, 2nd Dept 12-28-16**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 240(1) CAUSE OF ACTION BASED UPON A DEFECTIVE LADDER, BUT NOT ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW 241(6) CAUSE OF ACTION, PLAINTIFF DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT.

The Second Department determined plaintiff, who alleged a defective stepladder was the cause of his fall, was entitled to summary judgment on his Labor Law 240(1) cause of action (comparative negligence is not a factor). However, plaintiff should not have been awarded summary judgment on his Labor Law 241(6) cause action (alleging a violation of the industrial code) because plaintiff did not demonstrate his freedom from comparative negligence: "The plaintiff established, prima facie, that the defendant violated Labor Law § 240(1), as the owner of the building where the plaintiff was working, by providing a ladder with a defective supporting bracket, which caused the ladder to move and the plaintiff to fall to the ground ... . The fact that the plaintiff may have been the sole witness to the accident does not preclude the award of summary judgment in his favor ... . However, the plaintiff failed to establish, prima facie, the defendant's liability under Labor Law § 241(6). Although the evidence demonstrated that the ladder's defective supporting bracket, which the plaintiff had complained about prior to the accident, constituted a violation of 12 NYCRR 23-1.21(b)(3) ... , the plaintiff failed to demonstrate his freedom from comparative negligence ...". ***Cardenas v. 111-127 Cabrini Apts. Corp.*, 2016 N.Y. Slip Op. 08835, 2nd Dept 12-28-16**

LANDLORD-TENANT, MUNICIPAL LAW.

NYC RENT STABILIZATION RULES DO NOT APPLY TO A BUILDING CONVERTED FROM COMMERCIAL TO RESIDENTIAL USE AFTER 1974.

The Second Department, in a full-fledged opinion by Justice Dickerson, determined the exemption from (New York City) rent stabilization rules for housing units constructed after January 1, 1974, applied to defendant's post-1974 conversion of a commercial building to residential units: "... [Supreme Court] found that the defendant had made a prima facie showing that the complex was exempt from rent stabilization by demonstrating that its renovations had converted the complex from commercial to residential use, and that it had paid for a majority of the conversion costs. The court further found that the plaintiffs had failed to raise a triable issue of fact as to whether the complex was subject to rent stabilization. In this regard, the court reasoned that the 75% requirement of Rent Stabilization Code § 2520.11 did not apply where a commercial building was converted to residential use. We affirm. * * * The plaintiffs contend that ... they raised a triable issue of fact as to whether the defendant failed to replace 75% of the systems ... in accordance with section 2520.11(e)(1) of the Rent Stabilization Code... . We disagree. The most natural reading of the ... 75% requirement is that it is applicable in situations where an owner purports to substantially rehabilitate an existing residential building, and not in situations where a commercial building is converted to residential use." ***Bartis v. Harbor Tech, LLC*, 2016 N.Y. Slip Op. 08831, 2nd Dept 12-28-16**

PERSONAL INJURY.

ALTHOUGH PLAINTIFF HAD THE RIGHT OF WAY AND ALLEGED DEFENDANT FAILED TO STOP AT A STOP SIGN, SUMMARY JUDGMENT WAS PROPERLY DENIED, PLAINTIFF DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE NEGLIGENCE.

The Second Department determined plaintiff's motion for summary judgment in this vehicle-collision case was properly denied. Plaintiff had the right of way and alleged defendant did not stop at a stop sign. However, plaintiff did not demonstrate she was free from comparative fault: "... [T]he only evidence in admissible form submitted by the plaintiff in support of her motion was her own affidavit, in which she briefly alleged that the defendant driver had failed to stop at the stop sign governing traffic on Batchelder Street and yield to traffic on Avenue U. The plaintiff's affidavit did not set forth other relevant circumstances, including the rate of speed at which she was traveling, where her vehicle was positioned when she allegedly observed the defendant driver fail to stop at the stop sign, and where her vehicle was positioned when the collision occurred. Accordingly, the plaintiff's affidavit was insufficient to establish, prima facie, that the defendant driver's alleged negligence was the sole proximate cause of the accident, and that she was free from comparative fault ...". ***Kanfer v. Wong*, 2016 N.Y. Slip Op. 08851, 2nd Dept 12-28-16**

PERSONAL INJURY.

DEFENDANT PROPERTY OWNER'S ACKNOWLEDGED AWARENESS OF THE SIDEWALK DEFECT IN THIS TRIP AND FALL CASE PRECLUDED SUMMARY JUDGMENT.

The Second Department determined the defendant abutting property owner's motion for summary judgment in this sidewalk trip and fall action was properly denied. The court clearly explained the relationship between the applicable administrative code provision and the abutting property owners' responsibility for maintaining a safe sidewalk. The plaintiff tripped over a raised sidewalk flag. The defendant's own motion papers demonstrated he was aware of the defect for four years: "Section 7-210 of the Administrative Code of the City of New York (hereinafter the Administrative Code) imposes tort liability upon certain owners of real property, including the appellant, for injuries proximately caused by the failure of such owners to maintain the sidewalks abutting their property in a reasonably safe condition ... . Section 7-210 of the Administrative Code does not, however, impose strict liability upon landowners for injuries arising from allegedly dangerous conditions on a sidewalk abutting their property ... . Rather, the injured party has the obligation to prove the elements of negligence to demonstrate that the landowner is liable under this section of the Administrative Code ... . Specifically, the injured party must establish (1) the existence of a duty on the landowner's part as to the injured party, (2) a breach of this duty, and (3) a resulting injury to the injured party ... . In support of a motion for summary judgment dismissing a cause of action pursuant to section 7-210 of the Administrative Code, the landowner has the initial burden of demonstrating, prima facie, that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ...". ***Nisimova v. City of New York*, 2016 N.Y. Slip Op. 08875, 2nd Dept 12-28-16**

PERSONAL INJURY, CONTRACT LAW.

DESPITE THE EXPRESS EXCLUSION OF LIABILITY TO THIRD PARTIES IN THE CONTRACT BETWEEN DEFENDANT SECURITY COMPANY AND DEFENDANT THEATER, THE COMPLAINT ALLEGED A COMMON-LAW DUTY OWED BY THE SECURITY COMPANY TO PLAINTIFF, THE SECURITY COMPANY ALLEGEDLY DIRECTED PLAINTIFF TO RESTRAIN A NONPARTY WHO THEN ASSAULTED AND INJURED PLAINTIFF.

The Second Department determined defendant Arrow Security, a company under contract with defendant theater, Paramount, to provide security for patrons, was not entitled to a dismissal of the complaint. Plaintiff, an employee of Paramount, alleged he was instructed by Arrow to restrain a person, John Doe, who was in the rear alley of the theater premises. Plaintiff alleged he was beaten and injured by John Doe. The contract between Arrow and Paramount specifically stated the contract did not create a duty owed to third parties. However, the court concluded the complaint stated a claim for common-law negligence because it was alleged Arrow directed plaintiff to restrain John Doe: "... Arrow failed to conclusively establish that it owed no common-law duty to the plaintiff. To the contrary, the allegations in the complaint, viewed in the light most favorable to the plaintiff ... , set forth a cognizable legal theory under which Arrow could be found to have assumed a duty of care to the plaintiff by calling for and instructing him to investigate, restrain, and/or detain the intoxicated John Doe ... . A duty of care may be assumed where a 'defendant's conduct placed plaintiff in a more vulnerable position than plaintiff would have been in had defendant done nothing' ... , or where a defendant's conduct 'enhanced the risk that plaintiff faced, created a new risk or induced plaintiff to forego some opportunity to avoid risk' ...". ***Garda v. Paramount Theatre*, LLC, 2016 N.Y. Slip Op. 08841, 2nd Dept 12-28-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SCHOOL'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED IN THIS NEGLIGENT SUPERVISION ACTION BROUGHT BY INJURED STUDENT.

The Second Department determined the defendant school's motion for summary judgment in this negligent supervision action was properly denied. The complaint alleged plaintiff's fall was caused by students jumping up and down on a bridge: "... [T]he defendant, in support of its motion for summary judgment dismissing the complaint, failed to submit evidence sufficient to establish, prima facie, that it properly supervised the infant plaintiff or that its alleged negligent supervision was not a proximate cause of his injuries …". ***J.M. v. North Babylon Union Free Sch. Dist.*, 2016 N.Y. Slip Op. 08847, 2nd Dept 12-28-16**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SCHOOL NOT ENTITLED TO SUMMARY JUDGMENT, PLAINTIFF INJURED WHEN A STUDENT FELL ON TOP OF HIM.

The Second Department determined the school's motion for summary judgment in this negligent supervision action was properly denied. The plaintiff student was injured when another student fell on top of him. There was evidence the student who injured plaintiff had been acting up for 10 minutes prior to the incident: " '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' ... . Here, the defendants failed to demonstrate, prima facie, that they properly supervised the infant plaintiff or that their alleged negligent supervision was not a proximate cause of his injuries ... . In support of their motion, the defendants submitted the infant plaintiff's deposition testimony in which he asserted that the student who fell on top of him had been running around the gym throwing basketballs at another student before he fell on the infant plaintiff, and that this behavior had been transpiring, unimpeded, for approximately 10 minutes before the accident." ***Roth v. Central Islip Union Free Sch. Dist.*, 2016 N.Y. Slip Op. 08894, 2nd Dept 12-28-16**

PERSONAL INJURY, MUNICIPAL LAW, IMMUNITY.

COUNTY DID NOT DEMONSTRATE IT WAS NOT LIABLE FOR FAILURE TO INSTALL A GUARDRAIL IN THIS VEHICLE-ACCIDENT CASE, SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the county's motion for summary judgment was properly denied in this vehicle-accident case alleging the negligent failure to install a guardrail. The county did not demonstrate it was entitled to qualified immunity based upon a relevant highway-safety study of the area, and did not demonstrate the absence of a guardrail was not a proximate cause of plaintiff's injuries: "A municipal defendant is entitled to qualified immunity 'where a duly authorized public planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury' ... . Here, the evidence presented by the County failed to establish that it undertook a study which entertained and passed on the very same question of risk that is at issue in this case ... . [T]he County failed to establish, prima facie, that it did not have a duty to place guardrails near the concrete headwall involved in the plaintiff's accident. ... [T]he County's submissions failed to eliminate all triable issues of fact as to whether its alleged negligence in failing to place guardrails near

the concrete headwall ... was a substantial factor in aggravating the plaintiff's injuries ...". ***Bednoski v. County of Suffolk*, 2016 N.Y. Slip Op. 08832, 2nd Dept 12-28-16**

THIRD DEPARTMENT

ATTORNEYS.

ATTORNEY, WHO WAS ACTING AS CO-COUNSEL WITH THE DISQUALIFIED LAWFIRM, WAS NOT SUFFICIENTLY ASSOCIATED WITH THE LAWFIRM TO WARRANT DISQUALIFICATION ON CONFLICT OF INTEREST GROUNDS.

The Third Department, reversing Supreme Court, determined defendant did not demonstrate plaintiffs' attorney, Schultz, should be disqualified based upon a conflict of interest. Plaintiffs, in this motorcycle accident case, were initially represented by a law firm (HHK) which had previously represented defendant. Schultz, who was not part of HHK, was acting as "co-counsel" for plaintiffs, working with an HHK partner, at the time HHK was disqualified. After analyzing the facts, the Third Department found that Schultz was not "associated" with HHK within the meaning of the relevant Rules of Professional Conduct: "The Rules of Professional Conduct prohibit attorneys who are 'associated in a firm' from representing a client when a conflict of interest would preclude any one of them from doing so if he or she were practicing alone ... . The Rules of Professional Conduct do not define the phrase 'associated in a firm,' but it is well established that its meaning extends beyond partners and associates who are employed by the same firm and includes attorneys with 'of counsel' relationships ... . However, not every lawyer who has any connection or relationship with a firm is considered to be "associated" with that firm for the purpose of imputing a conflict of interest ... . Whether an attorney is considered to be 'associated in a firm' ... is a factual analysis that turns on whether the attorney's relationship with the firm is sufficiently 'close, regular and personal' ... . 'Because disqualification can affect a party's federal and state constitutional rights to counsel of his or her own choosing, the burden is on the party seeking disqualification to show that it is warranted' ... . We are unpersuaded that this 'heavy burden' was satisfied here ...". ***Kelly v. Paulsen*, 2016 N.Y. Slip Op. 08920, 3rd Dept 12-29-16**

CIVIL PROCEDURE, APPEALS.

ORDER WHICH IS NOT ISSUED PURSUANT TO A MOTION ON NOTICE IS NOT APPEALABLE, A MOTION TO VACATE IS THE PROPER PROCEDURE.

The Third Department, reversing Supreme Court, noted that an order which is not issued pursuant to a motion on notice is not appealable. The proper procedure is to move to vacate the order and, if the motion is denied, appeal the denial: "... [P]laintiff followed the appropriate procedure in moving to vacate the ... order. Contrary to Supreme Court's determination, plaintiff could not have challenged the order by taking a direct appeal. As the order was made in response to plaintiff's letter and did not decide a motion made upon notice, it was not appealable as of right (see CPLR 5701 [a] [2]...). Such an order is properly challenged by moving on notice for vacatur, as plaintiff did here, and then by taking an appeal as of right if the requested relief is denied (see CPLR 5701 [a] [3]...). Thus, the court should have addressed the merits of plaintiff's motion to vacate the ... order, and the application should not have been denied based upon the standards applicable to motions pursuant to CPLR 5015 and 2221." ***Novastar Mtge., Inc. v. Melius*, 2016 N.Y. Slip Op. 08928, 3rd Dept 12-29-16**

CIVIL PROCEDURE, CORPORATION LAW, WORKERS' COMPENSATION LAW, PERSONAL INJURY.

DEFENDANT'S SUMMARY JUDGMENT MOTION WAS PREMATURE, PIERCING THE CORPORATE VEIL MIGHT BE AN ISSUE DETERMINING WHETHER WORKERS' COMPENSATION IS THE SOLE REMEDY, FURTHER DISCOVERY NEEDED.

The Third Department determined defendant's summary judgment motion in this wrongful death action should have been denied as premature. Plaintiff's decedent was killed in a workplace accident and workers' compensation death benefits were paid out. In addition to arguing that workers' compensation was plaintiff's sole remedy, defendant argued the corporation plaintiff sued had been dissolved and assets transferred to another corporation. Because piercing the corporate veil might be an issue, the Third Department held that plaintiff was entitled to discovery to flesh out the relationship among plaintiff's decedent and the two corporations: " '[A] summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant or a codefendant' ... . Although we have held that, 'in certain situations, . . . more than one entity may be considered a plaintiff's employer for purposes of workers' compensation' ... , defendant's submissions fall far short of establishing that premise as a matter of law. A determination as to whether two entities are alter egos of each other requires a far more detailed record than is present here ...". ***Pringle v. AC Bodyworks & Sons, LLC*, 2016 N.Y. Slip Op. 08924, 3rd Dept 12-29-16**

CIVIL PROCEDURE, INSURANCE LAW, CONTRACT LAW.

CRITERIA FOR DENIAL OF A MOTION FOR SUMMARY JUDGMENT AS PREMATURE ILLUSTRATED.

The Third Department determined defendant insurance company's motion for summary judgment should have been denied as premature. Plaintiff was seeking reformation of the insurance contract to add plaintiff as an insured. Plaintiff held a mortgage on the insured property when the property was destroyed by fire: "Erie's [the insurance company's] motion for summary judgment should have been denied as premature. "[A] summary judgment motion is properly denied as premature when the nonmoving party has not been given reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant or a codefendant' ... . As is relevant to plaintiff's claim, a party seeking reformation of a contract must establish, by clear and convincing evidence, either that the writing at issue was executed under mutual mistake or that there was a fraudulently induced unilateral mistake ... . The importance of documents and depositions that plaintiff sought but had not been provided is readily apparent. The premise of plaintiff's cause of action is that, in executing the relevant insurance policy, the corporation and Erie both intended to include plaintiff as a loss payee but that, by mutual mistake, he was omitted. Erie had exclusive knowledge of its understanding of the intended coverage and any intended loss payees at the time of the execution of the relevant insurance policy. Moreover, it is likely to be in exclusive possession of any collateral documents memorializing the intended scope of the relevant insurance policy. Further, plaintiff's contention that Erie has exclusive possession of employees and materials that could shed light on its intent as to the insurance policy is patently reasonable and not merely speculation ...". ***Imrie v. Ratto*, 2016 N.Y. Slip Op. 08907, 3rd Dept 12-29-16**

CIVIL PROCEDURE, PRIVILEGE, INSURANCE LAW, PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE DOCUMENTS SOUGHT BY A DISCOVERY DEMAND WERE ENTITLED TO CONDITIONAL IMMUNITY AS DOCUMENTS PREPARED IN ANTICIPATION OF LITIGATION, MATTER REMITTED FOR COURT REVIEW OF THE DOCUMENTS.

In an action against a veterinary clinic stemming from an alleged attack by a dog in the waiting room, the Third Department determined the clinic did not demonstrate documents sought by plaintiff's discovery demands were entitled to conditional immunity as documents prepared for litigation. The matter was remitted for court review of the documents: "Inasmuch as '[t]he purpose of liability insurance is the defense and settlement of claims . . . once an accident has arisen,' documents contained in the insurance adjuster's file are generally protected by 'a conditional immunity . . . as material prepared for litigation' ... . Accident reports that are prepared with 'a mixed purpose and result at least in part from the internal operations of the defendant's business' are not, however, exempt from disclosure ... . It is therefore incumbent upon 'the party resisting disclosure to[, in the first instance,] show that the materials sought were prepared solely for litigation and this burden cannot be satisfied with wholly conclusory allegations' ...". ***Hewitt v. Palmer Veterinary Clinic, PC*, 2016 N.Y. Slip Op. 08926, 3rd Dept 12-29-16**

CRIMINAL LAW.

FOR CAUSE CHALLENGE SHOULD HAVE BEEN GRANTED, JUROR WAS A LONG-TERM FRIEND OF AN INVESTIGATOR WORKING ON DEFENDANT'S CASE.

The Third Department, reversing defendant's conviction, determined defendant's for cause challenge to a juror, who had been friends for 30 years with an investigator working on defendant's case, should have been granted, despite the juror's assurance he could be fair: "The juror's mere status as a law enforcement officer, without more, would not necessarily have required his disqualification, nor would any relationship with a member of the District Attorney's staff that was 'little more than a nodding acquaintance' ... . However, the juror described the investigator as a 'friend,' and said that their social relationship had endured for more than 30 years and was sufficiently close to include the juror's wife. While the juror did not specifically describe the recency or frequency of his contacts with this investigator, nothing in his description of their relationship suggested any recent lessening in the strength of this longstanding connection. Further, the investigator in question was working on defendant's case, had already appeared in the courtroom by the time the juror was questioned and, according to the prosecutor, might continue to be present during the trial." ***People v. Montford*, 2016 N.Y. Slip Op. 08901, 3rd Dept 12-29-16**

CRIMINAL LAW, APPEALS.

DEFENDANT'S STATEMENT DURING THE PLEA COLLOQUY THAT HE HAD NO MEMORY OF COMMITTING THE CRIME DUE TO DRUG USE REQUIRED FURTHER INQUIRY BY THE COURT, GUILTY PLEA SHOULD NOT HAVE BEEN ACCEPTED, NARROW EXCEPTION TO PRESERVATION REQUIREMENT APPLIED.

The Third Department determined defendant's guilty plea to attempted robbery should not have been accepted by County Court. The error, although unpreserved, can properly be considered on appeal because defendant's statement during the plea colloquy (that he had no recollection of committing the crime due to his drug use) raised the question whether he could have formed the intent to forcibly steal property: "Defendant's sole contention is that his guilty plea was not knowing,

voluntary and intelligent. Preliminarily, we note that, inasmuch as defendant failed to make an appropriate postallocution motion, this claim is unpreserved for our review ... . Nevertheless, we find that the narrow exception to the preservation rule is applicable because defendant's statement during the plea colloquy that he had no recollection of committing the crime due to drug use raises the unaddressed question of his ability to form the intent to forcibly steal property, an essential element of the crime of attempted robbery ... . Under these circumstances, defendant's statement 'casts significant doubt upon [his] guilt or otherwise calls into question the voluntariness of the plea,' such that County Court was required to conduct a further inquiry to ensure that defendant's guilty plea was knowing and voluntary ... ". ***People v. Laflower*, 2016 N.Y. Slip Op. 08899, 3rd Dept 12-29-16**

CRIMINAL LAW, EVIDENCE, APPEALS.

TEMPORARY INSPECTION STICKER NOT SUFFICIENT TO JUSTIFY TRAFFIC STOP, DRUGS SEIZED FROM DEFENDANT'S CAR SHOULD HAVE BEEN SUPPRESSED, HARMLESS ERROR STANDARD APPLIES TO APPEALS AFTER A GUILTY PLEA.

The Third Department, reversing defendant's conviction, determined the motion to suppress drugs seized from defendant's car should have been granted. The deputy stopped defendant's car based solely on a temporary inspection sticker without any suspicion of criminal behavior. The court noted that the denial of the suppression motion was appealable because defendant did not waive his right to appeal, and the harmless error standard applied because defendant pled guilty after the motion was denied: "The deputy candidly admitted that he had no idea whether the sticker was valid when he made the stop, nor did he indicate that the temporary sticker gave him any other reason for suspicion. He instead stated that his 'general practice' was to stop any vehicle he encountered with a temporary inspection sticker in order to 'ensure [that the sticker had] not expired.' It is entirely proper to operate a motor vehicle with a temporary inspection sticker under certain circumstances and, as a result, the display of one does not constitute grounds for a traffic stop absent a 'specific articulable basis' to believe that illegality is afoot ... . The practice of stopping any vehicle with a temporary inspection sticker, without more, represents impermissible 'idle curiosity' as to the sticker's validity rather than the 'reasonable suspicion' of illegality needed to effect a traffic stop ...". ***People v. Driscoll*, 2016 N.Y. Slip Op. 08902, 3rd Dept 12-29-16**

DEFAMATION, MUNICIPAL LAW, IMMUNITY.

COMPLAINT INCLUDED ACTIONABLE DEFAMATORY STATEMENTS AGAINST THE INDIVIDUAL WHO MADE THE STATEMENTS IN A LETTER TO TOWN OFFICIALS, TOWN OFFICIALS ENTITLED TO ABSOLUTE OR QUALIFIED IMMUNITY.

The Third Department, partially reversing Supreme Court, determined several statements in this defamation action were not merely opinions and were therefore actionable against the defendant who made the statements in a letter to town officials. The republication of the defamatory statements as well as other statements by town officials were entitled to either absolute privilege or qualified immunity. The decision includes substantive discussions of the elements of defamation, opinion versus fact, mixed opinion and fact, absolute immunity and qualified immunity, which cannot be fairly summarized here. With regard to (actionable) fact versus (nonactionable) opinion, the court explained: "It is well settled that, '[s]ince falsity is a necessary element of a defamation cause of action and only facts are capable of being proven false, only statements alleging facts can properly be the subject of a defamation action' ... . 'Distinguishing actionable fact from a protected expression of opinion is a question of law in which several factors are weighed, including whether the allegedly defamatory words have a precise meaning that is readily understood, whether the statement can be proven as true or false, and whether the context and surrounding circumstances would indicate that the comment is an opinion' ... . While a pure expression of opinion is not actionable, a 'mixed opinion' — i.e., one that 'implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it' — can be the subject of a defamation claim ... . 'Rather than sifting through a communication for the purpose of isolating and identifying assertions of fact,' we must 'look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff' ...". ***Hull v. Town of Prattsville*, 2016 N.Y. Slip Op. 08917, 3rd Dept 12-29-16**

FAMILY LAW.

MOTHER'S PETITION TO MODIFY VISITATION WITH HER DAUGHTER SHOULD HAVE BEEN GRANTED, MOTHER WAS SUCCESSFULLY CONTROLLING HER ADDICTION AND WAS MAINTAINING A FULL TIME JOB.

The Third Department, reversing Family Court, determined mother had sufficiently demonstrated a change in circumstances to warrant unsupervised visitation with her child. Mother was successfully controlling her addiction and was maintaining a full-time job: " 'As the party seeking to modify a prior order of visitation, the [mother] bore the initial burden of showing that a change in circumstances has occurred since the entry thereof that is sufficient to warrant Family Court undertaking a best interests analysis in the first instance; assuming that requirement is met, the [mother] then must show that modification of the prior order is necessary in order to ensure the child's continued best interests' ... . In this regard, 'expanded visitation is generally favorable absent proof that such visitation is inimical to the child['s] welfare' ... . The moth-

er's modification request stemmed from certain changes that had occurred in both her personal life and the child's schedule since entry of the prior order. With respect to the child's schedule, the mother explained that, now that the child was enrolled in school, there was a narrow window of opportunity during the school week (60 to 90 minutes each day) when she could enjoy visitations with her daughter. As to her personal life, the mother testified — without contradiction — that she had completed a detox program, was actively engaged in both group therapy and a community-based support group (Alcoholics Anonymous), the latter of which she attended three or four times each week, had obtained a sponsor (with whom she spoke daily and tried to meet in person twice a month), was participating in a Suboxone treatment program (for which she underwent regular testing to monitor the level of Suboxone in her system), was subject to regular drug testing for illegal substances (all of which came back negative), was successfully maintaining a full-time job and, as of the date of the hearing, had been 'clean' for more than one year ...". ***Matter of Beeken v. Fredenburg*, 2016 N.Y. Slip Op. 08919, 3rd Dept 12-29-16**

FAMILY LAW.

COURT SHOULD NOT HAVE GIVEN HUSBAND CREDIT FOR HIGHER CHILD SUPPORT PAYMENTS MADE BEFORE THE LOWER FINAL CHILD SUPPORT AWARD UPON DIVORCE.

The Third Department, in this divorce action, determined that Supreme Court's attempt to give the husband credit for the difference between the higher child support payments imposed prior to the divorce and the lower payments ordered in the final child support award was error: "... [T]he temporary support payments already made by the husband pursuant to the pendente lite order exceeded the retroactive support obligation set forth by Supreme Court. Absent any statutory authority for recoupment of overpayments of child support and given the 'strong public policy against restitution or recoupment of [such] overpayments' ... , we conclude that Supreme Court erred in crediting the husband for the temporary child support payments that he made in excess of what he was required to pay under the final child support award ...". ***Sprole v. Sprole*, 2016 N.Y. Slip Op. 08911, 3rd Dept 12-29-16**

FREEDOM OF INFORMATION LAW (FOIL).

DENIAL OF FREEDOM OF INFORMATION LAW REQUESTS REVERSED, CASE REMITTED TO DETERMINE IF REDACTION CAN ADEQUATLEY PROTECT PRIVACY.

The Third Department, reversing Supreme Court, determined that the requests for information about former public employees who applied for positions in state college police departments should not have been denied. The argument that redaction of identifying information from the documents (to which petitioner agreed) would not protect the applicants' privacy was rejected. The matter was remitted for court review of the documents: "... [R]espondents argue — and Supreme Court agreed — that, given the prominent nature of the positions and the limited number of applicants, disclosure of the requested documents, even with appropriate redactions, could lead to the identification of the unsuccessful applicants. Such speculation, however, 'does not rise to the level of 'a particularized and specific justification for denying access' to the [entirety of] the records requested' ... . Respondents have failed to demonstrate any factual basis for their assertion that the requested documents cannot be redacted in such a manner as to protect the identity of the individual applicants ... . [T]he matter must be remitted to Supreme Court for an in camera inspection of the requested documents to determine the extent to which they contain information exempt from disclosure and whether such information can be redacted while still protecting the personal privacy of those individuals ...". ***Matter of Police Benevolent Assn. of N.Y. State, Inc. v. State of New York*, 2016 N.Y. Slip Op. 08918 3rd Dept 12-29-16**

INVOLUNTARY MEDICAL TREATMENT AND FEEDING (INMATES).

AUTHORIZATION TO FORCE FEED INMATE FOR THE DURATION OF HIS INCARCERATION PROPERLY GRANTED.

The Third Department affirmed the grant of a petition by the prison warden authorizing the force feeding of an inmate for the duration of his incarceration: "When an inmate commences a hunger strike, which, if continued, would create a substantial risk of imminent death or serious permanent injury, a force-feeding order is warranted if the state's intervention, even if contrary to the inmate's constitutional rights, is reasonably related to its legitimate penological interests, including those in preserving the inmate's life and maintaining safety and discipline within the facility (see *Matter of Bezio v. Dorsey*, 21 NY3d 93, 99, 101-107 [2013]). The record shows that respondent had repeatedly engaged in hunger strikes since May 2013 with the stated purpose of obtaining a transfer to a maximum A security facility, and that respondent had stated that he would continue his hunger strike until he died or was transferred. ... We look no further than the holding in *Matter of Bezio v. Dorsey* (supra) to reach the conclusion that the state's interest in preserving respondent's life outweighs any claimed infringement of respondent's constitutional rights. On the record before us, Supreme Court properly issued a force-feeding order for the duration of respondent's incarceration." ***Matter of Martuscello v. Jua TT.*, 2016 N.Y. Slip Op. 08905, 3rd Dept 12-29-16**

PERSONAL INJURY, MUNICIPAL LAW.

PLAINTIFF'S ACTIONS WERE THE SOLE PROXIMATE CAUSE OF HIS INJURY, NEGLIGENT SUPERVISION CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED AS A MATTER OF LAW, NOTICE OF CLAIM WAS SUFFICIENT NOTIFICATION OF THE NEGLIGENT SUPERVISION CAUSE OF ACTION.

The Third Department, reversing Supreme Court, after finding the notice of claim was sufficient notice of the negligent supervision cause of action, determined the defendant town was entitled to summary judgment dismissing the complaint. Town workers were in the process of delivering a load of wood chips to plaintiff. When the wood chips stopped flowing from the the dump truck, plaintiff attempted to free the chips by slamming the tailgate. Plaintiff's thumb and wrist were crushed by the tailgate. Although plaintiff alleged that he called out to the driver (Klopfer) to ask if he should slam the tailgate, there was no response. The Third Department found plaintiff's unilateral decision to slam the tailgate was the sole proximate cause of his injury. ***Barone v. Town of New Scotland*, 2016 N.Y. Slip Op. 08927, 3rd Dept 12-29-16**

PERSONAL INJURY, WORKERS' COMPENSATION LAW, CORPORATION LAW.

QUESTION OF FACT WHETHER WORKER'S COMPENSATION LAW PRECLUDED SUIT IN NEGLIGENCE, DEFENDANT WAS BOTH AN OFFICER OF PLAINTIFF'S EMPLOYER AND OWNER, IN AN INDIVIDUAL CAPACITY, OF THE PREMISES WHERE PLAINTIFF SLIPPED AND FELL.

The Third Department, reversing Supreme Court, determined there was a question of fact whether the Workers' Compensation Law precluded a lawsuit in negligence against the defendant, who was the president and a shareholder of plaintiff's employer, Total Recall, and was the owner, in an individual capacity, of the building in which Total Recall is located. Plaintiff slipped and fell on ice in the parking lot behind the building: "... [W]hen an employee, during the course of his or her employment, is injured due to the negligence of a coemployee, the employee's right to compensation lies under the exclusive provisions of the Workers' Compensation Law (see Workers' Compensation Law § 29 [6] ...). Where the defendant is both the property owner and a corporate officer of the plaintiff's employer, the defendant's responsibility to provide the plaintiff with a safe place to work may be merged, in which case, workers' compensation benefits are the sole remedy for the plaintiff ... . If, however, the 'defendant's duty of care toward [the] plaintiff was owed purely in [the] capacity as owner of the property at the accident site, and not at all as a coemployee,' Workers' Compensation Law § 29 (6) will not bar the plaintiff's negligence action ... . The issue distills to whether the accident site was in an area that was exclusive to Total Recall and its employees such that defendant, as the property owner and an executive officer of Total Recall, had indistinguishable obligations to maintain the area in a reasonably safe condition." ***Garelle v. Geinitz*, 2016 N.Y. Slip Op. 08916, 3rd Dept 12-28-16**

UNEMPLOYMENT INSURANCE.

BLOGGER FOR "THE NATION" MAGAZINE NOT AN EMPLOYEE.

The Third Department, in an extensive decision, reversed the Unemployment Insurance Appeal Board and found that claimant, a blog writer for the "The Nation" magazine, was not an employee and therefore was not entitled to unemployment insurance benefits: "… [T]he record reveals that claimant was not formally interviewed for his position ... , worked from home utilizing his personal laptop, set his own hours and did not suffer any adverse consequences if he did not post a story ... . Additionally, claimant did not have a supervisor ... and was not permitted to work from The Nation's offices. Significantly, the record makes clear that claimant generally was not assigned to write on a particular topic and could post a story to his blog prior to it being edited by The Nation's staff ... . * * * Although claimant was given 'a broad direction to write about the media . . . and politics,'the contents of the post and the topic were really . . . entirely his choice.' Unlike staff writers, claimant could not be compelled to write on a particular topic and, while The Nation preferred that claimant post his articles early in the workday and that such articles be submitted for editorial review prior to posting on the website, the senior editor made clear that claimant had no established work hours, could post whenever and from wherever he wished and that there were 'no repercussions' and 'no consequences' if claimant posted an article later in the day without editorial review or, alternatively, did not post at all on a given day." ***Matter of Mitchell (Nation Co. Ltd. Partners -- Commissioner of Labor)*, 2016 N.Y. Slip Op. 08923, 3rd Dept 12-29-16**

UNEMPLOYMENT INSURANCE.

SECURITY OFFICERS NOT EMPLOYEES OF PLACEMENT SERVICE.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant security officer was not an employee of TMR, which was essentially a placement service which posted security jobs on a secure website: "TMR posted security-related jobs on a secure website for its clients, who dictated the hours to be worked, as well as the scope of services that were needed. The security officers, after browsing through these postings, would request to work on any particular job, which TMR ultimately awarded on a 'first come, first serve' basis. The security officers were free to select a job that they wanted and were not prohibited from seeking jobs from TMR's competitors. TMR did not provide the security officers with training or equipment nor did TMR pay the security officers a set hourly rate. Furthermore, once TMR placed

the security officer with a client, TMR did not enter into a contract with the security officer. While a security officer could be in the middle of a continuing job for a client, he or she was nonetheless free to leave at any point and work elsewhere. In addition, if an issue arose with the security officer's performance, the client dealt with the security officer directly, and TMR would be notified if it needed to provide a substitute security officer." ***Matter of TMR Sec. Consultants, Inc. (Commissioner of Labor)*, 2016 N.Y. Slip Op. 08922, 3rd Dept 12-29-16**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.