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FIRST DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY, PRIVILEGE.

MENTAL HEALTH, HIV, SUBSTANCE ABUSE AND ALCOHOL ABUSE MEDICAL RECORDS NOT DISCOVERABLE IN THIS PERSONAL INJURY CASE.

The First Department, over a two-justice dissent, determined the defendants in this personal injury case did not demonstrate a need for plaintiff's mental health, alcohol abuse, substance abuse and HIV-related medical records. Supreme Court properly issued a protective order to that effect: "Defendants did not meet their burden of showing a 'compelling need' for medical records concerning HIV; they failed to submit evidence that would establish a connection between plaintiff's claimed HIV status and her future enjoyment of life (Public Health Law § 2785[2][a]...). Similarly, defendants failed to meet their burden of showing that 'the interests of justice significantly outweigh the need for confidentiality' such to permit discovery of mental health, alcohol abuse, or substance abuse records (Mental Hygiene Law § 33.13[c][1]; Mental Hygiene Law § 22.05 [b] ...). As the dissent notes, as a rule, 'all matter material and necessary in the prosecution or defense of an action' should be fully disclosed (CPLR 3101[a] ...). However, plaintiff's alleged general anxiety and mental anguish from back and leg injuries do not place her entire mental and physical health into contention ... . She has not, as argued by the dissent, waived any protection applicable to such records." ***James v. 1620 Westchester Ave. LLC*, 2017 N.Y. Slip Op. 01303, 1st Dept 2-21-17**

CONTRACT LAW.

POSSIBLE APPLICABILITY OF THE CONSCIOUS IGNORANCE DOCTRINE PRECLUDED SUMMARY JUDGMENT IN THIS MUTUAL MISTAKE ACTION.

The First Department, over an extensive dissent, determined a question of fact precluded summary judgment in this "mutual mistake" action. Plaintiff purchased two artifacts which were supposed to be ancient. Both were subsequently deemed by experts to be modern in origin. Plaintiff sought to rescind the purchase as having been based upon mutual mistake. There was evidence, however, that plaintiff was aware the defendant had sold "fake" artifacts in the past, raising an issue of fact about the applicability of the "conscious ignorance' exception the mutual mistake doctrine: 'The doctrine of mutual mistake 'may not be invoked by a party to avoid the consequences of its own negligence' ... . Where a party 'in the exercise of ordinary care, should have known or could easily have ascertained' the relevant fact ... – here, whether the items were ancient – that party is deemed to have been '[c]onscious[ly] ignoran[t]' and barred from seeking rescission ... or other damages. This is true '[e]ven where a party must go beyond its own efforts in order to ascertain relevant facts (such as obtaining experts' reports)' ...". ***Jerome M. Eisenberg, Inc. v. Hall*, 2017 N.Y. Slip Op. 01437, 1st Dept 2-23-17**

CONTRACT LAW, CIVIL PROCEDURE.

CONTINUING WRONG DOCTRINE DID NOT APPLY TO EXTEND THE STATUTE OF LIMITATIONS IN THIS BREACH OF CONTRACT ACTION.

The First Department determined the continuing wrong doctrine did not apply to extend the statute of limitations in this breach of contract action. Plaintiff alleged he should not have been billed for certain services in which he never enrolled and the issuance of each new bill continued the wrong: "In contract actions, the doctrine is applied to extend the statute of limitations when the contract imposes a continuing duty on the breaching party ... . Thus, where a plaintiff asserts a single breach — with damages increasing as the breach continued — the continuing wrong theory does not apply ... . Here, the alleged wrongs are the enrollment of plaintiff in the CPP and PAS programs in March 2001 and 2007, respectively, and there was no breach of a recurring duty. The monthly billings demanding payment of CPP and PAS fees, both before and after plaintiff closed his account, represent the consequences of those wrongful acts in the form of continuing damages, not the wrongs themselves, and do not qualify for application of the continuous wrong doctrine." ***Henry v. Bank of Am.*, 2017 N.Y. Slip Op. 01436, 1st Dept 2-23-17**

CONTRACT LAW, CIVIL PROCEDURE.

CONTRACT FOR INTERIOR DECORATOR SERVICES AND THE PURCHASE OF FURNITURE AND ACCESSORIES WAS A SERVICE CONTRACT GOVERNED BY THE SIX-YEAR STATUTE OF LIMITATIONS, NOT A CONTRACT FOR THE PURCHASE OF GOODS GOVERNED BY THE FOUR-YEAR STATUTE OF LIMITATIONS.

The First Department, in a full-fledged opinion by Justice Acosta, reversing Supreme Court, in a case of first impression, determined a mixed contract for interior decoration services and the purchase of furniture and other goods is governed by the six-year statute of limitations for service contracts, not the four-year statute of limitations for contracts for the purchase of goods: "In this case, the contract was primarily for interior design services, and the provision of furniture and accessories was merely incidental. Thus, the six-year statute of limitations applies. This conclusion is supported by the fact that plaintiff is an expert in the field of interior design, and it is clear from the contract that Ms. Swenson [defendant] hired her for that reason. The contract, which is on plaintiff's interior design company's letterhead, states that plaintiff will provide advice and design suggestions regarding construction, cabinetry, painting, and using the clients' existing items. Plaintiff stated that she designed most of the rooms throughout defendants' Tuxedo Park house, and the contract provides that she will select products and materials, show them to Ms. Swenson, and then purchase them on her behalf. In addition, the contract provides that defendants will be charged 'List price,' which plaintiff states is understood in the industry to include both the cost of the materials as well as a percentage service fee. Moreover, the contract acknowledges that certain 'custom work' will be done by 'interior designers work people,' and a number of the invoices referenced such 'custom made' items. Finally, plaintiff and Ms. Swenson also agreed that plaintiff could use and publish photographs of the items to show off plaintiff's work, which demonstrates that plaintiff's value is attributed to the selection of the various items and putting them together for a particular scheme, not merely to her acting as a retailer." ***Hagman v. Swenson*, 2017 N.Y. Slip Op. 01483, 1st Dept 2-23-17**

CRIMINAL LAW, APPEALS, CIVIL PROCEDURE.

NO INTERLOCUTORY APPEAL FROM DENIAL OF A CIVIL MOTION MADE IN THE CONTEXT OF A CRIMINAL PROCEEDING.

The First Department determined the denial of a civil motion seeking discovery (letters rogatory) oversees which was made in the context of a criminal proceeding could not be the subject of an interlocutory appeal: "In this matter where an indictment has been filed, a criminal trial is pending, and defendants seek information via letters rogatory for use at their criminal trial, the denial of the application for such letters is part of the criminal proceeding, notwithstanding that the application was brought under CPLR 3108 ... . 'It is well established that no appeal lies from a determination made in a criminal proceeding unless specifically provided for by statute' ... . The order appealed from is not a disposition listed in CPL 450.10 or 450.15, and is therefore not an appealable paper ... . A 'defendant may only appeal after conviction' ... , and may not obtain an interlocutory appeal by claiming to invoke the court's civil jurisdiction." ***People v. DePalo*, 2017 N.Y. Slip Op. 01441, 1st Dept 2-23-17**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT WAS ENTITLED TO A HEARING ON HIS MOTION TO SET ASIDE HIS CONVICTION ON INEFFECTIVE ASSISTANCE GROUNDS, WHETHER THE OUTCOME OF THE TRIAL WOULD HAVE BEEN DIFFERENT ABSENT DEFENSE COUNSEL'S MISTAKES IS NOT THE FOCUS OF THE INEFFECTIVE-ASSISTANCE ANALYSIS.

The First Department, over an extensive two-justice dissent, determined defendant was entitled to a hearing on his motion to set aside the judgment of conviction based upon ineffective assistance of counsel. Defendant alleged that he wanted to testify but didn't because the Sandoval hearing was never completed and defense counsel never asked that it be completed. Defendant further alleged defense counsel told defendant not to testify and threatened to leave the case if defendant insisted. Defendant also alleged defense counsel was paid to hire an expert on DNA evidence but never did. Defendant submitted expert opinion evidence that cross-examination of the People's DNA expert could have been more effective had the defense been advised by a defense expert. The First Department explained that an inquiry into whether a defendant received effective assistance is not an inquiry into whether the outcome of the trial would have been different absent the mistakes by counsel. The only issue is whether defendant received a fair trial: "It is well established that a defendant who is represented by counsel nevertheless retains authority over certain fundamental decisions regarding the case, including the decision whether to testify in his or her behalf ... . The decision to testify in one's behalf is personal and can be waived only by the defendant, not counsel alone ... . Defendant's affidavit submitted with the 440.10 motion made clear that he informed trial counsel that he wished to testify, depending on the outcome of the Sandoval hearing. In light of this affidavit, a hearing is required to more fully explore the circumstances surrounding trial counsel's alleged representation to the court that defendant would not be testifying, and whether defendant was aware of, and concurred with, that decision. * * * The dissent argues that no hearing is necessary because 'the alleged deficiencies in trial counsel's performance . . . could not have affected the result of the trial.' That, however, is not the standard for reviewing claims of ineffective assistance of counsel under the State Constitution." ***People v. Mercado*, 2017 N.Y. Slip Op. 01439, 1st Dept 2-23-17**

CRIMINAL LAW, CIVIL PROCEDURE, EVIDENCE, JUDGES.

WRIT OF PROHIBITION PROPER REMEDY FOR TRIAL COURT'S ERRONEOUS EVIDENTIARY RULING, COLLATERAL ESTOPPEL DOCTRINE SHOULD NOT HAVE BEEN APPLIED TO PRECLUDE EVIDENCE IN THIS CRIMINAL CASE.

The First Department, in a full-fledged opinion by Justice Gische, determined the trial court should not have applied the collateral estoppel doctrine to preclude the People from introducing evidence the defendant used a firearm to threaten the robbery victim. The grand jury dismissed the robbery first count and indicted on robbery third. The trial court reasoned that the grand jury necessarily found the defendant did not have a weapon by refusing to indict on robbery first. The First Department held: (1) the article 78 proceeding seeking a writ of prohibition (brought by the People against the trial judge) was the appropriate remedy; and (2) the trial judge is prohibited from enforcing the order precluding evidence of the defendant's possession of a weapon: "A writ of prohibition is an extraordinary remedy, only available to prevent a court from either acting without jurisdiction or in excess of its authorized powers in a proceeding over which it otherwise has jurisdiction ... . Prohibition is not available to review mere errors of law, even when the errors are truly egregious ... . 'Although the distinction between legal errors and actions made in excess of authority is not always easily made, abuses of power may be identified by their impact on the entire proceeding as distinguished from an error in a proceeding itself' ... . * * * At bar, although the ruling did not actually terminate the case, it effectively terminated the ability of the People to prosecute the highest count in the indictment ... . We therefore find that the court's ruling is reviewable by way of a writ of prohibition. * * * The Court of Appeals has recognized ... that for policy reasons collateral estoppel is not as liberally applied in criminal prosecutions as in civil actions ... . The rigid application of collateral estoppel must yield to society's preeminent and overwhelming interest in ensuring the correctness of determinations of guilt or innocence ... . 'Thus, if ... collateral estoppel 'cannot practicably be followed if a necessary witness is to give truthful testimony, then [the doctrine] should not be applied' ...". ***Matter of Clark v. Newbauer*, 2017 N.Y. Slip Op. 01326, 1st Dept 2-21-17**

CRIMINAL LAW, EVIDENCE.

FIVE HOUR BREAK SUFFICIENT TO DISSIPATE EFFECT OF THE MIRANDA VIOLATION.

The First Department determined Supreme Court properly denied suppression of the February 5th statement, as well as the first portion of the July 11th videotaped statement by the defendant, despite the suppression of statements made five or six hours earlier on July 11. The videotaped statement was deemed sufficiently attenuated from the inadmissible statements: "Defendant's videotaped statement was made approximately five hours after the initial Miranda violation. Much shorter breaks have been found sufficient to dissipate the taint of a Miranda violation ... . In addition, 'defendant had demonstrated an unqualified desire to speak' ... , seemed alert and relaxed in the video, and did not appear nervous or intimidated. Indeed, he was even 'laughing on occasion.' Defendant had been Mirandized after his first encounter with the police concerning the case, on February 5. Further, the ADA — who had not participated in the earlier interrogation — was the sole questioner in the admitted portion of the video. Although two of the detectives who had conducted the earlier interrogation were present, they did not participate in the questioning in the admitted segment. Notably, the court suppressed any references to the suppressed statements made earlier on July 11th, as well as the later portion of the video in which the detectives participated in questioning ...". ***People v. Richardson*, 2017 N.Y. Slip Op. 01304, 1st Dept 2-21-17**

CRIMINAL LAW, EVIDENCE.

MIRANDA WARNINGS AND 710.30 NOTICE NOT REQUIRED; DEFENDANT'S STATEMENT HE RESIDED AT THE APARTMENT WHERE CONTRABAND WAS FOUND WAS IN RESPONSE TO PEDIGREE QUESTIONS.

The First Department determined the defendant's statement that he lived in the apartment which was searched and where contraband was found did not require Miranda warnings or a 710.30 notice: "Neither Miranda warnings nor CPL 710.30(1)(a) notice was required with respect to defendant's statement, in response to a detective's pedigree question, that his residence was the apartment where the police had executed a search warrant and discovered contraband. The detective's routine administrative questioning was not designed to elicit an incriminating response ... , even if the answer was reasonably likely to be incriminating ...". ***People v. Martin*, 2017 N.Y. Slip Op. 01309, 1st Dep 2-21-17**

FAMILY LAW.

WIFE ENTITLED TO A PERCENTAGE OF HUSBAND'S ENHANCED EARNING CAPACITY BY ENABLING HUSBAND'S LONG WORKING HOURS AND HIS STUDY FOR MEDICAL BOARD EXAMS.

The First Department determined defendant wife was properly awarded a percentage of plaintiff husband's enhanced earning capacity related to his medical license. Husband worked long hours and unpopular shifts as an anesthesiologist to earn double the average salary of his peers---over $800,000 per year at one point. Wife enabled husband's intense work schedule by caring for the children and home. [The decision is extensive and covers many issues not summarized here]: "The court … properly exercised its discretion in making a distributive award equal to 10% of plaintiff's enhanced earnings ... . It is well-established law that both parties in a matrimonial action are entitled to 'fundamental fairness in the allocation

of marital assets, and that the economic and noneconomic contributions of each spouse are to be taken into account' .... . In reaching its decision the court below considered the statutory factors listed in Domestic Relations Law § 236, as well as the nontitled defendant spouse's direct and/or indirect contributions to the marriage ... . [P]laintiff was earning almost twice as much as other ... doctors [in the firm] because he worked extraordinarily long hours, accepted unpopular shifts, like holidays, weekends and evenings, and was better compensated precisely because plaintiff kept this "totally unbalanced life." By not adhering to a more balanced work schedule, plaintiff necessarily shifted primary responsibility for his home life to defendant. Although he may have borne equal, if not primary, responsibility for the children when he was home, this was often a physical impossibility, given his demanding work schedule. Defendant not only made it possible for plaintiff to work the grueling schedule that he kept, she also made sure plaintiff was able to study without interruption for the boards on two separate occasions. She did this by taking the children away to visit relatives and doing other things to keep them out of his way." ***Ning-Yen Yao v. Karen Kao-Yao*, 2017 N.Y. Slip Op. 01440, 1st Dept 2-23-17**

FRAUD.

FRAUD-BASED AND UNJUST ENRICHMENT CAUSES OF ACTION PROPERLY DISMISSED, PLEADING REQUIREMENTS EXPLAINED.

The First Department determined plaintiffs' fraud-based causes of action and the unjust enrichment cause of action were properly dismissed. Plaintiffs alleged defendant fraudulently induced them to sell their business (for $190 million) at a deflated price by concealing that the buyer was a competing business: "Damages for fraud are calculated according to the 'out-of-pocket; rule and must reflect 'the actual pecuniary loss sustained as the direct result of the wrong' ... . Damages may only properly compensate plaintiffs for 'what they lost because of the fraud, not . . . for what they might have gained,' and 'there can be no recovery of profits which would have been realized in the absence of fraud' ... . Here, plaintiffs seek to recover the profits they might have gained had the true identity of the buyer been revealed. But there is no way of knowing what purchase price would have been agreed upon had the buyer's identity been known. Nor is there any suggestion that the agreed price was unfair ... . Plaintiffs' fraud-based claims also fail because their reliance on the alleged misrepresentations was not reasonable. Plaintiffs did not press defendant for a contractual warranty regarding the purchaser's identity, or even for direct answers to their questions on this subject, despite their awareness of defendant's close relationship with their competitor and suspicions regarding its involvement. ... Plaintiffs' unjust enrichment claim was also properly dismissed. To successfully plead unjust enrichment, '[a] plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered' ... . Here, the second element is not satisfied. Plaintiffs claim that defendant was unjustly enriched by a $25 million fee received from the competitor for its assistance in facilitating the purchase. Although there is no black-and-white rule that the payment complained of must have been made by the plaintiff itself ... , plaintiffs' claimed entitlement to the fee is too speculative to support their allegation that defendant was enriched 'at [their] expense' ...". ***Norcast S.ar.l. v. Castle Harlan, Inc.*, 2017 N.Y. Slip Op. 01479, 1st Dept 2-23-17**

INSURANCE LAW, CONTRACT LAW.

ALTHOUGH THE INSURANCE POLICY EXCLUDED WATER DAMAGE AND THE INSURED PROPERTY WAS FLOODED DURING HURRICANE SANDY, THE INSURER'S EXPERT'S AFFIDAVIT DID NOT REFUTE THE ALLEGATION THE INSURED PROPERTY WAS DAMAGED BY AN ELECTRICAL SHORT A MONTH AFTER THE STORM WHEN ELECTRICITY WAS RESTORED.

The First Department determined the insurer's (National Specialty's) motion for summary judgment dismissing the complaint was properly denied. The insurance policy excluded water-related damage. There was no question that the building housing plaintiff's (Pastabar's) refrigeration equipment was flooded during Hurricane Sandy. However, plaintiff alleged damage to the refrigeration equipment was caused by an electrical short when the electricity was turned on a month after the storm. The affidavit from the insurer's expert did not refute plaintiff's allegation: "In compliance with its obligations under its lease, Pastabar had bought a commercial package policy containing commercial general liability and property damage coverage from defendant National Specialty. * * * National Specialty failed to establish prima facie that all of Pastabar's claimed losses were caused by flood waters resulting from Hurricane Sandy ... , and were thus within the insurance policy exclusion for water and floods. Based on photographs that Pastabar received from an unidentified neighbor, National Specialty's expert made a finding concerning the exterior water level at the premises ... . However, the expert never inspected the site or the electrical wiring. Therefore, the expert could not refute testimony by Pastabar's manager that Pastabar suffered additional damage a month after the storm, when electricity was restored and caused "the melting of wires and burning of . . . most of the equipment." Thus, the expert's report never rose above the level of speculation ...". ***Pastabar Café Corp. v. 343 E. 8th St. Assoc., LLC*, 2017 N.Y. Slip Op. 01305, 1st Dept 2-21-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW 240(1) CAUSE OF ACTION, PLAINTIFF FELL OFF MATERIAL STACKED ON A FLATBED TRUCK.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law 240(1) cause of action. He fell from scaffolding materials stacked on a flatbed truck: "Plaintiff's testimony that he fell from scaffolding materials stacked atop the surface of a flatbed truck, about 10 feet above the ground, and that he was not provided with a safety device that would have prevented his fall, was sufficient to establish his entitlement to partial summary judgment on his Labor Law § 240(1) claim ... . Although plaintiff was wearing a safety harness at the time of the accident, there was no place on the truck where the harness could be secured." ***Idona v. Manhattan Plaza, Inc.*, 2017 N.Y. Slip Op. 01444m 1st Dept 2-23-17**

PERSONAL INJURY.

REAR DRIVER MUST TAKE WEATHER CONDITIONS INTO ACCOUNT WHEN FOLLOWING ANOTHER CAR, PLANTIFF'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED IN THIS REAR-END COLLISION CASE.

The First Department determined plaintiff's motion for summary judgment in this rear-end collision case was properly granted. The driver of the rear vehicle must take weather conditions into account when following another car. The emergency doctrine is not available because the driver was aware of the weather conditions. An allegation that the plaintiff's car stopped suddenly is not enough to rebut the presumption of negligence: "A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate, nonnegligent explanation for the accident ... . Plaintiff made a prima facie showing of his entitlement to partial summary judgment on the issue of liability by establishing that defendant Angel Sanchez, the driver of defendant Basics Development Group's vehicle, was negligent. Although plaintiff came to a sudden stop and defendants contend that icy road conditions that day provide a valid, non-negligent explanation for why the accident occurred (i.e., that Sanchez's car skidded), a driver is expected to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road conditions ... . Furthermore, defendants' reliance on the emergency doctrine is misplaced, since that defense is unavailable where, as here, defendant driver was aware of inclement weather conditions and should have properly accounted for them … . Defendants' alternative argument, that plaintiff stopped suddenly, is insufficient to rebut the presumption of Sanchez's negligence ...". ***Matos v. Sanchez*, 2017 N.Y. Slip Op. 01306, 1st Dept 2-21-17**

PERSONAL INJURY.

THE ALLEGATION THE LEAD CAR STOPPED SUDDENLY NOT ENOUGHT TO DEFEAT LEAD CAR'S SUMMARY JUDGMENT MOTION.

The First Department, reversing (modifying) Supreme Court, determined the owner of the lead car struck from behind was entitled to summary judgment. The allegation the lead car stopped suddenly was not sufficient to raise a question of fact: "A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of that driver to 'come forward with an adequate nonnegligent explanation for the accident' ... . A claim by the rear driver that 'the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence' ...". ***Bajrami v. Twinkle Cab Corp.*, 2017 N.Y. Slip Op. 01458, 1st Dept 2-23-17**

PERSONAL INJURY, EMPLOYMENT LAW.

JANITOR CAN NOT SUE FOR A SLIP AND FALL CAUSED BY THE CONDITION HE WAS TO REMEDY AS PART OF HIS JOB.

The First Department, reversing Supreme Court, determined plaintiff janitor could not sue for a slip and fall because the fall was caused by the condition he attempting to remedy as part of his job: "Dismissal of the complaint as against defendants is warranted in this action where plaintiff janitor alleges that he was injured when he slipped on pebbles on the bathroom floor of the building he was hired to clean. It is well established that a maintenance or cleaning worker has no claim at law for injury suffered from a dangerous condition that he was hired to remedy ... , and here, plaintiff stated that as part of his job cleaning the bathroom, he frequently removed the pebbles from the floor." ***Black v. Wallace Church Assoc.*, 2017 N.Y. Slip Op. 01480, 1st Dept 2-23-17**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFFS' EXPERTS RAISED ISSUES OF FACT REQUIRING DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION.

The First Department, in a full-fledged opinion by Justice Renwick, over a two-justice dissenting opinion, determined Supreme Court properly denied the defendants' motion for summary judgment in this medical malpractice action. The dissent

found the plaintiffs' experts' opinions too speculative to raise a question of fact. The opinion is fact-specific and cannot be fairly summarized here: "In sum, defendants submitted expert affirmations that established prima facie that they did not depart from good and accepted medical practice or that any such departure was not a proximate cause of [plaintiff's] injuries ... . In opposition, plaintiffs submitted expert opinions that raised issues of fact as to the following alleged departures: the premature release of [plaintiff] from postanesthesia care unit, the failure to identify and treat his overdose or adverse reaction to morphine, and the failure to timely respond to his cardiorespiratory arrest ...". ***Severino v. Weller*, 2017 N.Y. Slip Op. 01325, 1st Dept 2-21-17**

SECURITIES, FRAUD.

INFORMATION ALLEGED BY THE DEFENDANTS TO HAVE REVEALED FRAUD IN THE SALE OF CREDIT DEFAULT OBLIGATIONS AT A TIME WHICH RENDERED THE CURRENT FRAUDULENT MISREPRESENTATION ACTION TIME-BARRED WAS NOT SUFFICIENT TO WARRANT A DISMISSAL AT THE PLEADING STAGE.

The First Department, in a full-fledged opinion by Justice Mazzarelli, over a two-justice dissent, in a case involving the sale of credit default obligations (CDO's), determined the motion to dismiss the fraudulent misrepresentation cause of action was properly denied. Defendants argued the plaintiffs had sufficient information to alert them to the fraud at a time which would render the current action time-barred. The First Department determined the information cited by the defendants was insufficient to support dismissal at the pleading stage. [The opinion is fact-specific and too detailed to fairly summarize here]: "Here, it is undisputed that, when plaintiffs commenced the action, six years had passed since plaintiffs made their investments in the Funds. The question, then, is whether plaintiffs discovered, or could with reasonable diligence have discovered, the fraud more than two years before commencement (CPLR 213[8]). * * * ... [W]e make no conclusive finding that plaintiffs were blind to the scheme they accuse defendants of perpetrating. We merely determine, at this early stage of the litigation, that the evidence presented by defendants can be interpreted in a myriad of ways and does not facially clash with plaintiffs' position that, even having some knowledge that the Funds had an equity component to them, they could not have known before the SEC proceeding the extent to which defendants used plaintiffs' investment to acquire and control the Portfolio Companies, or otherwise had an obligation, based on that evidence, to further investigate. Thus, Supreme Court properly declined to dismiss the fraudulent misrepresentation complaint on statute of limitations grounds, and the viability of the defense must await a fully developed factual record, at which point it can be either decided as a matter of law on a motion for summary judgment, or at a trial." ***Norddeutsche Landesbank Girozentrale v. Tilton*, 2017 N.Y. Slip Op. 01482, 1st Dept 2-23-17**

SECOND DEPARTMENT

ANIMAL LAW, LANDLORD-TENANT, PERSONAL INJURY.

QUESTION OF FACT WHETHER LANDLORD'S AGENTS WERE AWARE OF THE DOG'S VICIOUS PROPENSITIES IN THIS DOG-BITE CASE, LANDLORD'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this dog-bite case, determined there was a question of fact whether the landlord's (Fowler LLC's) agents knew of the vicious propensities of a dog on the premises: " 'To recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog' ... . 'Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others' ... . 'Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm' ... . Fowler met its prima facie burden for judgment as a matter of law by demonstrating that it was not aware, nor should it have been aware, that the dog had any vicious propensities ... . However, in opposition to the motion, the plaintiff raised a triable issue of fact as to whether nonparties John Martel and Carlos Ortez were Fowler's agents such that their knowledge of the dog's alleged vicious propensities could be imputed to Fowler ...". ***Kraycer v. Fowler St., LLC*, 2017 N.Y. Slip Op. 01345, 2nd Dept 2-22-17**

CIVIL PROCEDURE, PERSONAL INJURY.

PROMPT MOTION TO STRIKE NOTE OF ISSUE AND CERTIFICATE OF READINESS SHOULD HAVE BEEN GRANTED, DISCOVERY WAS NOT COMPLETE.

The Second Department, reversing Supreme Court, determined defendants' motion to strike the note of issue and certificate of readiness should have been granted on the ground discovery was incomplete: "The Supreme Court should have granted the defendants' motion to strike the note of issue and certificate of readiness and to compel the plaintiff to appear for an independent medical examination ... . 'While discovery determinations rest within the sound discretion of the trial court, the Appellate Division is vested with a corresponding power to substitute its own discretion for that of the trial court' ... . Under

the circumstances of this case, including the defendants' prompt motion to strike the note of issue and certificate of readiness on the ground that discovery was incomplete, and the plaintiff's failure to demonstrate any prejudice in opposition, the note of issue and certificate of readiness should be stricken, and the plaintiff compelled to appear for an independent medical examination so that discovery may be completed." ***Moses v. B & E Lorge Family Trust*, 2017 N.Y. Slip Op. 01349, 2nd Dept 2-22-17**

CIVIL PROCEDURE, PERSONAL INJURY.

EXCLUDING A REPRESENTATIVE OF THE DEFENDANT ELEVATOR COMPANY FROM THE COURTROOM AND PROHIBITING COMMUNICATION BETWEEN DEFENSE COUNSEL AND THE REPRESENTATIVE REQUIRED A NEW TRIAL IN THE INTEREST OF JUSTICE.

The Second Department ordered a new trial (in the interest of justice) in this elevator accident case because the trial judge excluded a witness representing the elevator company from the courtroom and prohibited any communication between the witness and defense counsel: "... [A] new trial is required due to the Supreme Court's error in excluding a witness from the courtroom and in prohibiting the witness from communicating with defense counsel during the trial as to any matter. The witness at issue was an employee of the defendant and the representative it had designated to assist in the defense of this action. Under these circumstances, and in the absence of extenuating circumstances, the witness was entitled to remain in the courtroom throughout the trial ... . Further, the court's decision to prohibit defense counsel from communicating at all with the witness, who was knowledgeable about the technical aspects of elevator mechanics and maintenance that were the subject of the testimony of the plaintiff's expert, compromised the defendant's ability to assist in and present its defense ...". ***Perry v. Kone, Inc.*, 2017 N.Y. Slip Op. 01395, 2nd Dept 2-22-17**

CONTRACT LAW, EVIDENCE.

PROFFERED COPY OF A GUARANTY PROPERLY EXCLUDED FROM EVIDENCE.

The Second Department determined Supreme Court properly excluded a purported copy of a guaranty from evidence and properly dismissed the complaint which sought enforcement of the guaranty. The purported original guaranty was incomplete and was withdrawn as evidence: "Supreme Court properly determined that the proffered copy of the guaranty was inadmissible as secondary evidence of the terms of the guaranty or pursuant to CPLR 4539(a). Under an exception to the best evidence rule, 'secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith' ... . Once the absence of an original document is excused, all competent secondary evidence is generally admissible to prove its contents ... . However, the proponent of the secondary evidence has a 'heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original' ... . 'Thus, as a threshold matter, the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original' before ruling on its admissibility' ... . Here, even if the plaintiff sufficiently explained the unavailability of the original guaranty ... , it failed to meet its heavy burden of establishing that the proffered copy was a reliable and accurate portrayal of the original ... . The plaintiff's principal was not present when the original guaranty was executed, and thus could not testify as to whether the original guaranty was similarly missing a portion of paragraph 4, while Gluck testified that the guaranty she executed contained complete paragraphs. Further, the copy was not satisfactorily identified as a copy of the guaranty so as to be admissible as a reproduction pursuant to CPLR 4539(a) ...". ***76-82 St. Marks, LLC v. Gluck*, 2017 N.Y. Slip Op. 01329, 2nd Dept 2-22-17**

CRIMINAL LAW, EVIDENCE.

NO PROOF DEFENDANT INTENDED TO PERMANENTLY, AS OPPOSED TO TEMPORARILY, DEPRIVE COMPLAINANT OF POSSESSION OF HIS CAR, ATTEMPTED ROBBERY CONVICTIONS REVERSED.

The Second Department reversed defendant's attempted robbery convictions as against the weight of the evidence. Defendant, covered in blood, approached the complainant's car, asked to be taken to the hospital, and then tried to open the car door. That proof was insufficient to demonstrate larcenous intent, which is the intent to permanently deprive someone of his or her property: " 'In order to sustain a conviction for robbery . . . the People must establish that defendant had the requisite intent—that is, larcenous intent. Larcenous intent means the intent to deprive another of property or to appropriate the same to himself or to a third person' ... . The terms 'deprive' and 'appropriate' are specifically defined in Penal Law § 155.00(3) and (4), respectively, and connote a purpose 'to exert permanent or virtually permanent control over the property taken, or to cause permanent or virtually permanent loss to the owner of the possession and use thereof' ... . Thus, '[t]he mens rea element of larceny . . . is simply not satisfied by an intent temporarily to use property without the owner's permission, or even an intent to appropriate outright the benefits of the property's short-term use' ...". ***People v. Terranova*, 2017 N.Y. Slip Op. 01390, 2nd Dept 2-22-17**

CRIMINAL LAW, JUDGES.

TRIAL JUDGE'S EXTENSIVE QUESTIONING OF WITNESSES DEPRIVED DEFENDANT OF A FAIR TRIAL.

The Second Department ordered a new trial because the trial judge conducted extensive questioning of witnesses: "Supreme Court conducted excessive and prejudicial questioning of trial witnesses, warranting a new trial. Although defense counsel did not object to the questioning of witnesses by the court, we reach this contention in the exercise of our interest of justice jurisdiction .... . '[W]hile a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on the function or appearance of an advocate' ... . 'In last analysis, [the trial judge] should be guided by the principle that his [or her] function is to protect the record, not to make it' ... . '[T]he line is crossed when the judge takes on either the function or appearance of an advocate at trial' ... . Indeed, 'even proper questions from trial judges present significant risks of prejudicial unfairness, particularly when the trial judge indulge[s] in an extended questioning' of witnesses' ... . * * * ... [T]he court's improper interference with the conduct of the trial deprived the defendant of a fair trial, and a new trial is warranted ...". ***People v. Davis*, 2017 N.Y. Slip Op. 01381, 2nd Dept 2-22-17**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

REQUEST TO FILE LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's request for leave to file a late notice of claim should have been denied. Plaintiff student was allegedly injured at school in a collision with another student at recess. The Second Department held that plaintiff (1) did not demonstrate the school's timely awareness of the negligent supervision allegations (knowledge of plaintiff's injury was not enough), (2) did not present a reasonable excuse for the failure to timely file, and (3) did not demonstrate the school was not prejudiced by the delay (therefore the burden did not shift to the school to demonstrate prejudice): "... [A]s to the issue of substantial prejudice, the petitioners presented no "evidence or plausible argument" that their delay in serving a notice of claim did not substantially prejudice the appellant in defending on the merits ... . The petitioners contend that the appellant has not been substantially prejudiced in its defense because the condition of the accident location has not changed. The condition of the accident location is irrelevant, however, to the petitioners' claim of negligence—that the appellant was negligent in its supervision of students during a noon recess—and, thus, to the issue of substantial prejudice as well. The petitioners also assert that there were no known witnesses to the incident and, therefore, their delay in filing a notice of claim did not substantially prejudice the appellant in its ability to investigate. This contention runs counter to the petitioners' allegation that the incident, a collision between the infant petitioner and another student, occurred during a group activity. Lastly, the petitioners contend that the availability of records as to the infant petitioner's injuries establishes a lack of substantial prejudice. The medical records, however relevant to the issue of damages, have little, if anything, to do with the appellant's ability to conduct an investigation as to its liability ... . Thus, their availability does not support the petitioners' argument that the appellant has not been substantially prejudiced. Inasmuch as the petitioners failed to present any evidence or plausible argument that the appellant has not been substantially prejudiced by the delay, the appellant never became required to make "a particularized evidentiary showing" that they were substantially prejudiced ...". ***Matter of A.C. v. West Babylon Union Free School Dist.*, 2017 N.Y. Slip Op. 01351, 2nd Dept 2-22-17**

FAMILY LAW.

SUPREME COURT SHOULD HAVE ORDERED PENDENTE LITE MAINTENANCE DESPITE WAIVER OF MAINTENANCE UPON TERMINATION OF THE MARRIAGE IN THE PRENUPTIAL AGREEMENT, SUPREME COURT FAILED TO EXPLAIN THE DEVIATION FROM THE CHILD SUPPORT STANDARDS ACT IN ITS AWARD OF PENDENTE LITE CHILD SUPPORT, CASE REMITTED.

The Second Department determined a waiver of maintenance, equitable distribution and an award of attorney's fees included in the prenuptial agreement did not preclude Supreme Court from awarding temporary relief prior to termination of the marriage. The Second Department also held that Supreme Court's pendente lite child support deviated from the criteria of the Child Support Standards Act (CSSA) and therefore an explanation for the deviation was required: "Although the prenuptial agreement contains a waiver of maintenance, equitable distribution, and an award of attorney's fees in the event of termination of the marriage, it does not bar temporary relief, including pendente lite maintenance and attorney's fees during the pendency of this litigation ... . While the Supreme Court properly awarded the plaintiff interim attorney's fees, the court, without explanation, improvidently denied that branch of the plaintiff's motion which was for an award of pendente lite maintenance. Accordingly, we remit the matter to the Supreme Court, Nassau County, for a new determination of that branch of the plaintiff's motion ... . In determining an award of pendente lite child support, courts may, in their discretion, apply the Child Support Standards Act (hereinafter CSSA) standards and guidelines, but they are not required to do so ... . 'However, under some circumstances, particularly where sufficient economic data is available, an award of temporary child support that deviates from the level that would result if the provisions of the CSSA were applied may constitute an improvident exercise of discretion, absent the existence of an adequate reason for the deviation' ... . Here, the court failed to provide any explanation as to how it determined the amount of the award of pendente lite child support. Under

the circumstances of this case, the matter must be remitted to the Supreme Court ...". ***Kashman v. Kashman*, 2017 N.Y. Slip Op. 01343, 2nd Dept 2-22-17**

FAMILY LAW.

FAMILY COURT SHOULD NOT HAVE SUMMARILY DENIED COUNTY'S APPLICATION FOR PATERNITY DNA TESTING WITHOUT REQUIRING PUTATIVE FATHER TO RAISE A QUESTION OF FACT TO SUPPORT THE EQUITABLE ESTOPPEL DEFENSE; COUNTY HAS STATUTORY AUTHORITY TO BRING A PATERNITY ACTION WHEN THE MOTHER OR CHILD IS LIKELY TO BECOME A PUBLIC CHARGE.

The Second Department, reversing Family Court, determined Family Court should not have denied, without a hearing, the County's request for DNA paternity testing. The putative father had not raised a question of fact to support his assertion of the equitable estoppel defense (demonstrating that another had developed a father-child relationship). Only after determining whether equitable estoppel defense applies can the propriety of DNA testing be considered. The County has the statutory authority to bring a paternity proceeding when the mother or child is likely to become a public charge: "... [T]he doctrine of equitable estoppel may be used by a purported biological father to prevent an adverse party from asserting that he is the biological father where the child has developed a close relationship with another father figure such that it would be detrimental to the child's interests to disrupt that relationship ... . Under such circumstances, in order to be entitled to a hearing on the issue of whether equitable estoppel should be applied, a putative father must raise an issue of fact as to whether 'a determination that he is in fact the father would disturb any relationship the child[ ] may have had with any other father figure' ... . '[W]hether it is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, equitable estoppel is only to be used to protect the best interests of the child' ... . The Family Court ... erred to the extent that it based its order dismissing the petition on its prior determination, in effect, denying the County's application for DNA testing. The Family Court should not have summarily denied the County's application without first requiring the putative father to raise an issue of fact with respect to his defense of equitable estoppel ...". ***Matter of Suffolk County Dept. of Social Servs. v. James D.*, 2017 N.Y. Slip Op. 01369, 2nd Dept 2-22-17**

FAMILY LAW.

ABSENT PROOF OF 16-YEAR-OLD CHILD'S COLLEGE PLANS, ANY AWARD OF COLLEGE EXPENSES WOULD BE PREMATURE.

The Second Department, in a decision covering many equitable distribution issues not summarized here, determined any award of college expenses for a 16-year-old child was premature. No evidence was presented concerning the child's academic wishes or plans: "... [T]he court did not err in declining to direct the defendant to contribute his pro rata share of the parties' unemancipated child's future college expenses. 'The court may direct a parent to contribute to a child's college education pursuant to Domestic Relations Law § 240(1-b)(c)(7)' ... . 'However, when college is several years away, and no evidence is presented as to the child's academic interests, ability, possible choice of college, or what his or her expenses might be, a directive compelling [a parent] to pay for those expenses is premature and not supported by the evidence' ... . At the time of the trial, the parties' unemancipated child was 16 years old and was entering his junior year of high school. There was no evidence presented as to his academic interests, his possible choice of college, or what the expenses of college might be. Accordingly, the plaintiff's request that the court direct the defendant to contribute his pro rata share of the parties' unemancipated child's future college expenses was premature ...". ***Repetti v. Repetti*, 2017 N.Y. Slip Op. 01396, 2nd Dept 2-22-17**

PERSONAL INJURY.

KNEE HIGH TABLE, UNDER THE CIRCUMSTANCES, WAS NOT AN OPEN AND OBVIOUS DEFECT AS A MATTER OF LAW.

The Second Department, reversing Supreme Court, determined defendant did not demonstrate, as a matter of law, the low table over which plaintiff tripped and fell was an open and obvious condition: "The plaintiff Concetta Dalton (hereinafter the plaintiff) was attending a wedding reception at the defendants' catering hall and allegedly was injured when she tripped over a knee-high table in the lobby of the catering hall and fell. The plaintiff was walking through the lobby area, where there was a crowd of people, to reach the main dining area when the accident occurred. The plaintiff testified at her deposition that she did not see the table before she fell. ... Whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the particular facts and circumstances of each case and is generally a question of fact for the jury ... . A condition that is generally apparent 'to a person making reasonable use of their senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted' ... . The determination of 'whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances' ...". ***Dalton v. North Ritz Club*, 2017 N.Y. Slip Op. 01333, 2nd Dept 2-22-17**

PERSONAL INJURY.

PLAINTIFF'S RECKLESS ACTIONS SEVERED ANY CONNECTION BETWEEN ANY ALLEGED NEGLIGENCE AND THE ACCIDENT.

The Second Department determined plaintiff's reckless actions severed any connection between any alleged negligence and the accident. Plaintiff was hit by a train while walking in an area to which she was not allowed access: "... [T]he defendants ... demonstrated, as a matter of law, that the plaintiff's conduct, under the circumstances of this case, constituted an intervening and superseding cause which absolved the defendants of liability ... . The defendants' submissions demonstrated that the then-17-year-old plaintiff circumvented various barriers to access an elevated track area, proceeded to walk alongside the track area, and then attempted to cross a train bridge that had limited clearance and no protective railings or fencing. In doing so, she acted with reckless and extraordinary conduct, which, as a matter of law, constituted an intervening and superseding event which severs any causal nexus between the occurrence of the accident and any alleged negligence on the part of the defendants ...". ***Weimar v. Metropolitan Transp. Auth.*, 2017 N.Y. Slip Op. 01403, 2nd Dept 2-22-17**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

SANCTIONS FOR SPOLIATION OF EVIDENCE SHOULD NOT HAVE BEEN IMPOSED, NO SHOWING EVIDENCE WAS DESTROYED WITH A CULPABLE STATE OF MIND.

The Second Department determined Supreme Court should not have imposed sanctions on defendants in this medical malpractice action. The action was premised on the failure of a suture which had to be repaired by a subsequent surgery. The suture at issue was thrown away at the time of the second surgery. Plaintiff failed to demonstrate the defendants threw away the suture with a culpable state of mind: " 'A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind,' and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense' ... . Where evidence has been intentionally or willfully destroyed, its relevance is presumed ... . However, where evidence has been destroyed negligently, the party seeking spoliation sanctions must establish that the destroyed evidence was relevant to the party's claim or defense ... . * * * ... Supreme Court improvidently exercised its discretion in granting the plaintiff's motion to impose sanctions against the defendants for the wilful spoilation and destruction of evidence, as the plaintiff failed to demonstrate that the defendants were obligated to preserve the broken suture at the time of its destruction, that the suture was destroyed with a 'culpable state of mind,' and/or that the destroyed suture was relevant to the plaintiff's claim ... . In any event, the plaintiff failed to establish that the defendants were on notice that the suture might be needed for future litigation ...". ***Golan v. North Shore-Long Is. Jewish Health Sys., Inc.*, 2017 N.Y. Slip Op. 01342, 2nd Dept 2-22-17**

REAL PROPERTY LAW.

A PARTY'S FAILURE TO EXECUTE A MEMORANDUM OF A PURCHASE AND SALE AGREEMENT RENDERED THE MEMORANDUM IMPROPERLY RECORDED AND FAILED TO GIVE PRIORITY TO A CLAIM TO THE PROPERTY.

The Second Department, in a decision too complex to fairly summarize here, determined a party's (Myrtle's) failure to execute a recorded memorandum referencing a purchase and sale agreement and assignment resulted in the failure to give priority to a claim to the property by a another party to the agreement (All Year): "Real Property Law § 294(2) provides, inter alia, '[i]n lieu of the recording of an executory contract, there may be recorded a memorandum thereof, executed by the parties.' Here, in lieu of recording the purchase and sale agreement and assignment thereof, All Year and Cumberland executed and recorded a memorandum referencing the purchase and sale agreement and the assignment. However, Myrtle, which was a party to both the purchase and sale agreement and the assignment, did not execute the memorandum. As Myrtle did not execute the memorandum, it was improperly recorded in lieu of the purchase and sale agreement and assignment, and its recording did not serve to give All Year's claim to the property priority over Brookland's claim." ***Vanderbilt Brookland, LLC v. Vanderbilt Myrtle, Inc.*, 2017 N.Y. Slip Op. 01402, 2nd Dept 2-22-17**

SEPULCHER, RIGHT OF.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BASED UPON THE RIGHT OF SEPULCHER SHOULD NOT HAVE BEEN GRANTED; DEFENDANT HOSPITAL'S MOTION TO DISMISS THE CAUSE OF ACTION FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, over an extensive two-justice dissent, determined plaintiff's motion for summary judgment based upon the common law right of sepulcher should have been denied and the defendant's motion for summary judgment dismissing the cause of action based upon failure to timely perform an autopsy should have been granted. Plaintiffs elected to terminate a pregnancy because genetic testing indicated the fetus could not live. The defendant hospital provided plaintiffs with a burial form and plaintiffs consented to having the hospital bury the fetus. When plaintiffs allegedly were told the sex of the fetus was male (the genetic testing indicated the fetus was female), the plaintiffs asked for

an autopsy. The fetus had been misplaced and was ultimately found in a bin with body parts. The autopsy was performed and confirmed the fetus was female. The hospital argued that the right of sepulcher only applied to "bodies" and the fetus, which was less than 20 weeks old, was not a "body." The Second Department held that the hospital had essentially waived that argument by agreeing to bury the fetus. Although the plaintiffs, by signing the burial form, relinquished their right to prompt possession of the body, the cause of action alleging the mishandling of the remains was viable. The Second Department went on to hold that there was no cause of action for negligent infliction of emotional distress stemming from the delay of an autopsy: "The common-law right of sepulcher ;gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial, and . . . damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body' ... . Here, although the plaintiffs relinquished their right to prompt possession of the fetal remains when Linru Fan executed a written consent form authorizing the Hospital to arrange for the burial, the plaintiffs also alleged that the Hospital violated their right to sepulcher by mishandling the fetal remains ... . However, damages attributable to emotional distress caused by the failure to timely perform an autopsy on the fetus are not recoverable ...". ***Zhuangzi Li v. New York Hosp. Med. Ctr. of Queens*, 2017 N.Y. Slip Op. 01405, 2nd Dept 2-22-17**

WORKER'S COMPENSATION LAW, CORPORATION LAW, PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE IT WAS THE ALTER EGO OF PLAINTIFF'S EMPLOYER, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THE NEGLIGENCE COMPLAINT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant did not demonstrate it was the alter ego of plaintiff's employer (which would trigger the Worker's Compensation Law as plaintiff's sole remedy). Defendant's summary judgment motion on that ground should have been denied. Plaintiff was injured by a defective floor condition where he worked. He sued the owner of the building and the holder of the lease, Clean Rite Cleaners - Flatbush Avenue, LLC: "At the time of the accident, the plaintiff was employed by nonparty CRC-Management Co., LLC (hereinafter CRC-Management), and, after the accident, he sought Workers' Compensation benefits from CRC-Management. CRC-Flatbush moved, in effect, for summary judgment dismissing the complaint insofar as asserted against it on the ground that the plaintiff's causes of action were barred by the exclusive remedy provisions of the Workers' Compensation Law. Among other things, CRC-Flatbush argued that it was 'part of a single integrated entity' along with CRC-Management since they were both subsidiaries of nonparty Clean Rite Centers, LLC. ... ... '[A] mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other' ... . Here, CRC-Flatbush failed to make a prima facie showing either that it and the plaintiff's employer, CRC-Management, operated as a single integrated entity, or that either company controlled the day-to-day operations of the other ...". ***Moses v. B & E Lorge Family Trust*, 2017 N.Y. Slip Op. 01350, 2nd Dept 2-22-17**

THIRD DEPARTMENT

CIVIL RIGHTS LAW (PRIVACY).

COMPLAINT BY PLAINTIFF, WHO HAD COMMITTED MURDER, SUFFICIENTLY ALLEGED THE FILM ABOUT HIM WAS INTENDED TO BE FICTIONAL AND THEREFORE WAS SUBJECT TO THE PRIVACY PROTECTIONS OF THE CIVIL RIGHTS LAW, COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The Third Department determined the plaintiff's complaint, alleging a violation of privacy under Civil Rights Law 50 and 51, stated a cause of action and should not have been dismissed. Plaintiff was convicted of the murder of his father and the attempted murder of his mother. The defendant made a film about the plaintiff and the crime which was aired nationally. Even films which purport to deal with factual, newsworthy events can violate the Civil Rights Law if the films are deemed to have fictionalized the events. The Third Department determined the allegations sufficiently supported plaintiff's claim that the film was intended to be fictional to avoid dismissal at the pleading stage: "New York provides a limited statutory right of privacy. Pursuant to Civil Rights Law § 50, it is a misdemeanor when a firm or corporation " 'uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such a person' ... . Similarly, Civil Rights Law § 51 allows a plaintiff to 'maintain an equitable action in the supreme court of this state against the [firm or corporation] so using his [or her] name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use' ... . The Legislature intended for this statutory protection of privacy to be 'strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person' ... , and these statutory provisions 'do not apply to reports of newsworthy events or matters of public interest' ... . The scope of the newsworthiness exception to liability, however, must be construed in accordance with binding Court of Appeals precedent. The Court of Appeals has held that statutory liability applies to a materially and 'substantially fictitious biography' ... where a 'knowing fictionalization' amounts to an 'all-per-

vasive' use of imaginary incidents ... and a biography that is 'nothing more than [an] attempt[] to trade on the persona' of the plaintiff ...". ***Porco v. Lifetime Entertainment Servs., LLC*, 2017 N.Y. Slip Op. 01421, 3rd Dept 2-23-17**

CONTRACT LAW, REAL PROPERTY TAX LAW, MUNICIPAL LAW.

AGREEMENT TO FOREGO APPLYING FOR A REAL PROPERTY TAX EXEMPTION IN RETURN FOR THE TRANSFER OF TWO BUILDINGS FOR ONE DOLLAR WAS ENFORCEABLE.

The Third Department determined defendant non-profit breached material terms of its contract with the city. The city transferred two buildings to the non-profit in return for promises to bring the buildings into compliance and not to seek a property tax exemption for 20 years. The buildings were not brought into compliance, and defendant sought and received property tax exemptions. Because the tax exemptions were granted, the Third Department found there was a question of fact whether the city waived that term of the contract: "... [P]laintiff demonstrated that the compliance provision was an integral and material part of the contract and that defendant's breach substantially defeated the contract's purpose ... . Plaintiff's proof also established that, under the circumstances presented here, rescission of the contract is the only adequate remedy ... . * * * ... '[T]he Constitution and the State Legislature, in the furtherance of the general welfare, have established a clear policy that [educational] institutions are to be free, if they so choose, from local taxes' ... . Contrary to defendant's contention, we find that nothing in NY Constitution, article XVI, § 1 or RPTL 420-a prohibits an educational organization, such as defendant, from freely choosing to refrain from applying for a real property tax exemption. Rather, the prohibition set forth is to restrain municipalities from denying a real property tax exemption to a statutorily exempt organization once an application has been submitted or attempting to extort the organization's waiver of the exemption ... . Accordingly, we find that the tax exemption provision is enforceable. * * * ... [A]lthough we agree that rescission is the appropriate remedy for defendant's established breaches of the contract, rescission would be premature at this point because issues of fact exist as to defendant's affirmative defense of waiver." ***City of Schenectady v. Edison Exploratorium, Inc.*, 2017 N.Y. Slip Op. 01427, 3rd Dept 2-23-17**

CRIMINAL LAW.

ALTHOUGH DEFECTS IN GUILTY PLEA NOT PRESERVED BY A MOTION, PLEA VACATED IN THE INTEREST OF JUSTICE BECAUSE JUDGE DID NOT ENSURE DEFENDANT UNDERSTOOD THE CONSTITUTIONAL RIGHTS HE WAS GIVING UP.

The Third Department determined defendant's waiver of appeal was inadequate and there was no assurance defendant understood the constitutional rights waived by his guilty plea. The plea was vacated, in the interest of justice, on that ground: "Although defendant's challenge to the plea was not preserved through an appropriate postallocution motion ... , we exercise our interest of justice jurisdiction to reverse the judgment ... . 'While there is no mandatory catechism required of a pleading defendant, there must be an affirmative showing on the record that the defendant waived his or her constitutional rights' ... . Here, County Court made no effort to explain the consequences of a guilty plea, making only a passing reference to them by asking defendant if anyone was forcing him to give up his 'right[] to [a] jury trial' ... . The court further failed to establish that defendant had consulted with his counsel about the trial-related rights that he was forfeiting by pleading guilty or the constitutional consequences of a guilty plea, 'instead making a vague inquiry into whether defendant had spoken to defense counsel' ... or had any questions of his counsel regarding his 'rights,' 'the plea bargain, the trial and anything else that [was] important to [him]' ... . With no affirmative showing on the record that defendant understood and waived his constitutional rights when he entered the guilty plea, the plea was invalid and must be vacated ...". ***People v. Herbert*, 2017 N.Y. Slip Op. 01408, 3rd Dept 2-23-17**

CRIMINAL LAW.

UNDER THE FACTS, THE ATTEMPTED KIDNAPPING CONVICTION MERGED WITH THE SEXUAL ABUSE AND ASSAULT CONVICTIONS.

The Third Department, in the interest of justice, determined that the attempted kidnapping conviction merged with the sexual abuse and assault convictions: "The merger doctrine bars convictions for kidnapping 'based on acts which are so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that independent criminal responsibility may not fairly be attributed to them' ... . While application of the doctrine is dependent on the particular facts and circumstances of each case, 'a kidnapping is generally deemed to merge with another offense . . . 'where there is minimal asportation immediately preceding' the other crime or 'where the restraint and underlying crime are essentially simultaneous' ... . Here, the victim's testimony, as well as the surveillance footage, established that defendant immediately began punching the victim upon opening the door to her vehicle and that, after dragging her roughly 58 feet, he continued to punch the victim while forcibly subjecting her to sexual contact. This brutal encounter lasted between three and four minutes. Under these circumstances, because the conduct underlying the charge of attempted kidnapping

in the second degree was simultaneous to, and inseparable from, the conduct underlying the charges of sexual abuse in the first degree and assault in the second degree ... , we must apply the doctrine of merger, reverse defendant's conviction of attempted kidnapping in the second degree and dismiss that count of the indictment ...". ***People v. Bautista*, 2017 N.Y. Slip Op. 01410, 3rd Dept 2-23-17**

CRIMINAL LAW, EVIDENCE.

PEOPLE SHOULD NOT HAVE BEEN ALLOWED TO IMPEACH THEIR OWN WITNESS WITH A PRIOR INCONSISTENT STATEMENT THAT SUBSTANTIALLY WEAKENED BUT DID NOT CONTRADICT THE PEOPLE'S THEORY OF PROSECUTION; DESPITE DIRECT EVIDENCE OF DEFENDANT'S DOMINION AND CONTROL OVER APARTMENT WHERE HEREOIN WAS FOUND, THE EVIDENCE DEFENDANT POSSESSED THE HEREOIN WAS CIRCUMSTANTIAL, THE JURY SHOULD HAVE BEEN GIVEN THE CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

The Third Department, reversing defendant's conviction, determined the People should not have been allowed to impeach their own witness (Abellman) with a prior inconsistent statement which did not contradict the People's theory of prosecution and the trial judge should have instructed the jury on circumstantial evidence: "Abellman indicated in a written statement to investigators and testimony before the grand jury that defendant was his heroin supplier and that defendant's heroin was stashed at the apartment. Abellman testified at trial, however, that he did not know defendant, had never bought drugs from defendant and did not recall ever having been to the apartment. * * * ... [T]he People extensively questioned Abellman regarding his prior statements by asking if he recalled previously saying, among other things, that defendant supplied him with heroin and that he and defendant frequently went to the apartment to bag heroin and cocaine for sale. While '[e]vidence of a prior contradictory statement may be received for the limited purpose of impeaching [a] witness's credibility with respect to his or her testimony,' it is inadmissible where 'the testimony of the witness 'does not tend to disprove the position of the party who called him [or her] and elicited [the contradictory] testimony' '... . Abellman's trial testimony falls into the latter category, as he did not call defendant's connection to the heroin into question and only maintained that he had no knowledge of whatever connection there might be. This claimed lack of knowledge 'merely failed to corroborate or bolster the [People]'s case' and did not affirmatively 'contradict or disprove' evidence presented by them ... . There was direct evidence of defendant's dominion and control over the apartment [where the herein was found] but, as things ultimately stood, proof of his dominion and control over the heroin and related items was circumstantial. County Court was obliged to, but did not, give a circumstantial evidence charge to the jury under these circumstances ...". ***People v. Gaston*, 2017 N.Y. Slip Op. 01411, 3rd Dept 2-23-17**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

DNA EVIDENCE WAS STRONG EVIDENCE DEFENDANT WAS THE ROBBER, DESPITE THE DNA MATCH, THE FULL CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTION SHOULD HAVE BEEN GIVEN, NEW TRIAL ORDERED; PROSECUTOR'S STATEMENT IN SUMMATION THAT THE BLOOD BELONGED TO THE ROBBER WAS IMPROPER.

The Third Department, reversing defendant's conviction, determined the trial judge erred when the full circumstantial evidence jury instruction was not given. There was no direct evidence identifying defendant as the robber of the victim, who was sitting in his car at the time he was robbed. Blood matched to the defendant by DNA evidence was found on the handle of the door of the victim's car. The Third Department also noted that the prosecutor exceeded the bounds of acceptable commentary during summation when he told the jury the blood on the victim's car belonged to the robber: "Contrary to the People's assertion, this was not a case 'where both direct and circumstantial evidence [were] employed to demonstrate . . . defendant's culpability[,] thereby negating the need for the [requested] charge' ... . While there indeed is no question — based upon the victim's testimony and the photographic evidence contained in the record — that the charged crimes did in fact occur, the record makes clear — and the People readily concede — that there was no direct evidence identifying defendant as the perpetrator. In this regard, while the People are correct that a DNA match 'can provide strong evidence of a person's presence at and participation in a criminal act' ... , a defendant's mere presence at the scene of the crime in close temporal proximity to its commission does not establish his or her identity as the perpetrator ... . Simply put, where there is no direct evidence linking the defendant to the charged crimes, courts consistently have required that a circumstantial evidence charge be given ... . As the People's proof relative to the identity of the perpetrator here was entirely circumstantial, Supreme Court should have granted defendant's request to charge the jury accordingly; moreover, as the proof against defendant was less than overwhelming, we cannot deem the court's failure to grant the requested charge to be harmless error ...". ***People v. James*, 2017 N.Y. Slip Op. 01409, 3rd Dept 2-23-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA)

A SEXUAL OFFENSE WHICH DEFENDANT ADMITTED COMMITTING BUT WITH WHICH HE WAS NEVER CHARGED SHOULD NOT HAVE BEEN CONSIDERED.

The Third Department determined a sexual offense which defendant admitted committing but with which he was never charged could not be considered in the under risk factor 8: "... [W]e agree with defendant that 10 points were improperly assessed for risk factor 8, his '[a]ge at first sex crime.' The People submitted evidence that the victim had recounted to police that her first sexual contact with defendant had occurred in June 2011, when defendant was 19 years old and she was 13 years old; defendant admitted that this incident had occurred but claimed that the victim had been the aggressor. As defendant pointed out at the SORA hearing, however, he was never charged with or convicted of a crime consisting of that conduct. Under the criminal history section of the RAI, 10 points may be assessed under risk factor 8 where '[t]he offender committed a sex offense, that subsequently resulted in an adjudication or conviction for a sex crime, at age 20 or less' ... . The commentary similarly instructs, with regard to risk factor 8, that 'criminal convictions [and] youthful offender adjudications . . . are to be considered in scoring this category, as well as [risk factors] 9 [number and nature of prior crimes] and 10 [recency of prior felony or sex crime]' ... . To that end, the commentary specifically indicates that, for purposes of the criminal history section of the RAI, 'the term 'crime' includes criminal convictions [and] youthful offender adjudications' and that '[c]onvictions for Penal Law offenses and unclassified misdemeanors should be considered' ... . The commentary further clarifies that, '[w]here an offender has admitted committing an act of sexual misconduct for which there has been no such judicial determination, it should not be used in scoring his [or her] criminal history' ... . While proof of the commission of a prior sex crime committed by an offender at age 20 or under that did not result in a conviction or adjudication may be relied upon to argue in favor of an upward departure ... , the People did not request this alternative relief from County Court at any point." ***People v. Current*, 2017 N.Y. Slip Op. 01415, 3rd Dept 2-23-17**

DEFAMATION.

UPON DEFENDANT'S DEFAULT, PUNITIVE DAMAGES, ATTORNEY'S FEES AND DAMAGES FOR LIBLE PER SE AND ABUSE OF PROCESS WERE PROPER, HOWEVER THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND VIOLATION OF PRIVACY CAUSES OF ACTION WERE NOT VIABLE, AND SUPREME COURT DID NOT HAVE THE AUTHORITY TO ISSUE THE ORDER OF PROTECTION.

The Third Department affirmed Supreme Court's awards of damages (upon defendant's default) for libel per se and abuse of process, as well as punitive damages and attorney's fees. The Third Department determined the causes of action for intentional infliction of emotional distress and violation of privacy were not viable, and Supreme Court did not have the authority to issue an order of protection. Plaintiff alleged defendant had contacted his employers making false allegations and had initiated many actions against him raising issues already litigated. With respect to intentional infliction of emotional distress, violation of privacy, and the order of protection, the court explained: "A cause of action for intentional infliction of emotional distress should not be entertained 'where the conduct complained of falls well within the ambit of other traditional tort liability' ... . Here, plaintiff's complaint incorporated his libel and abuse of process allegations as the basis for this cause of action. Because damages were awarded on those causes of action, the damages awarded on the cause of action for intentional infliction of emotional distress must be vacated. A cause of action for violation of the right to privacy under Civil Rights Law §§ 50 and [*4]51 is 'strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person' ... . Absent from the proof furnished by plaintiff was any indication that defendant sought to use his name or photograph 'for advertising purposes or for the purposes of trade only' … . Therefore, Supreme Court should have determined that this was not a viable cause of action. ... Supreme Court can properly issue an order of protection in a matrimonial action under Domestic Relations Law §§ 240, 252 ... ; here, no matrimonial action was pending. Although such an order is available under Family Ct Act article 8, the pleadings do not contain allegations of conduct that would constitute one of certain enumerated family offenses ...". ***Xiaokang Xu v. Xioling Shirley He*, 2017 N.Y. Slip Op. 01412, 3rd Dept 2-23-17**

FAMILY LAW.

UPON REVERSAL OF MOTHER'S MURDER AND MANSLAUGHTER CONVICTIONS, MOTHER ENTITLED TO NEW DISPOSITIONAL HEARING ON TERMINATION OF HER PARENTAL RIGHTS.

The Third Department determined respondent mother was entitled to a new dispositional hearing on termination of her parental rights. At the time of the prior hearing she was facing a long incarceration for murder and manslaughter. However, those convictions were subsequently reversed: "Remittal is ... required for a new dispositional hearing. Upon appeal from respondent's criminal conviction, this Court modified the judgment of conviction by reversing her murder and manslaughter convictions and dismissing the underlying counts of the indictment. Respondent is accordingly not facing the lengthy term of imprisonment anticipated at the time the dispositional order was issued and, as such, it is unclear whether the best

interests of the children continue to demand the termination of her parental rights. Thus, we agree with petitioner and respondent that a new dispositional hearing is required ...". ***Matter of Zoey O. (Veronica O.)*, 2017 N.Y. Slip Op. 01413, 3rd Dept 2-23-17**

FAMILY LAW.

FATHER PAID CHILD SUPPORT PRIOR TO SENTENCING FOR WILLFUL FAILURE TO PAY, FAMILY COURT SHOULD NOT HAVE ISSUED THE ORDER OF COMMITMENT.

The Third Department determined a sentence of incarceration for father's willful failure to pay child support was proper. However, because the support was paid by father prior to sentencing, Family Court abused its discretion by issuing the order of commitment: "Upon a willful violation, Family Court is authorized to impose a sentence of incarceration of up to six months ... . Such a sentence is in the nature of a civil contempt, which 'may only continue until such time as the offender, if it is within his or her power, complies with the support order' ... . Since respondent cured the default prior to sentencing, we conclude that Family Court abused its discretion by issuing the order of commitment." ***Matter of Provost v. Provost*, 2017 N.Y. Slip Op. 01422, 3rd Dept 2-23-17**

FAMILY LAW.

REPORT OF INADEQUATE GUARDIANSHIP MAINTAINED BY THE CENTRAL REGISTER OF CHILD ABUSE AND MALTREATMENT SHOULD HAVE BEEN AMENDED TO BE UNFOUNDED AND EXPUNGED.

The Third Department, in a full-fledged opinion by Justice Garry, determined petitioner-mother's application to have a report maintained by the Central Register of Child Abuse and Maltreatment amended to be unfounded and expunged should have been granted. The finding of inadequate guardianship was based on two incidents where the petitioner was abused by her paramour in the presence of a child. Three days after the latest incident petitioner reported the abuse to the police and the paramour was taken into custody. The Third Department held that, under the circumstances of the abuse targeting petitioner, petitioner acted reasonably to protect her children: "... [A]ddressing petitioner's brief delay in reporting the abuse, it is well recognized that the most dangerous time in an abusive relationship occurs when the victim attempts to separate from the abuser ... . * * * A finding that petitioner failed to exercise a minimum degree of care cannot be supported where the record reveals that she acted reasonably under the circumstances and thoughtfully planned a strategy to report her paramour's abuse in such a way as to protect her own safety and that of her children ... . * * * ... [W]e find no basis in the record to support respondent's finding that petitioner's actions resulted in impairment or immediate danger to the children. A finding of impairment 'requires proof of actual (or imminent danger of) physical, emotional or mental impairment to the child' ... . An immediate danger must be 'near or impending' and more than 'merely possible' ... . Although the record supports a finding that the youngest child was placed in immediate danger during both incidents and that the eldest child suffered emotional impairment after witnessing the second incident, neither the danger nor the impairment were the consequence of petitioner's actions. As a result of petitioner's actions shortly thereafter, the paramour was incarcerated and an order of protection was issued; these circumstances continued through the time of the hearing." ***Matter of Elizabeth B. v. New York State Off. of Children & Family Servs.*, 2017 N.Y. Slip Op. 01424, 3rd Dept 2-23-17**

INSURANCE LAW.

EVEN WHERE PLAINTIFF CAN NOT DEMONSTRATE SERIOUS INJURY WITHIN THE MEANING OF THE NO-FAULT LAW, PLAINTIFF MAY BE ABLE TO RECOVER ECONOMIC LOSS ABOVE THE STATUTORY BASIC ECONOMIC LOSS ($50,000).

The Third Department noted that even where (as in this case) "serious injury" within the meaning of the No-Fault law has not been demonstrated, an injured plaintiff may still be entitled economic loss above "basic economic loss:" "Under New York's No-Fault Law, an injured party's right to bring a personal injury action for noneconomic losses, i.e., 'pain and suffering' (Insurance Law § 5102 [c]), arising out of an automobile accident is limited to those instances where such individual has incurred a serious injury ... . However, basic economic loss coverage (up to $50,000) is available to a covered person regardless of fault (see Insurance Law § 5102 [a]) and 'includes payments . . . for items such as lost earnings of up to $2,000 per month for three years after the date of the accident' ... . Where, as here, an injured party asserts a claim for economic loss in excess of basic economic loss, he or she need not demonstrate that a serious injury was sustained ... . Rather, all that is required is that such party demonstrate that his or her total economic loss actually exceeded basic economic loss ... . To our analysis, 'plaintiff[s] made a sufficient showing that [Jones] sustained economic loss in excess of basic economic loss to warrant submission of the issue to [a] jury' ... and, therefore, Supreme Court should not have dismissed plaintiffs' claim in this regard." ***Jones v. Marshall*, 2017 N.Y. Slip Op. 01432, 3rd Dept 2-23-17**

LABOR LAW, EMPLOYMENT LAW.

INSUFFICIENT EVIDENCE PUBLIC FUNDS WERE USED TO PAY FOR CONSTRUCTION AT THE SARATOGA RACE COURSE, THEREFORE THE PREVAILING WAGE REQUIREMENT OF LABOR LAW 220 DID NOT APPLY.

The Third Department annulled the determination of the Department of Labor finding that the New York Racing Association (NYRA) was required to pay the prevailing wage to a construction contractor working at the Saratoga Race Course. The Third Department held there was insufficient proof public funds were used to pay the contractor: "Labor Law § 220 provides that '[t]he wages to be paid for a legal day's work . . . to laborers, work[ers] or mechanics upon . . . public works, shall be not less than the prevailing rate of wages' (Labor Law 220 § [3] [a]), defined as the rate paid to 'workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed' (Labor Law § 220 [5]). The NY Constitution further provides that '[n]o laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used' (NY Const, art I, § 17). The Court of Appeals has recently clarified the meaning of a public work: '[f]irst, a public agency must be a party to a contract involving the employment of laborers, workers, or mechanics. Second, the contract must concern a project that primarily involves construction-like labor and is paid for by public funds. Third, the primary objective or function of the work product must be the use or other benefit of the general public' ...". ***W.M. Schultz Constr., Inc. v. Musolino*, 2017 N.Y. Slip Op. 01425, 3rd Dept 2-23-17**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFFS' DECEDENT COMMITTED SUICIDE SHORTLY AFTER DEFENDANT PSYCHIATRISTS SAW HER, PLAINTIFFS' EXPERT RAISED QUESTIONS OF FACT ABOUT WHETHER DEFENDANTS DEVIATED FROM THE MINIMUM STANDARD OF CARE.

The Third Department, reversing Supreme Court, determined defendants' motions for summary judgment in this psychiatric malpractice case should not have been granted. Plaintiffs' expert found fault in, inter alia, defendants' failure to document suicide assessments. Plaintiffs' decedent committed suicide shortly after the defendant psychiatrists, Roberts and Decker, saw her: "Plaintiffs submitted the factually specific affidavit of a psychiatrist who, relying upon the foregoing, opined that Roberts deviated from the minimum standard of care in failing to document a proper suicide risk assessment and then discharging decedent without ensuring that she obtain psychotherapy and medication management within two days ... . * * * Plaintiffs' expert psychiatrist opined that Decker fell short of the minimum standard of care by failing to properly conduct and document a suicide risk assessment of decedent, who was experiencing triggering anxiety and untreated depression. The psychiatrist further opined that Decker departed from the minimum standard of care in placing medication adjustment and psychotherapy on hold in the expectation that a 'severely compromised' person would provide more information on an inpatient treatment facility that she was curious about." ***Tkacheff v. Roberts*, 2017 N.Y. Slip Op. 01429, 3rd Dept 2-23-17**

MUNICIPAL LAW, REAL PROPERTY.

TOWN'S PUBLIC ROAD EASEMENT IS THREE RODS WIDE AND IS NOT CONFINED TO THE PAVED PORTION OF THE ROAD.

The Third Department determined the town had the right, pursuant to the Highway Law, to a pubic road easement three rods wide, even though the easement extended past the paved portion and included a plaintiffs' fence: "After a roadway is established as a highway by use, Highway Law § 189 plainly permits a town to maintain and improve it in furtherance of the public's right of travel, to the width of 'at least three rods.' Stated differently, so long as the use at issue relates directly or indirectly to the public's right of travel, the use of the highway may be extended past the paved portion of the road to a width of at least three rods. In our view, this interpretation of the statute is consistent with case law holding that the extent of the easement is defined by its actual use ... . Inasmuch as the Town's plowing and widening of Fox Hollow Road are uses that are 'necessary to preserve the public's right of passage,' they define the Town's easement pursuant to Highway Law § 189 ... . Further, it is undisputed that plaintiffs' fence and the widening of the roadway were well within the three-rod width that defendants are statutorily authorized to open." ***Hoffman v. Town of Shandaken*, 2017 N.Y. Slip Op. 01430, 3rd Dept 2-23-17**

PERSONAL INJURY.

PLAINTIFF'S DECEDENT FELL DOWN A STAIRWAY LEADING TO THE RESTAURANT BASEMENT WHICH WAS ACCESSED BY AN UNMARKED, UNLOCKED DOOR; ALTHOUGH THE ACCIDENT WAS NOT WITNESSED, DEFENDANT RESTAURANT'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED.

The Third Department, reversing Supreme Court, determined questions of fact precluded summary judgment in favor of defendant restaurant. Plaintiff's decedent fell down a flight of stairs leading from an unmarked door to the basement of the restaurant. Although no one witnessed the accident, circumstantial evidence supported the view that the stairway and unmarked door presented a dangerous condition which caused plaintiff's fall: "The evidence established numerous questions of fact as to whether the staircase presented a dangerous condition to those using it, the most obvious being that the door opened over descending stairs ... . [The owner's] regular use of the stairs and his personal installation of the handrail established a question of fact as to notice or creation of the dangerous condition ... . Finally, although the fall was unwitnessed, a jury could logically infer from the evidence regarding the risks that the staircase posed, the evidence of previous falls on the staircase and the evidence that decedent was healthy, agile and not visibly intoxicated at the time of the accident that the dangerous condition of the staircase caused her fall ...". ***Acton v. 1906 Rest. Corp.*, 2017 N.Y. Slip Op. 01431, 3rd Dept 2-23-17**

WORKER'S COMPENSATION LAW, ATTORNEY'S FEES.

ATTORNEY'S FEE FORM IMPROPERLY FILLED, IMPOSSIBLE FOR APPELLATE REVIEW OF $3000 AWARD.

The Third Department sent the matter back to the Worker's Compensation Board for a review of the Board's award of $3000 in attorney's fees. The Third Department determined that the attorney's fee form was not properly filled out and there was not enough information in the form to allow appellate review: "Our review of the OC-400.1 form submitted in this case reveals that it is very similar to the form submitted by counsel in Matter of Tenecela v. Vrapo Constr. (146 AD3d 1217, 2017 N.Y. Slip Op. 00367 [2017]) — a form that the Board ultimately deemed to be inadequate in that case (id. at *2). Specifically, although the form here sets forth the dates upon which services were rendered to claimant and the number of hours allocated thereto, the description of those services is largely indecipherable. More to the point, the form tendered by counsel in this matter appears to allocate '25+"' hours to an unspecified date or range of dates, thereby 'making impossible any assessment of the services rendered' (id.). Finally, the Board premised its award (in part) upon 'the financial status of . . . claimant' but, other than noting a reduction in the loss of wage-earning capacity suffered by claimant, the Board's decision makes no reference to — and the record sheds no light upon — claimant's financial status. For these reasons, the Board's award of counsel fees is incapable of intelligent appellate review, and we remit this matter to the Board for reconsideration thereof ...". ***Matter of Shiqerukaj v. Gotham Broad, LLC*, 2017 N.Y. Slip Op. 01426, 3rd Dept 2-23-17**

ZONING.

PROPERTY OWNERS' FRAUD AND OFFICIAL MISCONDUCT COUNTERCLAIM SHOULD HAVE BEEN DISMISSED IN THIS ACTION BY THE TOWN ALLEGING ZONING VIOLATIONS.

The Third Department, reversing Supreme Court, determined defendant property owners' counterclaim should have been dismissed. Defendants, in the context of a zoning-violation action by the town, alleged fraud and a violation of civil rights by the town. With respect to municipal liability for civil rights violations in the zoning context, the court explained: "A government official may face civil liability if a party can prove that he or she was 'depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws' (42 USC § 1983). With respect to zoning issues, '42 USC § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution' ... . To state a cause of action, defendants must 'allege that, without legal justification, they were deprived of a vested property interest, consisting of more than a mere expectation or hope of obtaining a permit or a variance' ... . Further, a municipal body may face liability pursuant to 42 USC § 1983 only where the constitutional deprivation stems from an official municipal policy or custom ... . Here, defendants never had a permit to allow them to park more than four commercial vehicles on the property or to install fuel tanks to use in association with their commercial operations. Nor do they allege that they had a vested property interest in such a special use permit ... . Moreover, defendants' submissions fail to establish that the Planning Board's discretionary determination to impose conditions on defendants' special use permit 'rose to the level of a constitutional violation, i.e., that they were so outrageously arbitrary as to constitute a gross abuse of governmental authority . . . that would support a claim pursuant to 42 USC § 1983' ... . Even accepting as true that one Planning Board member stated that he wanted to 'make an example' of defendants, defendants did not allege, nor does the record support a claim, that this motivation resulted from official municipal policy or custom ...". ***Town of Tupper Lake v. Sootbusters, LLC*, 2017 N.Y. Slip Op. 01428, 3rd Dept 2-23-17**

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