March 22, 2017

CasePrepPlus

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

Editor: **Bruce Freeman**

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

FIRST DEPARTMENT

ANIMAL LAW.

ALTHOUGH THE FIRST DEPARTMENT FELT CONSTRAINED BY COURT OF APPEALS PRECEDENT TO DISMISS THIS DOG INJURY CASE SOUNDING IN NEGLIGENCE, THE COURT FORCEFULLY ARGUED THE LAW SHOULD BE CHANGED TO ALLOW SUCH A SUIT.

The First Department, in a substantial opinion by Justice Acosta, reluctantly affirmed Supreme Court's dismissal of the dog-injury complaint. Defendant tied his 35 pound dog to an unsecured bicycle rack which weighed five pounds. The dog ran off, dragging the rack. Plaintiff's leg became tangled in the rack, causing him to fall. The First Department followed the Court of Appeals precedent, which allows a dog-injury suit only on vicious propensity/strict liability grounds. The opinion strongly argued the law should be changed to allow dog-injury suits based upon negligence: "Were we not ... constrained ... we would ... permit plaintiffs to pursue their negligence cause of action. To avoid the harshness of the [Court of Appeals] rule, the recognition of the following exception would be appropriate: A dog owner who attaches his or her dog to an unsecured, dangerous object, allowing the dog to drag the object through the streets and cause injury to others, may be held liable in negligence. In these circumstances, negligence liability would be in keeping with the principles of fundamental fairness, responsibility for one's actions, and societal expectations ... assuming a jury would deem unreasonable defendant's failure to ensure that the rack was secured before he tied his dog to it. It is not unreasonable to expect dog owners to restrain their dogs in public unless unleashing them is safe or specifically permitted at certain times and locations, as evidenced by local leash laws (see e.g. 24 RCNY 161.05). However, the Court of Appeals has decided that local leash laws have no bearing on whether liability in negligence ought to attach ... , undermining the declared public policy of those localities that have enacted such laws ... And although the [Court of Appeals] reasoned that New Yorkers may expect to find unrestrained dogs in public parks ... , New Yorkers certainly do not expect to find those dogs running on public roads towing large metal objects behind them. A dog owner who, without observing a reasonable standard of care, attaches his or her dog to an object that could foreseeably become weaponized if the dog is able to drag the object through public areas should not be immune from liability when that conduct causes injury." ***Scavetta v. Wechsler*, 2017 N.Y. Slip Op. 01985, 1st Dept 3-16-17**

ATTORNEYS.

ATTORNEY MISCONDUCT CLAIM UNDER JUDICIARY LAW § 487 APPLIES ONLY TO COURT, NOT ARBITRATION, PROCEEDINGS.

The First Department noted that a Judiciary Law § 487 claim against attorneys for misconduct does not apply to alleged misconduct in arbitration, as opposed to court, proceedings: "Plaintiff ... failed to state a cause of action under Judiciary Law § 478, because the statute does not apply to attorney misconduct during an arbitral proceeding. The plain text of § 478 limits the statute's application to conduct deceiving 'the court or any party' ... , and, because the statute has a criminal component, it must be interpreted narrowly ... . Moreover, courts have held that the statute does not apply to conduct outside New York's territorial borders or to administrative proceedings, observing that its purpose is to regulate the manner in which litigation is conducted before the courts of this State ... . In any event, plaintiff failed to allege the elements of a cause of action under the statute, i.e., intentional deceit and damages proximately caused by the deceit ... . The misconduct that plaintiff alleges is not 'egregious' or 'a chronic and extreme pattern of behavior' ... and the allegations regarding scienter lack the requisite particularity ...". ***Doscher v. Mannatt, Phelps & Phillips, LLP*, 2017 N.Y. Slip Op. 01973, 1st Dept 3-16-17**

ATTORNEYS, PRIVILEGE.

NO EXPECTATION OF PRIVACY IN EMAIL ACCOUNT OWNED BY ATTORNEY'S EMPLOYER, THEREFORE ATTORNEY CLIENT AND SPOUSAL PRIVILEGES DID NOT APPLY, ATTORNEY WORK PRODUCT PROTECTION MAY APPLY.

The First Department determined nonparty Perlmutter (attorney) did not have an expectation of privacy in an email account owned by his employer, Marvel. Therefore the emails were not protected by attorney client privilege or spousal privilege. However, some emails may be protected as attorney work product: "Application of the four factors set forth in *In re Asia Global Crossing, Ltd.* (322 BR 247, 257 [Bankr SD NY 2005]), which we endorse ... , indicates that Perlmutter lacked

any reasonable expectation of privacy in his personal use of the email system of Marvel, his employer, and correspondingly lacked the reasonable assurance of confidentiality that is an essential element of the attorney-client privilege ... . Among other factors, while Marvel's email policies during the relevant time periods permitted 'receiving e-mail from a family member, friend, or other non-business purpose entity . . . as a courtesy,' the company nonetheless asserted that it 'owned' all emails on its system, and that the emails were 'subject to all Company rules, policies, and conduct statements.' Marvel 'reserve[d] the right to audit networks and systems on a periodic basis to ensure [employees'] compliance' with its email policies. It also 'reserve[d] the right to access, review, copy and delete any messages or content,' and 'to disclose such messages to any party (inside or outside the Company).' Given, among other factors, Perlmutter's status as Marvel's Chair, he was, if not actually aware of Marvel's email policy, constructively on notice of its contents … . Perlmutter's use of Marvel's email system for personal correspondence with his wife waived the confidentiality necessary for a finding of spousal privilege ... . Given the lack of evidence that Marvel viewed any of Perlmutter's personal emails, and the lack of evidence of any other actual disclosure to a third party, Perlmutter's use of Marvel's email for personal purposes does not, standing alone, constitute a waiver of attorney work product protections ...". ***Peerenboom v. Marvel Entertainment, LLC*, 2017 N.Y. Slip Op. 01981, 1st Dept 3-16-17**

CIVIL PROCEDURE, LANDORD-TENANT, NEGLIGENCE.

BUILDING RESIDENTS CAN BRING CLASS ACTION AGAINST OWNERS-MANAGERS ALLEGING NEGLIGENCE IN PREPARATION FOR SUPERSTORM SANDY.

The First Department determined the residents of a building met the requirements for a class action suit alleging negligent failure to secure the building prior to Superstorm Sandy: "The court properly concluded that plaintiffs satisfied the criteria of CPLR 901, and the factors enumerated in CPLR 902 support class certification. It is undisputed that the building has more than 400 residential apartments above 15 floors of commercial space. Thus, the numerosity requirement is met and joinder of all class members is impracticable ... . The commonality requirement is also satisfied in that the proof at trial will consist of evidence of defendants' efforts to prevent damage in advance of the storm and to repair damage after the storm. Since the class consists of tenants of the building, common questions predominate over individual questions concerning the amount and type of damages sustained by each class member ... . Any differences in proof with respect to the applicability of the warranty of habitability in Real Property Law § 235-b as between residential tenants and commercial tenants is insufficient to overcome the significant common questions, and the court may, in its discretion, establish subclasses ... The claims of the putative class representatives are typical of the class's claims since each resides or leases space in the building and their injuries, if any, derive from the same course of conduct by defendants ... . Moreover, the record reflects that they are sufficiently informed about the facts, have no conflicts of interest with the class they seek to represent, and are able to act as a check on counsel ...". ***Roberts v. Ocean Prime, LLC*, 2017 N.Y. Slip Op. 01974, 1st Dept 3-16-17**

CRIMINAL LAW.

PRESENCE OF POLICE OFFICERS AND OFFICER'S STATEMENT TO THE VICTIM DID NOT RENDER THE SHOWUP INDENTIFICATION UNDULY SUGGESTIVE.

The First Department determined the showup identification was not unduly suggestive, despite the presence of police officers and an officer's statement to the victim they may have someone who matched the perpetrator's description: "Police, who undisputedly had a sufficient basis for a common-law inquiry of defendant based on their investigation of a robbery, entered defendant's apartment with the consent of another resident. After the resident who answered the door knocked on a bathroom door, defendant came out of the bathroom and complied with an officer's request to move to a position between two officers. Meanwhile, an officer told the victim that the police might have someone who matched the description, and then brought him to the apartment. While defendant was flanked on both sides by two officers, and other officers were nearby, the victim identified defendant as one of the robbers. ... The showup identification procedure was not unduly suggestive, in light of the 'close spatial and temporal proximity to the robbery, as the result of a single unbroken chain of events,' and the fact that defendant was not physically restrained ... . Notwithstanding the presence of several police officers in or near the apartment, and an officer's statement to the victim that the police had someone who might match the description provided by the victim, 'the overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup' ...". ***People v. Vizcaino*, 2017 N.Y. Slip Op. 01811, 1st Dept 3-5-17**

CRIMINAL LAW.

FAILURE TO GIVE SUPPLEMENTAL INSTRUCTIONS TO CLARIFY THE SHARED INTENT REQUIREMENTS FOR ACCOMPLICE LIABILITY DEPRIVED DEFEFNDANTS OF A FAIR TRIAL.

The First Department, in a full-fledged opinion by Justice Renwick, over a full-fledged dissenting opinion, determined (in the interest of justice) the two defendants were deprived of a fair trial by the failure of the trial judge give supplemental instructions to clarify the requirements for robbery convictions under an accomplice (shared intent) theory. One of the two defendants stole three rings from a small shop. The other struck the shopkeeper after she confronted them. The jury made repeated requests for clarification of the intent criteria. In response to each request the trial court read the elements of the

robbery charges and accomplice liability: "With regard to Telesford, the issue of intent was critical in one respect. The evidence adduced at trial undeniably established that Telesford assaulted the complainant. To sustain a conviction for robbery in the second degree based upon accessorial liability, however, the evidence, when viewed in a light most favorable to the prosecution, must prove beyond a reasonable doubt that Telesford acted with the mental culpability necessary to commit the robbery and that, in furtherance thereof, he solicited, requested, commanded, importuned or intentionally aided the principal to commit such crime ... . Thus, in this case, an inference that Telesford helped Celestine commit the robbery, based on his role as an accomplice, would have been insufficient to prove the requisite intent to steal, in the absence of a specific finding that Telesford intended to do more than commit an assault… . With regard to Celestine, the issue of intent was critical in a different respect. Undeniably, the evidence established beyond a reasonable doubt that Celestine took the three rings. Such conduct, however, by itself, constituted no more than a larceny, absent proof that either defendant used force to take or retain the stolen items. Although, as indicated, Telesford did use force to attack the victim, in order to convict either defendant of robbery, the jury needed to find that the violent attack on the victim, by Telesford, was not a mere response to insults and being spat upon by the victim, but that it was rather part and parcel to the taking or retaining of the stolen items. In other words, the jury had to find that Celestine intended to use force to retain the ring(s), either by using his own force or taking advantage of Telesford use of force ...". ***People v. Telesford*, 2017 N.Y. Slip Op. 01836, 1st Dept 3-15-17**

CRIMINAL LAW, EVIDENCE.

WITNESS'S DISAVOWED IDENTIFICATION OF ANOTHER AS THE PERPETRATOR COULD NOT BE USED AFFIRMATIVELY BY THE DEFENDANT AS EVIDENCE OF THIRD-PARTY CULPABILITY.

The First Department determined a witness's disavowed of identification of another as the perpetrator could not be used as evidence of third-party culpability: "The court providently exercised its discretion in ruling that defendant could not, in the absence of additional evidence, argue that the person initially identified by the witness was the actual perpetrator ... , and this ruling did not deprive defendant of a fair trial or the right to present a defense. The court did not preclude defendant from introducing evidence of third-party culpability; on the contrary, it expressly invited defendant to introduce certain evidence of that nature. Rather than precluding a third-party culpability defense, the court providently ruled that such a defense could not, without more, be supported by the disavowed identification, which the witness explained as a deliberate falsehood. Defendant received a full opportunity to explore the misidentification and all surrounding circumstances, and to use these matters to attack the witness's credibility. While defendant cites additional evidence that would have supported the claim that the misidentified man was the actual perpetrator, he was free to introduce this evidence at trial but failed to do so. Even if the court had permitted defendant to specifically argue third-party culpability in summation, defendant would not have been entitled to argue about matters not in evidence." ***People v. Francis*, 2017 N.Y. Slip Op. 01817, 1st Dept 3-15-17**

CRIMINAL LAW, EVIDENCE.

ALLOWING POLICE OFFICER TO TESTIFY ABOUT VICTIM'S IDENTIFICATION OF DEFENDANT AT A SHOWUP WAS NOT BOLSTERING, VICTIM'S STATEMENT WAS AN EXCITED UTTERANCE.

The First Department determined a police officer was properly allowed to testify the robbery victim identified defendant at a showup because the victim's statement was an excited utterance: "At trial, the court properly permitted a police officer to testify that the victim of the ... robbery identified defendant at a showup. This testimony was admissible, notwithstanding the general rule against third-party bolstering ... , because the victim's declaration qualified as an excited utterance. Shortly after the victim was robbed at gunpoint in his taxicab, he called 911 and was brought in a police vehicle to defendant, who was being detained. The victim immediately yelled, '[O]h my God[!] . . . [I]t is the same guy . . . . Thank God you caught him[!]' Under the circumstances, this identification was made 'under the stress of excitement caused by an external event, and [was] not the product of studied reflection and possible fabrication' ... ". ***People v. Everette*, 2017 N.Y. Slip Op. 01962, 1st Dept 3-16-17**

CRIMINAL LAW, EVIDENCE.

NO NEED FOR ARRESTING OFFICER TO TESTIFY AT SUPPRESSION HEARING, INFERENCE OF MUTUAL COMMUNICATION APPLIED.

The First Department determined the arresting officer did not need to testify at the suppression hearing and explained the inference of mutual communication: "The arresting officer had probable cause to arrest defendant under the fellow officer rule because 'the radio transmission [of] the undercover officer . . . provided details of the defendant's race, sex, clothing, as well as his location and the fact that a positive buy' had occurred' and defendant was the only person in the area who matched the description at the location ... . Although the arresting officer did not testify at the suppression hearing, 'the only rational explanation for how defendant came to be arrested . . . is that [the arresting officer] heard the radio communication [heard by the testifying officer] and apprehended defendant on that basis' ... . The inference of mutual communication ... does not turn on what kind of radios the officers were using, or how well the radios were working, but on the simple fact

that, without hearing the radio transmission, the arresting officer would have had no way of knowing where to go or whom to arrest." ***People v. Vidro*, 2017 N.Y. Slip Op. 01975, 1st Dept 3-16-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

TILTING A SKID FROM A VERTICAL POSITION ONTO A DOLLY IS COVERED UNDER LABOR LAW § 240(1), QUESTION OF FACT WHETHER A SAFETY DEVICE WAS REQUIRED.

The First Department determined Labor Law § 240(1) applied to the task of tilting a skid from a vertical position to a dolly. However, there was a question of fact whether the skid was heavy enough to require a safety device: Plaintiff was injured when he and a coworker attempted to move a wooden skid from a vertical position onto an A-frame dolly by tilting it at a 45-degree angle on one corner and toppling it onto the dolly. While plaintiff hoisted his side of the skid overhead with his arms, his coworker apparently lost his grip, and the skid fell on plaintiff, causing tears in his arm and shoulder. That plaintiff and the skid were on the same level does not bar application of Labor Law § 240(1) ... . However, contrary to plaintiff's argument, a triable issue of fact exists as to the weight of the skid and, therefore, whether a safety device was required under the statute." ***Natoli v. City of New York*, 2017 N.Y. Slip Op. 01818, 1st Dept 3-15-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, FALL FROM A-FRAME LADDER.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff fell when the A-frame ladder moved when he was standing on it: "Plaintiff established his entitlement to partial summary judgment on the Labor Law § 240(1) claim through his testimony that he was injured when the A-frame ladder on which he was standing moved underneath him as he applied pressure to it while trying to remove part of the drop ceiling he was demolishing ... . Plaintiff was not required to show that the ladder was defective or that he actually fell off the ladder to satisfy his prima facie burden ... . Defendants failed to raise a triable issue of fact whether plaintiff was the sole proximate cause of the accident. There is no testimony in the record as to whether there were other readily available, adequate safety devices at the accident site that plaintiff declined to use ... . Moreover, the evidence establishes that the ladder twisted underneath plaintiff because it was unsecured, not because he misused it, and that defendants provided no other safety devices for his use. At most, plaintiff's application of pressure to the ladder while engaged in the work he was directed to do, which caused it to twist, was comparative negligence, no defense to a section 240(1) claim ... . 'Regardless of the method employed by plaintiff to remove [the drop ceiling], the ladder provided to him was not an adequate safety device for the task he was performing' ..". ***Messina v. City of New York*, 2017 N.Y. Slip Op. 01823, 1st Dept 3-15-17**

MUNICIPAL LAW, PERSONAL INJURY.

LATE NOTICE OF CLAIM SHOULD HAVE BEEN ALLOWED DESPITE LACK OF A REASONABLE EXCUSE AND DEFENDANT'S LACK OF KNOWLEDGE OF THE INJURY.

The First Department determined plaintiff's motion for leave to file a late notice of claim against the NYC Housing Authority should have been granted, despite the lack of a reasonable excuse and defendant's lack of knowledge of the injury. The infant plaintiff was nine months old when he was burned by an exposed water pipe. The infancy and the lack of prejudice to the defendant warranted allowing the claim to be filed after a 10-month delay: "The infant plaintiff was approximately nine months old at the time that he allegedly sustained injuries as a result of an exposed hot water pipe in his family's apartment, in a building owned and operated by defendant. This infancy weighs in favor of granting leave to serve a late notice of claim, regardless of the lack of a nexus between the delay and infancy ... . In addition, defendant failed to address plaintiff's showing that defendant would not be substantially prejudiced by the 10-month delay in seeking leave since the condition of the exposed pipes remained unchanged from the time of the accident ... . Given these factors, which the motion court failed to address, and given the remedial nature of the statute, the motion court improvidently exercised its discretion in dismissing the infant plaintiff's claim ...". ***Eboni B. v. New York City Hous. Auth.*, 2017 N.Y. Slip Op. 01816, 1st Dept 3-15-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER FAILURE TO SAND OR SALT STEPS CREATED OR EXACERBATED A DANGEROUS CONDITION.

The First Department, finding that summary judgment was properly denied in this slip and fall case, noted that there was a question of fact whether the failure to sand or salt the steps created or exacerbated a dangerous condition: "Plaintiff alleges that she was injured when she slipped on icy steps in front of defendants' residence. The record shows that defendant Kenneth Clarke testified that sheets of icy rain had been falling all morning on the day of the accident, and that the steps had been cleared earlier that morning by a man he had hired to clear snow and ice. However, plaintiff and a neighbor who lived across the street testified that there was no precipitation on the morning of the accident, but that it had snowed two and three days earlier. Plaintiff also stated that she had not seen the man defendant had hired to clear the steps, either after

the previous snowfall or that morning, although she was home and would have been aware of his presence. Moreover, there are conflicting opinions of expert meteorologists regarding the weather conditions on the morning of plaintiff's fall. Under these circumstances, summary judgment was properly denied, since triable issues of fact exist as to whether there was a storm in progress on the morning of plaintiff's accident, which would have suspended defendants' obligation to clear the steps of snow and ice ... . Furthermore, assuming that there was no storm in progress, the record also presents issues of fact as to whether anyone acting on defendants' behalf ever inspected and cleared the steps, either on the morning of the accident or after the prior snowfall, and, if so, whether such person's 'failure to place sand or salt on the stairs created or exacerbated a dangerous condition' after the prior storm ...". ***Arroyo v. Clarke*, 2017 N.Y. Slip Op. 01809, 1st Dept 3-15-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER NEGLIGENT WAXING WAS CAUSE OF PLAINTIFF'S FALL.

The First Department determined there was a question of fact whether plaintiff's slip and fall was caused by excessive wax on the floor: "Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she slipped on a floor that was negligently waxed. Defendants submitted evidence showing that the floor was last waxed approximately three months before plaintiff's fall ... . In opposition, plaintiff raised triable issues as to whether 'a dangerous residue of wax was present' ... . She stated that after she fell, there was wax on her hands and, when she stepped on the waxy area, she saw a 'scuff mark; running through a circular area, creating a 'sunken stripe through the wax.' Plaintiff slid her foot back and forth on the circular patch, and felt the 'accumulated, raised, substance on the floor' move with the pressure of her foot, and these actions were captured on the building's security footage." ***Sanchez v. Mitsui Fudosan Am., Inc.*, 2017 N.Y. Slip Op. 01821, 1st Dept 3-15-17**

PERSONAL INJURY, CONTRACT LAW.

TRIVIAL DEFECT IN SIDEWALK NOT ACTIONABLE DESPITE ABSENCE OF NEGLIGENCE BROAD INDEMNFICATION CLAUSE MANDATED PAYMENT OF DEFENDANT'S COSTS ASSOCIATED WITH THE ACTION.

The First Department determined the sidewalk defect was trivial and not actionable but the costs associated with defending the action were recoverable under the broad language of an indemnification clause (despite the absence of negligence): "Plaintiff's description of the alleged defect that caused her fall as an 'uneven spot' that 'wasn't as level as the other side' of a 'little ridge' of concrete in the ground, without more, establishes that the alleged defect was trivial and nonactionable ... . Moreover, defendants established that they had no notice of the alleged defect ... . The indemnification provision in Montesano's contract was ... broad and required Montesano to indemnify defendants for liability, damage, etc., 'resulting from, arising out of or occurring in connection with the execution of the Work,' including attorneys' fees. Thus, although there was no negligence here, to the extent defendants incurred costs connected with Montesano's execution of its work, which included constructing/resurfacing roads and sidewalks on this shopping center renovation project, Montesano is required to indemnify defendants." ***Robinson v. Brooks Shopping Ctrs., LLC*, 2017 N.Y. Slip Op. 01972 1st Dept 3-16-17**

PERSONAL INJURY, EMPLOYMENT LAW.

QUESTION OF FACT WHETHER BOUNCER WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN HE THREW PLAINTIFF TO THE GROUND.

The First Department determined defendant bar's motion for summary judgment dismissing plaintiff's respondeat superior claim was properly denied. Plaintiff was thrown to the ground by the bar's bouncer. There was a question of fact whether the bouncer was acting within the scope of his employment: "Plaintiff was assaulted by a security guard/bouncer in the employ of defendant after plaintiff, who had been denied admittance to defendant's bar because of perceived intoxication, grabbed the baseball cap from the bouncer's head. Less than 30 seconds elapsed between plaintiff taking the cap and the bouncer throwing plaintiff to the ground, which occurred approximately 10 feet from the entrance to defendant's bar. On this record, it cannot be concluded, as a matter of law, that the bouncer was acting outside the scope of his employment at the time of the assault ...". ***Salem v. MacDougal Rest. Inc.*, 2017 N.Y. Slip Op. 01832, 1st Dept 3-15-17**

PRODUCTS LIABILITY, LABOR LAW-CONSTRUCTION LAW.

PRODUCTS LIABILITY ACTION AGAINST ELEVATOR MANUFACTURER SHOULD HAVE SURVIVED SUMMARY JUDGMENT, LABOR LAW § 240(1) INAPPLICABLE TO ELEVATOR ACCIDENT.

The First Department, reversing Supreme Court, determined there was a question fact whether a defective elevator part caused the elevator to fall when plaintiff, who was repairing the elevator, was in the elevator car. The court further determined plaintiff's Labor Law § 240(1) was properly dismissed because securing the elevator to prevent a fall would have made repairing the elevator impossible: "... [P]laintiff raised issues of fact whether the shim was defective and a cause of the accident and whether there was a failure to warn. Plaintiff's expert opined that the cracked shoe caused the elevator car to get wedged in the hoistway in the manner that plaintiff described, and ... [an] engineer involved in the design of the elevator acknowledged that the car could come out of the rails and get hung up if a guide shoe cracked while the elevator

was descending. The engineer also testified that, after a previous instance in which a similar guide shoe by the same manufacturer had cracked because bolts had been over-tightened, [the manufacturer] had redesigned the shim in 2003 to prevent the guide shoe from cracking because of over-tightening of the bolts, but had made no effort to notify customers whose elevators had the older shims. The elevator was not a safety device within the meaning of Labor Law § 240(1) ... . Plaintiff's reliance on *McCrea v. Arnlie Realty Co. LLC* (140 AD3d 427 [1st Dept 2016]) is unavailing. In that case, the elevator on which the plaintiff was engaged in repair work fell onto the plaintiff because it had not been secured. In this case, plaintiff was inside the elevator, riding up and down to test it. To the extent plaintiff may have been engaged in 'repair' within the meaning of Labor Law § 240(1), the statute does not apply, because any securing device would have defeated the purpose of his work by precluding him from riding the elevator ...". ***Versace v. 1540 Broadway L.P.*, 2017 N.Y. Slip Op. 01813, 1st Dept 3-15-17**

TAX LAW.

IN THIS PROSECUTION ALLEGING DEFENDANT CELL PHONE COMPANY'S UNDERPAYMENT OF SALES TAX, DEFENDANT WAS ENTITLED TO THE SALES TAX RETURNS OF OTHER CELL PHONE SERVICE PROVIDERS.

The First Department determined defendant Sprint Communications was entitled to state's sales tax returns and records of other providers of mobile telecommunications voice services, but with the names of the providers redacted. The action was brought by the state and alleged the underpayment of sales tax: "The People claim that they will use only material obtained from third-party discovery and that they have disclosed those materials to defendants. However, the fact that the People have chosen to restrict the materials they will use to prosecute defendants does not mean that defendants must restrict the materials they will use to defend themselves. Moreover, defendants cannot obtain ... [the] documents from third parties. If a document that shows another cell phone company's or DTF's position about debundling, etc., happens to mention the other cell phone company's name, the People may not withhold the entire document. ... Instead, the People should replace the taxpayers' names with 'Cell Phone Company No. 1' and 'Cell Phone Company No. 2,' or the like." ***People v. Sprint Communications Inc.*, 2017 N.Y. Slip Op. 01801, 1st Dept 3-15-17**

SECOND DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY, MEDICAL MALPRACTICE.

PLAINTIFF ENTITLED TO AMEND BILL OF PARTICULARS AS OF RIGHT PRIOR TO FILING OF NOTE OF ISSUE.

The Second Department, over a two-justice dissent, determined plaintiff properly amended his bill of particulars as of right prior to the filing of the note of issue, despite labeling the document a "supplemental" bill of particulars. The amended bill of particulars added the failure to diagnose appendicitis as a basis for the lawsuit: "The defendant's contentions regarding the plaintiff's delay in amending his bill of particulars are misplaced. While it is true that 'once discovery has been completed and the case has been certified as ready for trial, [a] party will not be permitted to amend the bill of particulars except upon a showing of special and extraordinary circumstances' ... , no such showing is required where a bill of particulars is amended as of right before the note of issue and certificate of readiness have been filed. The as-of-right amendment of a bill of particulars has been appropriately compared to the as-of-right amendment of a pleading: 'Presumably this amendment [pursuant to CPLR 3042(b)] can make any change in the bill, just as an amendment as of course can make any change in a pleading under CPLR 3025(a). But the latter is restricted in time to the outset of the action while CPLR 3042(b) keeps the bill's amendment time open during the whole pre-note of issue period'... ." ***Mackauer v. Parikh*, 2017 N.Y. Slip Op. 01847, 2nd Dept 3-15-17**

COURT OF CLAIMS, IMMUNITY, PERSONAL INJURY.

CLAIM ALLEGING NEGLIGENT PLACEMENT OF A GUARDRAIL PROPERLY DISMISSED, STATE ENTITLED TO QUALIFIED IMMUNITY.

The Second Department determined the claim alleging negligent highway design was properly dismissed after trial: " '[A] municipality owes to the public the absolute duty of keeping its streets in a reasonably safe condition' ... . However, 'in the field of traffic design engineering, the State is accorded a qualified immunity from liability arising out of a highway planning decision' ... . Under the qualified immunity doctrine, liability may arise where there is proof that the State's traffic design plan 'evolved without adequate study or lacked a reasonable basis' ... . Moreover, 'something more than a mere choice between conflicting opinions of experts is required before the State . . . may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public' ... . Here, the Court of Claims properly dismissed the claim based upon the evidence the State submitted at trial, which showed that the design and placement of the guardrail were the result of a deliberate decision-making process after an adequate study and had a reasonable basis ...". ***Gagliardi v. State of New York*, 2017 N.Y. Slip Op. 01845, 2nd Dept 3-15-17**

CRIMINAL LAW.

POSSIBILITY OF DEPORTATION NOT MENTIONED AT TIME OF GUILTY PLEA, MATTER REMITTED.

The Second Department sent the matter back for a report from Supreme Court because the possibility of deportation was not mentioned at the time of the guilty plea: "Here, the record does not demonstrate that the Supreme Court mentioned the possibility of deportation as a consequence of the defendant's plea. Under the circumstances of this case, we remit the matter to the Supreme Court, Westchester County, to afford the defendant an opportunity to move to vacate his plea, and for a report by the Supreme Court thereafter. Any such motion shall be made by the defendant within 60 days after the date of this decision and order ... , and, upon such motion, the defendant will have the burden of establishing that there is a 'reasonable probability' that he would not have pleaded guilty had the court advised him of the possibility of deportation ... . In its report to this Court, the Supreme Court shall state whether the defendant moved to vacate his plea of guilty, and if so, shall set forth its finding as to whether the defendant made the requisite showing or failed to make the requisite showing ...". ***People v. Agramonte*, 2017 N.Y. Slip Op. 01876, 2nd Dept 3-15-17**

CRIMINAL LAW.

IT WAS THEORETICALLY POSSIBLE (ALTHOUGH HIGHLY UNLIKELY) THE TWO ASSAULT CONVICTIONS WERE BASED UPON THE SAME ACT, DEFENDANT SHOULD NOT HAVE BEEN GIVEN CONSECUTIVE SENTENCES.

The Second Department determined defendant should have been sentenced concurrently for his two assault convictions. The victim was stabbed 20 times and his face was slashed. Defendant was convicted of two counts of assault first — intent to disfigure and intent to cause serious injury. It was not possible to determine whether the jury convicted on both counts based upon only the slashing of the victim's face as opposed to two different acts: "We agree with the defendant's contention. Pursuant to Penal Law § 70.25(2), concurrent sentences must be imposed 'for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other.' 'Thus, sentences [of imprisonment] imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other' ... . Nonetheless, 'trial courts retain consecutive sentence discretion when separate offenses are committed through separate acts, though they are part of a single transaction' ... . Here, the People have failed to establish that the acts constituting the respective assault in the first degree convictions were separate and distinct from each other as required by the statute ... . It is impossible to determine from the record whether the slashing of an 'X' into the victim's face, which formed the basis for the assault in the first degree 'intent to disfigure another person seriously and permanently' conviction ... , also formed the basis for the jury's verdict of guilt on the assault in the first degree 'intent to cause serious physical injury' conviction ... Thus, the People failed to establish that the acts constituting each of the two assault in the first degree convictions were separate and distinct from each other." ***People v. Henderson*, 2017 N.Y. Slip Op. 01885, 2nd Dept 3-15-17**

CRIMINAL LAW, EVIDENCE.

911 CALL AND PRIOR CONSISTENT STATEMENT PROPERLY ADMITTED AS EXCITED UTTERANCES.

The Second Department determined a 911 call and a prior consistent statement were properly admitted as excited utterances: "... [T]he recording of the 911 call was properly admitted into evidence under the excited utterance and present sense impression exceptions to the hearsay rule, as the probative value of this evidence outweighed any prejudicial effect ... . The defendant contends that he was deprived of a fair trial when the prosecutor elicited testimony from a police officer and the victim's niece regarding statements made by the victim's son at the scene, which improperly bolstered the testimony of the victim's son identifying the defendant as the shooter. ... . If a proffered statement also meets the requirements to be admitted as an excited utterance, its admission would be proper, notwithstanding the characterization as a prior consistent statement ... . Here, the Supreme Court properly admitted the testimony of the police officer and the victim's niece concerning the statements of the victim's son at the scene identifying the defendant as the shooter under the excited utterance exception to the hearsay rule, and that testimony did not constitute improper bolstering ...". ***People v. Chin*, 2017 N.Y. Slip Op. 01880, 2nd Dept 3-15-17**

FAMILY LAW.

PUBLIC POLICY PROHIBITS RECOUPMENT OF OVERPAYMENT OF CHILD SUPPORT.

The Second Department noted that public policy prohibited the recoupment of overpayment of child support by reducing future child support payments. However a commensurate reduction of future payments of educational expenses was okay: " 'There is strong public policy in this state, which the [Child Support Standards Act] did not alter, against restitution or recoupment of the overpayment of child support' ... . 'The reason for this policy is that . . . child support payments are deemed to have been devoted to that purpose, and no funds exist from which one may recoup moneys so expended' if the award is thereafter reversed or modified' ... . Thus, recoupment of child support payments is only appropriate under 'limited circumstances' ... . * * * However, '[w]hile child support overpayments may not be recovered by reducing future support payments, public policy does not forbid offsetting add-on expenses against an overpayment' ... . Thus, although the overpayments may not be applied to the father's child support obligation, he may use the overpayments to offset his share of the add-on expenses, such as the educational expenses ...". ***Matter of McGovern v. McGovern*, 2017 N.Y. Slip Op. 01862. 2nd Dept 3-15-17**

FAMILY LAW.

APPELLANT'S LATE APPEARANCE FOR A HEARING DID NOT JUSTIFY A DEFAULT FINDING.

The Second Department determined Family Court should not have denied a motion to vacate an order of protection. Appellant had been slightly late for a hearing on her sister's request for an order of protection and the order was issued based upon appellant's default: "In this family offense proceeding, the Family Court issued an order of protection against the appellant and in favor of her sister upon the appellant's failure to appear at a hearing. The appellant moved to vacate the order of protection entered upon her default, and the Family Court denied her motion. * * * The Family Court improvidently exercised its discretion in denying the appellant's motion to vacate the order of protection entered upon her default in appearing at the hearing. The appellant showed no willfulness or intent to default, where she was minimally tardy to the hearing, and the tardiness might have been due, at least in part, to crowded conditions at the courthouse, she attended prior court appearances, she engaged in motion practice through her attorney, and she participated in multiple preparatory conferences with her attorney ... . Also, the appellant moved to vacate the order of protection relatively soon after it was issued. Under the circumstances, the appellant demonstrated a reasonable excuse for her failure to appear at the hearing. Further, the appellant demonstrated a potentially meritorious defense to the petition ....". ***Matter of Williams v. Williams*, 2017 N.Y. Slip Op. 01873, 2nd Dept 3-15-17**

FAMILY LAW, APPEALS.

PETITIONER'S PATERNITY CLAIM PROPERLY DISMISSED ON EQUITABLE ESTOPPEL GROUNDS, REINSTATEMENT OF PETITION UPON A PRIOR APPEAL DID NOT PRECLUDE DISMISSAL.

The Second Department determined petitioner was properly estopped from asserting his paternity claim. The Second Department noted that the fact that petitioner's paternity petition was reinstated upon a prior appeal did not preclude the denial of the petition on equitable estoppel grounds: "The Family Court properly applied the doctrine of equitable estoppel to preclude the petitioner from asserting his paternity claim with respect to the subject child. The evidence at a hearing established that the respondent Gaston R. has established a strong father-daughter relationship with the child. The child has referred to Gaston R. as 'daddy' since she was 18 months old and continues to view him as the only father figure in her life. In contrast, the petitioner learned, shortly after the child's birth, that he was the child's biological father. Nevertheless, he did not commence the instant paternity proceeding until the child was four years old. The petitioner has not had a parent-child relationship with the child for several years, and the child no longer recognizes the petitioner's name. Under these circumstances, the court properly determined that it was in the child's best interests to equitably estop the petitioner from asserting his paternity claim Contrary to the petitioner's contention, this Court's determination on a prior appeal, which, inter alia, reinstated his paternity petition, did not preclude the Family Court from considering the doctrine of equitable estoppel upon remittal ...". ***Matter of Thomas T. v. Luba R.*, 2017 N.Y. Slip Op. 01870, 2nd Dept 3-15-17**

FAMILY LAW, EVIDENCE.

NEGLECT PETITION ALLEGING EXCESSIVE CORPORAL PUNISHMENT SHOULD NOT HAVE BEEN DISMISSED AFTER PRESENTATION OF DIRECT CASE, CHILD'S OUT OF COURT STATEMENTS SUFFICIENTLY CORROBORATED.

The Second Department, reversing Family Court, determined the neglect petition should not have been dismissed at the close of the direct case. There was sufficient evidence of excessive corporal punishment and sufficient corroboration of the child's out of court statements: "At the fact-finding hearing, the petitioner introduced a recording of two telephone calls to the 911 emergency number, and elicited testimony from a police officer and a caseworker that the mother admitted using a belt against the child. Such evidence was sufficient to corroborate the child's out-of-court statements to the caseworker that the mother beat her ... . Moreover, the absence of physical injury is not dispositive ... . In any event, the caseworker's testimony that the child had stated that her upper right arm hurt from having defended herself, was not undermined on cross examination. Finally, dismissal was not warranted on the ground that the child gave a conflicting statement to the police officer." ***Matter of Jaivon J. (Patricia D.)*, 2017 N.Y. Slip Op. 01856, 2nd Dept 3-15-17**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

PETITION FOR LEAVE TO FILE LATE NOTICE OF CLAIM PROPERLY DENIED.

The Second Department determined the petition for leave to file a late notice of claim for a student (Lopez) allegedly injured in gym class was properly denied: "Here, the petitioner failed to establish that the City had acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident or a reasonable time thereafter (see General Municipal Law § 50-e[5]). While the petitioner alleges that the physical education teacher invented the particular exercise and was present when Lopez was injured, she failed to submit any evidence that the City acquired actual knowledge of the essential facts underlying their negligence claims ... . Thus, the City had no reason to conduct a prompt investigation into the purported negligence ... . The petitioner also failed to proffer evidence establishing a reasonable excuse for her failure to serve a timely notice of claim ... . Lopez's infancy, without any showing of a nexus between the infancy and the delay, was insufficient to constitute a reasonable excuse ... . Moreover, the assertion by the petitioner that she was consumed with Lopez's

medical care was also insufficient to constitute a reasonable excuse, as it was not supported by any evidence demonstrating that the delay in serving a notice of claim was directly attributable to Lopez's medical condition ... . Finally, the petitioner failed to present 'some evidence or plausible argument' supporting a finding that the City was not substantially prejudiced by the 11-month delay in serving a notice of claim ...". ***Matter of Ramos v. Board of Educ. of the City of New York*, 2017 N.Y. Slip Op. 01868, 2nd Dept 3-15-17**

INSURANCE LAW.

NOTICE OF DISCLAIMER SENT TO PLAINTIFF'S INSURER WAS NOT EFFECTIVE NOTICE TO PLAINTIFF.

The Second Department determined a notice of disclaimer sent by defendant insurer (FMIC) to plaintiff's insurer (Mt. Hawley) was not sufficient to disclaim coverage of plaintiff (Harco): "Here, although Mt. Hawley was acting on behalf of the plaintiffs when it sent notice of the occurrence to FMIC and demanded that FMIC assume the plaintiffs' defense and indemnification in connection with any lawsuits arising from the incident, that did not make Mt. Hawley the plaintiffs' agent for all purposes, or for the specific purpose that is relevant here: receipt of a notice of disclaimer ... . Contrary to FMIC's contention, Mt. Hawley's interests were not necessarily the same as Harco's in this litigation and because Harco had its own interests at stake, separate from that of Mt. Hawley, Harco was entitled to notice delivered to it ... . Since FMIC failed to provide timely notice of its denial of coverage on the basis of a policy exclusion to Harco, it is estopped from disclaiming insurance coverage on that ground ...". ***Harco Constr., LLC v. First Mercury Ins. Co.*, 2017 N.Y. Slip Op. 01846, 2nd Dept 2-15-17**

INTENTIONAL TORTS, CIVIL PROCEDURE.

CONTINUING TORT DOCTRINE APPLIED TO A COUNTERCLAIM FOR A DELIBERATE CAMPAIGN OF HARASSMENT SPANNING 13 YEARS.

The Second Department, in this assault and battery action, determined defendant's counterclaim alleging a deliberate campaign of harassment spanning 13 years was not subject to the one-year statute of limitations because the continuing tort doctrine applied: "... [T]he Supreme Court properly concluded that so much of the defendant's third counterclaim as was based on conduct occurring prior to September 29, 2013, was not barred by the one-year statute of limitations (see CPLR 215), and that it was instead governed by the continuing tort doctrine, which permits claims based on 'wrongful conduct occurring more than one year prior to commencement of the action, so long as the final actionable event occurred within one year of the suit' ... . The counterclaim was supported by factual allegations that the plaintiff engaged in a continuing and concerted campaign of harassment and intimidation of the defendant that progressed from, among other things, calling the defendant, his family, and guests ethnic and racial epithets and throwing items onto his property to eventually making threats of violence, making false criminal accusations, committing assault and battery against the defendant, and continuing to engage in threatening and intimidating conduct nearly two months after the physical confrontation that is the subject of the plaintiff's complaint ... . The final actionable event, allegedly occurring in November 2013, fell within one year of the defendant's service of the verified answer with counterclaims ...". ***Estreicher v. Oner*, 2017 N.Y. Slip Op. 01844, 2nd Dept 3-15-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INJURY WHILE TRIMMING A TREE NOT ACTIONABLE UNDER LABOR LAW §§ 200 OR 240(1).

The Second Department determined Supreme Court properly granted defendants' motion for summary judgment on the Labor Law §§ 200 and 240(1) causes of action. Plaintiff was injured by a power saw as he was standing on a ladder cutting a tree branch. The Labor Law § 200 cause of action was dismissed because defendants did not control the manner of plaintiff's work. The Labor Law § 240(1) cause of action was dismissed because tree-trimming was not encompassed by the statute: "Here, the accident arose from the manner in which the work was performed, and the defendants established their prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 200 claim by submitting evidence demonstrating that they did not have the authority to supervise or control the methods or materials of the plaintiff's work ... . The defendants established, prima facie, that the plaintiff's tree branch cutting work was outside the ambit of Labor Law § 240(1), because a tree is not a 'building or structure' within the meaning of the statute ... . In opposition, the plaintiff failed to raise a triable issue of fact. His contention that the tree branch cutting work was necessary to complete a larger renovation project with respect to the building on the premises is unsupported by the record ...". ***Olarte v. Morgan*, 2017 N.Y. Slip Op. 01874, 2nd Dept 3-15-17**

PERSONAL INJURY.

DEFENDANT HEAVY METAL CLUB DID NOT DEMONSTRATE PLAINTIFF ASSUMED THE RISK OF COLLIDING WITH A SLAM DANCER, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant heavy metal club did not demonstrate plaintiff assumed the risk of colliding with a slam dancer. Plaintiff was not participating in the slam dancing: "The doctrine of primary assumption of risk 'applies when a consenting participant in a qualified activity is aware of the risks; has an appreciation of the nature of the risks; and voluntary assumes the risks' ... . A person who chooses to engage in such an activity 'consents

to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation' ... . The doctrine has generally been restricted 'to particular athletic and recreative activities in recognition that such pursuits have enormous social value' even while they may involve significantly heightened risks' ... , and are, therefore, 'worthy of insulation from a breach of duty claim; ... . Here, even assuming, without deciding, that attending a heavy metal concert where slam dancing takes place is a qualified activity to which the doctrine may properly be applied ... , under the facts presented, the defendants, as the organizers and sponsors of the event, failed to eliminate triable issues of fact as to whether they met their duty to exercise care to make the conditions at the subject venue as safe as they appeared to be ... and did not unreasonably increase the usual risks inherent in the activity of concert going ...". ***Brosnan v. 6 Crannell St., LLC*, 2017 N.Y. Slip Op. 01840, 2nd Dept 3-15-17**

THIRD DEPARTMENT

CRIMINAL LAW.

DEFENDANT'S OMISSIONS, INCONSISTENT STATEMENTS AND LIES AFTER A ROUTINE TRAFFIC STOP JUSTIFIED THE CANINE SNIFF.

The Third Department, over a two-justice dissent, determined the motion to suppress cocaine discovered using a canine sniff after a traffic stop for tinted windows was properly denied. Enough information and inconsistencies came to the officers' attention after the stop to warrant the dog sniff. Defendant was on parole but initially did not inform the officer of that fact, the stop was outside the county in which defendant was paroled, defendant lied about his cell phone being broken, etc.: "The prolonged diet of inconsistencies and lies provided by defendant about his travels, when coupled with his parole situation and his nervous demeanor throughout the encounter, combined to give the officers a 'founded suspicion of criminality' ... . This founded suspicion justified both the extension of the stop after its initial justification had been exhausted and the exterior canine sniff that followed ... . The alert gave the troopers probable cause to search the vehicle and recover the bookbag from the back seat that contained cocaine ...". ***People v. Banks*, 2017 N.Y. Slip Op. 01916, 3rd Dept 3-16-17**

DISCIPLINARY HEARINGS (INMATES).

FAILURE TO PRODUCE A COPY OF THE MAIL WATCH AUTHORIZATION REQUIRED THAT THE DETERMINATION BE ANNULLED AND EXPUNGED.

The Third Department determined the respondent did not demonstrate the mail watch which led to the charges against petitioner was properly authorized. The related evidence could not be the basis for the determination, which was annulled and expunged: "... [P]etitioner requested a copy of the mail watch authorization four times during the course of the hearing, but it was never produced and is not part of the record. Although the senior investigator testified that the mail watch was authorized by the Superintendent of the facility, the reason for its issuance and the specific facts underlying it were never disclosed and are not apparent from the record. Under these circumstances, we find that authorization for the mail watch was not established in accordance with the requirements of 7 NYCRR 720.3 (e) (1) ... . Inasmuch as correspondence obtained through the unlawful mail watch was instrumental in finding petitioner guilty of solicitation and violating facility correspondence procedures, that part of the determination must ,,, be annulled ...". ***Matter of Wilson v. Commissioner of N.Y. State Dept. of Corr. & Community Supervision*, 2017 N.Y. Slip Op. 01921, 3rd Dept 3-16-17**

INSURANCE LAW.

INSURANCE BROKER ENGAGED IN UNTRUSTWORTHY CONDUCT STEMMING FROM A MISLEADING AD FOR VIATICAL SETTLEMENT AGREEMENTS AND WAS PROPERLY FINED.

The Third Department determined petitioner, a licensed insurance agent/broker, had engaged in untrustworthy conduct and was properly fined. Petitioner sold so-called viatical settlement agreements involving the purchase of interests in life insurance policies of elderly and terminally ill persons. Whether the purchased interests would return a profit depended on whether the amounts paid for the policies and premiums was less than the amount the policies paid out upon death. Petitioner took out an ad which was deemed misleading and there was evidence petitioner did not inform purchasers of the risks: "... [W]e agree with respondent's determination that the subject advertisement was misleading. As a starting point, the language at issue indeed could be read as suggesting that an investor would receive a fixed rate of return at the end of a predetermined period of time — a representation that was not universally true, as the timing of the payout was entirely dependent upon when the viator died; more to the point, the promised fixed rate of return could effectively be diminished if the viator exceeded his or her life expectancy, i.e., did not die within the "plan" period, and the investor's profit might be eliminated altogether if he or she was required to assume responsibility for paying the premiums due. * * * We reach a similar conclusion with respect to the finding that respondent failed to fully disclose the risks of viatical settlements to some of his clients. ... [R]espondent's finding that petitioner acted in an untrustworthy manner in this regard stems from petitioner's failure to 'sufficiently disclose the risks in his oral presentations to some of his clients.' Without recounting the extensive

testimony adduced on this point, suffice it to say that the record contains conflicting evidence as to what petitioner did or did not say to investors regarding the nature and risks of viatical settlements." ***Matter of Nichols v. New York State Dept. of Fin. Servs.*, 2017 N.Y. Slip Op. 01944m 3rd Dept 3-16-17**

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