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COURT OF APPEALS

EMPLOYMENT LAW, CIVIL PROCEDURE LAW, ATTORNEYS.

PLAINTIFF STATE TROOPER ENTITLED TO ATTORNEY'S FEES AFTER HER SUCCESSFUL SEX DISCRIMINATION ACTION AGAINST THE STATE UNDER THE EQUAL ACCESS TO JUSTICE ACT.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurrence and a two-judge dissent, determined plaintiff state trooper was entitled to attorney's fees in connection with her successful employment discrimination action against the State under the Equal Access to Justice Act (EAJA): "... [T]he plain language, legislative history and remedial nature of the EAJA together demonstrate that this civil action is eligible for an award of attorneys' fees. We hold that for cases commenced before the effective date of the 2015 amendment to the Human Rights Law, the EAJA permits the award of attorneys' fees and costs to a prevailing plaintiff in an action against the State under the Human Rights Law for sex discrimination in employment by a state agency. The plain language of the statute, which is supported by the legislative history, compels the conclusion that 'any civil action' encompasses cases brought under the Human Rights Law. It is not for this Court to engraft limitations onto the plain language of the statute. Indeed, '[t]his Court should be very cautious in interpreting statutes based on what it views as a better choice of words when confronted with an explicit choice made by the Legislature' ....". ***Kimmel v. State of New York*, 2017 N.Y. Slip Op. 03689, CtApp 5-9-17**

VEHICLE AND TRAFFIC LAW, ADMINISTRATIVE LAW.

DEPARTMENT OF MOTOR VEHICLES REGULATIONS ALLOWING A 25 YEAR LOOK BACK FOR CERTAIN DRIVERS WITH DRIVING WHILE INTOXICATED CONVICTIONS WERE LAWFULLY PROMULGATED AND APPLIED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, affirming the Appellate Division, determined the regulations promulgated by the Commissioner of the Department of Motor Vehicles (DMV) and the application of those regulations to the petitioners were lawful. Petitioners challenged certain DMV regulations pursuant to which their applications for driver's licenses, which had been revoked for Driving While Intoxicated offenses, were denied. Applying the *Boreali* criteria, the court found the Commissioner did not exceed her rule-making powers. The court further found the regulations did not conflict with the relevant statutes and there was a rational basis for the Commissioner's denial of the license applications: "The amendments at issue in these appeals (the Regulations) were adopted as emergency regulations in September 2012 and took effect immediately. In relevant part, the Regulations provide that, '[u]pon receipt of a person's application for relicensing, the Commissioner shall conduct a lifetime review of such person's driving record' (15 NYCRR 136.5 [b]). The Commissioner 'shall deny the application' if 'the record review shows that': (1) the applicant has 'five or more alcohol- or drug-related driving convictions or incidents in any combination within his or her lifetime,' (15 NYCRR 136.5 [b] [1]) or (2) within a '25 year look back period,' the applicant 'has three or four alcohol- or drug-related driving convictions or incidents in any combination' and 'one or more serious driving offense' (15 NYCRR 136.5 [b] [2]). A 'serious driving offense' includes: (i) 'a fatal accident'; (ii) 'a driving-related Penal Law conviction'; (iii) 'conviction of two or more violations for which five or more points are assessed' on the applicant's driving record; or (iv) '20 or more points from any violations' (15 NYCRR 136.5 [a] [2]). For applicants with 'three or four alcohol- or drug-related driving convictions or incidents in any combination within the 25 year look back period but no serious driving offenses within the 25 year look back period,' the Regulations provide that the Commissioner 'shall deny the application for at least five years' in addition to the minimum statutory revocation period (15 NYCRR 136.5 [b] [3]). Following the expiration of this five-year waiting period, 'the Commissioner may in his or her discretion approve the application … [with restrictions].'" ***Matter of Acevedo v. New York State Dept. of Motor Vehs.*, 2017 N.Y. Slip Op. 03690, CtApp 5-9-17**

FIRST DEPARTMENT

CIVIL PROCEDURE, FREEDOM OF INFORMATION LAW (FOIL), PRIVILEGE.

MOTION TO COMPEL DISCOVERY OF NYPD DOCUMENTS SHOULD NOT HAVE BEEN DENIED SOLELY BECAUSE FOIL REQUESTS FOR THE DOCUMENTS HAD BEEN DENIED.

The First Department determined Supreme Court should not have denied a motion to compel discovery of New York Police Department documents solely because prior requests for the documents under the Freedom of Information Law were denied. The "public interest" privilege did not justify outright denial of the motion: "... [T]the court erred in denying defendants' motion outright because of the prior denials of their requests for the same information under the Freedom of Information Law (FOIL). 'CPLR article 31 is not a statute specifically exempt[ing]' public records from disclosure under FOIL' and 'no provision of FOIL bars simultaneous use of both' CPLR 3101 and FOIL to procure discovery ... . The 'public interest' privilege did not justify the outright denial of defendants' motion, because the court did not engage in the requisite balancing of the public interest in encouraging witnesses to come forward to cooperate in pending criminal investigations against defendants' need for the documents to defend against plaintiffs' claim ... . Accordingly, we find that remittal to the motion court for in camera review of the requested files is appropriate in this case, to give the court the opportunity to conduct the proper balancing, in the first instance, of the interests of both parties ...". ***Smith v. Watson*, 2017 N.Y. Slip Op. 03878, 1st Dept 5-11-17**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

NEGLIGENT SUPERVISION ACTION AGAINST SCHOOL DISTRICT PROPERLY SURVIVED SUMMARY JUDGMENT, STUDENT ASSAULTED INFANT PLAINTIFF.

The Second Department determined the negligent supervision action against the school district, stemming from an assault by a student against the infant plaintiff (another student), properly survived summary judgment. The Second Department noted that the school, as opposed to the school district, is not an entity which can be sued. The decision includes a concise but complete explanation of the relevant law. Here the district was aware the infant plaintiff had been harassed by the student before and the student punched the infant plaintiff while a teacher was present in a classroom. The punch was immediately preceded by a couple of minutes of harassment of the infant plaintiff by the assailant: "... [T]he School District has not shown, prima facie, that the incident 'involved the type of unforeseeable, spontaneous acts of violence for which school districts cannot be held liable' ... , or that the teacher had no time to prevent the infant plaintiff's injuries and, therefore, the alleged negligent supervision was not a proximate cause of the infant plaintiff's injuries ... . Moreover, the School District did not demonstrate, prima facie, that the infant plaintiff voluntarily entered into a fight with the classmate; rather, the infant plaintiff's testimony demonstrated the existence of triable issues of fact as to whether he acted in self-defense ... . Because the School District did not meet its prima facie burden, we do not consider the sufficiency of the plaintiffs' opposition papers ...". ***Guerriero v. Sewanhaka Cent. High Sch. Dist.*, 2017 N.Y. Slip Op. 03736, 2nd Dept 5-10-17**

FAMILY LAW.

FATHER'S REQUEST FOR UNSUPERVISED VISITATION SHOULD NOT HAVE BEEN DENIED, NOTWITHSTANDING THE PENDING PERMANENT NEGLECT PROCEEDINGS.

The First Department, reversing Family Court, over a dissent, determined respondent father had demonstrated good cause for a modification of his visitation to allow "sandwich visits," a half hour of unsupervised visitation between two periods of supervised visitation ... . The fact that there was a pending permanent neglect proceeding was not an impediment to the change in visitation. Although father had a drug problem and had been incarcerated, he was working full time and had been drug free for some time: "Although respondent has a history of drug abuse, which led to a period of incarceration, he has demonstrated his commitment to counseling and treatment, and has not tested positive for drugs since January 2016. Respondent has also demonstrated a desire to turn his life around, obtaining regular employment and endeavoring to build a relationship with the child, who is now almost six years old, by regularly attending the twice weekly supervised visits. It is undisputed that these visits have been positive for the child and that there are no concerns about the child's safety in spending time with respondent. Nor is there any evidence that the limited sandwich visits would be emotionally damaging for the child just because there is a possibility that respondent's parental rights will be terminated at the end of the permanency proceeding. 'No case has been cited for the proposition that a finding of permanent neglect and a goal of adoption are legal impediments to changing the nature of a parent's visitation or increasing its frequency, and none has been found . . . Until the conclusion of disposition and the rendering of a decision, the outcome of this case remains uncertain' ...". ***Matter of Gerald Y.-C. (Roland Y.)*, 2017 N.Y. Slip Op. 03843, 1st Dept 5-11-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE LADDER PLAINTIFF WAS USING WOBBLED, SPUN AND FELL OVER, PLAINTIFF WAS PROPERLY AWARDED SUMMARY JUDGMENT ON HIS LABOR LAW § 240 (1) CAUSE OF ACTION.

The First Department determined plaintiff was entitled to summary judgment on his Labor Law § 240 (1) cause of action. Plaintiff alleged the ladder on which he was standing wobbled causing him to fall. The court distinguished a recent Court of Appeals case which found a question of fact precluded summary judgment where plaintiff fell on wet temporary exterior stairs. The First Department noted there is a presumption that a ladder or scaffold which fails did not provide adequate protection: "As the Court of Appeals recently reiterated in O'Brien v. Port Auth. of N.Y. & N.J. (_ NY3d _, 2017 N.Y. Slip Op. 02466 ... , 'The fact that a worker falls at a construction site, in itself, does not establish a violation of Labor Law § 240(1).' 'Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein' ... . However, '[i]n cases involving ladders or scaffolds that collapse or malfunction for no apparent reason,' the Court of Appeals has applied 'a presumption that the ladder or scaffolding device was not good enough to afford proper protection' ... — a presumption that the O'Brien Court recognized but found inapplicable to the facts before it, which involved a fall from an exterior stairway. Here, plaintiff established prima facie that Labor Law § 240(1) was violated through his testimony that the ladder from which he fell wobbled during its use ... , that two of the ladder's rubber feet were missing ..., and that the ladder spun and fell over ...". ***Kebe v. Greenpoint-Goldman Corp.*, 2017 N.Y. Slip Op. 03712, 1st Dept 5-9-17**

MEDICAL MALPRACTICE, PERSONAL INJURY.

CONTINUOUS TREATMENT TOLLS THE STATUTE OF LIMITATIONS IN A MEDICAL MALPRACTICE ACTION WHEN THE INITIAL ERRONEOUS DIAGNOSIS IS OUTSIDE THE STATUTE AND THE CONTINUED TREATMENT WAS BY OTHER DOCTORS IN THE GROUP.

The Second Department determined there was a question of fact whether the continuous treatment doctrine applied to render this medical malpractice action timely. The court noted that the doctrine applies when the allegedly incorrect diagnosis occurred outside the statute of limitations and the continued treatment is not by the original doctor, but by other doctors in the group: "The continuous treatment doctrine tolls the statute of limitations for medical malpractice actions when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint ... . With respect to failure-to-diagnose cases, a physician 'cannot escape liability under the continuous treatment doctrine merely because of a failure to make a correct diagnosis as to the underlying condition, where [he or she] treated the patient continuously over the relevant time period for symptoms that are ultimately traced to that condition' ... . The continuous treatment doctrine may be applied to a physician who has left a medical practice by imputing to him or her the continued treatment provided by subsequent treating physicians in that practice ...". ***Matthews v. Barrau*, 2017 N.Y. Slip Op. 03738, 2nd Dept 5-10-17**

PERSONAL INJURY, CIVIL PROCEDURE, WORKERS' COMPENSATION.

WORKERS' COMPENSATION BENEFITS WERE A COLLATERAL SOURCE, DAMAGES FOR PAST AND FUTURE LOST WAGES REDUCED BY THE AMOUNT OF THE BENEFITS.

The Second Department determined the defendants had demonstrated at a collateral source hearing that plaintiff will receive $205 per week in Workers' Compensation benefits for the rest of her life. Even though the benefits were awarded after an unrelated 2002 accident, the damages awards for past and future lost income were reduced by $205 per week from the time of the 2010 accident (plaintiff was planning to return to work, and thereby lose the benefits, at the time of the 2010 accident): "In '[a]ctions for personal injury . . . where the plaintiff seeks to recover for the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source, except for life insurance and those payments as to which there is a statutory right of reimbursement' (CPLR 4545[a]). The legislative intent of CPLR 4545(a) is to 'eliminat[e] plaintiffs' duplicative recoveries' ... .. 'The moving defendant bears the burden of establishing an entitlement to a collateral source reduction of an award for past or future economic loss.'... ." ***McKnight v. New York City Tr. Auth.*, 2017 N.Y. Slip Op. 03740, 2nd Dept 5-10-17**

PERSONAL INJURY, TOXIC TORTS.

MOLD-INJURY CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED AT THE PLEADING STAGE, PLAINTIFF ADEQUATELY PLED THE DEVELOPMENT OF "NEW" SYMPTOMS WITHIN THREE YEARS OF FILING SUIT.

The First Department, reversing Supreme Court, determined plaintiff's toxic tort (injury from mold) cause of action should not have been dismissed at the pleading stage on statute of limitations grounds. There was a question whether the symptoms plaintiff developed within three years of filing suit were qualitatively different from symptoms experienced more than

three years before the suit: "The motion court erred in dismissing plaintiff's claim for personal injury due to toxic mold. Plaintiff sufficiently pleaded that, after August 2010 (within three years of commencing this action), he suffered from 'new' symptoms and injuries, including, among other things, eczema and significant fungal growth on his tongue and throat. Accordingly, defendants failed to make a prima facie showing that this claim is time-barred ... . While there are factual questions as to whether the sinus infections and related symptoms suffered prior to August 2010 were 'qualitatively different' from plaintiff's injuries after August 2010 ... , at this procedural juncture it would be improper to dismiss the claim." ***Gordon v. ROL Realty Co.*, 2017 N.Y. Slip Op. 03851, 1st Dept 5-11-17**

SECURITIES, CONTRACT LAW, CIVIL PROCEDURE.

ALTHOUGH MOST OF THE CAUSES OF ACTION STEMMING FROM THE PURCHASE OF RESIDENTIAL MORTGAGE-BACKED SECURITIES WERE TIME-BARRED, A LIMITED BACKSTOP GUARANTY CAUSE OF ACTION AND A FAILURE TO NOTIFY CAUSE OF ACTION WERE REINSTATED.

The First Department, in a full-fledged opinion by Justice Moskowitz, reinstated a couple of causes of action in a lawsuit stemming from the purchase of residential mortgage-backed securities, the bulk of which was deemed time-barred. A limited backstop guaranty cause of action and a cause of action stemming from the failure to notify of a material breach were reinstated. The intertwined contracts and guarantees and the legal reasoning stemming from recent similar cases are too detailed to fairly summarize here. ***Bank of N.Y. Mellon v. WMC Mtge.*, LLC, 2017 N.Y. Slip Op. 03881, 1st Dept 5-11-17**

SECOND DEPARTMENT

CIVIL PROCEDURE, ATTORNEYS, LEGAL MALPRACTICE.

LETTER TERMINATING ATTORNEY-CLIENT RELATIONSHIP CANNOT BE THE BASIS FOR A MOTION TO DISMISS A LEGAL MALPRACTICE COMPLAINT AS BARRED BY DOCUMENTARY EVIDENCE.

The Second Department determined defendant-attorneys' motion to dismiss based on documentary evidence was properly denied. Plaintiff alleged the attorneys missed a statute of limitations deadline. The attorneys submitted a letter purporting to terminate the attorney-client relationship with plaintiff prior to the expiration of the statute of limitations. The court found that the letter was not the type of document upon which a motion to dismiss the complaint can be based: " 'A motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law'... . The evidence submitted in support of such motion must be 'documentary' or the motion must be denied ... . In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as documentary evidence, it must be 'unambiguous, authentic, and undeniable' ... . '[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case' ... . 'Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence' ...". ***Prott v. Lewin & Baglio, LLP*, 2017 N.Y. Slip Op. 03786, 2nd Dept 5-10-17**

CIVIL PROCEDURE, NEGLIGENCE.

MOTION TO SET ASIDE THE VERDICT IN THIS PERSONAL INJURY CASE PROPERLY GRANTED, THE JURY FOUND DEFENDANT NEGLIGENT BUT WENT ON TO FIND THE NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF THE INJURY.

The Second Department determined plaintiff's motion to set aside the verdict in this personal injury case was properly granted. The jury found defendant negligent but went on to find the negligence was not the proximate cause of the injury: "... [T]he plaintiff ... was injured when an ammunition reloading device, owned by the defendant, exploded as the plaintiff attempted to remove what was purportedly a "dead" cartridge from the device. The defendant had inadvertently jammed a live round in the device two months earlier and had attempted to remove the combustible components before bringing it to the plaintiff and seeking his assistance in removing the jammed cartridge. * * * ... [T]here existed no valid line of reasoning and permissible inferences from which the jury could rationally have found that the defendant's negligent conduct was not a proximate cause of the plaintiff's injuries." ***Piro v. Demeglio*, 2017 N.Y. Slip Op. 03785, 2nd Dept 5-10-17**

CONTRACT LAW.

PLAINTIFF DEEMED TO HAVE READ AND UNDERSTOOD THE SETTLEMENT DOCUMENT BEFORE SIGNING, LEGAL MALPRACTICE COMPLAINT AGAINST HER ATTORNEYS PROPERLY DISMISSED.

The Second Department determined plaintiff's legal malpractice and fraudulent concealment complaint against her prior attorneys was properly dismissed. Plaintiff alleged she was not aware a document she signed settled a lawsuit for $200,000. The court explained she was deemed to have read and understood the document before signing it: " 'A party is under an

obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents' ... . Generally, a cause of action alleging that the plaintiff was induced to sign something different from what he or she thought was being signed only arises if the signer is illiterate, blind, or not a speaker of the language in which the document is written ... . Here, the ... defendants established their prima facie entitlement to judgment as a matter of law dismissing the causes of action asserted against the ... firm ... by presenting evidence that the plaintiff could read and understand English, that she had the opportunity to read the document dated June 10, 2009, which expressly stated that she was accepting $200,000 'as full and final compensation for her loss of services claim,' and that she never expressed any difficulty understanding the terms of the document ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether she was incapable of understanding the document signed by her based on her conclusory testimony that '[n]o one . . . explained [it] to me.' " ***Anderson v. Dinkes & Schwitzer, P.C.*, 2017 N.Y. Slip Op. 03721, 2nd Dept 5-19-17**

CRIMINAL LAW.

FOR CAUSE CHALLENGE SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED.

The Second Department, reversing defendant's conviction, determined a for cause challenge to a juror should have been granted: "Here, prospective juror number 12 stated unequivocally that her experience as a crime victim, which she described as 'traumatic,' would make it hard for her to be fair and impartial in this case. The prospective juror's follow-up statement that she would "have to hear the case" before she could make a decision did not rehabilitate her initial response ... . Inasmuch as the sum of the prospective juror's statements revealed a state of mind likely to preclude her from rendering an impartial verdict based upon the evidence adduced at the trial ... , the challenge for cause should have been allowed ...". ***People v. Hutthinson*, 2017 N.Y. Slip Op. 03774, 2nd Dept 5-10-17**

CRIMINAL LAW.

JUROR MISCONDUCT REQUIRED A NEW TRIAL, JURORS SHARED INFORMATION FROM A FORMER DA AND A FORMER POLICE OFFICER DURING DELIBERATIONS.

The Second Department, reversing defendant's conviction, determined juror misconduct required a new trial. During deliberations two jurors shared information concerning trial evidence which was provided in one case by a former assistant district attorney and in the other by a retired police officer: "... [O]ne of the jurors improperly shared the views of her husband, who was a retired assistant district attorney, by telling the other jurors that he told her that everything the prosecutors said was true, that law enforcement officers would not lie, that the accomplice could never have come up with such an extravagant story in such a limited amount of time, and that crime scene videos didn't show everything. Moreover, the evidence established that the juror's comments regarding her husband's statements influenced one juror who testified at the hearing. Additionally, another juror testified that during deliberations she sent a text message to her uncle, a retired police officer, and asked him if a nine millimeter bullet could fit into a .40 caliber gun. Her uncle told her 'no,' and the following day she shared that information with the jury." ***People v. Plowden*, 2017 N.Y. Slip Op. 03779, 2nd Dept 5-10-17**

CRIMINAL LAW, ATTORNEYS.

PROSECUTOR ACTED AS AN UNSWORN WITNESS DURING SUMMATION, PROSECUTORIAL MISCONDUCT MANDATED A NEW TRIAL.

The Second Department, reversing defendant's conviction, determined prosecutorial misconduct deprived defendant of a fair trial: "... [T]he prosecutor acted as an unsworn witness when he addressed the impeachment of one of the People's main witnesses, a sister of the complainant (hereinafter the sister). During cross-examination, the sister was impeached by inconsistent testimony she gave in the grand jury proceeding. During summation, the prosecutor argued to the jury that defense counsel had 'selected certain portions out of context in the grand jury minutes,' and that the jury 'didn't get the entire grand jury minutes' ... . These comments were particularly prejudicial. The sister's testimony, and thus her credibility, were crucial to the People's proof against the defendant, which was less than overwhelming. The prosecutor's comments suggested, without any evidentiary support, that the jury should disregard the sister's grand jury testimony, in which she failed to name the defendant as a participant in the subject assault, because there was more to the testimony than they knew. In addition, in reference to the father of the complainant and the sister, who was present during the subject assault but was not called to testify, resulting in a missing witness charge, the prosecutor improperly suggested, and invited the jury to speculate, that the father would have given testimony supportive of his children had he been called to testify ...". ***People v. Ramirez*, 2017 N.Y. Slip Op. 03780, 2nd Dept 5-10-17**

CRIMINAL LAW, CIVIL RIGHTS LAW (18 USC § 1983), MUNICIPAL LAW.

PLAINTIFF STATED A CAUSE OF ACTION AGAINST THE COUNTY UNDER 18 USC 1983 FOR VIOLATION OF HIS RIGHT TO A SPEEDY TRIAL.

The Second Department, reversing Supreme Court, determined plaintiff had stated a cause of action under 18 USC § 1983, against the county, for violation of his right to a speedy trial: "We reject the County's argument that it cannot be held liable pursuant to 42 USC § 1983 for the alleged misconduct of the office of the District Attorney. Where, as here, a complaint alleges a failure to train and supervise employees regarding legal obligations, 'liability for the District Attorney's actions in his role as a manager of the District Attorney's office rests with the county' ... and a claim pursuant to 42 USC § 1983 may therefore be maintained against the County for the conduct of the District Attorney's office insofar as the District Attorney acted as a County policymaker ... . Moreover, here, the complaint sufficiently alleges that the District Attorney's office failed to train and supervise its assistant district attorneys with respect to the constitutional speedy trial rights of the accused persons with whom they interacted, to the extent that they manifested deliberate indifference to those rights ...". ***Victor v. County of Suffolk*, 2017 N.Y. Slip Op. 03796, 2nd Dept 5-10-17**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW, ATTORNEYS.

DRIVER WAS NOT SUFFICIENTLY WARNED OF THE CONSEQUENCES OF WAITING FOR A RETURN CALL FROM HIS ATTORNEY CONCERNING WHETHER HE SHOULD SUBMIT TO A BLOOD ALCOHOL TEST, ARRESTING OFFICER DEEMED THE CIRCUMSTANCES TO CONSTITUTE A REFUSAL.

The Second Department determined the Department of Motor Vehicles' finding that petitioner (driver) refused to submit to the chemical (blood alcohol) test after a vehicle stop must be annulled. Although the driver was warned that a refusal required the revocation of his license, he was not told that waiting for a return call from his attorney had been deemed a refusal by the arresting officer: "A motorist under arrest based on an alleged violation of Vehicle and Traffic Law § 1192 may not condition his or her consent to a chemical test on first being permitted to consult with counsel ... . Nonetheless, the consequences of refusing to accede to a chemical test may be imposed only if the motorist, after being adequately warned of those consequences, has refused to accede to the test (see Vehicle and Traffic Law § 1194[2][b], [f]). The adequacy of the warning is the same for the consequence imposed by Vehicle and Traffic Law § 1194(2)(b) (suspension and ultimate revocation of the motorist's driver license) and the consequence imposed by Vehicle and Traffic Law § 1194(2)(f) (admissibility of evidence of refusal at a subsequent criminal trial) ... . Here, the undisputed evidence at the hearing held pursuant to Vehicle and Traffic Law § 1194(2)(c) failed to establish that the petitioner was warned that his time for deliberation had expired and his further request to consult with counsel, which the police sought to accommodate, would be deemed a refusal to accede to the chemical test ... . We emphasize that our determination is not based on any violation of any purported right to counsel ... , but on the adequacy of the warnings that the request to consult with counsel would constitute a refusal to accede to the chemical test ...". ***Matter of Lamb v. Egan*, 2017 N.Y. Slip Op. 03751, 2nd Dept 5-10-17**

FAMILY LAW, CRIMINAL LAW.

ORDER OF PROTECTION ISSUED BY AN INTEGRATED DOMESTIC VIOLENCE COURT AS PART OF A CRIMINAL PROCEEDING CAN BE APPEALED BUT NOT MODIFIED BY MOTION, HERE THE CRIMINAL ORDER OF PROTECTION COULD NOT BE MODIFIED BY A SUBSEQUENT CHILD NEGLECT PROCEEDING ORDER OF PROTECTION ISSUED BY THE SAME COURT.

The Second Department determined father could not move to modify an order of protection issued by the Integrated Domestic Violence (IDV) court in connection with a criminal conviction. The order of protection could be appealed as part of an appeal of the conviction, but the Criminal Procedure Law does not provide for modification of the order. In addition, an order of protection issued by the same court in related child neglect proceedings could not change the terms of the "criminal" order of protection unless that order indicated is was subject to subsequent orders of protection (which was not the case here): " '[W]here a criminal court order of protection bars contact between a parent and child, the parent may not obtain visitation until the order of protection is vacated or modified by the criminal court'... . The criminal court has authority to determine whether its order of protection is 'subject to' subsequent orders pertaining to custody and visitation, and can decline to amend an order of protection to so provide ... . Here, the order of protection ... that was entered in the criminal action did not state that it was 'subject to' subsequent orders pertaining to custody and visitation." ***Matter of Utter v. Usher*, 2017 N.Y. Slip Op. 03760, 2nd Dept 5-10-17**

FORECLOSURE.

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW 90-DAY NOTICE REQUIREMENT FOR FORECLOSURE PROCEEDINGS NOT MET, PROOF OF MAILING INSUFFICIENT.

The Second Department, reversing Supreme Court, determined the 90-day notice requirement of Real Property Actions and Proceedings Law (RPAPL) for foreclosure proceedings was not met: "Here, contrary to the Supreme Court's determination, the plaintiff failed to establish, prima facie, that it complied with RPAPL 1304. The plaintiff failed to submit an affidavit of

service or any proof of mailing by the post office demonstrating that it properly served the appellant pursuant to the terms of the statute ... . Contrary to the plaintiff's contention, the affidavit of a vice president for loan documentation of the loan servicer, which referenced purported tracking numbers stamped on the notice, was insufficient to establish that the notice was sent to the appellant in the manner required by RPAPL 1304, as the loan servicer did not provide proof of a standard office mailing procedure and provided no independent proof of the actual mailing ...". ***Citibank, N.A. v. Wood*, 2017 N.Y. Slip Op. 03727, 2nd Dept 5-10-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFECT WHICH ALLEGEDLY CAUSED PLAINTIFF TO FALL WAS NOT DESIGNED TO PROTECT AGAINST FALLS AND THEREFORE WAS NOT ACTIONABLE UNDER LABOR LAW § 240(1), PLAINTIFF NOT ENGAGED IN CONSTRUCTION, DEMOLITION OR EXCAVATION, THEREFORE LABOR LAW § 241(6) NOT APPLICABLE.

The Second Department determined plaintiff's Labor Law § 240(1) cause of action was properly dismissed because, although he fell when getting out of an aerial bucket, the bucket was not extended and his injury was not related to the failure of a safety device designed to prevent falls. Plaintiff alleged he fell from the bucket because his foot got caught in an electrical device inside the bucket from which the cover was missing. In addition, the Labor Law § 241(6) cause of action was properly dismissed because plaintiff was not involved in construction, demolition or excavation at the time of the injury (he was hired to place an antenna on a utility pole): "... [T]he bucket truck from which the injured plaintiff fell was not defective or inadequate insofar as it related to providing him with fall protection ... . Although the dielectric liner was missing from the bucket, the injured plaintiff's own deposition testimony was that this device was designed to protect workers from electrical shocks, and not falls. Therefore, its absence did not constitute a failure to protect pursuant to Labor Law § 240(1) ... . Further, the ... defendants established, prima facie, that the work the injured plaintiff was performing at the time of the accident did not involve construction, demolition, or excavation and, accordingly, that Labor Law § 241(6) does not apply ...". ***Robinson v. National Grid Energy Mgt., LLC*, 2017 N.Y. Slip Op. 03787, 2nd Dept 5-10-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

HOMEOWNER'S MOTION FOR SUMMARY JUDGMENT ON LABOR LAW §§ 240(1), 241(6) AND 200 CAUSES OF ACTION PROPERLY DENIED, HOMEOWNER DID NOT DEMONSTRATE HE DID NOT CONTROL AND SUPERVISE PLAINTIFF'S WORK OR DID NOT CREATE OR WAS NOT AWARE OF THE DANGEROUS CONDITION.

The Second Department determined defendant homeowner's motion for summary judgment on the Labor Law §§ 240(1), 241(6) and 200 causes of action were properly denied. Defendant did not demonstrate he did not control and supervise plaintiff's work and he did not demonstrate he did not create or was not aware of the dangerous condition. Therefore the motion was properly denied without reference to plaintiff's opposing papers: " 'Labor Law §§ 240 and 241 provide an exemption for owners of single and two-family houses such that liability can only be imposed where the homeowner directs or controls the work being performed' ... . 'In this regard, the phrase direct or control' is to be strictly construed and, in ascertaining whether a particular homeowner's actions amount to direction or control of a project, the relevant inquiry is the degree to which the owner supervised the method and manner of the actual work being performed by the injured employee' ... . Here, the proof submitted in support of the defendant's motion for summary judgment raises triable issues of fact as to whether he exercised the requisite degree of direction and control over the injury-producing method of work so as to impose liability under Labor Law §§ 240(1) and 241(6) ... . * * * '[W]hen a worker at a job site is injured as a result of a dangerous or defective premises condition, a property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether there is evidence that the property owner created the condition, or had actual or constructive notice of it and a reasonable amount of time within which to correct the condition' ... . '[W]hen a worker at a job site is injured as a result of dangerous or defective equipment used in the performance of work duties, the property owner's liability under Labor Law § 200 and for common-law negligence rests upon whether the property owner had the authority to supervise or control the means and methods of the work'... . Where, as here, 'an accident is alleged to involve defects in both the premises and the equipment used at the work site, the property owner moving for summary judgment with respect to causes of action alleging a violation of Labor Law § 200 is obligated to address the proof applicable to both liability standards' ...". ***Wadlowski v. Cohen*, 2017 N.Y. Slip Op. 03797, 2nd Dept 5-10-17**

MUNICIPAL LAW, PERSONAL INJURY.

MOTION FOR LEAVE TO AMEND NOTICE OF CLAIM TO INDICATE PLAINTIFF WAS RIDING A BICYCLE AT THE TIME OF THE ACCIDENT PROPERLY GRANTED.

The Second Department determined plaintiff's motion for leave to amend the notice of claim was properly granted in this bicycle accident case. The notice of claim stated plaintiff was "lawfully traveling" on a service road when injured by a defect in the road. The amendment sought to indicate plaintiff was riding a bicycle at the time he was injured: "A court may, in its discretion, grant an application for leave to serve an amended notice of claim if the mistake, omission, irregularity, or defect in the original notice was made in good faith, and the municipality has not been prejudiced ... . In making a determination as to whether the municipality has been prejudiced, the court may consider the evidence adduced at a hearing conducted

pursuant to General Municipal Law § 50-h, as well as any other evidence that is properly before the court ... . Here, the record does not show any bad faith on the part of the plaintiff, and the County failed to show that it would be prejudiced by the amendment. In particular, the County does not allege that the condition of the roadway changed prior to the service of the summons and complaint, which alleged that the plaintiff was injured while bicycling. Moreover, the record shows that Nassau County Police Department EMS personnel responded to the scene of the accident, and EMS personnel prepared a written report indicating that the plaintiff fell from a bicycle." ***Fast v. County of Nassau*, 2017 N.Y. Slip Op. 03734, 2nd Dept 5-10-17**

PERSONAL INJURY.

PLAINTIFF DID NOT KNOW WHAT CAUSED HER FALL, CODE VIOLATIONS NOT CONNECTED TO THE FALL, DEFENSE SUMMARY JUDGMENT PROPERLY GRANTED.

The Second Department determined defendant's motion for summary judgment in this slip and fall case was properly granted because plaintiff could not describe the cause of the fall. The expert affidavit citing code violations did not connect the violations to the fall: "Here, the defendants established their prima facie entitlement to judgment as a matter of law by submitting, among other things, the plaintiff's deposition testimony, which demonstrated that she could not identify the cause of her fall ... . In opposition, the plaintiff failed to raise a triable issue of fact. Although the plaintiff submitted an expert affidavit from an engineer who asserted that the stairs violated several provisions of the 'New York State Building Construction Code,' the plaintiff presented no evidence connecting these alleged violations to her fall. Thus, even assuming that an applicable code provision was violated, it would be speculative to assume that any such violation was a proximate cause of the accident ...". ***Amster v. Kromer*, 2017 N.Y. Slip Op. 03720, 2nd Dept 5-10-17**

PERSONAL INJURY.

DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE ACTUAL OR CONSTRUCTIVE NOTICE OF OR CREATE THE ICY CONDITION, THEIR SUMMARY JUDGMENT MOTION IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Defendants' failed to demonstrate they did not have actual or constructive notice of or create the icy condition: "... [T]he defendants failed to establish, prima facie, that they did not create the alleged hazardous condition or have actual or constructive notice of it. The plaintiff testified at her deposition that six or more inches of snow fell the day before the accident, and that the area of the gas station where she fell looked as if it had been plowed. The defendants provided only general information about their snow and ice removal practices, and no evidence was submitted, inter alia, as to when it last snowed prior to the time of the accident, what they actually did to remove snow and ice from the premises prior to the accident, when they last inspected the accident site prior to the accident, or what the accident site looked like within a reasonable time prior to the accident. Accordingly, the Supreme Court should have denied that branch of the defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against them, regardless of the sufficiency of the plaintiff's opposition papers ...". ***D'Esposito v. Manetto Hill Auto Serv., Inc.*, 2017 N.Y. Slip Op. 03729, 2nd Dept 5-10-17**

PERSONAL INJURY.

EVIDENCE OF GENERAL CLEANING PRACTICES DID NOT DEMONSTRATE DEFENDANT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE PRESENCE OF LIQUID ON THE FLOOR, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED.

The Second Department noted that evidence of general cleaning practices was not sufficient to demonstrate a lack of constructive notice of the presence of liquid on the floor (the cause of plaintiff's fall): "A defendant has constructive notice of a dangerous condition when the condition is visible and apparent, and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected... . Here, viewing the evidence in the light most favorable to the plaintiff, the defendant failed to demonstrate, prima facie, that it lacked constructive notice of the alleged dangerous condition. Contrary to the defendant's contention, the deposition testimony of the cafeteria supervisor, which only referred to general cleaning practices and did not establish when, prior to the subject accident, the area was last cleaned or inspected, failed to demonstrate that the alleged condition existed for an insufficient amount of time for it to have been remedied ...". ***Valdes v. Pepsi-Cola Bottling Co. of N.Y., Inc.*, 2017 N.Y. Slip Op. 03794, 2nd Dept 5-10-17**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

PLAINTIFF'S EXPERT, A RADIOLOGIST, DID NOT INDICATE FAMILIARITY WITH THE STANDARD OF CARE FOR ORTHOPEDIC SURGEONS, SURGEON-DEFENDANTS PROPERLY GRANTED SUMMARY JUDGMENT.

The Second Department determined defendant doctors' motion for summary judgment in this orthopedic surgery medical malpractice action was properly granted. Plaintiff's expert was a radiologist and did not demonstrate familiarity with the standard of care for orthopedic surgeons: "... [W]here, as here, 'a physician opines outside his or her area of specialization,

a foundation must be laid tending to support the reliability of the opinion rendered' ... . The plaintiff's expert, a board-certified radiologist, did not indicate any familiarity with the standards of orthopedic care." ***Donnelly v. Parikh*, 2017 N.Y. Slip Op. 03731, 2nd pt 5-10-17**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

OWNER OF LEASED VEHICLE NOT VICARIOUSLY LIABLE FOR DEFENDANT DRIVER'S ACCIDENT, LESSOR IS PROTECTED BY THE GRAVES AMENDMENT.

The Second Department determined the complaint against Nissan LT, the owner of a car leased to the defendant in this car accident case, was properly dismissed. Nissan LT was entitled to the protection of the Graves Amendment: "Under the Graves Amendment, in order for recovery to be barred, the owner, or an affiliate of the owner, must be engaged in the trade or business of renting or leasing motor vehicles, and the owner, or its affiliate, must not be negligent ... . Here, Nissan LT showed that it was the owner of the subject vehicle and engaged in the business of renting or leasing motor vehicles ... . Additionally, to the extent that the plaintiff's claim that Nissan LT negligently maintained the subject vehicle was supported by factual allegations, Nissan LT established that the alleged facts were not facts at all through its submissions showing that it did not engage in the repair and maintenance of the vehicles it leases ...". ***Aviaev v. Nissan Infiniti LT*, 2017 N.Y. Slip Op. 03722, 2nd Dept 5-10-17**

TRUSTS AND ESTATES.

QUESTION OF FACT WHETHER RENUNCIATION OF INHERITANCE WAS INVALID.

The Second Department determined Surrogate's Court should not have granted the administrator's (decedent's father's) motion for summary judgment dismissing the objections of the decedent's niece and nephew (objectants) on the ground the niece and nephew did not have standing. Initially decedent's father, who was entitled to inherit all of decedent's estate, renounced his inheritance. He then argued the renunciation was invalid and summary judgment was granted in his favor on that ground. The Second Department held there was a question of fact whether the renunciation was invalid: "Surrogate's Court erred in granting the petitioner's cross motion for summary judgment dismissing the objections at issue based on a finding that the objectants lacked standing to challenge the accounting. Where, as here, a decedent who died intestate was survived by a parent but no spouse and no issue, the whole of the decedent's estate would be distributed to the surviving parent pursuant to EPTL 4-1.1(a)(4). In that event, the objectants, who would not be distributees, would lack standing as persons interested in the estate ... . However, EPTL 2-1.11(c)(1) provides, in part, that any beneficiary of a disposition 'may renounce all or part of such beneficiary's interest.' Further, EPTL 2-1.11(g) provides that '[a] renunciation may not be made under this section with respect to any property which a renouncing person has accepted . . . For purposes of this paragraph, a person accepts an interest in property if such person voluntarily transfers or encumbers, or contracts to transfer or encumber all or part of such interest, or accepts delivery or payment of, or exercises control as beneficial owner over all or part thereof, or executes a written waiver of the right to renounce, or otherwise indicates [an] acceptance of all or part of such interest.' Here, the petitioner failed to establish, prima facie, that his renunciation of his interest in the estate was invalid, resulting in him being the sole distributee and the objectants lacking standing as not being persons interested in the estate. The petitioner adduced no evidence to demonstrate that he accepted an interest in the estate by exercising control over it as its beneficial owner prior to his irrevocable renunciation of his interest pursuant to EPTL 2-1.11." ***Matter of Kaplan*, 2017 N.Y. Slip Op. 03750, 2nd Dept 5-10-17**

THIRD DEPARTMENT

ANIMAL LAW.

EVEN THOUGH THE DOG HAD NEVER BITTEN ANYONE BEFORE, THE EVIDENCE SUBMITTED BY DEFENDANT DEMONSTRATED VICIOUS PROPENSITIES AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN DENIED.

The Third Department, reversing Supreme Court, determined defendant's motion for summary judgment should not have been granted in this dog bite case. The proof did not demonstrate defendant was unaware of the dog's vicious propensities. Defendant's motion should have been dismissed without reference to the opposing papers: "On his motion, along with his deposition testimony, defendant submitted the deposition testimony of his girlfriend and that of plaintiff. However, rather than showing that he was entitled to summary judgment, the deposition testimony showed just the opposite. Defendant testified that the dog was chained outside in order to alert him to the presence of people in his yard and to protect business assets on his property. He testified that the dog is 'there to bark' and that barking and running to the full extent of its chain when people enter the property is the dog's 'job.' Defendant described an incident three to five years prior to the instant bite in which the dog grabbed a customer's pant leg, though defendant claimed that the dog did not break any skin. We note that, even if the dog had not broken the person's skin, such aggressive behavior may reflect a proclivity to act in such a way that puts others at risk of harm and can be found to be evidence of a vicious propensity ... . * * * 'Knowledge of vicious

propensities may . . . be established by proof of prior acts of a similar kind of which the [defendant] had notice . . . even in the absence of proof that the dog had actually bitten someone — by evidence that it had been known to growl, snap or bare its teeth' ... . The evidence submitted by defendant shows that he kept a guard dog on a chain so that it could not bite people, it had previously broken its chain to get to, and then circle, a person who came on defendant's property, it had grabbed hold of another person's pant leg and children had been warned to stay away from the dog. All these factors reflect a proclivity for the dog to act in a way that puts others at risk of harm and that defendant knew, or should have known, of the dog's vicious propensity ...". ***Olsen v. Campbell*, 2017 N.Y. Slip Op. 03828, 3rd Dept 5-11-17**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, PRIVILEGE.

REPORT REGARDING CARE OF PLAINTIFF'S DECEDENT WAS NOT PART OF A MEDICAL OR QUALITY ASSURANCE PROGRAM, WAS NOT PRIVILEGED UNDER THE EDUCATION LAW OR PUBLIC HEALTH LAW, AND WAS THEREFORE SUBJECT TO DISCOVERY IN THIS MEDICAL MALPRACTICE ACTION.

The Third Department, reversing Supreme Court, determined that a report sought by plaintiffs was not part of a medical or quality assurance review function or participation in a medical malpractice prevention program and therefore was not privileged pursuant to Education Law § 6527 (3) and Public Health Law § 2805-m: "... [W]e find that defendants failed to meet their burden of establishing the report's privilege. Defendants did not submit an affidavit or other information from anyone with first-hand knowledge establishing that a review procedure was in place or that the report was obtained or maintained in accordance with any such review procedure ... . Nevertheless, defendants argue that the face and content of the report clearly establish that it is a quality assurance review which is precluded from disclosure. Yet, nothing in the report reflects that the hospital's Department of Patient Safety and Quality Improvement ever reviewed it ... . Further, the report's conclusory statement that it was prepared for quality assurance purposes and was shielded by the subject statutes is patently insufficient to satisfy the required standard ... .In short, the purpose of the Education Law and Public Health Law discovery exclusions is to encourage a candid peer review of physicians, and thereby improve the quality of medical care and prevent malpractice... , but such protections are not automatically available and do not prevent full disclosure where it should otherwise be provided ...". ***Estate of Savage v. Kredentser*, 2017 N.Y. Slip Op. 03825, 3rd Dept 5-11-17**

CONTRACT LAW, REAL PROPERTY, CORPORATION LAW.

ORAL OFFER TO SELL SHARES IN FAMILY CORPORATION FORMED SOLELY TO OWN ONE PIECE OF REAL PROPERTY WAS SUBJECT TO THE STATUTE OF FRAUDS, THE WRITING REQUIREMENT WAS NOT REMOVED BY PART PERFORMANCE.

The Third Department determined defendant's oral offer to sell to plaintiff her shares in a family corporation (SEI) formed solely to hold one piece of property (Beach Cove) as its single asset was subject to the statute of frauds (and therefore unenforceable). The court further found that certain actions, like opening a bank account, did not amount to part performance sufficient to overcome the writing requirement of the statute of frauds: "SEI was a single-asset corporation — that single asset being its ownership of Beach Cove — and, inasmuch as the alleged oral agreement involved the sale of plaintiff's shares of stock in a corporation whose only asset was an interest in real property, the statute of frauds indeed applied here ... . As the alleged oral agreement was not reduced to writing, plaintiff could avoid application of the statute of frauds only if her conduct fell within the part performance exception. In this regard, while the actions upon which plaintiff relies — i.e., opening a bank account in anticipation of a wire transfer of funds from defendant, retrieving her SEI stock certificates to relinquish to defendant, hiring an attorney to coordinate with defendant and/or reduce the alleged oral agreement to writing, timely removing her personal possessions from Beach Cove and promptly vacating the premises in accordance with defendant's alleged wishes — are consistent with plaintiff's assertion that she and defendant had a deal to sell plaintiff's shares in SEI to defendant for $900,000, such actions are not unequivocally referable to — or unintelligible without reference to — the alleged oral agreement, nor so substantial in quality to irremediably alter the situation." ***Wells v. Hodgkins*, 2017 N.Y. Slip Op. 03824, 3rd Dept 5-11-17**

CRIMINAL LAW, EVIDENCE.

TESTIMONY ABOUT DEFENDANT'S ASSERTION OF HIS RIGHT TO REMAIN SILENT SHOULD NOT HAVE BEEN ADMITTED, ERROR DEEMED HARMLESS HOWEVER.

The Third Department determined the prosecutor should not have elicited testimony from an investigator about defendant's exercise of his right to remain silent. The error was deemed harmless however: "We agree with defendant that Supreme Court erred in permitting the People to elicit testimony about defendant's invocation of his right to silence and to comment on that testimony in summation. '[I]t is axiomatic that when a defendant invokes his or her constitutional right against self-incrimination, the People may not use his or her silence against him or her on their direct case'... . The principle applies when a defendant unequivocally states his or her desire to halt all questioning, even if he or she has previously responded to other questions ... . A State Police investigator testified at trial that he interviewed defendant after his arrest and read him his Miranda rights, which defendant stated that he understood. Defendant then willingly answered a series of questions

about various topics. However, when asked if he had punched or pushed the trooper, defendant responded that 'he didn't want to say any more.' During summation, the prosecutor remarked upon this testimony, noting that when defendant was asked about striking the trooper, he had not denied that he had done so or offered an explanation, but instead had stated that he did not want to say anything else. Defendant's counsel objected twice to these remarks, but was overruled. Contrary to the People's assertion, defendant's statement that he did not want to say any more was an 'unequivocal and unqualified invocation of [the] right' to remain silent ...". ***People v. Johnson*, 2017 N.Y. Slip Op. 03804, 3rd Dept 5-11-17**

FAMILY LAW, APPEALS.

MOTHER'S ATTORNEY APPEARED AND PARTICIPATED IN THE PROCEEDINGS, EXPLAINING MOTHER'S ABSENCE, MOTHER, CONTRARY TO FAMILY COURT'S RULING, WAS NOT IN DEFAULT AND COULD APPEAL THE ORDER.

The Third Department, after noting that orders issued upon default are not appealable, determined mother, contrary to Family Court's ruling, was not in default and therefore the order could be appealed: "In the circumstances presented, the mother was not required to seek to vacate the default judgment before taking this appeal. A party may not appeal from an order entered on default (see CPLR 5511), but a party's absence does not necessarily constitute a default, 'particularly where counsel appears upon the absent party's behalf and offers an explanation for his or her failure to attend' ... . Here, the mother's counsel appeared and advised Family Court that he had communicated with the mother several times by phone and email, that she was then at a considerable distance in either Florida or South Carolina, and that she had a limited income. The mother's counsel further advised the court relative to the mother's position in the matter and participated in the proceedings by consenting to the requested relief, that is, to permit the child to remain temporarily with the father. Counsel also unsuccessfully requested a continuance, and ultimately advised that he did not have authority to consent to a final order of permanent physical placement to the father. In light of these circumstances, we find that the mother was not in default and that the order is appealable ...". ***Matter of Linger v. Linger*, 2017 N.Y. Slip Op. 03822, 3rd Dept 5-11-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LABOR LAW § 240(1) LIABILITY IS NONDELEGABLE AND EXTENDS TO INDEPENDENT CONTRACTORS.

The Third Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. The scaffolding plaintiff was using collapsed and he fell 40 feet. The defendants alleged that the improper assembly of the scaffolding caused the collapse and plaintiff assembled the scaffolding. Therefore the defendants argued plaintiff's acts constituted the sole proximate cause of his injuries, precluding recovery. However a contract indicated that another party was responsible for supplying safety equipment and meeting OSHA requirements. The court further noted that the general contractor (Varish) could not escape liability on the ground plaintiff was an independent contractor, not an employee: "We find no merit in Varish's contention that Labor Law § 240 (1) does not apply in that plaintiff was allegedly an independent contractor, not an employee. The duty to provide a safe working environment is nondelegable, and a contractor or owner and its agents may be liable 'even though it exercised no control over, or supervision of, an independent contractor who performed the job' ...". ***Griffin v. AVA Realty Ithaca, LLC*, 2017 N.Y. Slip Op. 03829, 3rd Dept 5-11-17**

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