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FIRST DEPARTMENT

CRIMINAL LAW.

TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT LETTING THE POSSESSION-OF-A-BB-GUN COUNT GO TO THE JURY BECAUSE THE COUNT COULD CONFUSE THE JURY AND LEAD TO A COMPROMISE VERDICT, DEFENDANT WAS CONVICTED OF POSSESSION OF A 9 MM HANDGUN.

The First Department, in a full-fledged opinion by Justice Tom, over a two-justice dissenting opinion by Justice Acosta, determined the trial court properly dismissed the count of the indictment which charged possession of a BB gun. Defendant was charged with possession of the BB gun as well as possession of a 9 mm handgun. It was alleged defendant threw both under a car as the police approached. Defendant produced a declaration (against penal interest) by a non-testifying witness (Ramsanany) who claimed (in the declaration) the handgun was his. In rebuttal the People presented a detective (DeLoren) who testified Ramsanany, when confronted, admitted his declaration about owning the handgun was a lie. The dissent argued the BB gun count should have gone to the jury, as it was an integral part of the defense and would not have caused jury confusion. The trial court ruled that the BB gun count could confuse the jury and lead to a compromise verdict . ***People v. Boyd*, 2017 N.Y. Slip Op. 04809, 1st Dept 6-13-17**

CRIMINAL LAW.

MISDEMEANOR COMPLAINT DID NOT INCLUDE FACTS DEMONSTRATING THE ARREST OF DEFENDANT'S BROTHER WAS AUTHORIZED, THEREFORE THE COMPLAINT CHARGING DEFENDANT WITH RESISTING ARREST AND OBSTRUCTING GOVERNMENTAL ADMINISTRATION WAS JURISDICTIONALLY DEFECTIVE.

The First Department, over a dissent, determined the misdemeanor complaint charging resisting arrest and obstructing governmental administration was jurisdictionally defective. The complaint alleged defendant interfered in the arrest of her brother and then herself resisted arrest. But the complaint did not allege the basis for the arrest of defendant's brother and therefore did not demonstrate the brother's arrest was 'authorized,' an essential element of the offense: "The factual part of the complaint merely states that the officer was 'attempting to effectuate the arrest of [defendant's brother].' However, the complaint contains no factual allegations that would establish, if true, that the underlying arrest of defendant's brother was authorized. Thus, the complaint fails to allege facts sufficient to establish all the essential elements of the crime of obstructing governmental administration in the second degree. Because the information fails to allege sufficient facts supporting the underlying obstructing governmental administration charge, it is also insufficient to allege that defendant's arrest on that charge was 'authorized,' as required by Penal Law § 205.30. Therefore, defendant is also entitled to dismissal of the resisting arrest charge ... . The dissent acknowledges that an element of the crime of obstructing governmental administration is that the underlying arrest was authorized, but nevertheless concludes that this essential element need not be alleged in the factual part of an information. This position, however, cannot be reconciled with the statutory requirement that an information contain 'nonhearsay allegations [that] establish, if true, every element of the offense charged'...". ***People v. Sumter*, 2017 N.Y. Slip Op. 04897, 1st Dept 6-15-17**

CRIMINAL LAW.

THE TOTALITY OF THE RECORD INDICATED DEFENSE COUNSEL WAIVED THE SPEEDY TRIAL RULE, SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined defense counsel waived the speedy trial (CPL § 30.30) rule. In response to the prosecutor's request that the waiver go back to the date of the arraignment, defense counsel stated a preference that the waiver start at the time of the agreement to it, but "if you insist" waiver from arraignment would be acceptable. Supreme Court reasoned that the phrase "if you insist" required further negotiation (which did not take place). The First Department held that, based on the totality of the record, defense counsel agreed to starting the waiver at the time of arraignment: "In assessing whether time is properly excluded, a court should look to the totality of the record ... . Here, based on a fair reading of the whole record, we conclude that defense counsel expressly waived inclusion of the 52-day period. Central to the court's reasoning was that the prosecutor 'did not insist' or otherwise respond' after defense counsel wrote 'I'd be inclined to waive from today, but if you insist on 1/24 that's acceptable.' However, in this exchange,

'insistence' was not an eventuality that had to be confirmed by further action of the prosecutor, but an already clearly stated position. The prosecutor had already, in her March 16 email, insisted on a waiver of 'all 30.30 time,' extending back to the arraignment — requiring such a total waiver as a condition of negotiations. She had explained that if defendant were not willing to waive all 30.30 time, the case would be presented to the current grand jury. The March 17 email repeated, even more explicitly, the prerequisite — to which defendant had already agreed — that defendant waive speedy trial time going back to January 24. There was no need for the People to again insist on this because they had unequivocally insisted on it from the beginning of the conversation. As a realistic matter, the question whether the People insisted on this was not an open one, and defense counsel did not treat it as unresolved. He 'accept[ed]' the waiver running back to the time of arraignment and promised to call the prosecutor the following week to make arrangements for a 'presentation to you.' " ***People v. Lewins*, 2017 N.Y. Slip Op. 04908, 1st Dept 6-15-17**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S GENDER DISCRIMINATION SUIT SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff's gender discrimination suit should not have been dismissed: "As ostensibly nondiscriminatory reasons for terminating plaintiff, defendants pointed to plaintiff's alleged management deficiencies; her alleged insubordination, by, among other things, refusing a directive to extend her vacation; and her alleged concealment of her romantic relationship with a subordinate. In response, plaintiff raised issues of fact as to pretext ... . Among other things, plaintiff points out that her termination on June 30, 2011, represented a drastic shift from the favorable performance review which she received only three weeks earlier. Indeed, plaintiff was on vacation for nearly a week of that three-week time period. Nothing in the record explains why any defects in plaintiff's management style, identified in her otherwise favorable performance review, suddenly warranted her termination. Defendants' assertion that plaintiff was insubordinate and hostile is belied by the record, which shows nothing more than innocuous e-mail exchanges between plaintiff and her superior ... during the several days prior to the termination. Finally, defendants' assertion that plaintiff's concealing of her relationship with her subordinate was a ground for termination is belied by, among other things, emails exchanged only a week earlier, demonstrating that the subordinate would be reporting to another manager, in order to avoid any appearance of impropriety. Plaintiff has also pointed to evidence of gender bias, in the form of [her superior's] holding women, including plaintiff, to a different standard than men in the workplace. Nor were these mere 'stray remarks.' To the contrary, [her superior] told plaintiff that she lacked 'emotional intelligence and empathy toward others,' which were perceived as shortcomings in her ability to manage her subordinates, and which were 'amplified because [she was] in a high profile seat and female.' " ***Barone v. Emmis Communications Corp.*, 2017 N.Y. Slip Op. 04787, 1st Dept 6-13-17**

INSURANCE LAW, CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ACTION BY PLAINTIFF'S SUBROGEE (INSURER) AGAINST DEFENDANT'S SUBROGEE (INSURER) IN THIS CONSTRUCTION ACCIDENT CASE BARRED BY COLLATERAL ESTOPPEL AND RES JUDICATA, CONCEPTS OF SUBROGATION AND PRIVITY EXPLAINED.

The First Department, over a detailed dissent which lays out the complicated facts, affirming Supreme Court (Reed, J.), determined the action by insurer's subrogee (Nationwide) against the insured's subrogee (US Underwriters) in this Labor Law (construction accident) action was barred by collateral estoppel and res judicata. The underlying action had settled for about $1.55 million. **FROM THE DISSENT (THE FACTS): "**On or about July 9, 2001, Kerwin Park, an employee of Armadillo Construction Corp., a demolition contractor, sustained personal injuries while working on a construction site. Park commenced the underlying Labor Law action against the general contractor (Artimus) and others. Nationwide, Artimus's insurer, tendered the defense of the action to Armadillo and Armadillo's insurer, U.S. Underwriters; Artimus was an additional insured on the U.S. Underwriters policy. By letter dated August 31, 2001, U.S. Underwriters denied coverage to Artimus, copying the broker and Armadillo on the letter, based on late notice of occurrence and various exclusions in the policy. ... [T]he underlying action settled for approximately $1.55 million. Nationwide contributed to the settlement on Artimus's behalf. Artimus also obtained a default judgment on its third-party indemnification claim against Armadillo. ... Artimus moved to restore its claims against Armadillo to the active calendar in the declaratory judgment action. In granting the motion, the court (Ramos, J.) cited to Justice Cahn's earlier decision in the action and observed that no decision had been made concerning Armadillo's entitlement to coverage. * * * Justice Reed granted U.S. Underwriters' motion to dismiss the complaint, concluding that Artimus, as Armadillo's subrogee, was collaterally estopped from bringing the instant action, because it was in privity with Armadillo, and whatever rules of collateral estoppel applied to Armadillo would also apply to Artimus (and its subrogee, Nationwide). The court found that as a consequence, Artimus was bound by Justice Cahn's order. The court also found that the action was barred by the doctrine of res judicata." ***Nationwide Mut. Ins. Co. v. U.S. Underwriters Ins. Co.*, 2017 N.Y. Slip Op. 04774, 1st Dept 6-13-17**

INSURANCE LAW, ATTORNEYS, WORKER'S COMPENSATION LAW, PERSONAL INJURY.

INSURER WHICH OPTED NOT TO DEFEND THIS CONSTRUCTION ACCIDENT CASE WAS REQUIRED TO INDEMNIFY THE INSURERS WHICH SETTLED THE CLAIM FOR BOTH DAMAGES AND EXCESS ATTORNEYS' FEES, PLAINTIFF HIRED A MORE EXPENSIVE LAW FIRM ($795/HR) RATHER THAN USE THE FIRM HIRED BY THE WORKERS' COMPENSATION CARRIER ($150/HR).

The First Department, over a dissent, determined the plaintiff's insurer (RLI), which opted not to defend this construction accident case, was required to indemnify the insurers who paid the $2.5 million settlement, both for the damages and the excess attorney's fees. The plaintiff opted to hire a law firm other that the firm used by the workers' compensation carrier (SLI). The workers' compensation carrier paid $150/hour toward the other attorneys' fees. The firm hired by plaintiff (Greenberg Traurig) charged $795/hr. The dissent argued the fees should have been capped at $150/hr. The other issue addressed by the court was the late notification of plaintiff's insurer. The late notice was excused because of a good faith belief recovery was limited to workers' compensation (and therefore subject to a policy exclusion): "RLI's argument that the voluntary payment doctrine bars recovery of amounts paid to Greenberg Traurig in defense of the underlying claim is without merit. Having chosen to deny coverage and not participate in the defense, RLI 'excluded itself from any aspect of the [p]laintiff's defense in the Vasquez estate's action,' including the negotiation of attorneys' fees and the selection of attorneys, as so found by the motion court, and cannot now be heard to complain. Plaintiff is entitled to recover attorneys' fees incurred in defense of the underlying action as 'damages which are the natural and probable consequence of the breach' by RLI of the contract of insurance ... . We reject defendant's argument that the $150 per hour contributed by SIF acts as a ceiling on fees ... . Any agreement between SIF and plaintiff as to fees has no bearing on RLI's responsibility to provide a defense, save as it pertains to any eventual allocation of defense costs as between the two carriers ...". ***Cohen Bros. Realty Corp. v. RLI Ins. Co.*, 20 17 N.Y. Slip Op. 04776, 1st Dept 6-13-17**

MEDICAL MALPRACTICE, EVIDENCE, PERSONAL INJURY.

EXPERT AFFIDAVIT SUFFICIENT TO RAISE A QUESTION OF FACT WHETHER THE SCHOOL NURSE'S FAILURE TO TELL PLAINTIFF TO REMOVE A CONTRACEPTIVE DEVICE WAS A PROXIMATE CAUSE OF BLOOD CLOTS AND SEVERE BRAIN DAMAGE.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a two-justice dissenting opinion by Justice Andrias, determined plaintiff's expert affidavit was sufficient to raise a question of fact whether the school nurse's failure to tell plaintiff to remove a contraceptive device (NuvaRing) was a proximate cause of blood clots which resulted in severe brain damage. The dissent argued plaintiff's expert affidavit was conclusory and speculative, insufficient to defeat defendant's expert's opinion that removing the NuvaRing would not have prevented the blood clots which occurred seven days after plaintiff complained to the nurse practitioner about chest pains: "Montefiore [the defendant which employed the nurse practitioner at the school clinic] made a prima facie case through its expert, Dr. Bardack, that it was not the proximate cause of plaintiff's injuries ... . In opposition, plaintiff's expert raised an issue of fact concerning causation. We disagree with the dissent that the affidavit of Dr. Gold was speculative and conclusory. Dr. Gold specifically opined that if the nurse practitioner had properly assessed plaintiff, instructed her to remove the NuvaRing, and referred her for further assessment, plaintiff's subsequent injuries and complications would have been avoided. Had the nurse properly assessed plaintiff as suffering from the symptoms of a blood clot, she could have instructed plaintiff to remove the ring immediately, thereby at least beginning to correct any clotting imbalance. As Montefiore's expert acknowledges, 'clot risk is gradually decreased after the ring is removed.' Thus, while the nurse was not in a position to treat clots, she certainly was in a position to make the diagnosis and to direct the plaintiff to remove the likely source of her symptoms, lessening the risk of an adverse outcome. Montefiore asserts that even if the NuvaRing had been removed on June 1, thromboembolism was nonetheless likely to ensue, relying on FDA guidelines concerning presurgical protocols; Dr. Gold, however, opined that the risk of blood clotting would have subsided had the ring been removed. At this stage, plaintiff's expert's affidavit suffices to raise a factual issue as to the element of causation. It may well be that the medical professionals who subsequently treated plaintiff are also at fault for failing to work her up for thromboembolism and failing to remove or direct her to remove the NuvaRing. Issues of relative culpability await resolution at trial. Plaintiff's submissions raise an issue of fact as to the liability of the nurse practitioner sufficient to defeat summary judgment." ***Adams v. Pilarte*, 2017 N.Y. Slip Op. 04913, 1st Dept 6-15-17**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE.

THE JURY COULD HAVE REASONABLY FOUND PLAINTIFF'S REGULAR USE OF THE UNLIGHTED SUBWAY STAIRWAY WAS NOT NEGLIGENT, PLAINTIFF'S VERDICT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN SET ASIDE.

The First Department, reversing Supreme Court, determined the plaintiff's verdict against the transit authority in this slip and fall case should not have been set aside. Plaintiff regularly used the unlighted subway stairway when he returned from work without incident. The jury, therefore, could reasonably have found plaintiff's use of the unlighted stairway was not negligent: "In this action for personal injuries, plaintiff alleges that he fell while descending a covered and unlit exterior

subway staircase owned by defendant. The jury found that defendant was negligent in its maintenance of the lighting on the staircase, that defendant's negligence was a substantial factor in causing plaintiff's injuries, and that plaintiff was not negligent. The trial court erred in setting aside as against the weight of the evidence the jury's finding that plaintiff was not negligent ... . Although plaintiff conceded that he descended an unlighted staircase, the jury could reasonably have concluded that his decision to do so was not negligent, as plaintiff testified that he used the same staircase every night while coming home from work, and had in fact done so without incident on previous evenings when the lights were inoperative." ***Sanchez v. New York City Tr. Auth.*, 2017 N.Y. Slip Op. 04899, 1st Dept 6-15-17**

SECOND DEPARTMENT

CIVIL PROCEDURE, MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

SUPREME COURT IMPROPERLY, SUA SPONTE, ORDERED A FRYE HEARING AFTER WHICH THE COMPLAINT AGAINST A DOCTOR IN THIS MEDICAL MALPRACTICE ACTION WAS, SUA SPONTE, DISMISSED, SUPREME COURT IMPROPERLY USED A FRYE HEARING TO AVOID THE LAW OF THE CASE DOCTRINE.

The Second Department, reversing Supreme Court, determined Supreme Court's sua sponte ordering of a Frye hearing in this medical malpractice action was an impermissible avoidance of the law of the case doctrine. Another justice, in the same action, had denied the summary judgment motion brought by defendant doctor (Vartolomei). The Second Department held that Supreme Court's ordering a Frye hearing and thereafter dismissing the complaint against Vartolomei was improper, as the hearing was used to rehear and grant the previously denied summary judgment motion: "The general purpose of a Frye hearing is to determine whether an expert's opinion is 'based on principles that are sufficiently established to have gained general acceptance as reliable' ... . Here, however, the overall nature of the questions posed at the hearing directed, sua sponte, by the Supreme Court, as well as statements by the court, establish that the true purpose of the hearing was not to determine whether Dr. Epstein's opinions were based on principles that are sufficiently established to have gained general acceptance as reliable. Rather, the hearing purported to revisit the determination made in the order ... denying Vartolomei's motion for summary judgment insofar as asserted against her. In doing so, the court violated the doctrine of law of the case by completely disregarding the prior order, issued by a Justice of coordinate jurisdiction, that had concluded that triable issues of fact existed as to whether Vartolomei departed from accepted medical standards of care and whether such departures were a proximate cause of the injuries sustained by the decedent ... . Moreover, this Court has held that '[a] court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, there were no extraordinary circumstances warranting the sua sponte dismissal of the complaint insofar as asserted against Vartolomei." ***Aguilar v. Feygin*, 2017 N.Y. Slip Op. 04811, 2nd Dept 6-14-17**

CONTRACT LAW.

THIRD-PARTY BENEFICIARY OF A CONTRACT DEMONSTRATED BREACH OF CONTRACT, CRITERIA EXPLAINED, A HEARING WAS REQUIRED TO ASSESS DAMAGES CONVERSION CAUSE OF ACTION CANNOT BE BASED UPON BREACH OF CONTRACT ALONE.

The Second Department determined that El Equity, which financed a line of credit, was a third-party beneficiary of a contract which required El Equity's approval before funds could be deposited in any accounts other than those designated in the contract between SDS and GBL. El Equity demonstrated the breach of contract, but was not entitled to summary judgment because the amount of damages was not proven. The Second Department further determined that the failure to deposit funds in violation of the contract will not also support a cause of action for conversion: "The evidence in admissible form submitted by El Equity demonstrated, prima facie, that it was an intended third-party beneficiary of the SDS Agreement, and that SDS breached that agreement. 'A non-party [to a contract] may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary' ... However, 'the identity of a third-party beneficiary need not be set forth in the contract or, for that matter, even be known as of the time of its execution'... . 'A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost'... 'In determining third-party beneficiary status it is permissible for the court to look at the surrounding circumstances as well as the agreement,' and 'the obligation to perform to the third party beneficiary need not be expressly stated in the contract' ... . Here, El Equity was not a party to the SDS Agreement. However, El Equity established, prima facie, that the SDS Agreement was a valid and binding contract between GBL and SDS, and that El Equity was an intended third-party beneficiary of the SDS Agreement... ". ***Greater Bright Light Home Care Servs., Inc. v. Jeffries-El*, 2017 N.Y. Slip Op. 04821, 2nd Dept 6-14-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

FAILURE TO DETERMINE WHETHER DEFENDANT RECEIVED NOTICE OF THE SORA HEARING REQUIRED REVERSAL.

The Second Department determine the steps taken to notify defendant of the SORA hearing were not adequate to ensure defendant was notified. Therefore defendant could not be deemed to have waived his presence at the hearing: " 'A sex offender facing risk level classification under [SORA] has a due process right to be present at the SORA hearing' ... . '[W] here there is a question as to whether the defendant's failure to appear is deliberate, in order to establish a waiver, evidence must be presented that the defendant was advised of the hearing date, of his right to be present, and that the hearing would be conducted in his absence' ... . Here, when defense counsel and the People initially appeared for the hearing, and the defendant failed to appear, the Supreme Court, recognizing its duty to ensure that any waiver of the defendant's right to be present was voluntary, adjourned the matter to permit defense counsel to send a notice to the defendant, by certified mail, return-receipt requested. Defense counsel sent the letter, but never received a return receipt from the post office or a response from the defendant, with whom he had never met or consulted. Defense counsel did not indicate any efforts he made to determine whether his letter had been delivered, such as, by contacting the post office. Further, there was no evidence in the record that notice was sent to the defendant by the court, but, even presuming such notice was sent, there was no evidence as to whether the notice was delivered or returned. Nor was there evidence regarding how the court or defense counsel obtained the address to which notices were sent. Thus, as defense counsel asserted, there was reason to believe that the defendant may not have received notice of the hearing. Indeed, even the court acknowledged that possibility." ***People v. Jenkins*, 2017 N.Y. Slip Op. 04869, 2nd Dept 6-14-17**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED, THE SCHOOL INVESTIGATED THE INCIDENT WITHIN 90 DAYS, PLAINTIFF IS DEVELOPMENTALLY DISABLED, THE NOTICE WAS TWO DAYS LATE.

The Second Department, reversing Supreme Court, determined plaintiffs' motion for leave to file a late notice of claim should have been granted. The claim alleged a school bus attendant sexually assaulted a developmentally disabled student. The school investigated the incident (which included reviewing video) and fired the bus attendant within 90 days of the last incident. The notice of claim was filed two days late if the date of the last sexual assault is used as the start of the 90 days: "Under the circumstances of this case, the School District acquired actual knowledge of the essential facts constituting the claim within 90 days after the claim arose ... . Pursuant to her individualized education plan (IEP), the School District transported K.A. and hired the bus attendant who sexually assaulted her during the course of his employment. Thus, an employee of the School District was not only 'directly involved' in the incident ... , but he committed the intentional tortious conduct giving rise to the claim. Further, the School District itself conducted the investigation that yielded the bus attendant's admission of abuse, and reported its findings to the police. In addition, the School District terminated the bus attendant ... prior to his conviction. Accordingly, the School District acquired timely, actual knowledge of the essential facts constituting the claim, which enabled it to conduct an appropriate investigation ... ". ***K.A. v. Wappingers Cent. Sch. Dist.*, 2017 N.Y. Slip Op. 04824, 2nd Dept 6-14-17**

FAMILY LAW, ATTORNEYS.

FAMILY COURT DID NOT MAKE SURE APPELLANT UNDERSTOOD THE CONSEQUENCES OF PROCEEDING WITHOUT COUNSEL IN THIS ORDER OF PROTECTION MATTER, ORDER OF PROTECTION REVERSED.

The Second Department determined Family Court did not make sure appellant under stood the consequences of proceeding without counsel in this order of protection matter: "A party in a proceeding pursuant to Family Court Act article 8 has the right to be represented by counsel... . A party, however, may waive that right, provided that he or she does so knowingly, voluntarily, and intelligently ... . To ensure that a party's waiver of the right to counsel is valid, the Family Court must conduct a 'searching inquiry'... . There is no rigid formula, but the record must demonstrate that the party has chosen to proceed without counsel despite being aware of and understanding the dangers and disadvantages of doing so ... . Here, when the appellant expressed his desire to proceed without counsel, the Family Court tried to explain the dangers and disadvantages of doing so. The record shows, however, that the appellant was confused by the colloquy and did not comprehend the court's explanation. The court nevertheless permitted him to proceed without counsel ... . The deprivation of a party's right to counsel guaranteed by Family Court Act § 262 requires reversal without regard to the merits of the unrepresented party's position ... ". ***Matter of Gugliara v. Gugliara*, 2017 N.Y. Slip Op. 04840, 2nd Dept 6-14-17**

PERSONAL INJURY.

PLAINTIFFS, PASSENGERS IN DEFENDANT'S CAR, ENTITLED TO SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE, DESPITE DEFENDANT'S CLAIM THAT THE CAR AHEAD STOPPED SUDDENLY FOR NO REASON.

The Second Department determined defendant did not raise a question of fact in this rear-end collision case. Although defendant (Alvarez) claimed plaintiff's (Cristea) car stopped suddenly for no apparent reason, defendant acknowledged Cristea's car was stopped at the time of the collision and defendant did not see the car until the collision. Plaintiffs, who were passengers in defendant Alvarez's car, entitled to summary judgment: "A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision ... . While a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead ... . Here, Cristea established his prima facie entitlement to judgment as a matter of law by submitting evidence that he was not at fault in the happening of the accident ... . Cristea submitted the deposition testimony of the parties, which demonstrated that Cristea's vehicle was stopped when it was struck in the rear by Alvarez's vehicle. Although Alvarez testified that Cristea's vehicle braked suddenly, he admitted that Cristea's vehicle was stopped at the time of impact, and that he did not see Cristea's vehicle until he hit it. Under these circumstances, Alvarez's claim that Cristea's vehicle braked suddenly did not raise a triable issue fact as to whether any negligence on the part of Cristea contributed to the accident ... ". ***Gonzalez v. Alvarez*, 2017 N.Y. Slip Op. 04819, 2nd Dept 6-14-1**

PERSONAL INJURY.

SMALL DECORATIVE LANDSCAPING STONES ON THE PARKING LOT WERE OPEN AND OBVIOUS, SLIP AND FALL COMPLAINT PROPERLY DISMISSED.

The Second Department determined small decorative stones (used for landscaping), two or three of which were on the parking lot where plaintiff slipped and fell, constituted an open and obvious condition which was not actionable: "The [defendant] Olive Garden used small decorative stones outside as part of its landscaping, and the plaintiff alleged that two or three of the stones were in the parking lot. After exiting the Olive Garden at approximately 1:00 p.m. on June 17, 2008, the plaintiff walked to the parking lot toward her car, but fell before reaching it. She alleged that her fall resulted from stepping on one of the Olive Garden's stones.The Olive Garden made a prima facie showing that the complained-of condition was both open and obvious, i.e., readily observable by those employing the reasonable use of their senses, and not inherently dangerous ... . In opposition, the plaintiff failed to raise a triable issue of fact." ***Lawrence v. Darden Rests., Inc.*, 2017 N.Y. Slip Op. 04826, 2nd Dept 6-14-17**

PERSONAL INJURY.

PROOF OF GENERAL CLEANING PRACTICES DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF THE WATER WHERE PLAINTIFF SLIPPED AND FELL, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY DENIED.

The Second Department determined defendant did not demonstrate it lacked constructive notice of the water where plaintiff slipped and fell. Proof of general cleaning practices is not enough: "The defendants failed to demonstrate, prima facie, that they lacked notice of the alleged water on the stairs so as to establish their entitlement to judgment as a matter of law ... . A defendant has constructive notice of a dangerous condition when the condition has been visible and apparent long enough for the defendant to have discovered and remedied it ... . Here, the defendants did not submit any evidence regarding specific cleaning or inspection of the area in question, or any other affirmative proof to demonstrate how long the condition had existed. Rather, they merely provided evidence regarding the general cleaning practices and inspection procedures employed by the building superintendent, which is insufficient to establish a lack of constructive notice ... . Further, the defendants' contention that the 'water could have been deposited there only minutes or seconds before the alleged fall' is pure speculation, and the defendants cannot satisfy their initial burden on summary judgment merely by pointing to gaps in the plaintiff's case ...". ***Lebron v. 142 S 9, LLC*, 2017 N.Y. Slip Op. 04827, 2nd Dept 6-14-17**

PERSONAL INJURY, MUNICIPAL LAW.

CITY DID NOT DEMONSTRATE ABSENCE OF WRITTEN NOTICE OF THE POTHOLE WHERE PLAINTIFF SLIPPED AND FELL, PROPERTY OWNER DID NOT DEMONSTRATE THE AREA WHERE PLAINTIFF FELL WAS NOT SUBJECT TO THE OWNER'S SPECIAL USE, DEFENDANTS' SUMMARY JUDGMENT MOTIONS SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the city did not demonstrate it did not have notice of the pothole which caused plaintiff to slip and fall, and the abutting property owner did not demonstrate it did not have a spe-

cial use of the area. Therefore neither the city's nor the property owner's motion for summary judgment should have been granted: "The City failed to establish, prima facie, the absence of a written acknowledgment of the alleged dangerous condition. Documents produced by the City's Department of Transportation demonstrated that the City acknowledged in writing that a pothole existed in the vicinity of the plaintiff's accident ... . Any dispute as to the precise location of the noticed pothole is a question of fact for the jury ... . Likewise, the owner failed to meet her prima facie burden. Generally, liability for injuries sustained as a result of a dangerous condition on a public sidewalk or street 'is placed on the municipality and not the abutting landowner'... . However, liability may be imposed on an abutting property owner where, inter alia, the owner of the abutting property caused the condition to occur through a special use of that area... . Here, the owner failed to demonstrate, prima facie, that she did not cause the alleged condition to occur because of some special use. The record establishes that the area where the plaintiff was injured was at the dead-end of Atkins Avenue, which was bordered on each side by Arlington Village apartment buildings. Indeed, part of Atkins Avenue is used for a parking lot solely for the benefit of Arlington Village tenants. The parking lot is partitioned from Atkins Avenue by chain link fencing and a gate maintained by the owner. The garbage dumpsters maintained for use by the tenants of Arlington Village are kept in the parking lot. There are no sidewalks in the dead-end area of Atkins Avenue. Accordingly, the roadway was used by tenants and employees of Arlington Village as a walkway, as a driveway for their vehicles, and as a driveway and walkway to access the adjacent parking lot and the garbage dumpsters. Thus, the owner failed to establish, prima facie, that she did not derive a special use from the area which contained the defect. Furthermore, '[w]hether an entity is liable for creating a defect as a special user is generally a question for the jury' ...". ***Llanos v. Stark*, 2017 N.Y. Slip Op. 04828, 2nd Dept 6-14-17**

THIRD DEPARTMENT

COURT OF CLAIMS, CORPORATION LAW, CIVIL PROCEDURE, ATTORNEYS.

ABSENCE OF AN ATTORNEY'S SIGNATURE ON A LIMITED LIABILITY COMPANY'S NOTICE OF CLAIM WAS NOT A JURISDICTIONAL DEFECT, COURT OF CLAIMS CAN NOT GRANT EQUITABLE RELIEF WHICH IS NOT RELATED TO THE REQUESTED MONETARY RELIEF.

The Third Department, reversing the Court of Claims, determined claimant limited liability company's (LLC's) notice of claim could be amended to add an attorney's signature. The notice of claim was timely filed pro se. The defendant argued that the failure to have the claim filed by an attorney representing the LLC violated CPLR 321(a) and was a jurisdictional defect. The Third Department disagreed, finding the application of CPLR 321(a) flexible and the related requirement nonjurisdictional. The court also noted that the claimant's demand for equitable relief was not incidental to the requested monetary relief and therefore must be dismissed as beyond the jurisdiction of the Court of Claims: "... [D]efendant does not point to any service or filing provision — or any other provision — of the Court of Claims Act that prohibits claimant from pro se representation. Instead, defendant relies on CPLR 321 (a), which provides that, subject to express exceptions, a 'corporation or voluntary association shall appear by attorney' to 'prosecute or defend a civil action,' and 'like a corporation or a voluntary association, [an] LLC may only be represented by an attorney and not by one of its members who is not an attorney admitted to practice in the state of New York' ... . Thus, as an initial matter, we conclude that compliance with CPLR 321 (a) does not implicate subject matter jurisdiction, as compliance with that provision is not a prerequisite to the waiver of sovereign immunity pursuant to the Court of Claims Act ... . * * * ... [G]iven the flexibility of the prohibition on corporate pro se representation and the Legislature's express intent that technical irregularities in filing are subject to correction, absent prejudice and upon just terms ... we hold that, under these circumstances, the irregularity of claimant's initial filing was one that the Court of Claims could have disregarded, given counsel's subsequent appearance on behalf of claimant, by granting so much of claimant's motion to amend the claim as added counsel's signature ...". ***Hamilton Livery Leasing, LLC v. State of New York*, 2017 N.Y. Slip Op. 04943, 3rd Dept 6-15-17**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

SCHOOL DISTRICT'S UNILATERALLY CONTRACTING WITH AN OUTSIDE AGENCY FOR A PREKINDERGARTEN PROGRAM WAS NOT AN IMPROPER PRACTICE UNDER THE EDUCATION LAW (TAYLOR LAW).

The Third Department, in a full-fledged opinion by Justice Devine, reversing (modifying) Supreme Court, determined the respondent school district's unilaterally contracting with an outside party for a prekindergarten program, without first negotiating with the teachers' union, did not constitute an improper practice: "Respondent Lawrence Union Free School District (hereinafter the District) implemented a universal prekindergarten program pursuant to Education Law § 3602-e. Program tasks were first performed by employees working in a collective bargaining unit exclusively represented by petitioner [teachers' union] but, in 2012, the District unilaterally contracted with an outside eligible agency to staff and operate it. Petitioner filed an improper practice charge with respondent Public Employment Relations Board (hereinafter PERB) alleging a violation of the Public Employees' Fair Employment Act (... the Taylor Law...), namely, that the District did not negotiate in good faith about outsourcing the work ... . * * * The Legislature ... created a 'comprehensive package for a school district's decision to' fashion a prekindergarten program plan and 'withdr[e]w that decision from the mandatory bargain-

ing process,' crafting a mechanism for public consultations that included affected collective bargaining units and left little time for traditional collective bargaining... . A school district was empowered by Education Law § 3602-e (5) (d) to contract without interference in implementing a plan crafted after that process ... . '[T]here is no absolute bar to collective bargaining over' the outsourcing of prekindergarten work to an outside agency... and, as we have held, an agreement reached after collective bargaining on the subject is enforceable... . Inasmuch as the clear language of Education Law § 3602-e compels the conclusion that negotiation is not required to begin with, however, PERB was right to determine that the absence of negotiation did not constitute an improper practice under the Taylor Law. This does not preclude petitioner from seeking impact negotiations in the future." ***Matter of Lawrence Teachers' Assn., NYSUT, AFT, NEA, AFL-CIO v. New York State Pub. Relations Bd.*, 2017 N.Y. Slip Op. 04944, 3rd Dept 6-15-17**

FAMILY LAW, EVIDENCE.

CHILD'S TESTIMONY ALLEGING SEXUAL ABUSE NOT CORROBORATED, SEXUAL ABUSE ADJUDICATION REVERSED.

The Third Department, reversing Family Court, determined the child's testimony alleged sexual abuse by father was not corroborated: "A child's mere repetition of an accusation to others, 'however consistent and believable, is not sufficient to corroborate [his or her] prior out-of-court statements'... . 'The corroboration requirement is not demanding and may be satisfied by any other evidence tending to support the reliability of the child's previous statements' ... . Nevertheless, 'there is a threshold of reliability that the evidence must meet'... . Here, relative to the allegations that the father had sexual contact with the daughter, that threshold was not met. This Court has found corroboration of a child's out-of-court statements pertaining to sexual abuse in such evidence as medical indications of abuse ... , expert validation testimony ... , cross-corroboration by another child's similar statements ... , marked changes in a child's behavior ... , and sexual behavior or knowledge beyond a child's years ... . No such evidence was presented here. Instead, the undisputed testimony of all of the witnesses described the daughter as a social, highly verbal child with no medical evidence of abuse, no significant behavioral alterations, and no indications of inappropriate sexual knowledge or behavior." ***Matter of Lee-Ann W. (James U.)*, 2017 N.Y. Slip Op. 04920, 3rd Dept 6-15-17**

MEDICAL MALPRACTICE, EVIDENCE, PERSONAL INJURY.

PLAINTIFF'S EXPERT DID NOT POINT TO ANY SUBSTANTIVE DEVIATION FROM A STANDARD OF APPROPRIATE CARE BY THE PSYCHIATRIC CARE-GIVERS, AND DID NOT DEMONSTRATE EXPERTISE IN EMERGENCY MEDICINE, MEDICAL MALPRACTICE ACTION BASED UPON PLAINTIFF'S DECEDENT'S COMMITTING SUICIDE SHORTLY AFTER RELEASE FROM DEFENDANTS' CARE PROPERLY DISMISSED.

The Third Department, affirming Supreme Court, determined the medical malpractice action brought on behalf of a high school student who committed suicide was properly dismissed. The decision lays out in detail the actions of the defendants and the expert affidavits submitted to demonstrate the defendants did not deviate from an appropriate standard of care in assessing plaintiff's decedent's mental state or in releasing plaintiff's decedent to his parents. The plaintiffs' expert affidavit did not demonstrate any substantive deviation from appropriate care, or any expertise in emergency medicine. Shortly after release from defendants' care, which related to drug abuse, not suicidal ideation, plaintiff's decedent shot himself in the head: "The burden ... shifted to plaintiffs to raise a triable issue of fact as to whether defendants departed from the accepted standard of care ... . To that end, plaintiffs primarily relied on an affirmation of Igor Galynker, a psychiatrist, who opined that Duplan [the psychiatrist] departed from accepted practice in several ways, including by failing to personally evaluate decedent and failing to consider several factors that increased decedent's risk for suicide. As to CMC [the emergency care provider], Galynker opined that it failed to establish procedures requiring Duplan to personally evaluate decedent and failed to create a 'structured interview algorithm' for assessment of acute suicide risk, leading to serious errors on Beeby's [the psychiatric nurse who interviewed plaintiff's decedent] part. Yet, Galynker failed to provide any factual basis for his opinions ... or point to any medical guidelines indicating that only a psychiatrist may conduct a mental health examination. … Galynker never articulated how or why, if certain questions were asked or mnemonics/algorithms were used, material information would have been revealed that would have altered the medical decision rendered. Consequently, … Galynker's affirmation to be conclusory and lacking sufficient detail to raise a triable issue of fact ... . With respect to Koch [the emergency medicine physician], Galynker opined that he deviated from accepted practice by, among other things, failing to discuss the case with Duplan and failing to consider the effects of decedent's drug use. Notably, however, Galynker did not indicate that he had any training or expertise in the field of emergency medicine ...". ***Gallagher v. Cayuga Med. Ctr.*, 2017 N.Y. Slip Op. 04941, 3rd Dept 6-15-17**

MUNICIPAL LAW, CONSTITUTIONAL LAW, LANDLORD-TENANT.

NUISANCE LAW COULD LEAD TO EVICTION FOR REPORTING CRIMES TO THE POLICE, THE REACH OF THE LAW VIOLATED TENANTS' FIRST AMENDMENT RIGHTS AND WAS THEREFORE UNENFORCEABLE AGAINST THE LANDLORD.

The Third Department, in a full-fledged opinion by Justice Garry, determined a village nuisance law was facially unconstitutional and could not be enforced against the owner of several properties which rented out single rooms. Apparently, criminal activity, including domestic abuse, at these properties was a concern for the village. The local village nuisance law assigned points for certain conditions or incidents at the properties. Points were assessed even when police were called to the properties by crime victims. Once a certain number of points are accumulated, the village can take certain enumerated actions against the property owner, including ordering the eviction of tenants. The reach of the nuisance statute therefore encroached on the tenant's first amendment right to report crimes to the police (to petition the government for redress of grievances): "The Nuisance Law's provisions pertaining to remedies demonstrate that the loss of a tenant's home may result directly from the designation of a property as a public nuisance. As previously noted, the Nuisance Law expressly permits owners to include the eviction of tenants in the required plans to abate public nuisances — again, with no exception for tenants who may have caused points to be assessed against a property by summoning police because they were victimized by criminal activity, or who otherwise exercised their constitutionally-protected right to request police assistance. Further, as the relief permitted by article II of the Nuisance Law includes the property's temporary closure, all tenants and occupants of a property where illegal activity occurs — not just those who actually commit a violation — are at risk of losing their homes upon a declaration that the property is a public nuisance. The plain language of the law therefore tends to discourage tenants from seeking help from police. As the amici curiae assert, this discouragement may have a particularly severe impact upon victims of domestic violence ... . If a tenant who has an order of protection against an individual because of prior domestic violence calls police for assistance in enforcing the order, points may be assessed against the property. Further, if a tenant summons police because he or she has been the victim of a crime of domestic violence involving assault or one of the other offenses worth 12 points, the Nuisance Law automatically deems the property to be a public nuisance, placing the tenant at risk of losing his or her home solely because of this victimization." ***Board of Trustees of The Vil. of Groton v. Pirro*, 2017 N.Y. Slip Op. 04938, 3rd Dept 6-5-17**

PERSONAL INJURY, IMMUNITY, MENTAL HYGIENE LAW.

OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES (OMRDD) WAS IMMUNE FROM A NEGLIGENCE SUIT ALLEGING ABUSE OF A DISABLED RESIDENT WHILE IN THE CARE OF A COMPANY CERTIFIED BY THE OMRDD.

The Third Department determined claimant's negligence suit against the state Office of Mental Retardation and Developmental Disabilities (OMRDD) was properly dismissed because the OMRDD's oversight of private companies providing care to the developmentally disabled was a government function and there was no special relationship with the resident, claimant's daughter. Therefore the state was immune from suit. Claimant alleged the resident was abused while in the care of Camary Statewide Services, a private, nonprofit corporation that was, at that time, certified by the OMRDD: "OMRDD conducted annual or biannual reviews, which included a sampling of records and interviews of staff members and residents, to determine whether Camary continued to be eligible for an operating certificate to provide care and treatment to developmentally disabled individuals ... . Where noncompliance was discovered, OMRDD could require private service providers to take corrective measures to address the deficiency or, where the noncompliance was severe, revoke, suspend or limit the service provider's operating certificate ... . In the event of noncompliance, OMRDD would provide guidance to the service provider, but it would not take affirmative steps to bring the provider into compliance with the applicable regulations. Moreover, OMRDD's oversight over, and regulation of, Camary was plainly undertaken to further the general goal of protecting the health and safety of persons with developmental disabilities. Based on the foregoing, we conclude that the actions, or inactions, in question were governmental in nature ... . * * * ... [C]laimant argues that the requisite special relationship was formed by OMRDD's violation of Mental Hygiene Law former § 13.07 (c) ... , as well as the reporting rules in 14 NYCRR former part 624 ... . … However, no private right of action is expressly created by the implementing statute and the relevant regulations and, contrary to claimant's contentions, one may not be fairly implied." ***T.T. v. State of New York*, 2017 N.Y. Slip Op. 04940, 3rd Dept 6-15-17**

FOURTH DEPARTMENT

CIVIL PROCEDURE.

NOTICES OF DISCONTINUANCE FILED AFTER MOTIONS TO DISMISS WERE BROUGHT, BUT BEFORE RESPONSIVE PLEADINGS, WERE TIMELY.

The Fourth Department, reversing Supreme Court, determined that plaintiff's notices of discontinuance were timely. Supreme Court had held the notices were not timely because they were filed after defendants' motions to dismiss. The statute requires that a discontinuance (without the need for court involvement) be filed before any responsive pleadings. A motion to dismiss is not a responsive pleading: "We conclude that the notices of discontinuance were not untimely because a motion to dismiss pursuant to CPLR 3211 is not a 'responsive pleading' for purposes of CPLR 3217 (a) (1). A motion pursuant to CPLR 3211 does not fall within the meaning of a 'pleading' as defined by CPLR 3011. Rather, a 'motion' is defined in the CPLR as 'an application for an order' (CPLR 2211). Indeed, the terms 'responsive pleading' and 'motion to dismiss pursuant to CPLR 3211' are not used interchangeably in the CPLR but, rather, are treated as distinct, separate items. For instance, CPLR 3211 (d) provides that, under certain circumstances, 'the court may deny the [CPLR 3211] motion, allowing the moving party to assert the objection in his responsive pleading' ([emphasis added]). Likewise, CPLR 3211 (e) provides that, '[a]t any time before service of the responsive pleading is required, a party may move on one or more grounds set forth in [CPLR 3211 (a)].' It is clear from the language used throughout the CPLR that the Legislature did not intend a CPLR 3211 motion to be considered a 'responsive pleading.' " ***Harris v. Ward Greenberg Heller & Reidy LLP*, 2017 N.Y. Slip Op. 04970, 4th Dept 6-16-17**

CIVIL PROCEDURE, APPEALS.

STATUTE OF LIMITATIONS ENDED ON A SATURDAY, ACTION COMMENCED ON THE FOLLOWING BUSINESS DAY WAS TIMELY, DISMISSAL OF COMPLAINT REVERSED SUA SPONTE IN THE INTEREST OF JUSTICE.

The Fourth Department reversed the dismissal of this Labor Law retaliatory discharge cause of action in the interest of justice. The two-year statute of limitations ended on a Saturday. The action was commenced on the next business day (a Tuesday following Columbus Day), rendering the action timely. The correct calculation had not been raised below or on appeal: Defendant failed to meet its initial burden of establishing that the statute of limitations period had expired ... . Even assuming, arguendo, that plaintiff's cause of action accrued on October 10, 2013, we note that the two-year statute of limitations period ended on a Saturday and therefore was extended until 'the next succeeding business day' (General Construction Law § 25-a [1]...). Because Columbus Day fell on the Monday following that Saturday (see § 24), the next business day was October 13, 2015, the date on which the action was commenced. Plaintiff's complaint therefore was timely. Although plaintiff did not assert that calculation in opposing defendant's motion before the motion court or on this appeal, we deem it appropriate to consider it sua sponte in the interest of justice ... . As noted above, defendant had the burden of establishing that the statute of limitations period had expired, and it could not refute that such period was extended by operation of law to October 13, 2015 ...". ***Wilson v. Exigence of Team Health*, 2017 N.Y. Slip Op. 04993, 4th Dept 6-16-17**

CONTRACT LAW.

RELEASE DID NOT ENCOMPASS A BREACH OF THE SETTLEMENT AGREEMENT ITSELF.

The Fourth Department, over an extensive dissent, determined a release from liability for flooding on plaintiff's land did not encompass a breach of contract action concerning the failure of a drainage system. As part of the settlement agreement in the prior action stemming from the flooding, defendant agreed to construct a drainage system which, plaintiff alleges, did not alleviate the flooding: "It is well settled that settlement agreements and general releases are 'governed by principles of contract law'... . Viewing the facts as alleged in the first and second causes of action, for breach of contract, in the light most favorable to plaintiff and affording plaintiff all favorable inferences ... , we conclude that the release does not 'evince an intention to encompass the distinct contractual obligations defendant undertook upon which plaintiff's breach of contract causes of action are premised' ... , i.e., the breach of the settlement agreement itself." ***Marinaccio v. Town of Clarence*, 2017 N.Y. Slip Op. 04962, 4th Dept 6-16-17**

CRIMINAL LAW.

COUNTY COURT FAILED TO MAKE A YOUTHFUL OFFENDER DETERMINATION, CASE REMITTED.

The Fourth Department noted that County Court did not make a determination on the record whether defendant was a youthful offender, which is mandatory. The case was remitted for that purpose: "We agree with defendant, however, that the court erred in failing to determine whether he should be afforded youthful offender status ... . Defendant was convicted of a sex offense enumerated in CPL 720.10 (2) (a) (iii), and the court therefore was required 'to determine on the record whether . . . defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)' ... . Because the court failed to make such a determination, we hold the case, reserve decision, and remit the matter to County Court to

make and state for the record 'a determination of whether defendant is a youthful offender' ...". ***People v. Wilson*, 2017 N.Y. Slip Op. 04985, 4th Dept 6-16-17**

CRIMINAL LAW.

FAILURE TO PROVIDE MEANINGFUL NOTICE OF A JURY NOTE REQUIRED REVERSAL.

The Fourth Department determined the judge's failure to provide meaningful notice of a jury note, which was sent out just before a note stating the jury had reached a verdict, was a mode of proceedings error requiring reversal: "... [T]he record fails to reflect that the court provided defense counsel with meaningful notice of a substantive jury note ... Thus, a mode of proceedings error occurred, requiring reversal ... . The record reflects that, during a period of approximately 30 minutes when the court had excused counsel, the jury sent three notes, which the court properly marked as court exhibits. The last note stated that the jury had reached a verdict; a prior note, however, stated 'we the jury request a copy of the wording of the law.' Inasmuch as the court would have been prohibited from providing the jury with either a copy of the statute, or a copy of its jury instructions, without the consent of defendant ... . we reject the contention of the People that the note was ministerial, and not substantive ... ". ***People v. Holloman*, 2017 N.Y. Slip Op. 05015, 4th Dept 6-16-17**

CRIMINAL LAW.

DEFENDANT, WHO HAD BEEN RETAINED AFTER A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, SHOULD NOT HAVE BEEN SUMMARILY RELEASED BY COUNTY COURT WITHOUT A HEARING.

The Fourth Department, reversing County Court, determined defendant, who had been retained after he had been indicted for assault and entered a plea of not responsible by reason of mental disease or defect, should not have been released without a hearing: "Although originally determined to suffer from a 'dangerous mental disorder,' defendant progressed in treatment to the point where he was transferred to a nonsecure psychiatric facility. Petitioner nevertheless contends that defendant remains '[m]entally ill' and in need of 'care and treatment as a patient, in the in-patient services of a psychiatric center under the jurisdiction of the state office of mental health' (CPL 330.20 [1] [d]). As a result, petitioner commenced this proceeding seeking a '[s]ubsequent retention order' (CPL 330.20 [1] [i]). In support of the application, petitioner submitted, inter alia, an appropriate affidavit from a psychiatric examiner in accordance with CPL 330.20 (20). Defendant demanded a hearing pursuant to CPL 330.20 (9), but he did not submit any affidavits in opposition to the application. * * * Before issuing a release order, the court must conduct a hearing to 'determine the defendant's present mental condition' (CPL 330.20 [12]). Here, the undisputed submissions before the court in support of petitioner's application for a subsequent retention order demonstrated that defendant remained 'mentally ill' as defined in CPL 330.20 (1) (d) and in need of in-patient treatment. Nonetheless, without taking any testimony or receiving any evidence, the court issued a release order. That, itself, was error. Moreover, before issuing a release order, the court must 'find[] that the defendant does not have a dangerous mental disorder and is not mentally ill' (CPL 330.20 [12]; ...). Here, we agree with petitioner that the court further erred in failing to make any finding on that issue." ***Guttmacher v. S.J.*, 2017 N.Y. Slip Op. 04968, 4th Dept 6-16-17**

CRIMINAL LAW, APPEALS.

FAILURE TO PROVIDE DEFENDANT WITH A STATEMENT OF CONVICTION REQUIRED VACATION OF HIS SENTENCE AS A SECOND FELONY OFFENDER IN THE INTEREST OF JUSTICE.

The Fourth Department determined defendant was not accorded the opportunity to contest the constitutionality of a prior conviction. Therefore the sentence as a second felony offender was vacated even though the error was not preserved (in the interest of justice). Defendant was not provided with a statement of conviction. The fact that the prior conviction was an element of the charged offense in a special information did not obviate the need for a statement of conviction: "... [D]efendant contends that the People failed to comply with the procedural requirements of CPL 400.15 in seeking to have him sentenced as a second violent felony offender inasmuch as they did not file a predicate felony offender statement as required by CPL 400.15 (2). Although that contention is not preserved for our review... , we nonetheless exercise our discretion to review it as a matter of discretion in the interest of justice ... . Contrary to the assertion of the prosecutor at sentencing, 'the need for a predicate felony offender statement was not obviated by defendant's pretrial admission to a special information setting forth his prior felony conviction as an element of a count charging criminal possession of a weapon. The special information did not permit defendant to raise constitutional challenges to his prior conviction, as he had the right to do before being sentenced as a second felony offender' ... . We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for the filing of a predicate felony offender statement pursuant to CPL 400.15 and resentencing." ***People v. Edwards*, 2017 N.Y. Slip Op. 04983, 4th Dept 6-16-17**

CRIMINAL LAW, ATTORNEYS.

PROSECUTOR ADMONISHED FOR MISCONDUCT, CONVICTION AFFIRMED BECAUSE THE JURY WAS PROPERLY INSTRUCTED AND THE EVIDENCE OF GUILT WAS OVERWHELMING.

The Fourth Department did not reverse defendant's conviction because of prosecutorial misconduct, but took the opportunity to admonish the prosecutor responsible for it, noting that several past reversals were based on that same prosecutor's misconduct. The court determined the fact that the trial judge sustained objections to the misconduct and properly instructed the jury, together with the overwhelming evidence of guilt, allowed the conviction to stand: "The People correctly concede that the prosecutor improperly appealed to the sympathy of the jury ... . The People also correctly concede that the prosecutor improperly implied that a potential adolescent witness did not testify because he felt 'guilt' about defendant's actions; County Court, however, properly sustained defense counsel's objection to the prosecutor's statement and gave a curative instruction, which the jury is presumed to have followed ... . Thus, with respect to that instance of misconduct, we conclude that any prejudice was alleviated … . The People also correctly concede that the prosecutor denigrated defense counsel by stating that he intentionally attempted to confuse an adolescent prosecution witness. We further conclude that, in an attempt to discredit the testimony of an adolescent defense witness, the prosecutor misstated the evidence with respect to whether the witness had spoken with defendant regarding the allegations against him. Although the prosecutor properly responded to defense counsel's remarks during summation attacking the credibility of the victim ... , she also improperly vouched for the credibility of the victim's testimony ... . Furthermore, the prosecutor improperly acted as an unsworn expert by describing defendant's behavior towards the victim as 'classic grooming behavior,' and as an unsworn witness with respect to reasons why the victim delayed in reporting what had occurred ...". ***People v. Flowers*, 2017 N.Y. Slip Op. 04990, 4th Dept 6-16-17**

FAMILY LAW.

MOTHER'S REQUEST FOR A CONTINUANCE IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING SHOULD HAVE BEEN GRANTED.

The Fourth Department determined Family Court abused its discretion when it refused mother's stress-related request for a continuation in this termination of parental rights proceeding: "We agree with the mother that the court abused its discretion in denying her counsel's request for a continuance when, due to emotional distress, the mother was unable to appear in the afternoon on the final day of her hearing. The determination whether to grant a request for an adjournment for any purpose is a matter resting within the sound discretion of the trial court ... . Under the circumstances presented here, including that the issue is the termination of parental rights, we conclude that it was an abuse of discretion to deny the mother's request for a continuance. We therefore vacate the order and remit the matter to Family Court to allow the mother to present evidence at a reopened fact-finding hearing... ". ***Matter of Destiny G. (Laricia H.)*, 2017 N.Y. Slip Op. 04965, 4th Dept 6-16-17**

FAMILY LAW.

MOTHER'S PETITION FOR A DOWNWARD MODIFICATION OF CHILD SUPPORT SHOULD NOT HAVE BEEN DISMISSED BASED ON MOTHER'S PARAMOUR'S REFUSAL TO PROVIDE FINANCIAL DISCLOSURE.

The Fourth Department, reversing (modifying) Family Court, determined mother's petition for a downward modification of child support should not have been dismissed based on the refusal of mother's paramour to provide financial disclosure: "... [T]he Support Magistrate erred in dismissing the mother's cross petition for a downward modification of child support. The sole justification for that dismissal was the mother's failure to provide financial disclosure from her paramour, a nonparty, who had filed an affidavit stating that he refused to provide financial disclosure to the court. 'While certain penalties or sanctions may be appropriate for the individual conduct of [the mother] . . . , it is apparent that the actions of a nonparty weighed heavily in the decision to invoke the ultimate penalty' ... . Under the circumstances of this case, we conclude that the court erred in dismissing the cross petition based on a nonparty's refusal to disclose financial information voluntarily ... . We therefore modify the order ... by granting the mother's objection in part and reinstating the mother's cross petition for a downward modification of child support, and we remit the matter to Family Court for a new hearing on the cross petition." ***Matter of Deshotel v. Mandile*, 2017 N.Y. Slip Op. 04972, 4th Dept 6-16-17**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, PERSONAL INJURY.

SUMMARY JUDGMENT TO PLAINTIFF ON THE LABOR LAW § 240(1) CAUSE OF ACTION, BASED UPON A FALL FROM A LADDER, WAS PREMATURE AS IT WAS BASED SOLELY ON PLAINTIFF'S DEPOSITION.

The Fourth Department, reversing Supreme Court, determined the grant of summary judgment to plaintiff in this Labor Law § 240(1) action, based on plaintiff's fall from a ladder, was premature. The ruling on the motion was based solely on the deposition of the plaintiff: "Stephen J. Jones (plaintiff), an employee and owner of third-party defendant Stephen J. Jones

Contracting, Inc., fell from a ladder while working on a single-family home. Plaintiff and his wife thereafter commenced this Labor Law and common-law negligence action against, inter alia, defendant-third-party plaintiff Jay P. Tovey Co., Inc. (defendant), the general contractor on the project. Insofar as relevant to this appeal, plaintiffs cross-moved for partial summary judgment on the issue of defendant's liability under Labor Law § 240 (1). We agree with defendant that, in view of the limited discovery that has been conducted, Supreme Court erred in granting the cross motion ... . Notably, discovery has been limited to plaintiff's own account of the accident during his examination before trial, and defendant has not had an opportunity to explore potential defenses ...". ***Jones v. Jay P. Tovey Co., Inc.*, 2017 N.Y. Slip Op. 05017, 4th Dept 6-16-17**

REAL PROPERTY, FORECLOSURE.

SOLAR AND WIND EASEMENTS, WHICH WERE RECORDED AFTER THE MORTGAGES, ARE SUBJECT TO FORECLOSURE.

The Fourth Department determined solar and wind easements granted subsequent to the mortgages are subject to foreclosure: "... [D]efendant's easements constitute interests in the realty that are subject to foreclosure by plaintiff. A mortgage creates a lien upon the property to the extent of the mortgagor's own interest or title at the time of the giving of the mortgage. Thus, '[t]he effect of the foreclosure [judgment and sale] . . . is to vest in the purchaser the entire interest and estate of mortgagor and mortgagee as it existed at the date of the mortgage, and unaffected by the subsequent [e]ncumbrances and conveyances of the mortgagor' ... . Given that defendant's easements were not granted and recorded until June 2015, after the subject mortgages were given and recorded in August 2012 and April 2014, respectively, the mortgagors' interests at the time of the giving of the mortgages included the use or control of the airspace above their properties. Thus, the mortgages are prior in time and right to defendant's easements ...". ***Bank of Akron v. Spring Cr. Athletic Club, Inc.*, 2017 N.Y. Slip Op. 05008, 4th Dept 6-16-17**

TOXIC TORTS, MUNICIPAL LAW, IMMUNITY, PERSONAL INJURY.

CITY'S LEAD PAINT ABATEMENT PROJECT WAS A PROPRIETARY FUNCTION, CITY THEREFORE COULD BE SUED IN NEGLIGENCE FOR INEFFECTIVE ABATEMENT IN THE ABSENCE OF A SPECIAL RELATIONSHIP WITH PLAINTIFF.

The Fourth Department determined plaintiff could sue the city alleging the lead abatement work undertaken by the city was ineffective. The lead abatement was deemed to be a proprietary function of the government. Therefore the city could be sued in negligence in the absence of any special relationship with plaintiff: "We agree with plaintiff that the court properly determined that defendants were acting in a proprietary capacity as a matter of law. The acts and omissions of defendants, as alleged by plaintiff, 'essentially substitute for or supplement traditionally private enterprises' ' ... . The evidence submitted by defendants in support of their motions established that defendants, through the jointly-managed Project, solicited homeowners to apply for enrollment in the Project; determined whether those applicants were qualified for the Project; performed preabatement testing of the property; identified the areas in need of abatement; prepared a list of specifications for each individual remediation project; prepared a bid package; solicited bids for work at the applicant's residence; chose the particular contractor to perform the abatement work; typed up the contract between the homeowner and the contractor; approved that contract after it was signed by the homeowner and the contractor at City Hall; issued a permit for the remediation work; arranged for the relocation of the occupants during the remediation work; established a time schedule for the remediation work; inspected the remediation work 'as it was being performed'; tested the property after the abatement work was completed; and obtained a written approval of the work from the homeowner. Contrary to defendants' contentions, they did not merely inspect the premises and order that abatement work be performed ... . Indeed, they coordinated and oversaw the entire abatement process at plaintiff's residence. It is well established that maintenance and care related to buildings with tenants is generally a proprietary function... . In our view, defendants voluntarily assumed the homeowner's duty to remediate the lead paint at plaintiff's residence. Once defendants assumed that proprietary duty, they 'also assume[d] the burdens incident thereto' ...". ***Moore v. Del-Rich Props., Inc.*, 2017 N.Y. Slip Op. 04975, 4th Dept 6-16-17**

ZONING.

NO SHOWING A REASONABLE RETURN ON THE PROPERTY WAS NOT POSSIBLE WITH A CONFORMING USE, USE VARIANCE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the grant of a use variance by the zoning board of appeals (ZBA) should have been annulled. The parties seeking the variance (JCC and Lynn) did not present any proof that a reasonable return was not possible with a conforming use: " 'No . . . use variance shall be granted without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship.' In order to prove such unnecessary hardship, the Zoning Ordinance requires the applicant to establish, among other things, that, for each and every permitted use under the zoning regulations for the particular district where the property is located, the applicant cannot

realize a reasonable return and that the lack of return is substantial as demonstrated by competent financial evidence... . In other words, the applicant must demonstrate 'by dollars and cents proof' that he or she cannot realize a reasonable return by any conforming use... . As part of that demonstration, the applicant must necessarily establish what a reasonable return for the property is … . An applicant's failure to establish that he or she cannot realize a reasonable return by any conforming use requires denial of the use variance by the ZBA ... . Here, JCC and Lynn failed to present any evidence to the ZBA to satisfy the first requirement of unnecessary hardship, i.e., that they could not realize a reasonable return on the property by any conforming use. In the absence of such evidence in dollars and cents form, there is no rational basis for the ZBA's finding that the premises would not yield a reasonable return in the absence of the requested use variance and, for that reason, we conclude that the ZBA's determination must be annulled ...". ***Leone v. City of Jamestown Zoning Bd. of Appeals*, 2017 N.Y. Slip Op. 04980, 4th Dept 6-16-17**

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