CasePrepPlus

November 1, 2017

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

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COURT OF APPEALS

CRIMINAL LAW.

RULE THAT A WARRANTLESS ARREST AT THE THRESHOLD OF AN APARTMENT DOORWAY DOES NOT VIOLATE PAYTON REAFFIRMED, DISSENT ARGUED NEW YORK'S PERSISTENT FELONY OFFENDER STATUTE VIOLATES APPRENDI.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a partial dissenting opinion by Judge Fahey, and separate dissenting opinions by Judges Wilson and Rivera, left unchanged the rule that a warrantless arrest may be effected at the threshold of an apartment entrance door without violating *Payton v. New York* (445 U.S. 573 [1980]). Here the defendant answered the door when the police knocked. As defendant stood in the doorway, the arresting officer told him he was under arrest. The defendant then turned around with his hands behind his back and was handcuffed. Judge Fahey's dissent concerned defendant's sentence as a persistent felony offender. Judge Fahey argued that New York's persistent felony offender statute violates *Apprendi v. New Jersey* (530 U.S. 466) because the sentencing judge, not the jury, must make findings of fact before imposing the enhanced sentence. Judges Wilson and Rivera argued the Payton rule prohibiting warrantless arrests inside a suspect's home should apply to threshold arrests when the police have summoned the suspect to the door: "... Payton does not prohibit the police from knocking on a suspect's door because, '[w]hen law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak' ... . Consistent with that understanding of Payton as prohibiting only 'the police . . . crossing the threshold of a suspect's home to effect a warrantless arrest in the absence of exigent circumstances' ... , we have upheld warrantless arrests — both planned and unplanned — of defendants who emerged from their homes after police knocked on an open door and requested that the defendant come out ... , used a noncoercive ruse to lure the defendant outside ... , or directed the defendant to come out after seeing him peek through a window ... . We also upheld a planned, warrantless arrest where the defendant either voluntarily exited his house, or stood behind his mother in the front doorway, and stuck his head out of the door in response to a police request that he come outside ...". ***People v. Garvin*, 2017 N.Y. Slip Op. 07382, CtApp 10-24-17**

CRIMINAL LAW.

TOW TRUCK WAS "EQUIPPED" WITH A POLICE SCANNER, EVEN THOUGH THE SCANNER WAS IN DEFENDANT'S POCKET, NOT ATTACHED TO THE TRUCK.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive dissenting opinion, determined defendant was properly convicted of "equipping" his tow truck with a police scanner without a permit. The scanner was not attached to the vehicle. It was in the defendant's pocket: "Our analysis begins with the language of the statute. Neither the VTL [Vehicle and Traffic Law] nor the Penal Law defines 'equips' or any derivation of that word. Absent a statutory definition 'we must give the term its 'ordinary' and 'commonly understood' meaning ... . To that end, '[i]n determining the meaning of statutory language, we 'have regarded dictionary definitions as useful guideposts' ... . A review of recent sources and those available at the time the statute was enacted in 1933 indicates that 'equips' does not necessitate physical attachment or a special adaptation. * * * Under these definitions 'equip' means to provide something with a particular feature or ability. None states or implies any need for the object's physical attachment to the thing equipped. ... Giving 'equip' its commonly understood meaning, VTL 397 applies regardless of whether the prohibited device is physically attached to the motor vehicle, so long as the device is ready for efficient service." ***People v. Andujar*, 2017 N.Y. Slip Op. 07383, CtApp 10-24-17**

CRIMINAL LAW, APPEALS, JUDGES.

CITY COURT JUDGE WHO CONVICTED DEFENDANT AND WAS THEN ELECTED TO COUNTY COURT SHOULD HAVE RECUSED HIMSELF FROM ADJUDICATING THE APPEAL OF DEFENDANT'S CITY COURT CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, determined defendant's due process rights were violated when the judge who convicted defendant also heard his appeal. After the conviction in city court, the judge was elected to county court, the court to which the appeal was made: "The right to an impartial jurist is a 'basic requirement of due

process' ... . Under federal constitutional jurisprudence, courts evaluate whether a 'serious risk of actual bias,' based on objective perceptions and considering all the circumstances alleged, rises to an unconstitutional level ... . Put differently, '[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his [or her] position is 'likely' to be neutral, or whether there is an unconstitutional 'potential' for bias' ... . Not only must judges actually be neutral, they must appear so as well. We therefore conclude that, under principles of due process ... , a judge may not act as appellate decision-maker in a case over which the judge previously presided at trial. ... In this case, the same Judge ruled upon defendant's pretrial motions, served as the trier of fact, convicted defendant, sentenced defendant, and then proceeded to serve as the sole reviewing Judge on appeal. On these facts, there was a clear abrogation of our State's court structure that guarantees one level of independent factual review as of right. Here, there was a facial appearance of impropriety which 'conflicted impermissibly with the notion of fundamental fairness' ... . Therefore, under these circumstances, recusal, as a matter of due process, was required." ***People v. Novak*, 2017 N.Y. Slip Op. 07384, CtApp 10-24-17**

MENTAL HYGIENE LAW, EVIDENCE, CRIMINAL LAW.

MAJORITY FOUND THE PROOF SUFFICIENT TO JUSTIFY CONTINUED CIVIL COMMITMENT OF THE SEX OFFENDER DIAGNOSED WITH PEDOPHILIA, THE DISSENT DISAGREED AND FORCEFULLY ARGUED THE ACCEPTED STANDARDS OF PSYCHIATRIC/PSYCHOLOGICAL PROOF ARE FLAWED.

The Court of Appeals, over a comprehensive and thoughtful dissent by Judge Wilson, determined the proof the respondent sex offender has "serious difficulty in controlling" his sexual conduct within the meaning of Mental Hygiene Law § 10.03(i) was sufficient. Therefore placement of respondent in a "Strict and Intensive Supervision and Treatment" (SIST) program was justified. The dissent noted that the respondent had been confined for 15 years, only four of which were his term of imprisonment, and raised serious questions about the level of psychiatric/psychological proof accepted as sufficient for civil commitment: "The State's expert witness testified, among other things, that he diagnosed respondent with pedophilia and antisocial personality disorder (ASPD), as well as substance abuse disorders. In the expert's opinion, respondent's 'combination of a pedophilic disorder with [ASPD] . . . create[d] a very toxic mixture in the sense that [respondent] [wa]s more likely to act on the urges towards children and not feel remorse.' * * * **From the Dissent:** As behavioral experts have opined, 'It would seem tautological, and certainly not scientific to argue that the offender has pedophilia because he/she commits sexual acts against children and he/she commits sexual acts against children due to that pedophilic condition. Translating this premise into the control paradigm: the offender lacks the ability to control his/her behavior because the person fails to control that behavior' ... . When one looks more closely at the testimony of [the state's expert], it becomes apparent that he rests his opinions here on a host of information that ... does not allow him or us to distinguish volitional conduct from conduct caused by a mental abnormality." ***Matter of State of New York v. Floyd Y.*, 2017 N.Y. Slip Op. 07381, CtApp 10-24-17**

WORKERS' COMPENSATION LAW, INSURANCE LAW.

AMENDMENT TO WORKERS' COMPENSATION LAW WHICH CLOSED THE SPECIAL FUND FOR REOPENED CASES IS CONSTITUTIONAL.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the appellate division, determined the amendment to Workers' Compensation Law § 25-a, which closed the special fund for reopened cases, is constitutional, despite some retroactive effect on insurers. Plaintiffs are insurance companies that write workers' compensation insurance policies. They challenged the legislature's 2013 amendment ... which closed the special fund for reopened cases. The special fund was designed to relieve insurers of unexpected reopened claims in cases that had been closed seven or more years before: "We conclude that, assuming the amendment has a retroactive impact by imposing unfunded costs upon plaintiffs for policies finalized before the amendment's effective date, that retroactive impact is constitutionally permissible. * * * … '[T]he constitutional impediments to retroactive civil legislation are now modest' ... . 'Absent a violation' of a specific constitutional provision, 'the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope' ... . * * * ... [T]he legislative amendment does not impair any term of plaintiffs' contracts with their insureds ... . * * * Plaintiffs cannot identify any vested property interest impaired by the legislative amendment ... . * * * Assuming that the 2013 amendment to section 25-a has some retroactive impact, we conclude that the retroactive impact is justified by a rational legislative purpose ... .[T]he closure of the Fund was intended to 'save New York businesses hundreds of millions of dollars in assessments per year' ...". ***American Economy Ins. Co. v. State of New York*, 2017 N.Y. Slip Op. 07385, CtApp 10-24-17**

FIRST DEPARTMENT

CIVIL PROCEDURE,

INSUFFICIENT SHOWING DISCLOSURE OF TAX RETURNS WAS NECESSARY TO PROVE DEFENDANT'S CLAIMS.

The First Department, reversing Supreme Court, determined that a sufficient showing of need was not made by defendant (Greene) for the disclosure of tax returns by plaintiff (Pinnacle): "Disclosure of tax returns is generally disfavored due to

their confidential and private nature ... , and Greene has not made a sufficiently particularized showing that the information contained in Pinnacle's tax returns, even if redacted to only reveal Pinnacle's revenue, is necessary to prove his claims ... . Moreover, he does not address why other sources are inadequate, inaccessible, or unlikely to be productive ...". ***Pinnacle Sports Media & Entertainment, LLC v. Greene*, 2017 N.Y. Slip Op. 07527, First Dept 10-26-17**

FAMILY LAW.

FAMILY COURT SHOULD HAVE FOUND FOUR MONTH OLD CHILD TO HAVE BEEN NEGLECTED, FATHER CHOKED MOTHER WITH CHILD IN THE ROOM.

The First Department, reversing Family Court, determined that the four-month-old child's (Jace's) presence in the room when father choked mother supported a finding Jace was neglected: "The mother testified that the father choked her in the presence of six-year-old Isabella and only a couple of feet away from where then four-month-old Jace was sleeping in his crib. The mother's testimony was supported by shelter records; the father did not testify. Family Court found the mother's testimony was credible and supported a finding that the father neglected Isabella. The same evidence also supports a finding that the father neglected Jace. Even a single instance of domestic violence may be a proper basis for a finding of neglect, so long as it 'occurred in the child's presence and resulted in physical, mental or emotional impairment or imminent danger thereof' ... . Jace was in imminent danger of physical impairment due to his close proximity to the violence ... . The father's assertion that Jace was in 'another part of' or 'somewhere else in' the one-room residence at the time of the attack is unsupported by the record." ***Matter of Isabella S. (Robert T.)*, 2017 N.Y. Slip Op. 07533, First Dept 10-26-17**

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

LICENSEE WAS THE OWNER OF THE PREMISES WITHIN THE MEANING OF THE LABOR LAW, EVIDENCE OF LICENSEE STATUS PROPERLY PRESENTED FOR THE FIRST TIME IN REPLY PAPERS, PLAINTIFF FELL FROM A STRUCTURE WITHIN THE MEANING OF LABOR LAW § 240 (1).

The First Department determined the defendant was the proper party in the Labor Law § 240 (1) action, evidence defendant was the proper party was properly presented for the first time in reply papers, and the plaintiff was working on a structure within the meaning of the Labor Law when he fell and was injured: "The court properly granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim because Live Nation was the 'owner' of the accident site in its role as licensee ... . The record demonstrates that as licensee, Live Nation had the sole authority to operate and maintain the premises, including the right to insist that workers on the site follow proper safety practices... . The court did not err in considering the merger agreement showing that Live Nation was the licensee of the premises for the first time in reply, because plaintiff submitted that document in response to an argument made in opposition to the motion ... . The court also properly found that plaintiff was engaged in the alteration of a structure at the time of the accident. When he fell, plaintiff was helping set up the second tier truss system of a sponsorship booth. This truss system constituted a "structure" because, viewed as a whole, it extended the height of the booth from 10 feet to 16 feet, was comprised of several interlocking parts that were connected in a specific way, and required the use of a forklift and several people to construct it ... . Although this truss system was being set up to allow for the display of branding, it was not a 'decorative modification' because the work . . . entail[ed] far more than a mere change[] [to] the outward appearance of' the booth and, instead, constituted an alteration to the preexisting structure ...". ***Perez v. Beach Concerts, Inc.*, 2017 N.Y. Slip Op. 07528, First Dept 10-26-17**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

THE CONCLUSORY ALLEGATIONS IN PLAINTIFF'S EXPERT'S AFFIDAVIT WERE INSUFFICIENT TO RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF PLAINTIFF'S TREATMENT, APPELLATE DIVISION REVERSED, TWO JUSTICE DISSENT.

The First Department, over a two justice dissent, reversing Supreme Court, determined plaintiff's expert failed to raise a question of fact about a deviation from an accepted standard of care in this medical malpractice action. The decision is detailed and fact specific and cannot be fairly summarized here. The essence of the malpractice claim was the failure to diagnose a micro-arteriovenous malformation (micro-AVM) in plaintiff's brain. Plaintiff had sought treatment after injuring her head in a fall and subsequently experiencing headaches and vision and balance problems: "... [P]laintiffs failed to raise a triable issue of fact. Plaintiffs submitted the affirmation of a neurological expert offering opinions in conclusory fashion, without evidentiary substantiation. Plaintiffs' neurological expert opined that the accepted standard of medical care on plaintiff's presentation of symptoms following her ... hemorrhage was to order a 'cerebral MRI and MRA or CTA [computed tomography angiography] or conventional cerebral angiography.' The disjunctive phrasing of this statement apparently indicates that, in plaintiffs' expert's view, performance of either noninvasive or invasive testing would have been sufficient to meet the accepted standard of medical care. Put otherwise, the apparent view of the expert is that the performance of noninvasive tests such as an MRI and MRA would have obviated the need for a cerebral angiogram. The record clearly establishes, however, that plaintiff's micro-AVM was MRI-occult, and thus was never detectable by means of noninvasive testing ... . Plaintiffs' expert's conclusory opinion that noninvasive testing would have led to an earlier diagnosis failed to address the opinion of defendants' expert (based on the noninvasive testing over the six-month period after plaintiff left de-

fendant's care) that the MRI-occult AVM was not diagnosable by such testing. Moreover, plaintiffs' expert failed to identify a basis for the apparent conclusion that, as an alternative to noninvasive testing, cerebral angiography was indicated prior to plaintiff's ... hemorrhage ...". ***Brooks v. April*, 2017 N.Y. Slip Op. 07386, First Dept 10-24-17**

PERSONAL INJURY.

BUS DRIVER ACTED REASONABLY IN RESPONSE TO AN EMERGENCY SITUATION (AN ASSAULT ON THE DRIVER), PLAINTIFF PASSENGER'S NEGLIGENCE AND FALSE IMPRISONMENT ACTION SHOULD HAVE BEEN DISMISSED.
The First Department, reversing Supreme Court, determined the NYC Transit Authority's motion for summary judgment should have been granted. Plaintiff was on a bus when a man attempted to get on the bus without paying and assaulted the driver. Plaintiff and others moved to the back of the bus and demanded that the driver, Hamblin, open the rear door (the door was not opened). Plaintiff allegedly suffered a panic attack which created a condition requiring that a defibrillation device be implanted in her chest. The court held that Hamblin was faced with an emergency situation to which he reacted appropriately: "Defendant established entitlement to judgment as a matter of law as to plaintiff's negligence claim by submitting evidence showing that the incident was the result of an emergency situation that was not of Hamblin's own making and that afforded him little or no time to consider an alternate course of action... . The record demonstrates that Hamblin reasonably and prudently responded to the emergency by making sure that the bus's emergency brake was activated and pressing the silent alarm to summon the police ... . In opposition, plaintiff failed to raise a triable issue of fact. She only presented unsubstantiated assertions and speculation that Hamblin may have breached a duty of care by not making sure that the rear exit door was unlocked and that her injuries might have been avoided if he had acquiesced to the assailant's demand that he be permitted to board the bus without paying the fare ... . Dismissal of the false imprisonment claim is also warranted, since there is no evidence that Hamblin intended to confine plaintiff ...". ***Savinon v. New York City Tr. Auth.*, 2017 N.Y. Slip Op. 07390, First Dept 10-24-17**

PRODUCTS LIABILITY, NEGLIGENCE, IMMUNITY.

MANUFACTURERS' MOTION TO AMEND THEIR ANSWER TO ADD A COUNTERCLAIM FOR CONTRIBUTION AND INDEMNIFICATION AGAINST THE MOTHER OF THE INJURED CHILD IN THIS PRODUCTS LIABILITY ACTION PROPERLY DENIED, THE COUNTERCLAIM WAS APPARENTLY PROHIBITED BY THE RULE OF INTRAFAMILIAL IMMUNITY.
The First Department determined the manufacturers' motion to amend their answer to assert a counterclaim for contribution and indemnification against the mother of the injured child was properly denied. Mother purchased a blender made by defendants. She opened the box but did not take the blender out of the box. When she was out of the room her child took the blender out of the box, plugged it in and was injured. The defendants argued the rule of intrafamilial immunity did not apply: "After plaintiff's deposition revealed the circumstances of the accident, defendants moved for leave to amend their answers to assert a counterclaim against her for contribution and indemnification. They argued that the general rule of intrafamilial immunity (*Holodook v. Spencer*, 36 NY2d 35 [1974]), does not apply when a parent, like plaintiff here, negligently entrusts an instrumentality, which she alleged was unreasonably defective, to a child, thereby creating a risk to third parties ... . Here the proposed counterclaims, as pleaded, state nothing other than a claim that plaintiff negligently supervised her own children with respect to a 'common, daily household hazard[]' ... , which ... does not implicate any duty owed to the public at large, and is insufficient to state a cognizable claim under *Holodook*." ***Y.A. v. Conair Corp.*, 2017 N.Y. Slip Op. 07542, First Dept 10-26-17**

SECOND DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY.

DRIVER'S AFFIDAVIT SUBSCRIBED AND SWORN TO OUT OF STATE SHOULD HAVE BEEN CONSIDERED IN THIS PEDESTRIAN ACCIDENT CASE, DESPITE ABSENCE OF CERTIFICATE OF CONFORMITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.
The Second Department, reversing Supreme Court, determined defendant driver's affidavit should have been considered in opposition to plaintiff's summary judgment motion in this pedestrian accident case. Although the defendant's affidavit was subscribed and sworn to out of state and was not accompanied by a certificate of conformity, it should have been considered and it raised a triable question of fact: "... [I]n determining the motion, the Supreme Court should have considered the defendant driver's affidavit "notwithstanding that it was subscribed and sworn to out of state and not accompanied by a certificate of conformity as required by CPLR 2309(c), as such a defect is not fatal, and no substantial right of the [plaintiff] was prejudiced by disregarding the defect" ... . In his affidavit, the defendant driver provided an account of the incident which contradicted the plaintiff's account of the incident. The defendant driver averred that the traffic light was in his favor as his vehicle approached and crossed the subject crosswalk. He also averred that when he first saw the plaintiff, the plaintiff

was running across the street, approximately 50 to 60 feet away from the crosswalk, and that he could not stop his vehicle in time to avoid the contact. Thus, the defendants raised a triable issue of fact as to whether the plaintiff was comparatively at fault in the happening of the accident ...". ***Voskoboinyk v. Trebisovsky*, 2017 N.Y. Slip Op. 07481, Second Dept 10-25-17**

CRIMINAL LAW, APPEALS.

DEFENDANT PENALIZED FOR GOING TO TRIAL WITH AN EXCESSIVE SENTENCE, SENTENCE REDUCED IN THE INTEREST OF JUSTICE.

The Second Department, reducing defendant's sentence, In the interest of justice (error not preserved), determined defendant was penalized for going to trial with an excessive sentence: " 'If a defendant refuses to plead guilty and goes to trial, retaliation or vindictiveness may play no role in sentencing following a conviction. Rather, the conventional concerns involved in sentencing, which include the considerations of deterrence, rehabilitation, retribution, and isolation, must be the only factors weighed when sentence is imposed' ... . 'The fact that the sentence imposed after trial was greater than that offered during plea negotiations is not, standing alone, an indication that the defendant was punished for asserting his right to proceed to trial' ... . Nevertheless, such disparities are a factor in the court's overall analysis when deciding whether a sentence was vindictive... . The defendant, who has no prior felony convictions, was offered a sentence of a definite term of imprisonment of one year as part of a plea agreement. His codefendant, who pleaded guilty to burglary in the second degree, was sentenced to a determinate term of six years' imprisonment, to run concurrently with a four-year sentence that he was already serving on a different case. In addition, the sentencing court admonished the defendant for putting the elderly complaining witness through the 'ordeal' of a trial even though the defendant was caught 'red-handed.' Under these circumstances, the sentence of seven years' imprisonment raises the inference that the defendant was penalized for exercising his right to a jury trial ...". ***People v. Hodge*, 2017 N.Y. Slip Op. 07456, Second Dept 10-25-17**

CRIMINAL LAW, EVIDENCE.

EVIDENCE WAS SUFFICIENT TO SUPPORT MANSLAUGHTER CONVICTION FOR THE DEATH OF A BABY, TWO JUSTICE DISSENT.

The Second Department, over a two-justice dissent, determined there was legally sufficient evidence to support the manslaughter conviction for the death of a baby. The dissenters argued there were two adults who could have committed the crime and there was insufficient evidence defendant was the perpetrator: "The evidence presented by the People established that the defendant had one-on-one access to Annie during relevant time periods preceding her hospitalization. Further, the record is replete with evidence, including strong medical expert evidence, that Annie's death was a homicide caused by violent shaking and forceful impacts to her head. This proof, coupled with the defendant's devastating admission that he 'carelessly bump[ed] her head on the night stand,' was both legally and factually sufficient to sustain the jury's verdict." ***People v. Hang Bin Li*, 2017 N.Y. Slip Op. 07454, Second Dept 10-25-17**

CRIMINAL LAW, EVIDENCE.

INSUFFICIENT EVIDENCE LINKING DEFENDANT TO THREATS TO WITNESS, WITNESS'S GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN READ TO THE JURY, WITNESS SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT THE THREATS, TWO JUSTICE DISSENT.

The Second Department, over a two-justice dissent, reversed defendant's conviction because a witness, Lopez, was allowed to testify he changed his testimony because he was threatened. Lopez's grand jury testimony was read into evidence and then Lopez testified in accordance with the grand jury testimony. The Second Department held that there was insufficient evidence the defendant was behind the threats to Lopez. The dissenters argued that the error was harmless: " ... 'As a general rule, the Grand Jury testimony of an unavailable witness is inadmissible as evidence-in-chief. However, a limited exception to this prohibition, and to the prohibition against the admission of hearsay, applies where the People establish by clear and convincing evidence that the witness's unavailability was procured by misconduct on the part of the defendant. Where the People establish that a witness is unwilling to testify due to the defendant's own conduct, or by the actions of others with the defendant's knowing acquiescence, defendant forfeits the right to confrontation, and such out-of-court statements are admissible' ... . Here, the People failed to establish, by clear and convincing evidence, that Lopez had been made unavailable due to threats made at the initiative or acquiescence of the defendant ... . Accordingly, the Supreme Court violated the defendant's right to confrontation by allowing Lopez's grand jury testimony into evidence. The Supreme Court also erred in allowing Lopez to testify at the trial that he had been threatened by a third party. Evidence that a third party threatened a witness with respect to testifying at a criminal trial is admissible as evidence of consciousness of guilt where there is 'at least circumstantial evidence linking the defendant to the threat' ... . Here, there was no evidence linking the defendant to the threat." ***People v. Vargas*, 2017 N.Y. Slip Op. 07465, Second Dept 10-25-17**

DEBTOR-CREDITOR.

DEBTOR CAN SIMPLY REFUSE TO REPAY THE CRIMINALLY USURIOUS LOAN.

The Second Department determined a loan with a 50% per year interest rate was criminally usurious and the debtor could simply refuse to repay it: "A borrower bears the burden of proving each element of usury by clear and convincing evidence, and usury 'will not be presumed' ... . Here, the plaintiff admits that the interest on the loan was excessive, criminally so, at 50% per annum, or 100% over the two-year term of the loan. Further, where a loan agreement is usurious on its face, usurious intent will be implied and usury will be found as a matter of law ... . Thus, the defendants met their burden of establishing the elements of criminal usury. Moreover, there was no evidence of a 'special relationship' between the parties ... , and no evidence that the defendants set a rate they knew to be usurious for the purpose of avoiding repayment of the loan ... . Accordingly, there is no triable issue of fact as to whether the defendants may be estopped from raising usury as a defense to the plaintiffs' action. Because an action by a lender on a usurious loan is impermissible ... , the plaintiff's motion was properly denied and that branch of the defendants' cross motion which was for summary judgment dismissing the action on the ground that the loan was usurious was properly granted ...". ***Roopchand v. Mohammed*, 2017 N.Y. Slip Op. 07476, Second Dept 10-25-17**

FAMILY LAW.

GARNISHMENT OF HUSBAND'S INCOME FOR CHILD SUPPORT ARREARS AT 65% DID NOT STRIKE A FAIR BALANCE BETWEEN THE NEEDS OF THE CREDITOR WIFE AND THE NEEDS OF THE DEBTOR HUSBAND, REDUCED TO 40%.

The Second Department, reversing Supreme Court, determined the plaintiff husband was entitled to a reduction in his wage garnishment for child support arrears from 65% to 40%: "Here, the Supreme Court determined that the 65% income execution was appropriate in light of the plaintiff's 'history of substantial arrears.' However, notwithstanding his history of arrears, the plaintiff demonstrated that, at the time of his motion, a 65% income execution was unduly prejudicial. Since the 2013 order, the defendant has received the sum of at least $511,000 toward the arrears, both of the parties' children have become adults and attended college, and only one of the adult children lives in the defendant's home. The plaintiff demonstrated that the 65% income execution provided the defendant with a monthly payment of approximately $7,500, that the plaintiff received only about $3,000 per month after garnishment and other deductions, and that his monthly expenses were approximately $5,000. Significantly, the plaintiff's expenses included the sum of $575 per month for student loan payments on behalf of one of the parties' adult children. Additionally, the defendant has not disputed the plaintiff's assertion that she has other sources of income apart from the monies that she receives from the income execution. Under all the circumstances present here, it cannot be said that, at the time of the instant motion, the 65% income execution struck 'a fair balance between the needs of a creditor holding a valid money judgment and the needs of a debtor managing competing financial obligations' ... . To the contrary, the record reflects that the 65% income execution created a tremendous disparity between the plaintiff's expenses and his actual income after garnishment and deductions, and that the defendant did not have any particular need for the maximum garnishment percentage." ***Fishler v. Fishler*, 2017 N.Y. Slip Op. 07429, Second Dept 10-25-17**

FAMILY LAW.

RESPONDENT WAS A PERSON LEGALLY RESPONSIBLE FOR THE CHILDREN, RESPONDENT'S VIOLENCE TOWARD MOTHER IN THE CHILDREN'S PRESENCE AND EXCESSIVE CORPORAL PUNISHMENT CONSTITUTED NEGLECT AND DERIVATIVE NEGLECT, FAMILY COURT REVERSED.

The Second Department, reversing Family Court, determined was in fact a person legally responsible for children in the household and had in fact neglected (and derivatively neglected) the children by committing domestic violence, and by administering excessive corporal punishment: "The evidence here showed that the respondent, as the long-term live-in boyfriend of the mother of the older children, had frequent contact with the older children, as they all lived in the same home for a period of several weeks during the summer of 2015. The respondent is also the father of the two younger children, who also lived in the same home. The evidence further established that the respondent exercised control over the older children, supervising them when the mother was not present, mediating arguments between the siblings, and disciplining them. Accordingly, the respondent acted as 'the functional equivalent of a parent in a familial or household setting' for the subject children ... . The Family Court ... improperly determined that the respondent did not neglect the older children and did not derivatively neglect the younger children. Acts of domestic violence committed in a child's presence can support a finding of neglect against the abuser because such acts impair, or create an imminent danger of impairing, the child's physical, emotional, or mental conditions ... . Additionally, '[a]lthough parents have a right to use reasonable physical force against a child in order to maintain discipline or promote the child's welfare, the use of excessive corporal punishment constitutes neglect' ... . 'Striking a child repeatedly with a belt can constitute excessive corporal punishment' ... . Derivative neglect arises where a respondent's neglect of one child demonstrates 'such an impaired level of parental judgment as to create a substantial risk of harm for any child in [his or her] care' ...". ***Matter of Gary J. (Engerys J.)*, 2017 N.Y. Slip Op. 07441, Second Dept 10-25-17**

FORECLOSURE, EVIDENCE.

BANK FAILED TO DEMONSTRATE STANDING TO FORECLOSE, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate standing to foreclose. The affidavit of the bank's vice president did not demonstrate the documents she relied on were subject to the business records exception to the hearsay rule: "Here, the plaintiff attempted to establish its standing by submitting the affidavit of Katherine Cacho, a vice president at Bank of America, N.A., which serviced the defendants' loan on behalf of the plaintiff. Cacho averred, in relevant part, that her affidavit was based upon her review of unspecified records indicating that the note was physically transferred to the plaintiff on August 16, 2007. The plaintiff failed to demonstrate that the records relied upon by Cacho were admissible under the business records exception to the hearsay rule (see CPLR 4518[a]) because Cacho did not attest that she was personally familiar with the plaintiff's record-keeping practices and procedures ...". ***Bank of N.Y. Mellon v. Cutler*, 2017 N.Y. Slip Op. 07424, Second Dept 10-25-17**

LIMITED LIABILITY COMPANY LAW, EVIDENCE, CIVIL PROCEDURE.

SUMMARY JUDGMENT IN FAVOR OF PETITIONER IN A SPECIAL PROCEEDING SEEKING DISSOLUTION OF A LIMITED LIABILITY COMPANY SHOULD NOT HAVE BEEN GRANTED, NO COMPETENT EVIDENTIARY PROOF SUBMITTED WITH THE PETITION.

The Second Department, reversing Supreme Court, determined the petition for dissolution of the limited liability company was not accompanied by competent supporting evidence (as is required in a special proceeding). The petition alleged that one of the members (Homapour) "unilaterally usurped management and control over the LLC in violation of the operating agreement by, inter alia, collecting rents from the building's tenants and depositing rental payments into newly established bank accounts, and making himself the sole signatory on such accounts." The petition further alleged "that although the parties had reached an agreement to sell the building to an unnamed purchaser for $2.9 million, Homapour caused the agreement to collapse by refusing to produce certain of the leases he had signed with building tenants:" "In a special proceeding, such as a proceeding for the judicial dissolution of a limited liability company, '[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised' (CPLR 409[b]). 'Unlike a complaint in a plenary action, a petition in a special proceeding must be accompanied by competent evidence'... . Here, the petitioners failed to establish their entitlement to a summary determination of the proceeding because they offered no competent evidentiary proof to support their assertions that Homapour unilaterally usurped management and control over the LLC in alleged violation of the operating agreement, and thwarted an alleged agreement for the sale of the building." ***Matter of FR Holdings, FLP v. Homapour*, 2017 N.Y. Slip Op. 07439, Second Dept 10-25-17**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERTS DID NOT RAISE A QUESTION OF FACT ABOUT THE ADEQUACY OF DEFENDANTS' CARE, AFFIDAVITS WERE CONCLUSORY, DID NOT ADDRESS PROXIMATE CAUSE, AND DID NOT PROVIDE A FOUNDATION FOR OPINIONS OUTSIDE THE EXPERTS' AREA OF EXPERTISE.

The Second Department, reversing Supreme Court, determined the conclusory affidavits of plaintiff's experts, and the failure to lay a foundation for opinions outside their areas of expertise, failed to raise a question of fact about the adequacy of defendants' care: "... [T]he plaintiff's evidence, including the expert affirmation of a radiologist and the affidavit of a gastroenterologist, was insufficient to raise a triable issue of fact. The plaintiff's experts did not differentiate between the acts or omissions of the various defendants, but merely stated in conclusory terms that all of the defendants who looked at the CT scan should have observed and diagnosed the esophageal perforation sooner. They also failed to lay a foundation tending to support the reliability of opinions rendered outside their fields of expertise. As such, the affirmation and affidavit did not raise a triable issue of fact ... . In any event, ... the plaintiff failed to submit evidence in admissible form showing that [defendants] departed from accepted standards of medical care by relying on the radiologist's interpretation ... . The opinions of the plaintiff's experts were conclusory and failed to address specific assertions made by the [defendants'] experts ... , including those regarding proximate causation ... . As such, there are no conflicting expert opinions that warrant a jury determination regarding the cause of action alleging medical malpractice insofar as asserted against [defendants]." ***Tsitrin v. New York Community Hosp.*, 2017 N.Y. Slip Op. 07480, Second Dept 10-25-17**

MORTGAGES, BANKRUPTCY.

EVEN THOUGH THE MORTGAGE NOTE WAS DISCHARGED IN BANKRUPTCY IN PERSONAM, THE HOLDER OF THE NOTE AND MORTGAGE HAD A SECURITY INTEREST IN REM.

The Second Department determined that plaintiff's mortgage/note, which was never recorded and was discharged in a bankruptcy proceeding, could still be enforced in rem. The defendant's discharge in bankruptcy was in personam: "... [T]he defendant filed a petition under chapter 7 of the United States Bankruptcy Code ... , listing the plaintiff, the current holder of the ... note and mortgage, as a creditor holding a secured claim. ... [T]he defendant was granted a discharge ... and the

chapter 7 case was closed. Thereafter, the plaintiff commenced this action to quiet title to its mortgage interest in the subject property ... to be equitably subrogated to the first mortgage lien ... . 'Where, as here, the funds of a mortgagee are used to discharge a prior lien upon the property of another, the doctrine of equitable subrogation applies to prevent unjust enrichment by subrogating the mortgagee to the position of the senior lienholder' ... . Here, the plaintiff established its prima facie entitlement to judgment as a matter of law on its equitable subrogation cause of action ... . In opposition, the defendant failed to raise a triable issue of fact ... . Contrary to the defendant's contention, the plaintiff's security interest in the subject property survived the defendant's discharge in bankruptcy. 'Although a bankruptcy discharge extinguishes one mode of enforcing a note—namely, an action against the debtor in personam, it leaves intact another—namely, an action against the debtor in rem' ...". ***Citimortgage, Inc. v. Chouen*, 2017 N.Y. Slip Op. 07427, Second Dept 10-25-17**

MUNICIPAL LAW.

PETITIONER DEMONSTRATED CITY WOULD NOT BE PREJUDICED BY THE FILING OF A LATE NOTICE OF CLAIM, BUT DID NOT SHOW THE CITY HAD TIMELY KNOWLEDGE OF THE CLAIM AND DID NOT PRESENT AN ADEQUATE EXCUSE FOR FAILURE TO FILE ON TIME, LEAVE TO FILE A LATE NOTICE PROPERLY DENIED, TWO JUSTICE DISSENT.

The Second Department, over a two-justice dissent, determined petitioner's request for leave to file a late notice of claim in an action for false arrest and false imprisonment was properly denied. Although the petitioner made a sufficient showing the city would not be prejudiced by the late notice, the petitioner did not demonstrate the city had timely knowledge of the claim: "... '[W]hether the municipality had actual knowledge of the essential facts constituting the claim is of great importance' ... . In order for a municipality to have actual knowledge of the essential facts constituting the claim, '[it] must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim' ... . Unsubstantiated contentions that the municipality acquired timely actual knowledge of the essential facts constituting the claim through the content of reports and other documentation are insufficient ... . Here, the petitioner, while alleging that the City had actual knowledge of the facts constituting the claims of false arrest and false imprisonment within 90 days after the claims arose or a reasonable time thereafter, failed to submit any evidence establishing such actual knowledge ... . Moreover, the petitioner's assertion that he knowingly delayed service of a timely notice of claim while the criminal charges were pending due to an unsubstantiated fear of reprisal, does not, under the circumstances of this case, constitute a reasonable excuse ... . Furthermore, as to the issue of reasonable excuse, the petitioner failed to explain why, after the criminal charges were dismissed ... , he waited approximately two more months to commence this proceeding." ***Matter of Ruiz v. City of New York*, 2017 N.Y. Slip Op. 07445, Second Dept 10-25-17**

PERSONAL INJURY.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATED ABSENCE OF COMPARATIVE NEGLIGENCE.

The Second Department, reversing Supreme Court, determined plaintiff's summary judgment motion in this intersection accident case should have been granted. Defendant made a left turn into plaintiff's path as plaintiff entered the intersection: "The plaintiff demonstrated, prima facie, that the defendant was negligent in violating Vehicle and Traffic Law § 1141 by making a left turn into the path of oncoming traffic without yielding the right-of-way to the plaintiff when the turn could not be made with reasonable safety ... .The defendant testified at her deposition that she observed the plaintiff's vehicle traveling in the opposite direction prior to the accident, but that she thought that she had enough time to cross the opposite lane of travel notwithstanding the fact that she was unable to gauge the speed of the plaintiff's vehicle. The undisputed fact that the defendant was, in fact, unable to complete her turn without being struck by the plaintiff's vehicle is compelling evidence of the immediate hazard created by the plaintiff's vehicle as it approached the intersection ... . The evidence demonstrated that the defendant violated Vehicle and Traffic Law § 1141 by failing to 'yield the right of way to any vehicle approaching from the opposite direction which [was] . . . so close as to constitute an immediate hazard' ... . Regardless of which vehicle entered the intersection first, the plaintiff, as the driver with the right-of-way, was entitled to anticipate that the defendant would obey traffic laws which required her to yield ... . The plaintiff also demonstrated that the defendant's negligence was the sole proximate cause of the accident, and that she was not comparatively at fault in the happening of the accident. The plaintiff testified at her deposition that she entered the intersection with the light in her favor, and that she first saw the defendant attempt to cross into her lane of travel as she was traveling through the intersection, at which time she slammed on her brakes in an unsuccessful attempt to avoid the collision." ***Giwa v. Bloom*, 2017 N.Y. Slip Op. 07430, Second Dept 10-25-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DRIVER WAS LIABLE IN COLLISION WITH BICYCLIST, DESPITE THE FACT THE BICYCLIST WAS NEGLIGENT AS A MATTER OF LAW FOR RIDING THE WRONG WAY ON A ONE WAY STREET.

The Second Department determined there was a question of fact concerning defendant driver's liability for a collision with a bicycle, despite the fact that the bicyclist, Sanchez, was going the wrong way on an one-way street: "Although Sanchez

was negligent as a matter of law in traveling the wrong way on Irving Avenue ... , the transcript of the defendant's deposition testimony, submitted in support of his motion, presented a triable issue of fact as to whether he failed to see what was there to be seen through the proper use of his senses ...". ***Rojas v. Solis*, 2017 N.Y. Slip Op. 07475, Second Dept 10-25-17**

PERSONAL INJURY, CIVIL PROCEDURE, MUNICIPAL LAW.

PLAINTIFF'S MOTION TO RENEW AND REARGUE HER OPPOSITION TO THE CITY'S SUMMARY JUDGMENT MOTION IN THIS SIDEWALK SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, NEWLY DISCOVERED DOCUMENTS RAISED A QUESTION OF FACT WHETHER THE CITY CREATED THE DANGEROUS CONDITION.

The Second Department, reversing Supreme Court, determined plaintiff's motion to renew and reargue her opposition to the city's summary judgment motion in this sidewalk slip and fall case should have been granted. And, upon renewal, the city's motion should have been denied. Plaintiff alleged she slipped on a wet sidewalk which was sloping as opposed to flat. After the city's motion was initially granted, plaintiff received documents pursuant to a Freedom of Information Law (FOIL) request which indicated the city was responsible for the design and installation of the smooth granite sidewalk: "Here, the plaintiff proffered new facts not offered in opposition to the NYC defendants' prior motion, consisting of documents that she received in response to her FOIL request after the prior motion was decided that would change the prior determination. Specifically, the plaintiff submitted documents demonstrating that one of the agencies of the NYC defendants approved the design of the sidewalk at issue and that the installation of the sidewalk was part of an extensive sidewalk improvement project proposed by the New York City Economic Development Corporation, formerly known as the Public Development Corporation. Since the plaintiff's proffered basis for her failure to submit these documents in opposition to the prior motion was reasonable—she had not received these documents, which were responsive to her FOIL request and in the sole possession and control of the NYC defendants, until after the December 2014 order ... —and the documents raise a triable issue of fact as to whether the NYC defendants created the condition complained of by the plaintiff ... , the Supreme Court should have granted that branch of the plaintiff's motion which was for leave to renew her opposition to the prior motion. Upon renewal, the Supreme Court also should have denied that branch of the motion of the NYC defendants which was for summary judgment dismissing the complaint insofar as asserted against them because the new facts proffered by the plaintiff establish that triable issues of fact exist as to whether the NYC defendants created the sidewalk condition complained of by the plaintiff ...". ***Trawinski v. Jabir & Farag Props.*, LLC, 2017 N.Y. Slip Op. 07479, Second Dept 10-25-17**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF WAS ONLY ABLE TO SPECULATE ABOUT THE CAUSE OF HER SLIP AND FALL, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED.

The Second Department determined defendant restaurant's motion for summary judgment in this slip and fall case was properly granted. Plaintiff testified "it could have been grease from the kitchen" which caused the fall. Plaintiff's failure to identify the cause of her fall was fatal to the lawsuit: "In a slip-and-fall case, a plaintiff's inability to identify the cause of the fall is fatal to the cause of action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation ... . Here, the defendant established its prima facie entitlement to summary judgment by demonstrating that the plaintiff could not identify the cause of her fall ...". ***Cross v. Friendship Rest. Group, LLC*, 2017 N.Y. Slip Op. 07428, Second Dept 10-25-17**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

PETITIONER ENTITLED TO A LICENSE PURSUANT TO RPAPL §881 ALLOWING TEMPORARY ACCESS TO RESPONDENT'S PROPERTY DURING CONSTRUCTION ON PETITIONER'S ADJACENT PROPERTY.

The Second Department determined Supreme Court properly granted a petition pursuant to Real Property Actions and Proceedings Law (RPAPL) § 881 allowing petitioner to temporarily enter respondent's property to facilitate construction next door: "... Supreme Court properly granted the petition pursuant to RPAPL 881 for a license to temporarily access the appellant's property, since an assessment of the foregoing factors supported the petition. The affidavits of the executive director of the museum and the architect retained for the project demonstrated that the limited access and placement of structures would protect the appellant's property and would not interfere with the use of the premises; that the access would be limited to certain phases of the project and was expected by the petitioner to last no more than 18 to 24 months after the commencement of construction; that the temporary structures to be erected along the lot line would not be unduly invasive and were necessary in order for the petitioner to build out to the lot line while protecting the adjoining property as required by the New York City Building Code; that the public interest would be served by the development of the project; and that the appellant would be financially protected by the naming of the appellant as an additional insured on the relevant construction insurance policies and by the petitioner's promise to indemnify her for any loss... . Accordingly, the evidence supports the conclusion that the petitioner would suffer an undue hardship if the RPAPL 881 license was denied, whereas the appellant will experience temporary and relatively minor inconvenience as a result of the issuance of the license." ***Matter of Queens Coll. Special Projects Fund, Inc. v. Newman*, 2017 N.Y. Slip Op. 07444, Second Dept 10-25-17**

REAL PROPERTY LAW, CIVIL PROCEDURE.

A RIGHT OF FIRST REFUSAL IN A DEED IS NOT A RESERVATION WITHIN THE MEANING OF THE STRANGER TO THE DEED RULE, PLAINTIFFS FAILED TO GIVE THE NOTICE REQUIRED BY THE RIGHT OF FIRST REFUSAL, MATTER IS NOT YET A JUSTICIABLE CONTROVERSY.

The Second Department determined Supreme Court properly denied plaintiff's motions for summary judgment in a declaratory judgment action about the validity of a right of first refusal in a deed. One of the defendant had conveyed vacant land to plaintiffs. The deed included a right of first refusal in favor of the defendants if the plaintiffs received a bona fide offer for the land. The plaintiffs received an offer from the town which was to preserve the land as undeveloped. Plaintiffs sought to have the defendants' right of first refusal declared invalid. The Second Department held that the "stranger to the deed" rule did not invalidate the right of first refusal and further held, because the plaintiffs never gave defendants the required notice of the bona fide offer, the matter was not yet a justiciable controversy: " ' [T]he long-accepted rule in this State holds that a deed with a reservation or exception by the grantor in favor of a third party, a so-called 'stranger to the deed,' does not create a valid interest in favor of that third party' ... . Contrary to the plaintiffs' contention, a right of first refusal does not constitute a 'reservation' falling within the ambit of that rule. A 'reservation' is 'always of something issuing, or coming out of, the thing or property granted, and not a part of the thing itself' ... . In practice, a 'reservation' refers to an interest that touches the land, such as a right to use, occupy, profit from, or enjoy the land being conveyed ... . A right of first refusal, on the other hand, is a preemptive or contractual right to 'receive an offer' ... . '[I]t is a restriction on the power of one party to sell without first making an offer of purchase to the other party upon the happening of a contingency: the owner's decision to sell to a third party' ... . Although a right of first refusal has been characterized as an interest in land ... , it is not the type of interest created by a reservation. Accordingly, the court properly determined that the rights of first refusal contained in the 1992 and 1997 deeds were not void under the stranger to the deed rule." ***Peters v. Smolian*, 2017 N.Y. Slip Op. 07473, Second Dept 10-25-17**

THIRD DEPARTMENT

CRIMINAL LAW.

DEFENDANT'S SENTENCE FOR ROBBING A PHARMACY OF OXYCODONE REDUCED BASED IN PART ON HIS STATUS AS A WOUNDED VETERAN AND HIS OPIOID ADDICTION.

The Third Department, over a dissent, reduced defendant's sentence for robbery of a pharmacy to procure oxycodone. The dissent argued the mitigating circumstances, including defendant's status as a wounded veteran, were not extraordinary: "In light of defendant's admission from the outset that he perpetrated the robbery, albeit without a knife, the correlation between the illness that he contracted while serving in Afghanistan and an opioid addiction that precipitated this event, his duly expressed remorse and his lack of any prior criminal record, we find that his sentence for the criminal possession of a controlled substance conviction was unduly severe and should be reduced to three years, with five years of postrelease supervision, to run concurrently with the sentences for his other convictions. Correspondingly, we vacate the $5,000 fine." ***People v. Wyrick*, 2017 N.Y. Slip Op. 07488, Third Dept 10-26-17**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

POLICE SHOULD HAVE STOPPED QUESTIONING AFTER DEFENDANT INDICATED HE WANTED TO SPEAK TO A LAWYER, SUBSEQUENT STATEMENTS SHOULD HAVE BEEN SUPPRESSED, ERROR HARMLESS HOWEVER.

The Third Department determined defendant had made a request for counsel which required the police to stop interrogating him. However, the error was deemed harmless: "... [D]efendant, handcuffed in a police interview room, was in custody ... . The video recording of the interrogation reflects that, after defendant was read Miranda warnings, he indicated that he understood them and then questioned the detective about why he had not received an earlier advisement of his rights and why he had been taken into custody, and the detective told him that he would need to cooperate in order to learn what was going on. At that point, defendant stated, 'I will get a lawyer. As a matter of fact, I don't wanna talk no more' and then asked, 'Can I please get a phone call?' Under these circumstances, defendant's statements were not 'merely a forewarning of a possible, contingent desire to confer with counsel [but,] rather[, were] an unequivocal statement of [his] present desire to do so' ... . That is, defendant made clear his desire to speak with an attorney to represent him and to cease questioning, thereby unequivocally asserting his right to counsel and to remain silent ... . Questioning should have stopped, and any waiver of his right to counsel thereafter was ineffective in the absence of counsel ... . Thus, we agree with defendant that the court erred in denying his motion to suppress his statements. However, we find that the erroneous admission of defendant's statements was harmless error in that, considering 'the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict'...". ***People v. Leflore*, 2017 N.Y. Slip Op. 07483, Third Dept 10-26-17**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER'S REQUEST FOR A WITNESS TO TESTIFY ABOUT THE CALIBRATION PROCEDURES FOR THE MACHINE USED TO TEST FOR THE PRESENCE OF MARIJUANA IN URINE SHOULD HAVE BEEN GRANTED.

The Third Department, annulling the determination, found that petitioner's request for a witness was improperly denied. Petitioner was charged with marijuana use based upon urinalysis done by a machine. Petitioner requested that a representative of the manufacturer of the machine testify about calibration procedures: "Here, petitioner requested as a witness a representative from the manufacturer of the drug testing machine in order to refute the testimony of the correction officer who performed the urinalysis test regarding the operating procedures used to calibrate the machine. The Hearing Officer, in denying petitioner's request, found that the representative's testimony would necessarily be redundant to that offered by the correction officer. Upon our review of the record, however, it is unclear as to whether the correction officer's testimony regarding how the machine was calibrated was in accord with or was a departure from the recommendations in the manufacturer's procedural manual ... . Under such circumstances, we find an insufficient basis in the record to support the Hearing Officer's conclusion that the testimony of the manufacturer's representative would be redundant ... . Inasmuch as the Hearing Officer articulated a good faith reason for denying a manufacturer's representative as a witness, we find that petitioner's regulatory right to call a witness was violated and the proper remedy is remittal for a new hearing ... ". ***Matter of Paddyfote v. Annucci*, 2017 N.Y. Slip Op. 07502, Third Dept 10-26-17**

EDUCATION-SCHOOL LAW, CONSTITUTIONAL LAW.

CASE ALLEGING SCHOOL DISTRICTS' FAILURE TO PROVIDE THE SOUND BASIC EDUCATION REQUIRED BY THE NYS CONSTITUTION REMITTED FOR FINDINGS OF FACT WHETHER THE FUNDING FOR EACH OF THE EIGHT SCHOOL DISTRICTS PASSES CONSTITUTIONAL MUSTER.

The Third Department, reversing the dismissal of the complaint after trial, remitted the matter to Supreme Court to determine whether the reduction in funding to eight school districts pass constitutional must. The lawsuit alleged the school districts failed to provide the sound basic education mandated by the state constitution: "Plaintiffs' causes of action — grounded in the assertion that the actual funding levels provided following the CFE cases [three Campaign for Fiscal Equity cases decided by the Court of Appeals] were insufficient to provide the affected students with a sound basic education — were based on detailed, district-specific allegations of insufficient inputs, deficient outputs and causation. More to the point, plaintiffs' proof at trial, which Supreme Court acknowledged established a prima facie case that defendant failed to fulfill its constitutional obligation, was more than sufficient to require analysis under the CFE II framework on a district-by-district basis ... . Indeed, by noting that changes in educational funding provided by defendant must still 'deliver on its obligation to ensure that schoolchildren are provided the opportunity for a sound basic education' ... , the court acknowledged that any reductions in funding must pass constitutional muster, which is an inquiry that can be answered only through CFE II analysis. Thus, Supreme Court erred by proceeding directly to the 'remedy' stage set forth in CFE III and affording deference to the Legislature without first applying the framework established in CFE II to determine whether plaintiffs had established a constitutional violation. No deference is due the Legislature when applying the CFE II factors to determine whether there is a violation in the first instance. Rather, courts must consider whether the evidence of inputs, outputs and causation establish that defendant has failed to provide constitutionally sufficient funding. It is only in adjudicating the sufficiency of the remedy for an established violation that deference to the political branches is required ...". ***Maisto v. State of New York*, 2017 N.Y. Slip Op. 07511, Third Dept 10-26-17**

EMPLOYMENT LAW, CONSTITUTIONAL LAW.

DEPARTMENT OF AGRICULTURE AND MARKETS PROPERLY PROHIBITED ITS MILK PLANT AND FARM INSPECTORS FROM SERVING AS COUNTY LEGISLATORS, THE RESULTING CONSTRAINT ON FREE SPEECH IS JUSTIFIED.

The Third Department determined the NYS Department of Agriculture and Markets did not commit a constitutional violation when it constrained the petitioners' right to free speech by prohibiting them from serving as county legislators while working as milk plant and farm inspectors for the Department of Agriculture and Markets: "Here, the parties do not dispute that declaring one's intent to campaign for elected political office constitutes speech on a matter of public concern ... . The primary issue, therefore, is whether Supreme Court erred when it determined that the Department's interest in reducing potential unethical behavior and preserving the professionalism and integrity of the Department outweighed the interest of [petitioners] to serve dual roles as both government inspectors and candidates for elected office. In applying this balancing test, courts have made clear that such a balance will tip in the employer's favor so long as '(1) the employer's prediction of the disruption that such speech will cause is reasonable; (2) the potential for disruption outweighs the value of the speech; and (3) the employer took the adverse employment action not in retaliation for the employee's speech, but because of the potential for disruption' ... . Upon balancing the relevant interests, we conclude that Supreme Court properly determined that the Pickering balance tips in respondents' favor and, therefore, the Department's disapprovals and revised outside activities policy were not unconstitutional." ***Matter of Spence v. New York State Dept. of Agric. & Mkts.*, 2017 N.Y. Slip Op. 07506, Third Dept 10-26-17**

ENVIRONMENTAL LAW.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAD THE AUTHORITY TO RESCIND ITS NOTICE OF COMPLETE APPLICATION (NOCA) AND NEGATIVE DECLARATION RE: THE EXPANSION OF AN OIL STORAGE FACILITY.

The Third Department, partially reversing Supreme Court, in a full-fledged opinion by Justice Pritzker, determined the Department of Environmental Conservation (DEC) had the authority to rescind a notice of complete application (NOCA) and its negative declaration re: the expansion of an oil storage facility: "While it is true that DEC's discretionary authority to rescind a NOCA is not express, it is implied through the statutes and rules governing this dispute and is specifically addressed in the commentary explaining the federal regulations governing state delegated operating permit programs under the Clean Air Act ... . DEC initially contends that it rescinded the NOCA because it received new information during the review process and the project itself was modified, without the opportunity for public comment ... . While petitioner correctly asserts that the mere furnishing of additional information will not affect NOCA status ... , the receipt of materially relevant and new information can legally and logically trigger rescission because DEC could no longer 'issue the permit within the specified deadlines' ... and the public was not on notice of project modifications ... . It is well-settled that when faced with new information or changed circumstances, agencies are permitted to reconsider and alter their prior determinations ... . More particularly, DEC's implied authority to revoke a NOCA under certain circumstances promotes the legislative intent of the Clean Air Act and SEQRA [State Environmental Quality Review Act]. * * * ... [A]s DEC had discretion to rescind the NOCA, the mandamus relief granted by Supreme Court, requiring DEC to take final action within 60 days, was unwarranted as petitioner cannot establish a clear right to the requested relief ...". ***Matter of Global Cos. LLC v. New York State Dept. of Envtl. Conservation*, 2017 N.Y. Slip Op. 07495, Third Dept 10-26-17**

ENVIRONMENTAL LAW.

VILLAGE PROPERLY GRANTED A PERMIT TO WITHDRAW WATER FROM AN AQUIFER, REQUIREMENTS FOR STANDING TO CONTEST PERMIT AND NEGATIVE DECLARATION EXPLAINED.

The Third Department determined the Village of Kiryas Joel's permit to withdraw water from an aquifer was properly issued by the Department of Environmental Conservation (DEC) and the action seeking annulment of the negative declaration under the State Environmental Quality Review Act (SEQRA) was properly dismissed as untimely. In addressing the standing requirement for bringing these actions, the court explained: "Supreme Court determined, and we agree, that petitioner Black Rock Fish and Game Club of Cornwall, Inc. in proceeding No. 1, as well as the proceeding No. 2 petitioners, lacked standing. All of those petitioners are organizations who alleged that the approved water withdrawal might deplete ground water in the area to the extent that 'water-dependent natural resources,' such as the nearby Woodbury Creek, will be impacted. Accepting those allegations at face value — and assuming that these petitioners either did, or did not need to, articulate grounds for organizational standing ... — the harm is 'no different in kind or degree from that suffered by the general public in the vicinity . . . and [does] not confer standing' ... . An impact upon a nearby landowner's water supply constitutes an injury specific enough to confer standing to challenge the action that caused it ... , and that is precisely the type of injury the neighbors allege the ... well will cause to their private wells. ... The neighbors ... 'asserted a concrete interest in the matter [DEC] is regulating, and a concrete injury from the agency's failure to follow procedure' sufficient to confer standing ... . The municipalities made similar allegations that the approved use of the … well will either affect the use of ground water in that area for municipal water supplies or impact residents who may suffer impacts to their private wells as a result of the withdrawal. Inasmuch as these allegations show 'how [the municipalities'] personal or property rights, either personally or in a representative capacity, will be directly and specifically affected apart from any damage suffered by the public at large, and [how they] will suffer an injury that is environmental and not solely economic in nature,' they also have standing ...". ***Matter of Village of Woodbury v. Seggos*, 2017 N.Y. Slip Op. 07512, Third Dept 10-26-17**

FAMILY LAW.

MOTHER'S PRO SE PETITION FOR A MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Third Department, reversing Family Court, determined mother's pro se petition for a modification of custody should not have been denied without a hearing: " 'In any modification proceeding, the threshold issue is whether there has been a change in circumstances since the prior custody order . . . to warrant a review of the issue of custody to ensure the continued best interests of the child. A petition filed by a pro se litigant should be construed liberally when considering whether it sufficiently alleged a change in circumstances. While not every petition in a Family Ct Act article 6 proceeding is automatically entitled to a hearing, generally an evidentiary hearing is necessary and should be conducted unless the party seeking the modification fails to make a sufficient evidentiary showing to warrant a hearing or no hearing is requested and the court has sufficient information to undertake a comprehensive independent review of the child's best interests' ... . We find that

the pro se petition is sufficient to warrant an evidentiary hearing based on the allegations that the father violated certain provisions of the existing custody arrangement when he moved three times without informing the mother, made plans for the child's Bat Mitzvah without consulting her and failed to provide her with information regarding a one-week vacation that he was taking with the child ...". ***Matter of Horowitz v. Horowitz*, 2017 N.Y. Slip Op. 07498, Third Dept 10-26-17**

PERSONAL INJURY.

TRIAL JUDGE PROPERLY INSTRUCTED THE JURY ON THE IMPLIED ASSUMPTION OF RISK DOCTRINE, RATHER THAN THE PRIMARY ASSUMPTION OF RISK DOCTRINE.

The Third Department upheld the substantial plaintiff's verdict where plaintiff, who was 48, was injured while jumping on a trampoline with her young nephew who threw her off-balance by "double jumping." The defense argued the verdict should have been set aside because the trial judge gave the implied assumption of risk charge to the jury, rather than the primary assumption of risk charge. The Third Department held that the circumstances did not fit the requirements for the primary assumption of risk doctrine, which precludes recovery completely and is reserved for sporting events (which public policy encourages): "Here, defendants concede that the injury-producing activity does not fit within the narrow group of cases to which the doctrine of primary assumption of risk has been applied ... . Instead, defendants assert that this Court should find that an exception to the general rule is warranted here ... . In our view, however, jumping on a trampoline, whether double jumping or otherwise, in the yard of a private residence 'does not fit comfortably within the parameters of the [primary assumption of risk] doctrine' as set out by the Court of Appeals ... . In this regard, we find that the activity at issue here is not the type of "socially valuable voluntary [sport or recreational] activity' that the doctrine seeks to encourage' ... , nor would application of the doctrine under these facts serve to promote the policy rationale underlying its continued retention — namely, 'to facilitate free and vigorous participation in athletic activities' ...". ***DeMarco v. DeMarco*, 2017 N.Y. Slip Op. 07504, Third Dept 10-26-17**

PERSONAL INJURY, EMPLOYMENT LAW.

RESIDENTIAL CARE FACILITY NOT LIABLE FOR ASSAULT ON PLAINTIFF EMPLOYEE BY A RESIDENT, ASSAULT WAS NOT FORESEEABLE.

The Third Department determined the residential care facility's motion for summary judgment was properly granted in this action by an employee of the facility stemming from an assault by a resident. The court held that there was no evidence demonstrating the facility was aware of the danger posed by the resident, i.e., no evidence the assault was foreseeable from the standpoint of the employer: "Defendant, 'like any other property owner, has a duty to protect persons lawfully present on its premises, including patients and visitors, from the reasonably foreseeable criminal or tortious acts of third persons' ... . Accordingly, since 'liability require[s] a showing that the wrongdoer's conduct was foreseeable to the defendant'... , defendant may 'establish[] its entitlement to judgment as a matter of law by showing that it had no notice of any prior similar incidents or similar aggressive behavior by the patient such that it should have anticipated the alleged incident and protected the plaintiff from it' ... . Here, while plaintiff and her coworkers may have been aware of the resident's history of assaultive conduct, there is nothing beyond the speculation of plaintiff and a coworker (her daughter) to suggest that anyone employed by defendant had a similar awareness. * * * ... [D]efendant satisfied its ... burden of showing that it could not have reasonably anticipated the attack on plaintiff ...". ***Boudreaux v. Columbia Mem. Hosp.*, 2017 N.Y. Slip Op. 07513, Third Dept 10-26-17**

PERSONAL INJURY, LANDLORD-TENANT.

CONFLICTING TESTIMONY RAISED QUESTIONS OF FACT IN THIS STAIRWAY FALL CASE WHETHER THE HANDRAIL WAS LOOSE AND ONE OF THE LANDLORDS HAD NOTICE OF THE CONDITION, OUT-OF-POSSESSION LANDLORD NOT LIABLE.

The Third Department determined conflicting testimony created questions of fact whether a handrail for an exterior stairway was loose, whether the landlord was aware the handrail was loose, and whether the loose handrail was proximate cause of plaintiff's fall. The court further noted that one of the owners was an out-of-possession landlord who had never seen the property and did not have any responsibility for maintenance of the property. The complaint against the out-of-possession landlord was therefore properly dismissed. ***Kraft v. Loso*, 2017 N.Y. Slip Op. 07514, Third Dept 10-26-17**

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