CasePrepPlus

November 29, 2017

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

Editor: **Bruce Freeman**

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

COURT OF APPEALS

CIVIL PROCEDURE, CORPORATION LAW.

CAYMAN ISLANDS RULE GOVERNING SHAREHOLDER DERIVATIVE ACTIONS IS PROCEDURAL, NOT SUBSTANTIVE, FAILURE TO COMPLY WITH RULE DOES NOT BAR SUIT IN NEW YORK.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the appellate division, determined that a Cayman Islands rule (Rule 12A) governing prerequisites for bringing a shareholder derivative action was procedural, not substantive. Therefore the New York suit, which must apply Cayman Islands substantive law, should not have been dismissed for failure to comply with the rule. Whether plaintiff had standing to sue under substantive Cayman Islands law was not determined by the Court of Appeals: "In *Tanges* [93 NY2d 48] we ... described general policy considerations that ought to be weighed when determining whether a rule is substantive or procedural. Specifically, we consider whether our determination would impose a burden on the foreign court (Connecticut in that instance) or federal courts operating under diversity rules and whether it would threaten to cause delay in the 'conduct of judicial business and impair judicial efficiency' ... . Here, these factors further weigh in favor of our conclusion that Rule 12A is procedural. Holding that Rule 12A is procedural does not impose a burden on our courts, or the courts of the Cayman Islands (see *Tanges*, 93 NY2d at 58). However, were Rule 12A held to be substantive, it is unclear what procedural path a party seeking to bring a derivative action in New York on behalf of a Cayman company would follow to comply with Rule 12A. ... Therefore, a Tanges analysis also leads to the conclusion that Rule 12A is procedural in nature. Because the procedural law of the forum typically applies under our conflict of law rules ... , plaintiff's failure to first comply with Rule 12A's leave application procedure does not bar his derivative claims ...". ***Davis v. Scottish Re Group Ltd.*, 2017 N.Y. Slip Op. 08157, CtApp 11-20-17**

CONSTITUTIONAL LAW (NYS), JUDGES, EMPLOYMENT LAW.

STATUTE REDUCING HEALTH BENEFITS FOR STATE EMPLOYEES DID NOT VIOLATE THE JUDICIAL COMPENSATION CLAUSE OF THE NEW YORK STATE CONSTITUTION.

The Court of Appeals, in a per curiam opinion, with two concurring opinions, determined that the reduction in health benefits provided under the Civil Service Law did not violate the Judicial Compensation Clause of the NYS Constitution: "The issue presented on this appeal is whether Civil Service Law § 167 (8), as amended, authorizing a reduction of the State's contribution to health insurance benefits for State employees, including members of the State judiciary, violates the Judicial Compensation Clause of the State Constitution ... . We conclude the State's contribution is not judicial compensation protected from direct diminution by the Compensation Clause, and the reductions in contributions do not have the effect of singling out the judiciary for disadvantageous treatment. Therefore, plaintiffs' constitutional challenge fails." ***Bransten v. State of New York*, 2017 N.Y. Slip Op. 08168, CtApp 11-21-17**

CRIMINAL LAW.

GEORGIA BURGLARY STATUTE WAS EQUIVALENT TO A NEW YORK VIOLENT FELONY DESPITE THE ABSENCE OF AN EXPLICIT INTENT ELEMENT BECAUSE THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS INCLUDED A KNOWINGLY ELEMENT.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, reversing the appellate division, over a two-judge concurring opinion, determined a Georgia burglary statute was equivalent to a New York violent felony and therefore defendant was properly sentenced as and second violent felony offender. The Georgia statute does not explicitly include intent as an element. However, a lesser included offense (the Georgia criminal trespass statute) in the Georgia includes a "knowingly" element: "Under Georgia statutory law, '[a] crime is included in another crime' ... — i.e., a crime is a lesser included offense of another crime — when, among other things, '[i]t is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged' ... . Georgia statutory law further provides that '[a] person commits the offense of criminal trespass when he or she knowingly and without authority . . . [e]nters upon the land or premises of another person . . . for an unlawful purpose' ... . Georgia case law, in turn, provides that criminal trespass is (and was at the time defendant violated the subject Georgia statute) a lesser included offense of burglary ... . Inasmuch as the 'lesser' Georgia crime of criminal trespass contains a 'knowingly' mens rea ... , the 'entry' component of

the 'greater' Georgia burglary statute in question ... necessarily must have a culpable mental state of at least "knowingly." In other words, the mental state for the greater crime logically cannot be less than the mental state for the lesser crime and, for the foregoing reasons, we conclude that the Georgia crime corresponds to a New York violent felony ...". ***People v. Helms*, 2017 N.Y. Slip Op. 08160, CtApp 11-20-17**

CRIMINAL LAW.

VIOLATION OF PROBATION PETITION FACIALLY INSUFFICIENT, TIME, PLACE AND MANNER OF ALLEGED VIOLATIONS NOT STATED.

The Court of Appeals, reversing the appellate division, determined the violation of probation petition was insufficient on its face and should have been dismissed: "County Court determined that defendant violated the terms of his probation, which prohibited him from associating with any convicted criminals, when on four occasions he picked up and walked the dog he once shared with his former intimate partner, who had a DWI misdemeanor conviction. The amended violation of probation petition, which listed four dates on which defendant allegedly 'had contact with' a convicted criminal, but did not include any additional information, was facially insufficient as it did not comport with the statutory requirement of providing probationer with the time, place, and manner of the alleged violation (CPL 410.70). Here, the defect in the amended petition was not cured by defendant's questions posed to the court at the prior arraignment, the substance of which indicated that he did not have notice of the manner in which he allegedly violated a condition of his probation." ***People v. Kislowski*, 2017 N.Y. Slip Op. 08169, CtApp 11-21-17**

CRIMINAL LAW, ATTORNEYS.

TRIAL JUDGE DID NOT INQUIRE INTO DEFENDANT'S SERIOUS REQUEST FOR ANOTHER ATTORNEY, CONVICTION REVERSED AND NEW TRIAL ORDERED.

The Court of Appeals reversed defendant's conviction and ordered a new trial because the trial judge did not conduct a sufficient inquiry into defendant's request for another attorney: "We agree with defendant that the trial court failed to adequately inquire into his 'seemingly serious request[]' to substitute counsel ... . Defendant's request was supported by 'specific factual allegations of 'serious complaints about counsel' ... , and a 'minimal inquiry' into 'the nature of the disagreement or its potential for resolution' was warranted ... . Accordingly, the trial court abused its discretion by failing to conduct such an inquiry." ***People v. Smith*, 2017 N.Y. Slip Op. 08165, CtApp 11-21-17**

Similar issue and result in ***People v. Dodson*, 2017 N.Y. Slip Op. 08171, CtApp 11-21-17**

CRIMINAL LAW, ATTORNEYS, APPEALS.

NO CORAM NOBIS RELIEF FOR DEFENDANT WHERE DEFENSE COUNSEL FILED A NOTICE OF APPEAL BUT ALLEGEDLY DID NOT ADVISE DEFENDANT OF THE AVAILABILITY OF POOR PERSON RELIEF AND DID NOT TAKE ANY ACTION ON A MOTION TO DISMISS THE APPEAL, DEFENDANT DID NOT MEET HIS BURDEN OF PROOF ON THE INEFFECTIVE ASSISTANCE CLAIM.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over two dissenting opinions, determined that defendant was not entitled to coram nobis relief based upon ineffective assistance for failure to perfect an appeal: "In *People v. Syville* (15 NY3d 391 [2010]), we held that, in rare circumstances, a defendant may seek coram nobis relief despite failing to move for an extension of time to file a notice of appeal within the one-year grace period provided by CPL 460.30. Specifically, we concluded that coram nobis may be available for a defendant who demonstrated that he or she timely requested that trial counsel file a notice of appeal, the attorney failed to comply, and the omission could not reasonably have been discovered within the one-year time limit ... . Defendant now asks us to expand Syville to situations in which retained trial counsel filed a timely notice of appeal but allegedly failed to advise the defendant of his or her right to poor person relief, or to take any action when served with a motion to dismiss the appeal years after the notice of appeal was filed. Because defendant has not met his burden of proving that counsel was ineffective, we decline to expand Syville under the circumstances presented here. * * * Given this ... Court's holdings ... that a defendant is not constitutionally entitled to the assistance of counsel in seeking poor person relief as long as he or she is given written notice that is similar to the one defendant received here — defendant has a heavy burden to demonstrate entitlement to a writ of error coram nobis premised on ineffective assistance of counsel for failing to assist in procuring poor person relief. ... He failed to meet that burden here… . With respect to the other prong of defendant's coram nobis motion (based on failure to respond to the dismissal motion four years after the notice of appeal was filed) defendant and Judge Rivera, in her dissent, essentially seek a rule that trial counsel has a constitutional responsibility in connection with an appeal for an indefinite period of time extending for years after the notice of appeal is filed. Neither defendant nor that dissent cite any legal support for the imposition of such a rule." ***People v. Arjune*, 2017 N.Y. Slip Op. 08159, CtApp 11-20-17**

EMPLOYMENT LAW, (NYC) HUMAN RIGHTS LAW.

STANDARD FOR PUNITIVE DAMAGES IN EMPLOYMENT DISCRIMINATION SUIT PURSUANT TO THE NYC HUMAN RIGHTS LAW DETERMINED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a dissenting opinion, answering a certified question from the Second Circuit, determined the appropriate standard of proof for the imposition of punitive damages in an employment discrimination (here gender and pregnancy discrimination) suit pursuant to the New York City Human Rights Law (NYCHRL): "The New York City Human Rights Law makes clear that punitive damages are available for violations of the statute, but does not specify a standard for when such damages should be awarded. The Second Circuit has, by certified question, asked us to determine the applicable standard. We conclude that, consistent with the New York City Council's directive to construe the New York City Human Rights Law liberally, the common law standard as articulated in Home Insurance Co. v. American Home Prods. Corp. (75 NY2d 196, 203-204 [1990]) applies. Accordingly, a plaintiff is entitled to punitive damages where the wrongdoer's actions amount to willful or wanton negligence, or recklessness, or where there is 'a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard' ...". ***Chauca v. Abraham*, 2017 N.Y. Slip Op. 08158, CtApp 11-20-17**

FAMILY LAW, CIVIL PROCEDURE.

ONCE THE NEGLECT PETITION WHICH LED TO THE PLACEMENT OF THE CHILD IN FOSTER CARE HAS BEEN DISMISSED, FAMILY COURT LOSES JURISDICTION AND CANNOT ENTERTAIN PERMANENCY HEARINGS TO CONTINUE FOSTER CARE PLACEMENT.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the appellate division, determined that, with respect to a child who has been removed from the home and placed in foster care based upon a pending neglect petition, once the underlying neglect petition has been dismissed, Family Court loses jurisdiction of the matter and cannot entertain permanency hearings to continue the foster care placement: "Here, the Department seizes on a hyperliteral reading of [Family Court Act] section 1088, divorced from all context, to argue that Family Court's pre-petition placement of Jamie J. under (Family Court Act] section 1022 triggered a continuing grant of jurisdiction that survives the eventual dismissal of the neglect petition. In other words, even if the Family Court removes a child who has not been neglected or abused, it has jurisdiction to continue that child's placement in foster care until and unless it decides otherwise. Section 1088's place in the overall statutory scheme, the legislative history of article 10-A, and the dictates of parents' and children's constitutional rights to remain together compel the opposite conclusion: Family Court's jurisdiction terminates upon dismissal of the original neglect or abuse petition." ***Matter of Jamie J. (Michelle E.C.)*, 2017 N.Y. Slip Op. 08161, CtApp 11-20-17**

FREEDOM OF INFORMATION LAW (FOIL).

SECOND DEPARTMENT USED THE WRONG STANDARD FOR APPLYING THE CONFIDENTIAL SOURCE EXEMPTION TO A FREEDOM OF INFORMATION LAW (FOIL) REQUEST FOR DOCUMENTS, CASE REMITTED, PETITIONER SOUGHT DOCUMENTS RELATING TO A REVIEW OF HIS SEX OFFENSE CASE WHICH WAS PROSECUTED AMID NATIONWIDE HYSTERIA OVER ALLEGATIONS OF RITUAL ABUSE AT DAY CARE CENTERS.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge partial dissent, determined that the standard for the confidentiality-source exemption for documents sought under the Freedom of Information Law (FOIL) in the Second Department was incorrect and remitted the matter. The requested documents relate to a review of petitioner's conviction by a panel specifically created for that review. Petitioner had pled guilty to several sex offenses at a time when a hysteria surrounding allegations of ritual child abuse at day care centers was sweeping the country: "The legislature's policy of broad public access, as expressed in FOIL, dictates that the exemption for confidential sources and information be narrowly circumscribed. Therefore disclosure under FOIL can only be refused pursuant to section 87 (2) (e) (iii) if the agency presents a 'particularized and specific justification for denying access' ... , based on an express promise of confidentiality to the source, or by establishing that, under the circumstances of the particular case, the confidentiality of the source or information can be reasonably inferred. Application of this rule is case and information specific, and depends on the particular facts and circumstances. In determining whether information obtained in the course of a criminal investigation should be treated as confidential or whether a source spoke on the assumption that the source's identity or statements would remain confidential, courts may consider, as they deem relevant, such factors as the nature of the crime, the source of the information in relation to the crime, and the content of the statements or information. Where the content of a statement or information and the circumstances surrounding its compilation by law enforcement convince a court that its confidentiality can be reasonably inferred, it may be withheld or released with appropriate redactions pursuant to section 87 (2) (e) (iii). Otherwise, absent an explicit assurance of confidentiality, it may not be withheld or redacted under that FOIL exemption. Here, because the Second Department majority misconstrued the FOIL exemption asserted by respondent, the order below must be reversed and the matter remitted for consideration under the correct standard." ***Matter of Friedman v. Rice*, 2017 N.Y. Slip Op. 08167, CtApp 11-21-17**

INSURANCE LAW.

INSURANCE LAW § 3240 ALLOWS A DIRECT CAUSE OF ACTION AGAINST INSURERS BY THE INJURED PARTY IF THE INSUREDS AND RISKS ARE IN NEW YORK, NOT ONLY WHEN THE POLICY IS ISSUED OR DELIVERED IN NEW YORK.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a three judge dissenting opinion, reversing the appellate division, determined several motions to dismiss in this insurance-coverage dispute should not have been granted. Plaintiff's decedent was killed when a DHL delivery truck driven by an employee of another company crossed the center line, causing a head-on crash. At issue was the reach of Insurance Law § 3240 with respect to an insurance policy issued to DHL by AAIC. The appellate division held that Insurance Law § 3240 did not allow suit because the policy was not "issued or delivered in this state." The Court of Appeals held the suit is allowed under Insurance Law 3240 because the insureds and risks are located in New York (two other issues, whether the DHL truck was a "hired auto" and whether it was driven with "permission" are not summarized here): "AAIC adopts the Appellate Division's rationale that because AAIC's policy was issued in New Jersey and delivered in Washington and then in Florida, it was neither issued nor delivered in New York, and therefore plaintiff cannot recover from AAIC pursuant to Insurance Law § 3420. ... Insurance Law § 3420 allows a limited cause of action on behalf of injured parties directly against insurers. Section 3420 applies to policies and contracts 'issued or delivered in this state' ... . Insurance Law § 3420 does not define the term 'issued or delivered in this state,' but other provisions of the Insurance Law are instructive: '[T]he proper interpretation of the term 'issued or delivered in this state' refers both to a policy issued for delivery in New York, and a policy issued for delivery outside of New York' ... . In Preserver, we interpreted section 3420 (d), which then required insurers to provide written notice when disclaiming coverage under policies 'issued for delivery' in New York. We held that '[a] policy is 'issued for delivery' in New York if it covers both insureds and risks located in this state' (10 NY3d at 642). Thus, under Preserver, "issued for delivery" was interpreted to mean where the risk to be insured was located — not where the policy document itself was actually handed over or mailed to the insured. We interpreted section 3420 to provide a benefit — deliberately in derogation of the common law — to New Yorkers whenever a policy covers 'insureds and risks located in this state' ... . Applying the Preserver standard to the facts of this case, it is clear that DHL is 'located in' New York because it has a substantial business presence and creates risks in New York. It is even clearer that DHL purchased liability insurance covering vehicle-related risks arising from vehicles delivering its packages in New York, because its insurance agreements say so." ***Carlson v. American Intl. Group, Inc.*, 2017 N.Y. Slip Op. 08163, CtApp 11-20-17**

MUNICIPAL LAW, CONSTITUTIONAL LAW.

PUBLIC BENEFIT CORPORATIONS ARE TREATED LIKE THE STATE FOR DETERMINING THEIR CAPACITY TO CHALLENGE A STATUTE, APPLICABLE DUE PROCESS STANDARD IS WHETHER THE STATUTE WAS ENACTED AS A REASONABLE RESPONSE TO REMEDY AN INJUSTICE, AT ISSUE IS A STATUTE ALLOWING LATE NOTICES OF CLAIM AGAINST BATTERY PARK CITY AUTHORITY TO BE FILED IN A 9-11 CLEANUP PERSONAL INJURY ACTION.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over two concurring opinions, answered two certified questions from the Second Circuit. The defendant in the federal suit is Battery Park City Authority (BPCA), a public benefit corporation, which was sued by plaintiffs alleging personal injury caused by 9-11 clean-up of properties owned by BPCA. The legislature had enacted an amendment to the General Municpal Law to allow the plaintiffs to file late notices of claim. BPCA successfully argued in federal district court that the amendment extending the time to file notices of claim was unconstitutional as applied. When the matter came before the Second Circuit on appeal, the Second Circuit asked the Court of Appeals to determine whether the BPCA should be treated like the state for purposes of the capacity to challenge a statute (answer: yes) and asked for clarification of the standard for analyzing due process in this context (answer: whether the statute was enacted as a reasonable response in order to remedy an injustice): "We ... hold that, under the capacity rule, public benefit corporations have no greater stature to challenge the constitutionality of State statutes than do municipal corporations or other local governmental entities. Of course, our holding today does not mean that public benefit corporations can never raise such constitutional challenges; like municipalities, they may avail themselves of an exception to the general rule ... . However, courts need not engage in a 'particularized inquiry' to determine whether a public benefit corporation should first be treated like the State. Unlike in other contexts, for purposes of our capacity bar, every public benefit corporation is the State. * * ... [A] claim-revival statute will satisfy the Due Process Clause of the State Constitution if it was enacted as a reasonable response in order to remedy an injustice." ***Matter of World Trade Ctr. Lower Manhattan Disaster Site Litigation*, 2017 N.Y. Slip Op. 08166, CtApp 11-21-17**

MUNICIPAL LAW (NYC), REAL PROPERTY LAW, CIVIL PROCEDURE.

NEW YORK CITY CHARTER PROVISION REQUIRES ONLY ONE ATTEMPT AT PERSONAL SERVICE OF NOTICES OF BUILDING CODE VIOLATIONS BEFORE TURNING TO THE NAIL AND MAIL ALTERNATIVE.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined that the New York City charter provisions governing service of a Notice of Violation (NOV) of the building code require only one unsuccessful attempt at personal

service before the affix and mail provisions kick in. The CPLR nail and mail provisions (which require due diligence in the attempts at personal service) do not apply: "The question presented is whether, prior to use of the affix and mail procedure, the City Charter requires more than a single attempt to personally serve the NOV at the premises. * * * ... [T]he plain language of the relevant statute speaks in the singular — '[s]uch notice may only be affixed . . . where a reasonable attempt has been made' at personal delivery — indicating that only one attempt is required ... . * * * Moreover, the alternate service procedure authorized by the statute — a single attempt to personally deliver the NOV, coupled with affixing the NOV to the property and mailing copies to the owner at the premises and other addresses on file with related City agencies — is reasonably calculated to inform owners of violations relating to their properties." ***Matter of Mestecky v. City of New York*, 2017 N.Y. Slip Op. 08162, CtApp 11-20-17**

PERSONAL INJURY.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS SLIP AND FALL CASE.

The Court of Appeals, reversing the appellate division, over a dissent, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff tripped over a cord tied to a barrel in a parking lot. The majority offered no factual explanation for the reversal. ***Lau v. Margaret E. Pescatore Parking, Inc.*, 2017 N.Y. Slip Op. 08170, CtApp 11-21-17**

FIRST DEPARTMENT

COOPERATIVES.

WHOLLY ARBITRARY DECISION BY COOPERATIVE BOARD TO RESCIND PLAINTIFF'S PURCHASE CONTRACT NOT SHIELDED BY THE BUSINESS JUDGMENT RULE.

The First Department determined the cooperative board's rescission of plaintiff's purchase contract was wholly arbitrary and was not shielded by the business judgment rule: "Plaintiffs' application to purchase a unit in defendants' cooperative residential complex was approved by defendant Board of Directors, and then rescinded two weeks later, based upon a Board member's erroneous report that plaintiff Richard Kallop told her he did not intend to reside in the complex, as required by the purchase contract. Plaintiffs filed a complaint seeking, inter alia, to compel defendants to permit the sale to go forward. After defendants filed their answer, plaintiffs, by order to show cause, sought an order permitting the sale to close. An evidentiary hearing was held, at which the reporting Board member's testimony revealed that Richard Kallop had not, as she claimed, informed her he intended to reside outside the cooperative complex. For his part, Richard testified that it had always been his plan to reside in the cooperative unit with his elderly mother, co-plaintiff Joan Kallop. Under these facts, we conclude that defendants' decision to rescind its approval of plaintiffs' purchase application, being without any basis in reason and without regard to the facts, was wholly arbitrary, and thus not entitled to the protections generally provided to cooperative boards by the business judgment rule ...". ***Kallop v. Board of Directors for Edgewater Park Owners' Coop. Inc.*, 2017 N.Y. Slip Op. 08174, First Dept 11-21-17**

CRIMINAL LAW, APPEALS.

FAILURE TO INSTRUCT THE JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED UPON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL ON THE REMAINING CHARGES IS REVERSIBLE ERROR, DESPITE THE FAILURE TO PRESERVE THE ERROR.

The First Department, reversing defendant's conviction, noted the jury should have been informed that an acquittal on the top count (second degree murder) based on the justification defense required an acquittal on the remaining charges. The defendant was convicted of manslaughter. Although the error was not preserved for appeal, the court exercised its interest of justice jurisdiction: "As in cases such as *People v. Velez* (131 AD3d 129 [1st Dept 2015]), the court's charge failed to convey that an acquittal on the top count of second-degree murder based on a finding of justification would preclude consideration of the remaining charges. We find that this error was not harmless and warrants reversal in the interest of justice ...". ***People v. Santiago*, 2017 N.Y. Slip Op. 08190, First Dept 11-21-17**

CRIMINAL LAW, APPEALS.

DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA DESPITE FAILURE TO PRESERVE THE ARGUMENT.

The First Department, vacating defendant's guilty plea, determined the wrong advice about whether defendant could appeal after pleading guilty warranted reversal, despite the failure to preserved the error. Defendant was told he could appeal the denial of his speedy trial motion: "A defendant forfeits his right to appellate review of a CPL 30.30 motion upon a guilty

plea ... . However, here, the record is clear that the court misadvised defendant that he could pursue his 30.30 claim on appeal of a guilty plea ... . Neither the defense counsel nor the prosecutor corrected the court's misadvice. Moreover, defendant accepted a lengthier sentence, and declined to replead to a different offense with a shorter prison sentence, based on this misstatement that his 30.30 claim could be raised on appeal. Under the totality of these circumstances, defendant's plea is vacated and the matter remanded ... . As defendant had no practical ability to object to the error because he was sentenced on the date the misstatement occurred, ... , he was not required to preserve his argument." ***People v. Sanchez*, 2017 N.Y. Slip Op. 08193, First Dept 11-21-17**

CRIMINAL LAW, EVIDENCE.

IN DENYING DEFENDANT'S MOTIONS FOR FRYE HEARINGS, THE TRIAL COURT PROPERLY RELIED ON THE RESULTS OF FRYE HEARINGS IN OTHER COURTS OF COORDINATE JURISDICTION CONCERNING LCN AND FST DNA TESTING.

The First Department noted that the trial court's denial of a Frye hearing about DNA testing was properly denied based upon the results of an eight-month long Frye hearing on the same issues in a court of coordinate jurisdiction: "The motion court's pretrial ruling ... denying defendant's motion to exclude, or alternatively to conduct a Frye ... hearing on, expert testimony relating to high sensitivity, or low copy number (LCN) DNA testing, was a provident exercise of discretion. At the time that the motion court's ruling was made, a court of coordinate jurisdiction, following an eight-month Frye hearing, had issued a decision holding that LCN DNA testing was 'generally accepted as reliable in the forensic scientific community' and 'not a novel scientific procedure' ... . 'A court need not hold a Frye hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony' ... . … Likewise, the trial court's denial of defendant's renewed motion for a Frye hearing ... , which motion was recast to include evidence relating to both LCN DNA testing and a then-recently issued FST DNA testing report, was a provident exercise of discretion. The trial court's ruling was consistent with prior determinations of courts of coordinate jurisdiction that these procedures were not novel scientific techniques and were generally accepted by the relevant scientific community ...". ***People v. Gonzalez*, 2017 N.Y. Slip Op. 08191, First Dept 11-21-17**

FORECLOSURE, REAL PROPERTY LAW, UNIFORM COMMERCIAL CODE.

DESPITE THE INITIAL FRAUDULENT TRANSFER OF THE MORTGAGED PROPERTY AND THE ABSENCE OF THE NOTE, PLAINTIFF LENDER COULD FORECLOSE AS THE UNDISPUTED HOLDER OF THE NOTE, THE INITIAL FRAUDULENTLY INDUCED DEED WAS VOIDABLE, NOT VOID.

The First Department, in a full-fledged opinion by Justice Renwick, over a comprehensive dissenting opinion, determined plaintiff could foreclose on a mortgage despite the initial fraudulent transfer of the property and the absence of the note: "...[P]laintiff Peter Weiss seeks, among other things, a foreclosure and sale based on a Mortgage and Note Extension and Modification Agreement (CEMA) executed by defendant Edward Phillips. Plaintiff lent $500,000 to borrowers who purported to own the real estate property they sought to mortgage. The borrowers signed a note, in which they promised to pay the loan, and a mortgage, in which they gave the plaintiff/lender a security interest in the property they purported to own. The borrowers, however, acquired the property by fraudulent means. After the rightful owner, Phillips, reacquired the property, he executed the CEMA with the individual lender, Weiss. Pursuant to the CEMA, Phillips acknowledged Weiss's rights under the note and mortgage; and, Weiss agreed to forbear from foreclosing on the subject property for a year, presumably to permit Phillips to obtain refinancing. ... [W]e find that Weiss's interest in the property as a mortgagee was not rendered null and void because his borrowers, the mortgagors, had acquired the property by fraudulent means. In addition, we find that Weiss met his burden for summary judgment, on his claim for foreclosure and sale, by submitting the Mortgage and CEMA, along with undisputed evidence establishing both the existence of the note, which obviated the need to submit the note as proof that Weiss had the right to foreclose, and the nonpayment. * * * UCC 3-804 allows one to maintain an action as a 'holder' on a promissory note even though the instrument has been lost or destroyed. The section does not apply here where it is established that plaintiff has the right to sue on the note as the undisputed 'holder' of the note. * * * Forged deeds and/or encumbrances are those executed under false pretenses, and are void ab initio ... . The interests of subsequent bona fide purchasers or encumbrancers for value are thus not protected under Real Property Law § 266 when their title is derived from a forged deed or one that is the product of false pretenses ... . In contrast, a fraudulently induced deed is merely voidable, not void ...". ***Weiss v. Phillips*, 2017 N.Y. Slip Op. 08209, First Dept 11-21-17**

SECOND DEPARTMENT

CIVIL PROCEDURE, MEDICAL MALPRACTICE, PERSONAL INJURY.

MOTION TO AMEND THE BILL OF PARTICULARS TO ADD A NEW THEORY OF LIABILITY WHICH WAS FIRST RAISED BY PLAINTIFFS' EXPERT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiffs' motion to amend the bill of particulars to add a new theory of liability should have been granted in this medical malpractice action. The amendment was based upon plaintiffs' expert's disclosures and the motion to amend was made shortly after the expert raised the issue: "While leave to amend a bill of particulars is generally freely given in the absence of prejudice or surprise (see CPLR 3025[b]), where a motion for leave to amend a bill of particulars alleging a new theory of liability not raised in the claim or the original bill is made on the eve of trial, leave of court is required, and 'judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious'... . In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom ... . Here, the delay would not have been prejudicial since the plaintiffs' amendment sought to include a theory of causation of the decedent's death raised in the defendants' expert disclosures. Moreover, the plaintiffs did not delay in seeking the amendment after receiving the defendants' expert disclosures, and the defendants were permitted further discovery ...". ***Moore v. Franklin Hosp. Med. Center-North Shore-Long Is. Jewish Health Sys.*, 2017 N.Y. Slip Op. 08263, Second Dept 11-22-17**

CRIMINAL LAW, APPEALS.

DEFENDANT WAS TOLD HE COULD APPEAL THE DENIAL OF HIS SPEEDY TRIAL MOTION AFTER ENTERING A GUILTY PLEA, WRONG ADVICE WARRANTED VACATING THE PLEA.

The Second Department, vacating defendant's guilty plea, determined that wrong advice about his ability to appeal the denial of his speedy trial motion warranted reversal: "A defendant who has entered a plea of guilty 'forfeit[s] his [or her] right to claim that he [or she] was deprived of a speedy trial under CPL 30.30'... .However, where, as here, the assurance on which a defendant's plea was predicated is ineffectual to preserve the right to appeal, he or she is entitled, if he or she wishes, to withdraw the plea of guilty ... . Here, it is clear from the record that the defendant pleaded guilty in reliance upon a promise from the Supreme Court that, upon his plea of guilty, he would retain the right to appeal the denial of his motion to dismiss the indictment pursuant to CPL 30.30. However, that promise could not be fulfilled .... Since the defendant is entitled to withdraw his plea of guilty ... , the judgment of conviction must be reversed, his plea vacated, and the matter remitted ...". ***People v. Smith*, 2017 N.Y. Slip Op. 08288, Second Dept 11-22-17**

FAMILY LAW.

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW JUVENILE TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS), REUNIFICATION WITH A PARENT AND RETURN TO INDIA WERE NOT IN THE CHILD'S BEST INTERESTS.

The Second Department, reversing Family Court, determined Family Court should have made the requisite findings to allow the juvenile to apply for special immigrant juvenile status (SIJS): "... [A] special immigrant is a resident alien who, inter alia, is under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. Additionally, for a juvenile to qualify for SIJS, a court must find that reunification of the juvenile with one or both of the juvenile's parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law ... , and that it would not be in the juvenile's best interests to be returned to his or her previous country of nationality or country of last habitual residence... . Based upon our independent factual review, we find that reunification of the child with his father is not a viable option due to parental neglect, which includes the infliction of excessive corporal punishment and requiring the child to begin working at the age of 15 instead of attending school on a regular basis ... . The record also supports a finding that it would not be in the child's best interests to be returned to India ...". ***Matter of Gurwinder S.*, 2017 N.Y. Slip Op. 08272, Second Dept 11-22-17**

FAMILY LAW, CRIMINAL LAW.

FAMILY OFFENSES OF AGGRAVATED HARASSMENT AND ASSAULT THIRD NOT SUPPORTED BY PROOF OF PHYSICAL INJURY.

The Second Department, reversing Family Court, found that the charged family offenses of aggravated harassment and assault third were not supported by proof of physical injury: "... [T]he petitioner failed to establish by a fair preponderance of the evidence that the appellant committed the family offenses of aggravated harassment and assault in the third degree. Both of those family offenses require proof of physical injury, which is defined as 'impairment of physical condition or substantial pain' ... . Contrary to the Family Court's determination, the evidence presented at the fact-finding hearing failed to adequately demonstrate that the petitioner suffered a physical injury as a result of the conduct alleged in the petition ...

. Since the court's factual determinations were not supported by the record, we vacate the finding that the appellant committed the family offenses of aggravated harassment and assault in the third degree ... ... Inasmuch as the petitioner has not raised any alternative grounds for affirmance of the order of protection ... , under the circumstances, we reverse the order of protection, deny the family offense petition, and dismiss the proceeding ...". ***Matter of Stanislaus v. Stanislaus*, 2017 N.Y. Slip Op. 08274, Second Dept 11-22-17**

LANDLORD-TENANT.

LESSEE DID NOT MOVE FOR A YELLOWSTONE INJUNCTION WITHIN THE CURE PERIOD ALLOWED BY THE LEASE, SUPREME COURT NO LONGER HAD JURISDICTION TO GRANT THE INJUNCTION

The Second Department determined the commercial lessee was not entitled to a Yellowstone injunction because the motion seeking the injunction was not made before the termination of the cure period set out in the lease: " 'A Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture' of the lease'... . ' To obtain a Yellowstone injunction, the tenant must demonstrate that (1) it holds a commercial lease, (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease, (3) it requested injunctive relief prior to both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord's notice to cure, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises' ... .'[A]n application for Yellowstone relief must be made not only before the termination of the subject lease . . . but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure" ... . "Where a tenant fails to make a timely request for a temporary restraining order, a court is divested of its power to grant a Yellowstone injunction' ...". ***Riesenburger Props., LLLP v. Pi Assoc., LLC*, 2017 N.Y. Slip Op. 08294, Second Dept 11-22-17**

MEDICAL (DENTAL) MALPRACTICE, PERSONAL INJURY.

DESPITE PLAINTIFF'S SIGNING A CONSENT FORM, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE LACK OF INFORMED CONSENT CAUSE OF ACTION PROPERLY DENIED, PLAINTIFF ALLEGED THE WRONG TOOTH WAS EXTRACTED.

The Second Department, affirming Supreme Court, determined defendants' motions for summary judgment on the lack of informed consent cause of action were properly denied. Plaintiff had signed a consent form but alleged the wrong tooth was extracted: " '[L]ack of informed consent is a distinct cause of action requiring proof of facts not contemplated by an action based merely on allegations of negligence" ... . "To establish a cause of action for malpractice based on lack of informed consent, plaintiff must prove (1) that the person providing the professional treatment failed to disclose alternatives thereto and failed to inform the patient of reasonably foreseeable risks associated with the treatment, and the alternatives, that a reasonable medical practitioner would have disclosed in the same circumstances, (2) that a reasonably prudent patient in the same position would not have undergone the treatment if he or she had been fully informed, and (3) that the lack of informed consent is a proximate cause of the injury' ... . 'The mere fact that the plaintiff signed a consent form does not establish the defendants' prima facie entitlement to judgment as a matter of law'... . ... Supreme Court properly determined that triable issues of fact precluded an award of summary judgment dismissing the cause of action alleging lack of informed consent insofar as asserted against them. The deposition testimony of the parties and the generic consent form signed by the plaintiff revealed a factual dispute as to whether the plaintiff was adequately informed about the extraction, namely which tooth would be removed... . In addition, each of the expert opinions submitted on the summary judgment motions was in agreement that a root canal was a viable alternative treatment to the extraction of tooth number four. Thus, there were triable issues of fact as to whether a reasonably prudent patient in the plaintiff's position would have undergone the extraction of tooth number four if he or she had been fully informed ... ". ***Godel v. Goldstein*, 2017 N.Y. Slip Op. 08260, Second Dept 11-22-17**

MENTAL HYGIENE LAW, CRIMINAL LAW.

ORDER THAT THE PATIENT INMATE SHOULD BE TREATED WITH A PARTICULAR DRUG FOR SCHIZOPHRENIA OVER HIS OBJECTION SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, ORDER ALLOWING ALTERNATIVE DRUGS, AND A NONDURATIONAL ORDER NOT SUPPORTED.

The Second Department determined clear and convincing evidence supported the finding that the patient (Radcliffe M.) was unable to make treatment decisions for himself and that a particular medication for schizophrenia should be administered over the patient's objection. However, the evidence did not support the findings that certain alternative drugs could be administered or that the order should be nondurational (no termination date): "The State may administer a course of medical treatment against a patient's will if it establishes, by clear and convincing evidence, that the patient lacks the capacity to make a reasoned decision with respect to proposed treatment ... , and that 'the proposed treatment is narrowly tailored to give substantive effect to the patient's liberty interest, taking into consideration all relevant circumstances, including the patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment

and any less intrusive alternative treatments'... . * * * … [T]he petitioner failed to offer any testimony or evidence at the hearing with respect to the additional medications included in the order as 'Reasonable Alternatives' ... . . A nondurational order is appropriate where it is established that treatment will allow the patient to become stabilized and restore the patient's ability to make reasoned decisions regarding the management of his or her mental illness ... . In such circumstances, 'the order's forcefulness will end as soon as [the patient] is no longer so incapacitated' ... . The petitioner failed to establish that Radcliffe M.'s ability to make reasoned decisions regarding his own treatment will be restored with treatment and that a nondurational order would therefore be appropriate ...". ***Matter of Radcliffe M.*, 2017 N.Y. Slip Op. 08270, Second Dept 11-22-17**

PERSONAL INJURY.

DESPITE PLAINTIFF'S APPARENT VIOLATION OF THE VEHICLE AND TRAFFIC LAW, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS TRAFFIC ACCIDENT CASE.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this car accident case should not have been granted. Plaintiff apparently made a left turn in front of defendant's car which was in the on-coming lane. Defendant struck plaintiff's car: " 'A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident'... . Pursuant to Vehicle and Traffic Law § 1141, the operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle which is within the intersection or so close to it as to constitute an immediate hazard ... . A violation of this statute constitutes negligence per se ... . The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law ... . A driver is negligent where he or she failed to see that which, through proper use of his or her senses, he or she should have seen ... . The driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident ... . Here, in support of the motion, the defendant submitted, inter alia, the deposition testimony of the parties. The defendant attested that she never saw the front of the plaintiff's vehicle and that when she first saw the plaintiff's vehicle, which was 'moving like a snail,' she saw the middle part of the vehicle directly ahead of her. Viewing the evidence in the light most favorable to the plaintiff as the nonmoving party, the defendant failed to establish, prima facie, her freedom from comparative fault and that the plaintiff's alleged violation of the Vehicle and Traffic Law was the sole proximate cause of the accident ...". ***Aponte v. Vani*, 2017 N.Y. Slip Op. 08252, Second Dept 11-22-17**

PERSONAL INJURY, CONTRACT LAW, EMPLOYMENT LAW.

TRANSMISSION REPAIR COMPANY OWED A DUTY TO PLAINTIFF'S DECEDENT AS A THIRD PARTY BENEFICIARY OF A TRUCK REPAIR CONTRACT WITH PLAINTIFF'S DECEDENT'S EMPLOYER, IF THE TRUCK HAD BEEN EQUIPPED WITH A FUNCTIONING NEUTRAL INTERLOCK SYSTEM IT WOULD NOT HAVE LURCHED BACK, KILLING PLAINTIFF'S DECEDENT.

The Second Department determined plaintiff's decedent could properly have been found to be a third-party beneficiary of a contract between a transmission repair company (Advanced) and plaintiff's decedent's employer (CCC). CCC owned a garbage truck which was repaired by Advanced. There was no neutral interlock system on the truck. Such a system would have prevented the truck from lurching backward and pinning plaintiff's decedent between the truck and a dumpster: "... [T]he record demonstrates that Advanced owed the decedent a duty as a third-party beneficiary of its contractual relationship between itself and CCC ... . If the parties to the contract intended to confer a direct benefit on the decedent, a duty is owed to the decedent... . Although there was no written contract between the contracting parties, an intent to confer a direct benefit on the decedent may also be inferred from the circumstances ... including the parties' oral agreement and course of conduct ... . An employee is not automatically a third-party beneficiary of a service contract between his or her employer and another party ... . However, if the employer's intent was to benefit its employees, third-party beneficiary status may be inferred ... * * * The evidence indicated that Advance and CCC recognized that the neutral interlock system was an important safety feature. Further, it is clear from the record that Advance and CCC recognized that this safety feature's primary benefit was to CCC's employees who loaded the garbage trucks. Accordingly, it could be inferred that the decedent was a third-party beneficiary of the contractual relationship between CCC and Advanced." ***Vargas v. Crown Container Co., Inc.*, 2017 N.Y. Slip Op. 08297, Second Dept 11-22-17**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

STUDENT WITH CEREBRAL PALSY COLLIDED WITH ANOTHER STUDENT DURING A SUPERVISED GAME, SUPERVISION WAS ADEQUATE AND INJURY WAS DUE TO A SPONTANEOUS ACT WHICH SUPERVISION COULD NOT PREVENT, SCHOOL'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED.

The Second Department determined the complaint in this negligent supervision case was properly dismissed. The student plaintiff had cerebral palsy and was being supervised at recess by an aide who was ten feet aware. The student was playing a game which was supervised by an athletic director when the student plaintiff and another student collided: "The infant plaintiff ... [alleged] that the defendants were negligent in failing to provide adequate supervision, and in allowing the in-

fant plaintiff to participate in the wall ball game. ... [T]he defendants moved for summary judgment ... contending that they provided adequate supervision to the children during recess, that the infant plaintiff's Individualized Education Plan did not restrict him from playing during recess, and that ... any alleged failure to provide adequate supervision was not a proximate cause of the infant plaintiff's injuries because the collision occurred suddenly and unexpectedly. 'Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision'... . Schools are not, however, insurers of their students' safety, and may not be held liable ' for every thoughtless or careless act by which one pupil may injure another' ... . Moreover, when an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not a proximate cause of the injury ... . Here, the defendants ... [demonstrated] that they provided adequate supervision to the infant plaintiff during recess... and, in any event, that the accident was caused by a sudden and spontaneous collision which could not have been prevented by more intense supervision ...". ***Tzimopoulos v. Plainview-Old Bethpage Cent. Sch. Dist.*, 2017 N.Y. Slip Op. 08296, Second Dept 11-22-17**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S CROSSING IN FRONT OF DEFENDANT DRIVER IN AN ATTEMPT TO MAKE A RIGHT TURN FROM THE CENTER LANE VIOLATED THE VEHICLE AND TRAFFIC LAW AND CONSTITUTED THE SOLE PROXIMATE CAUSE OF THE TRAFFIC ACCIDENT, PLAINTIFF'S OPPOSING PAPERS RAISED ONLY FEIGNED ISSUES OF FACT.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this traffic accident case should have been granted. Defendants were in the far right lane when plaintiff attempted to turn right from the center lane, crossing in front of defendants: "[The] evidence demonstrated, prima facie, that the plaintiff violated Vehicle and Traffic Law §§ 1128(a) and 1163, and that defendant driver was free from fault in the happening of the accident ... . This evidence also demonstrated, prima facie, that the plaintiff's actions were the sole proximate cause of the subject accident. In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff's affidavit, which contradicted admissions he made in the certified motor vehicle report, was insufficient to defeat the defendants' motion for summary judgment because it merely raised what appear to be feigned issues of fact ...". ***Park v. Sanchez*, 2017 N.Y. Slip Op. 08279, Second Dept 11-22-16**

PERSONAL INJURY, LANDLORD-TENANT, MUNICIPAL LAW.

OUT OF POSSESSION LANDLORD (NYC HOUSING AUTHORITY) DEMONSTRATED IT DID NOT HAVE NOTICE OF A DEFECTIVE WINDOW WHICH ALLEGEDLY SLAMMED SHUT SEVERING A PORTION OF PLAINTIFF'S FINGER, LANDLORD'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant out-of-possession landlord (NYC Housing Authority) should have been granted summary judgment in this personal injury action. Plaintiff alleged a window in his apartment failed to stay open and slammed shut, severing a portion of a finger. Apparently a window had been repaired by the landlord about a year before, but no subsequent complaints about windows were made: " 'An out-of-possession landlord that has assumed the obligation to make repairs to its property cannot be held liable for injuries caused by a defective condition at the property unless it either created the condition or had actual or constructive notice of it' ... . Here, with respect to the negligent maintenance claim, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not create the alleged injury-producing condition or have actual or constructive notice of the condition ... . The evidence showed that, more than one year prior to the incident, a window in the living room of the subject apartment had been repaired following an inspection by the defendant, and that there had been no complaints about the windows in the apartment following the repair. In opposition, the plaintiff failed to raise a triable issue of fact ... . The defendant also established its prima facie entitlement to judgment as a matter of law dismissing the remaining theories of liability by demonstrating that they had not been included in the notice of claim ...". ***Cotto v. New York City Hous. Auth.*, 2017 N.Y. Slip Op. 08258, Second Dept 11-22-17**

THIRD DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, CONTRACT LAW.

ARBITRATOR'S INTERIM DECISION RE PETITIONER'S SUSPENSION WITHOUT PAY WAS IMPROPER, AND THE ARBITRATOR'S DISMISSAL OF THE CHARGES VIOLATED PUBLIC POLICY, THIRD DEPARTMENT PROVIDED A COMPREHENSIVE DISCUSSION OF A COURT'S POWER TO REVIEW AN ARBITRATOR'S DECISION.

The Third Department determined the arbitrator's ruling in this employment matter violated public policy because the ruling, which dismissed the charges and imposed no penalty, acknowledged that petitioner had violated the Public Officers Law by sharing confidential information with her husband. Petitioner was employed by respondent Department of Corrections and Community Supervision (hereinafter DOCCS) ... . Petitioner was suspended without pay for allegedly releasing confidential information to her husband, who had recently been released from prison on parole supervision in connection

with his rape conviction. The decision too detailed to be fairly summarized here. It provides a comprehensive overview of the court's role and powers in reviewing an arbitrator's findings and is well worth reading carefully: "Section 33.5 (f) (4) of the CBA [collective bargaining agreement] prohibits arbitrators from adding new requirements to the provisions of the agreement. The arbitrator exceeded his power by adding a requirement to the CBA regarding what proof could be considered [in making an interim award] and by refusing to consider hearing evidence submitted by DOCCS to determine whether probable cause existed for petitioner's suspension [without pay pending a hearing]. Therefore, the interim decision and award by the arbitrator was improper. * * * … [T]he CBA could be read to require proof of every aspect of a particular charge before finding an employee guilty thereof, so we should not set aside the arbitrator's conclusions on the ground that they are based on that interpretation ... . … Although the arbitrator concluded that DOCCS failed to establish the charge as set forth in the notice of discipline, he factually determined that petitioner improperly accessed a confidential database 14 times, and at least one time she shared DOCCS's confidential information with a parolee. These factual findings, which we must accept... , establish that petitioner violated Public Officers Law § 74 (3) (c). ... [T]he relief granted in the arbitrator's award — dismissal of the charges, with no penalty or repercussions for her misconduct, and reinstating her to the position in which she would continue to have access to confidential information — violated public policy, requiring vacatur of that award...". ***Matter of Virginia Livermore-Johnson*, 2017 N.Y. Slip Op. 08239, Third Dept 11-22-17**

ADMINISTRATIVE LAW, CIVIL PROCEDURE.

NYS COMPTROLLER HAS THE CONSTITUTIONAL AND STATUTORY RIGHT TO SUBPOENA PATIENT BILLING RECORDS FROM HEALTH SERVICES PROVIDERS PAID UNDER THE STATE'S EMPIRE PLAN TO FACILITATE AN AUDIT, SUPREME COURT REVERSED.

The Third Department, reversing Supreme Court, determined the NYS Comptroller had the power to issue a subpoena for patients' billing records as part of an audit of a health services provider paid under the state's Empire Plan. Neither the CPLR, which governs the confidentiality of medical records sought in discovery as part of litigation, nor the Health Insurance Portability and Accountability Act (HIPAA), precluded the Comptroller from accessing the billing records: "We find that, contrary to petitioner's claims and the holding of Supreme Court, the subpoena was validly issued in furtherance of [the Comptroller's] constitutional and statutory authority and obligation to audit payments made by the state for medical services provided under the Empire Plan ... . In Matter of Martin H. Handler, M.D., P.C. v. DiNapoli (23 NY3d at 242-243, 245-248) ... the Court of Appeals outlined ... the obligations of participating and nonparticipating health care providers with regard to billing patients, and [the Comptroller's] independent authority and obligation to audit the state's payments to both categories of providers. As the Court of Appeals outlined, respondent is constitutionally obligated to audit state payments to health insurance vendors ... .The plain language of CPLR 3122 (a) (1) and (2), read together, makes clear that the provisions apply to subpoenas issued during the discovery phase of litigation, and are not applicable to the subpoena issued by [the Comptroller] here pursuant to its authority under State Finance Law § 9 ... . HIPAA's privacy regulations provide that "[a] covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; . . . criminal proceedings or actions; or other activities necessary for appropriate oversight of . . . [e]ntities subject to government regulatory programs for which health information is necessary for determining compliance with program standards," without the written authorization of the patient ...". ***Matter of The Plastic Surgery Group, P.C. v. Comptroller of The State of New York*, 2017 N.Y. Slip Op. 08247, Third Dept 11-22-17**

CIVIL PROCEDURE.

MOTION TO CHANGE VENUE BROUGHT IN WRONG COUNTY SHOULD NOT HAVE BEEN ENTERTAINED.

The Third Department, reversing Supreme Court, determine the motion to change venue was not brought in any county allowed by the statute and should not have been granted: "It is well-settled that a motion to change venue on a discretionary ground, such as the convenience of material witnesses pursuant to CPLR 510 (3), 'must be made in the county in which the action is pending, or in any county in that judicial district, or in any adjoining county'... . Here, it is undisputed that the action is pending in Kings County and that Sullivan County is not in the same judicial district as Kings County nor is it an adjoining county. In light of this, we find that defendants failed to bring their motion in a proper county and, thus, Supreme Court should not have entertained the motion ... ". ***Minenko v. Swinging Bridge Camp Grounds of N.Y., Inc.*, 2017 N.Y. Slip Op. 08245, Third Dept 11-22-17**

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW, CONTRACT LAW.

SERVICE AND VENUE PROVISIONS IN CONTRACT WITH A LIMITED LIABILITY COMPANY DID NOT APPLY TO DEFENDANT INDIVIDUALLY, DEFECTS IN SERVICE PROPERLY OVERLOOKED PURSUANT TO CPLR 2001.

The Third Department determined plaintiffs' service of process on defendant was flawed but Supreme Court properly overlooked the defects under CPLR 2001. The Third Department further held that the defendant's motion to change venue should have been granted. Both the method of service (mail) and venue were based on provisions in a purchase and sale contract. However, the purchase and sale agreement was with a limited liability company, but the confessions of judgment

upon which the suit were based were signed by defendant in her personal capacity, not as the sole member of the LLC. Therefore the service and venue contract provisions did not apply: "Defendant and the limited liability companies of which she is a member 'are distinct entities,' however, and the former is not individually bound by the contractual commitments of the latter... . Nothing in the purchase and sale agreement binds defendant to its terms, instead making clear that no 'shareholder, director, officer of or principal or agent of' [the LLC] will 'have any personal liability, directly or indirectly, under or in connection with' either the agreement or any amendments to it. ... Due to the inapplicability of those contractual provisions, plaintiffs' effort to serve defendant by mail was deficient in that service 'under CPLR 3213 is subject to the rules governing service of the summons generally' ... . … [W]hile a wholesale failure to timely serve defendant with the initiatory papers constitutes 'a fatal jurisdictional defect'... , defendant was placed on notice, then submitted a cross motion that raised various objections and included substantive opposition before being properly served. In light of these peculiar circumstances, as well as the absence of any prejudice flowing from plaintiffs' missteps, we are persuaded that the untimeliness of the proper service could be and rightly was overlooked (see CPLR 2001, 2004 ...)". ***Capolino v. Goren*, 2017 N.Y. Slip Op. 08246, Third Dept 11-22-17**

CRIMINAL LAW.

COUNTY COURT DID NOT HAVE STATUTORY AUTHORITY TO IMPOSE INCARCERATION FOR VIOLATION OF THE TERMS OF A CONDITIONAL DISCHARGE, DEFENDANT HAD COMPLETED HIS ONE YEAR DEFINITE SENTENCE OF INCARCERATION FOR FELONY DWI AND WAS IN THE CONSECUTIVE PERIOD OF CONDITIONAL DISCHARGE WHEN HE DROVE WITHOUT AN IGNITION INTERLOCK DEVICE.

The Third Department, in a full-fledged opinion by Justice Aarons, reversing County Court, determined defendant, who had completed his one-year definite sentence for felony DWI, could not be sentenced to further incarceration for violating the terms of the conditional discharge by driving without an ignition interlock device: "Defendant served the one-year jail term and ... served it first. ... [D]efendant did not serve part of his one-year sentence; rather, he completed the entirety of that definite sentence. Because of the statutory command of Penal Law § 60.21, the conditional discharge period had to run consecutively to the period of incarceration and, therefore, commenced upon his release from jail. It was during the time following defendant's completion of the one-year definite sentence that he admittedly operated a vehicle without an ignition interlock device and violated the terms of the conditional discharge. The statutory framework governing sentencing does not cover these factual circumstances. The enactment of Penal Law § 60.21 spawned the type of sentence that was imposed upon defendant in 2013 for his DWI conviction — i.e., a definite term of incarceration with a period of conditional discharge to run consecutively. There were, however, no corresponding statutes or amendments to already existing statutes that delineated the type of sanctions that courts could impose in a case such as this one. * * * 'A defendant must be sentenced according to the law as it existed at the time that he or she committed the offense'... and, at the time defendant operated a vehicle without an ignition interlock device, the applicable law did not allow for the imposition of an additional period of imprisonment as done by County Court and as advocated by the People. Accordingly, defendant's sentence of 2 to 6 years followed by three years of conditional discharge must be vacated." ***People v. Coon*, 2017 N.Y. Slip Op. 08216, Third Dept 11-22-17**

CRIMINAL LAW.

OFFICER'S PURSUIT, FORCIBLE STOP, DETENTION AND ARREST OF FLEEING DEFENDANT NOT JUSTIFIED, MOTION TO SUPPRESS STATEMENTS AND ITEMS SEIZED IN SEARCHES PROPERLY GRANTED.

The Third Department determined defendant's motion to suppress statements and seized property (from the search of his person and home) based upon an unjustified street stop was properly granted. Fifteen minutes after receiving a report that the victim of a robbery had found his stolen car, Deputy Mauser drove around the block in the vicinity of the stolen car and saw defendant "walking pretty fast" "with a purpose." When Mauser activated his lights and got out of his car, the defendant fled and Mauser followed, forcibly stopped, detained and arrested him: "In arguing that Mauser had, at least, a founded suspicion of criminality, the People rely heavily on defendant's geographic proximity to the stolen vehicle. However, time and again, courts have held that geographic location, without more, is insufficient to sustain a suspicion of criminality … . … In any event, even if Mauser's initial encounter with defendant was considered to be a level one stop or if Mauser were found to have possessed a founded suspicion that criminality was afoot to justify a level two stop, defendant had the constitutional right to be let alone and, by disregarding Mauser's directive to stop, defendant did not elevate the level of suspicion to a reasonable suspicion that a crime had been, was being or was about to be committed... . While '[f]light, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, could provide the predicate necessary to justify pursuit' ... , the requisite additional facts supporting criminality were lacking here ... . Accordingly, Mauser's pursuit and forcible stop and detention of defendant were improper, and County Court properly

suppressed the physical evidence found on defendant's person and in his home, as well as any statements he made to police ... ". ***People v. Rose*, 2017 N.Y. Slip Op. 08217, Third Dept 11-22-17**

CRIMINAL LAW, APPEALS.

DESPITE THE FAILURE TO RAISE THE ISSUE ON APPEAL, THE INCLUSORY CONCURRENT SECOND DEGREE MURDER COUNTS MUST BE DISMISSED BASED UPON THE FIRST DEGREE MURDER CONVICTION.

The Third Department determined that defendant's second degree murder counts were lesser inclusory counts of first degree murder. Therefore the second degree murder counts should have been dismissed upon the first degree murder conviction. The fact that this issue was not raised below or on appeal did not preclude dismissal by the appellate court: "... [A]lthough not raised by either party, modification of the judgment is required. 'With respect to inclusory concurrent counts, . . . [a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted' (CPL 300.40 [3] [b]). The two counts of murder in the second degree upon which defendant was convicted are inclusory concurrent counts of the count of murder in the first degree upon which he was also convicted ... . Consequently, defendant's convictions of murder in the second degree must be reversed and the respective counts of the indictment dismissed." ***People v. Davis*, 2017 N.Y. Slip Op. 08214, Third Dept 11-22-17**

FAMILY LAW, CONTRACT LAW.

STIPULATION COMPLIED WITH THE CHILD SUPPORT STANDARDS ACT AND STATED THE PROPER STANDARD FOR AN UPWARD MODIFICATION OF SUPPORT.

The Third Department, reversing Family Court, determined the child support provisions of a stipulation complied with the Child Support Standards Act (CSSA) and were enforceable. The Third Department further found that the proper standard for an upward modification of support was that which was agreed to in the stipulation: "The stipulation, as well as the order of support, recite that the parties had been advised of and fully understood the child support provisions of the CSSA and that the application of the statute would result in the presumptively correct amount of child support to be awarded. The stipulation then sets forth the presumptive amount of child support that would be awarded under the CSSA and the agreed-upon figures used to calculate that amount, states that the parties are deviating from the presumptive amount and provides a detailed explanation of the reasons for the deviation therefrom. Thus, the opt out provisions of the stipulation fully comply with the CSSA ... . That the judgment of divorce does not explicitly set forth the CSSA recitals is not determinative, as the statute only requires the inclusion of such recitals in the 'agreement or stipulation . . . presented to the court for incorporation in an order or judgment' … . * * * Here, the parties' 1999 stipulation expressly provides that either party may petition a court for a modification of child support based upon 'a change of circumstances.' Through this clear and unqualified language, the parties plainly expressed an intent to dispense with the 'unanticipated and unreasonable change of circumstances' standard in favor of a less burdensome 'change of circumstances' standard ...". ***Matter of Frederick-Kane v. Potter*, 2017 N.Y. Slip Op. 08219, Third Dept 11-22-17**

FAMILY LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT CONCLUSION THAT MOTHER WAS OR SHOULD HAVE BEEN AWARE FATHER HAD INJURED THE CHILD, CHILD ABUSE AND NEGLECT FINDINGS REVERSED.

The Third Department, reversing Family Court, determined the evidence did not support child abuse and neglect findings against the respondent mother. Injuries to the child were caused by father. But the evidence did not support the finding that mother knew or should have known father had injured the child: "Based upon our review of the evidence in this record, we cannot conclude that respondent knew or should reasonably have known that she was placing the younger child in danger by leaving him in the care of his father while she went to work. Respondent consistently maintained, in her testimony and in her various statements to law enforcement and a Child Protective Services caseworker, that she did not know how the fractures had occurred, that she did not think the father had caused them and that, prior to observing redness and swelling in the child's leg ... , she had not noticed anything unusual or concerning with respect to the younger child. ... Nor do we find that respondent neglected the younger child by failing to seek medical care for the child when she observed redness and swelling in his leg ... . Respondent testified that the child was not crying, that she thought the redness and swelling could be a reaction to vaccines that the child had a few days earlier and that she continually monitored the child's condition that evening and throughout the next day. According to respondent, prior to leaving for work the following morning, she directed the father to monitor the child's leg and let her know if it got worse. Respondent testified that she checked in with the father on her lunch break, scheduled an appointment with the child's pediatrician for immediately after work and instructed the father to take the child to the doctor earlier if he determined that it could not wait. Under these circumstances, the record does not support a finding that respondent neglected the younger child by, as petitioner contends, failing to secure prompt medical attention ...". ***Matter of Lucien HH. (Michelle PP.)*, 2017 N.Y. Slip Op. 08224, Third Dept 11-22-17**

FAMILY LAW, EVIDENCE.

EVIDENCE DID NOT SUPPORT THE AWARD OF SOLE CUSTODY OF THE CHILDREN TO THE MATERNAL GRANDMOTHER, MATTER REMITTED FOR FURTHER INQUIRY ABOUT A LEVEL ONE SEX OFFENDER IN THE HOME, INFORMATION FIRST LEARNED IN A LINCOLN HEARING CANNOT BE RELIED UPON WITHOUT FURTHER INVESTIGATION.

The Third Department, reversing Family Court and remitting the case, determined the record did not support the awarding of sole custody to the maternal grandmother, in this appeal by the parents: "While we accord considerable deference to Family Court's credibility assessments and factual findings on appeal, we conclude from our review of the trial testimony, without factoring in the Lincoln hearing, that petitioner failed to meet her threshold burden of establishing extraordinary circumstances. The record indicates that the mother and the father were only briefly incarcerated, during which time the children resided with the paternal grandmother — not the maternal grandmother. Upon their release, the mother and the father soon moved into the paternal grandmother's home and the father obtained full-time employment — a sequence that does not establish an extended disruption of the mother and the father's custody ... . Moreover, while DSS made a finding of neglect, a DSS representative informed Family Court ... that DSS did not have any ongoing child protective concerns. In doing so, DSS recognized that the father's brother, a level one sex offender, lived in the paternal grandmother's home. There is no evidence that the brother ever mistreated the children... . The father testified that he trusts his brother to be around the children, but would not and does not leave the children alone with him. The mother is not employed and is at home with the children. As for the maternal grandmother, the record shows that she has never spent more than a couple of hours with the children and would only see them a few times each year. ... Family Court's decision ... raises an additional concern. Specifically, the court's reference to 'another male whose presence around children is questionable' — a person that the court then characterized as an undesirable — is not based on any testimony during the trial. As explained by the Court of Appeals in Matter of Lincoln v. Lincoln (24 NY2d 270 [1969]), any new information adverse to the parents derived during a Lincoln hearing may not be considered by the court 'without in some way checking on its accuracy during the course of the open hearing' ...". ***Matter of Shaver v. Bolster*, 2017 N.Y. Slip Op. 08232, Third Dept 11-22-17**

MUNICIPAL LAW, REAL PROPERTY LAW.

PLAINTIFF'S MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS TRESPASS-NUISANCE ACTION AGAINST THE TOWN SHOULD HAVE BEEN GRANTED, PLAINTIFF DEMONSTRATED ACTUAL NOTICE AND LACK OF PREJUDICE.

The Third Department, reversing Supreme Court, determined that plaintiff's motion for leave to file a late notice of claim should have been granted. Plaintiff alleged defendant town caused water and debris to drain onto his property causing the foundation of his house to cave in. In finding plaintiff should have been allowed to file a late notice of claim, the court explained the factors that should be considered and the flaws in Supreme Court's analysis, which focused on the excuse for the delay and the merits of the underlying action. The most important factors are the defendant's actual notice of the facts of the case within the statutory period and the absence of prejudice: "While a reasonable excuse for the delay is a statutory factor ... , it is well settled that 'the failure to offer a reasonable excuse for the delay in filing a notice of claim is not fatal where actual [knowledge] was had and there is no compelling showing of prejudice' ... . Similarly, although Supreme Court was permitted to consider the merits of the underlying claim, leave should only be denied on this basis when the claim is "'patently meritless' ... , which was not established here. Upon our consideration of all of the pertinent statutory factors, we find that, although plaintiff did not provide a reasonable excuse for his delay, he adequately set forth proof of actual knowledge and lack of substantial prejudice such that his motion should have been granted." ***Daprile v. Town of Copake*, 2017 N.Y. Slip Op. 08243, Third Dept 11-22-17**

PERSONAL INJURY, CONTRACT LAW, INSURANCE LAW.

THICKNESS OF THE ICE RAISED A QUESTION OF FACT ABOUT CONSTRUCTIVE NOTICE IN THIS SIDEWALK SLIP AND FALL CASE, PROMISE TO PURCHASE LIABILITY INSURANCE IS NOT THE SAME AS A PROMISE TO INDEMNIFY.

The Third Department determined defendant property maintenance company's motion for summary judgment in this ice slip and fall case was properly denied. Plaintiff's testimony about the thickness of the ice raised a question of fact whether defendant had constructive notice of it. The property owner's motion for summary judgment on the breach of contract action against the property maintenance company was properly granted. In the contract, the property maintenance company agreed to purchase liability insurance, which it did not do. An agreement to purchase insurance is not the same as a promise to indemnify and an action on the agreement need not await a judgment in the slip and fall case: "... [T]he record ... includes plaintiff's testimony that there was no lighting in the sidewalk area and no witness was able to contradict her account that there was ice in the area at the time that she fell. Further, there was no proof that anyone had performed a routine inspection

of the area after 7:00 a.m. on the day of her alleged fall, i.e., at any time within 10 hours of the fall, but also no proof that there had been further accumulation of snow after the snowfall the day before. ... [I]t is clear that plaintiff raised a triable issue of fact with regard to whether defendant had constructive notice of any dangerous conditions... . The key question to be resolved by the trier of fact is whether, during this 10-hour lapse of time ... there was further precipitation that created a dangerous or unsafe condition on the sidewalk and, if so, whether there was sufficient time for defendant[s] ... 'to reasonably have discovered and remedied it' ... .Plaintiff's description of the thickness and extent of ice on the sidewalk, if accepted, is relevant to the factual question of how long it was present and whether it was visible and apparent such that it would have been discovered upon routine inspection, with sufficient time to remedy it ...". ***Calvitti v. 40 Garden, LLC*, 2017 N.Y. Slip Op. 08241, Third Dept 11-22-17**

WORKERS' COMPENSATION LAW, CONTRACT LAW, CIVIL PROCEDURE.

THE TERMS OF THE SETTLEMENT AGREEMENT DID NOT ALLOW THE COURT TO ALLOCATE ALL THE PROCEEDS OF AN INSURANCE POLICY TO THE WORKERS' COMPENSATION BOARD, RESPONDENT, A FORMER MEMBER OF AN INSOLVENT WORKERS' COMPENSATION TRUST WHICH HAD SETTLED WITH THE BOARD, WAS ENTITLED TO SOME OF THE PROCEEDS AND AN ACCOUNTING PURSUANT TO CPLR 7702.

The Third Department, reversing Supreme Court, determined that Supreme Court should not have allocated all the proceeds of an insurance policy to the Workers' Compensation Board and should have ordered the Board to file an accounting pursuant to CPLR 7702. The Board is seeking compensation from members of a workers' compensation trust which was found to be insolvent. Respondent was a member of the trust and settled with the Board, paying over $1,000,000. Subsequently, in accordance with the terms of the settlement agreement, both the Board and the respondent separately sought to recover funds from an insurance policy. Supreme Court ordered all the recovered proceeds to be paid to the Board and did not order the filing of a verified accounting. The Third Department found that respondent, under the terms of the settlement agreement with the Board, was entitled to some of the funds and an accounting should be filed by the Board. The matter was remitted. ***Matter of New York State Workers' Compensation Bd. v. Murray Bresky Consultants, Ltd*, 2017 N.Y. Slip Op. 08244, Third Dept 11-22-17**

TAX LAW.

INFORMATION ABOUT COMPETITORS' PRODUCT PRICING PROVIDED TO SUPERMARKET CHAIN IS NOT TAXABLE.

The Third Department, reversing the tax tribunal, determined that the information provided by a contractor (RetailData) to petitioner, a supermarket chain, about product-prices charged by competitors, was subject to exclusion from the sales and use tax: "While there is no question that the pricing information that RetailData collects on petitioner's behalf is information that is available to the public, we agree with petitioner that, under the circumstances presented here, such information does not derive from a singular, widely accessible common source or database as that test has previously been applied and commonly understood in determining the applicability of the subject tax exclusion ... . * * * ... [W]e find that the information services that petitioner purchased from RetailData were personal or individual in nature and were not substantially incorporated into reports of others such that petitioner's purchase of these information services should have been excluded from taxation pursuant to Tax Law § 1105 (c) (1) ... . In our view, to expand the interpretation of Tax Law § 1105 (c) (1) to allow for the Tribunal's denial of the subject tax exclusion based solely on the fact that the information ultimately furnished derived from a public source would, under the circumstances presented, serve to defeat the purpose of the exclusion ...". ***Matter of Wegmans Food Mkts., Inc. v. Tax Appeals Trib. of The State of New York*, 2017 N.Y. Slip Op. 08225, Third Dept 11-22-17**

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