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FIRST DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW, ENVIRONMENTAL LAW.

NYC LANDMARKS PRESERVATION COMMISSION'S DECISION THAT IT DID NOT HAVE THE AUTHORITY TO REGULATE THE MECHANISM OF AND ACCESS TO A LANDMARK NINETEENTH CENTURY CLOCKTOWER WHICH HAD BEEN PURCHASED BY A PRIVATE PARTY WAS BASED UPON AN ERROR OF LAW AND WAS IRRATIONAL.

The First Department, in a full-fledged opinion by Justice Gesmer, over a two-justice dissent, determined the NYC Landmarks Preservation Commission's (LPC's) decision to allow the electrification of a landmark nineteenth century clocktower (similar in structure to Big Ben) was based upon an error of law and was irrational. The clocktower had been sold to a private party which planned to convert it to a residence. The LPC found, in effect, that the commission did not have authority over the now privately-owned clocktower: "We hold that the LPC has authority under the Landmarks Law to regulate the clock mechanism for two reasons. First, this result effectuates the statutory purposes. The Landmarks Law, New York City's first historic preservation statute, * * * declares that 'the protection, enhancement, perpetuation and use of improvements . . . of special character or special historical or aesthetic interest or value is a public necessity and is required in the interest of the health, prosperity, safety and welfare of the people'(Landmarks Law § 25-301[b]). ... * * * Second, the Landmarks Law defines the term 'interior architectural feature' to include the 'components of an interior, including, but not limited to . . . the type and style of all . . . fixtures appurtenant to such interior' (Landmarks Law § 25-302[l])." ***Matter of Save America's Clocks, Inc. v. City of New York*, 2017 N.Y. Slip Op. 08457, First Dept 11-30-17**

CRIMINAL LAW.

JUROR DID NOT REVEAL DURING VOIR DIRE SHE HAD APPLIED FOR A JOB IN THE DISTRICT ATTORNEY'S OFFICE TWO DAYS BEFORE, DEFENDANT WAS DEPRIVED OF AN IMPARTIAL JURY, NEW TRIAL ORDERED.

The First Department, in a full-fledged opinion by Justice Tom, reversing Supreme Court, determined defendant's motion to vacate his conviction should have been granted. After the trial the prosecutor informed the court that a juror in defendant's trial had applied for a job at the district attorney's office two days before jury selection but did not disclose the application during voir dire. Ultimately the juror was hired by the district attorney's office. Although the juror had prior experience on the prosecution side, her position at the time of trial involved white collar criminal defense. Defense counsel stated at the hearing that the juror was chosen because of her criminal defense work and, had defense counsel been aware the juror had applied for work in the district attorney's office, the juror would have been struck: "Here, due to the juror's concealment of material information regarding her job application, which also demonstrated a predisposition in favor of the prosecution, defendant was deprived of an impartial jury comprised of 12 jurors whom he had selected and approved through voir dire. In fact, defendant was tried by only 11 jurors whom he truly selected and approved; this violated his constitutional right to a jury of 12 of his own choice in a criminal case ... . He was also deprived of exercising the various safeguards put into place by our legislature. As defense counsel testified, had the juror timely disclosed this information he would have moved to strike her for cause, and if unsuccessful would have exercised a peremptory challenge against her ... While we recognize that there is no rule requiring automatic reversal in these situations ... , since the verdict was not returned by a fair and impartial jury and we find the juror would have been subject to removal for cause, we agree with defendant that he was denied a fair trial on the ground that he was not tried by a jury of his own choice. We thus remand for a new trial. Critically, the juror remaining on the jury was prejudicial to defendant because he was ultimately convicted by the jury." ***People v. Southall*, 2017 N.Y. Slip Op. 08344, First Dept 11-28-17**

CRIMINAL LAW, EVIDENCE.

DOCTOR WHO OPERATED A PILL MILL FOR PERSONS ADDICTED TO OPIOIDS PROPERLY CONVICTED OF MANSLAUGHTER FOR OVERDOSE DEATHS.

The First Department determined defendant, a doctor accused of operation a "pill mill" for persons addicted to opioids and Xanax, was properly convicted of manslaughter in the overdose deaths of two persons to whom he has supplied drugs: "Defendant argues that the manslaughter convictions should be reversed because, as a matter of law, the sale of a controlled

substance can never support a homicide charge in the absence of express legislative authorization. He bases this position on a Second Department decision, People v. Pinckney (38 AD2d 217 [2d Dept 1972] ...). * * * ... Nothing in Pinckney suggests that one who provides a controlled substance, whether it be heroin by a street dealer, or opioids by a medical doctor, can never be indicted on a manslaughter charge. Indeed, in People v. Cruciani (36 NY2d 304 [1975]), the Court of Appeals affirmed the second degree manslaughter conviction of the defendant, who injected the victim with heroin, because he knew she was already in a highly intoxicated state. The Cruciani Court distinguished Pinckney, because in the latter case there was not 'any proof, as here, of awareness of the ongoing effect of drugs in the victim's body at the time any self-inflicted injection might have been made, or, beyond the general knowledge of the injuriousness of drug-taking, of a real threat to life. The remoteness of that fatal injection from the fact of sale diffused intent and scienter by possibly unknown or intervening events beyond Pinckney's control' ... . At bottom, all that was needed for the manslaughter charge to be sustained was for the People to satisfy its elements. That is, that defendant was 'aware of and consciously disregard[ed] a substantial and unjustifiable risk that [death] [would] occur . . . The risk [being] of such nature and degree that disregard thereof constitute[d] a gross deviation from the standard of conduct that a reasonable person would observe in the situation' ... . The question then becomes whether the People presented sufficient evidence to establish that defendant consciously disregarded the risk that Haeg and Rappold would die as a result of his prescribing practices. ... ". ***People v. Stan XuHui Li*, 2017 N.Y. Slip Op. 08438, First Dept 11-30-17**

CRIMINAL LAW, EVIDENCE.

PAIN AND PRESENCE OF BULLET FRAGMENTS FOUR YEARS AFTER THE SHOOTING WAS SUFFICIENT PROOF OF SERIOUS PHYSICAL INJURY, DISSENT DISAGREED.

The First Department, over a dissent, affirmed the first degree assault convictions. The dissent argued the proof of "serious physical evidence" was not sufficient: "The element of serious physical injury ... required for the assault convictions ... was established by evidence showing that four years after the complainant was struck by a bullet, he still felt pain and the bullet fragments in his leg and could not engage in sports at the same level as before the incident. This proof sufficiently shows a protracted impairment of health or protracted impairment of the function of a bodily organ to support a finding of serious physical injury ... . * * * **From the dissent:** There is no proof of injury connected to the bullet fragments, nor is there proof that [the victim's] life was endangered by the presence of the fragments ... .Notably, the People's expert was unable to opine as to whether [the victim] had suffered permanent deficits associated with the injury. The fact that [the victim] suffered a gunshot wound does not ipso facto establish that he suffered a 'serious physical injury' ...". ***People v. Garland*, 2017 N.Y. Slip Op. 08302, First Dept 11-28-17**

FORECLOSURE, CIVIL PROCEDURE.

MOTION TO VACATE DEFAULT IN THIS FORECLOSURE PROCEEDING SHOULD HAVE BEEN GRANTED, THE REASON FOR THE DEFAULT WAS DEEMED EXCUSABLE, THERE WAS NO PREJUDICE, THERE WERE MERITORIOUS ISSUES RE NOTICE AND STANDING.

The First Department determined Supreme Court should have granted defendant's motion to vacate the default in this foreclosure proceeding. Defendant's counsel had neglected to file opposing papers when plaintiff moved for summary judgment and moved to vacate the default a month later. The failure to answer the motion was deemed excusable. The First Department found merit in defendant's allegations of flaws in the notice provided by the bank, flaws in the bank's proof of standing, and flaws in the bank's proof the note was lost: "The borrower's prior counsel acknowledged that he failed to submit opposition to the summary judgment motion after stipulating to adjourn that motion. However, counsel moved to vacate the default less than one month after Supreme Court's decision was entered. Absent a pattern of dilatory behavior, the default was an excusable, one-time oversight, resulting in no prejudice ... . The borrower raised a colorable notice defense regarding plaintiff's service of the mortgage's 30-day default notice and the requisite 90-day notice under RPAPL 1304 ... . [T]he affidavit of plaintiff's servicing agent failed to indicate that she had familiarity with standard office mailing procedures ... . * * * Plaintiff seeks to foreclose the principal sum of $327,828.34, but there are gaps in its proof. * * * There is also a question as to the sufficiency of the content of the lost note affidavit submitted on summary judgment. The affidavit * * * does not state when the search was made or by whom, and does not indicate approximately when the note was lost. Therefore, the borrower has demonstrated a potentially meritorious standing defense ...". ***US Bank N.A. v. Richards*, 2017 N.Y. Slip Op. 08299, First Dept 11-28-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

AMONG SEVERAL LABOR LAW, NEGLIGENCE AND INSURANCE ISSUES ADDRESSED IN THIS LABOR LAW §§ 240(1), 241(6) AND 200 ACTION, THE SECOND DEPARTMENT DETERMINED SUPREME COURT APPLIED THE WRONG STANDARD IN ITS LABOR LAW 200 ANALYSIS.

The First Department affirmed and reversed several rulings on defendants' motions for summary judgment in this Labor Law §§ 240(1), 241(6), 200, and common law negligence action. Plaintiff was injured when he slipped on a loose piece of sprinkler pipe on property owned by defendant One City. The Second Department determined the correct standard for

analyzing the Labor § 200 cause of action was under the dangerous condition prong, rather than the manner of work prong, of Labor Law § 200 and dismissed that cause of action. There was no proof One City created or knew about the dangerous condition. The Labor Law § 241(6) cause of action properly survived summary judgment because there was a question of fact whether the fall occurred in a passageway that should be kept clear and there was a question fact whether plaintiff was cleaning up the area at the time (which would preclude suit). The Second Department further found that there was a question of fact whether another defendant had purchased insurance as required by a contract with One City. The court also addressed indemnification issues. With regard to the Labor Law § 200 and common law negligence causes of action, the court wrote: "Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work ... . 'Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed' ... .'Where the injury was caused by the manner and means of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work' ... . 'Where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it' ... . Here, the court finds that the appropriate standard to apply in this case is the dangerous condition standard and not the manner and means standard. The cause of the accident, the piece of loose pipe, was not a condition created by the manner in which the work was performed by plaintiff or his employer but was rather a condition that already existed prior to plaintiff's arrival on the fifth floor that day." ***Prevost v. One City Block LLC*, 2017 N.Y. Slip Op. 08303, First Dept 11-28-17**

PERSONAL INJURY, LANDLORD-TENANT.

OUT OF POSSESSION LANDLORD NOT LIABLE FOR INJURY TO PLAINTIFF WHO WAS SHOT ON THE SIDEWALK OUTSIDE THE LESSEE'S BAR.

The First Department determined the out-of-possession landlord (AIMCO) was not liable for plaintiff's injury from a shooting on the sidewalk outside a bar (PJ's)i n the landlord's building: "Dismissal of the complaint as against AIMCO was proper in this action for personal injuries sustained by plaintiff when, while standing on the sidewalk outside a bar owned and operated by codefendant [PJ's], he was shot in the foot. The record demonstrates that AIMCO owned the commercial space and had leased it to PJ's, and as a premises owner, AIMCO cannot be held liable in negligence for an assault that occurred on a public street over which it exercised no control ... . AIMCO also owed plaintiff no duty of care to prevent the incident since the evidence showed that AIMCO was an out-of-possession landlord when the shooting happened ... and while it had the right to reenter the premises for the purpose of effecting repairs, there is no evidence that it retained control over the premises or was involved with how PJ's operated its bar ... .The 2009 stipulation of settlement between nonparty City of New York, AIMCO and PJ's regarding a public nuisance action fails to raise a triable issue, because it expired by its own terms before the shooting and did not require AIMCO to do anything with regard to how the bar was being operated." ***Ballo v. AIMCO 2252-2258 ACP, LLC*, 2017 N.Y. Slip Op. 08443, First Dept 11-3017**

SECOND DEPARTMENT

CRIMINAL LAW.

DENIAL OF PAROLEE'S REQUEST TO LIVE IN HIS FAMILY HOME WAS APPARENTLY BASED UPON COMMUNITY PRESSURE AND WAS REVERSED AS ARBITRARY AND CAPRICIOUS.

The Second Department, reversing Supreme Court, determined the Department of Corrections and Community Supervision (DOCCS) acted arbitrarily and capriciously when it denied petitioner permission to live in his family home (Telford home) after released on parole, apparently based upon community pressure: " 'Pursuant to Executive Law § 259-c(2) and 9 NYCRR 8003.3, special conditions may be imposed upon a parolee's right to release. The courts routinely uphold these conditions as long as they are rationally related to the inmate's past conduct and future chance of recidivism. Acceptable parole restrictions have included geographical restrictions and restrictions requiring that parolees refrain from contact with certain individuals or classes of individuals'... . Under the circumstances of this case, speculation by DOCCS about possible community efforts to exclude the petitioner from otherwise suitable housing and about the petitioner's potential response to such efforts is not a rational basis for denial of otherwise suitable housing ... . As the respondents have articulated no other basis for denying approval of the proposed residence, the respondents' refusal to approve the Telford home as a suitable postrelease residence was arbitrary and capricious, as the determination bears no rational relation to the petitioner's past conduct or likelihood that he will re-offend ...". ***Matter of Telford v. McCartney*, 2017 N.Y. Slip Op. 08384, Second Dept 11-29-17**

FAMILY LAW.

COURT IMPROPERLY DELEGATED ITS AUTHORITY BY ALLOWING MOTHER TO CANCEL VISITATION IF FATHER WAS MORE THAN 15 MINUTES LATE.

The Second Department determined Family Court should not have given mother the power to cancel father's visit with a child if the father was more than 15 minutes late: "The Family Court erred in granting the mother the authority to unilaterally cancel the father's visitation if he were more than 15 minutes late to pick up or drop off the child. This provision did not give the father an opportunity to judicially challenge the mother's determination, or to present a legitimate reason for his tardiness before having a visit canceled ... . Thus, the court improperly delegated its authority to the mother to determine when the child would visit with the father ...". ***Matter of Michael R. v. Aliesha H.*, 2017 N.Y. Slip Op. 08377, Second Dept 11-29-17**

FAMILY LAW, APPEALS.

FATHER WHO WAS EXCLUDED FROM THE HOME AFTER CHILD ABUSE ALLEGATIONS HAD A RIGHT TO AN EXPEDITED HEARING PURSUANT TO FAMILY COURT ACT § 1028, BECAUSE THE ISSUE IS IMPORTANT AND LIKELY TO RECUR THE MOOTNESS DOCTRINE WAS NOT APPLIED TO PRECLUDE APPEAL.

The Second Department, in a comprehensive, full-fledged opinion by Justice Mastro (not fully summarized here), reversing Family Court, determined father, who had been excluded from the home because of sexual abuse allegations involving a child, was entitled to an expedited hearing pursuant to Family Court Act § 1028. Although the father had been returned to the home by the time the appeal was heard, the court deemed the issue important and likely to recur thereby warranting an exception to the mootness doctrine: "Since the removal of a child from the family home and the exclusion of a parent from that same home require equal showings of imminent risk, and both result in similar infringements on the constitutionally protected parent-child relationship, we conclude that both trigger the same due process protections. Accordingly, in cases such as the one before us, where no 'imminent risk' hearing is held before the parent is excluded from the household and the parent-child relationship is thereby severed, the holding of an expedited hearing within three court days pursuant to Family Court Act § 1028, upon the parent's request, is mandated so that the question of reunification of the parent and child pending resolution of the proceeding may be determined. Due process requires the parent's prompt, full, and fair opportunity to contest his or her exclusion from daily interaction with his or her children in this manner." ***Matter of Elizabeth C. (Omar C.)*, 2017 N.Y. Slip Op. 08370, Second Dept 11-29-17**

FORECLOSURE, ATTORNEYS.

INTEREST MUST BE RECALCULATED AND ATTORNEY'S FEES MUST BE SHOWN TO BE REASONABLE, PERHAPS IN A HEARING, IN THIS FORECLOSURE ACTION.

The Second Department determined the amount of interest and attorney's fees in this foreclosure proceeding must be recalculated. There was a three-year delay (which was not plaintiff's fault) for which interest should not have accrued. In addition there must be some showing the attorney's fees reflect the work actually done: " 'In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party' ... . Here, in view of the lengthy delay by PE-NC's [plaintiff's] predecessors in interest in prosecuting this action, PE-NC should recover no interest for the roughly three-year period of time from when the action was commenced in 2005 to when the defendant filed a request for judicial intervention in 2008. While PE-NC did not cause this delay, it should not benefit financially, in the form of accrued interest, from this delay caused by its predecessors in interest. Furthermore, PE-NC should not recover interest on the counsel fees awarded to it. Paragraphs 7 and 21 of the mortgage are inconsistent regarding whether interest could be recovered on counsel fees. Since 'ambiguities in a contractual instrument will be resolved contra proferentem, against the party who prepared or presented it' ... , this ambiguity must be resolved against PE-NC, whose predecessors in interest presented the mortgage. Moreover, interest awarded under paragraph 7 of the mortgage, on money advanced to protect the lender's rights in the property, should not have been awarded at the rate of 17%, but at the "Note rate," which, in this case, was 7.25%. 'An award of an attorney's fee pursuant to a contractual provision may only be enforced to the extent that the amount is reasonable and warranted for the services actually rendered. In determining reasonable compensation for an attorney, the court must consider such factors as the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation' ... . In this case, a determination must be made on the reasonableness of the counsel fees, following a hearing on that issue, if necessary". ***Greenpoint Mtge. Corp. v. Lamberti*, 2017 N.Y. Slip Op. 08353, Second Dept 11-29-17**

FRAUD, CONTRACT LAW.

FRAUDULENT INDUCEMENT AND DEMAND FOR PUNITIVE DAMAGES SHOULD NOT HAVE BEEN DISMISSED IN THIS BREACH OF CONTRACT ACTION, PLAINTIFF ALLEGED AIR AMBULANCE WAS NOT EQUIPPED WITH PROPER EQUIPMENT AND PERSONNEL.

The Second Department determined plaintiff's fraudulent inducement cause of action and the punitive damages demand should not have been dismissed. Plaintiff contracted with defendants to transport his brother by air ambulance from Puerto Rico to New York. Plaintiff alleged no respiratory therapist was on the plane and the plane was not equipped with advanced life support equipment: "The Supreme Court erred in granting that branch of the defendants' cross motion which was for summary judgment dismissing the cause of action alleging fraudulent inducement. Contrary to the court's determination, the cause of action alleging fraudulent inducement was not duplicative of the breach of contract cause of action, as it alleged that the defendants made misrepresentations of present fact that were collateral to the contract and served as an inducement to enter into the contract ... .Contrary to the defendants' contention, they failed to establish, prima facie, that their alleged misrepresentations of fact were not false and, therefore, not misrepresentations at all ... . The Supreme Court also erred in granting that branch of the defendants' cross motion which was for summary judgment dismissing so much of the complaint as sought to recover punitive damages. The defendants failed to make a prima facie showing that they did not engage in conduct having a high degree of moral culpability which manifested a conscious disregard for the rights of others or conduct so reckless as to amount to such disregard ...". ***Greenberg v. Meyreles*, 2017 N.Y. Slip Op. 08351, Second Dept 11-20-17**

PERSONAL INJURY.

DEFENDANTS FAILED TO DEMONSTRATE THEY DID NOT CREATE OR HAVE NOTICE OF THE ICE-SNOW CONDITION ON THE SIDEWALK IN THIS SLIP AND FALL CASE, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this sidewalk slip and fall case should not have been granted. Defendants failed to show that they did not create the dangerous snow-ice condition or have notice of it: "Here, the defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law ... . Their own submissions, which included, inter alia, the deposition testimony of the plaintiff and the defendants' superintendent, in addition to a certified weather report for the month of February 2014, failed to eliminate all triable issues of fact as to the whether the defendants caused or exacerbated the alleged icy condition on the subject sidewalk or had notice of it. The plaintiff testified that, at the time of the accident, she slipped on ice on the path which had been shoveled through the snow on the sidewalk adjacent to her apartment building. She also testified that the path was slippery when she had used it the night before and that she did not observe any salt or sand on it. Although the building superintendent testified as to general snow removal procedures for the building, he could not remember what he did on the date of the accident and did not have an independent recollection of removing snow from the outside of the building at any time on either February 3, 2014, or February 4, 2014. His testimony conflicted with statements set forth in his affidavit, submitted in support of the motion, in which he stated that he personally checked the path at issue at the end of his shift at 5:00 p.m. on February 4, 2014, and did not observe any snowy and/or icy condition. Such contradictory statements raise an issue of credibility which cannot be resolved on a motion for summary judgment ... . Further, the certified weather report demonstrated that there was an accumulation of 6.7 inches of snow as of 5:00 p.m. on February 3, 2014, approximately 26½ hours prior to the accident, and that no snow fell on the date of the accident. Consequently, the defendants did not establish, prima facie, that they neither created the alleged hazardous icy condition on the sidewalk nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ...". ***Michalska v. Coney Is. Site 1824 Houses, Inc.*, 2017 N.Y. Slip Op. 08365, Second Dept 11-29-17**

PERSONAL INJURY.

DEFENDANTS SUBMITTED CONFLICTING EVIDENCE ABOUT THE WEATHER IN THIS SLIP AND FALL CASE, SUMMARY JUDGMENT PURSUANT TO THE STORM IN PROGRESS RULE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined a question of fact about the storm in progress proof precluded summary judgment in favor of the defendants in this slip and fall case. In support of the motion, defendants submitted plaintiff's deposition testimony and climatological data. Because there was a conflict between those two sources of evidence, summary judgment was not available: " 'Under the storm in progress rule,' a landowner generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter' ... . Here, the defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law dismissing the complaint ... based on the storm in progress rule. The climatological data submitted by the defendants in support of their motion contradicted the plaintiff's deposition testimony, which the defendants also submitted, as to whether precipitation was falling at or near the time of the accident. Since the evidence submitted by the defendants was in conflict and, thus, could not establish, prima facie, that the storm in progress rule applied ... , the court should have denied

that branch of their motion which was for summary judgment dismissing the complaint ... regardless of the sufficiency of the plaintiff's opposition papers ...". ***Pecoraro v. Tribuzio*, 2017 N.Y. Slip Op. 08386, Second Dept 11-29-17**

PERSONAL INJURY.

DEFENDANT ATTEMPTED A TURN IN VIOLATION OF THE VEHICLE AND TRAFFIC LAW WHICH CONSTITUTED NEGLIGENCE PER SE, CO-DEFENDANTS, WHOSE TRUCK COLLIDED WITH THE CAR DRIVEN BY THE DEFENDANT WHO VIOLATED THE VEHICLE AND TRAFFIC LAW, ENTITLED TO SUMMARY JUDGMENT.

The Second Department determined the truck defendants' (Crown and Kumar's) motion for summary judgment in this traffic accident case should have been granted. Another defendant, Ferreira, had cut the truck off attempting to make a right turn from the left lane. Ferreira's actions were the sole proximate cause of the accident: "Ferreira's testimony indicated that she violated Vehicle and Traffic Law § 1128(a), which states that '[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.' Therefore, she was negligent as a matter of law ... . The appellants further established that Kumar was not negligent, since he took prompt evasive action by applying his brakes hard. Thus, by demonstrating that Ferreira was negligent and that her negligence was the sole proximate cause of the accident, the appellants established their prima facie entitlement to judgment as a matter of law. In opposition, the plaintiff and Ferreira failed to raise a triable issue of fact. Accordingly, the appellants' motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against them should have been granted." ***Pipinias v. Ferreira*, 2017 N.Y. Slip Op. 08400, Second Dept 11-29-17**

ZONING, CIVIL PROCEDURE, ENVIRONMENTAL LAW.

ALTHOUGH THE PLANNING BOARD HELD THAT IT HAD JURISDICTION OVER THE PROPOSED DEVELOPMENT, A FINDING WITH WHICH PETITIONERS DISAGREED, THE BOARD ALSO HELD THE PETITIONERS COULD APPLY FOR A HARDSHIP EXEMPTION WHICH WAS NOT DONE, THE ACTION IS THEREFORE PREMATURE.

The Second Department determined the action seeking a declaration whether a proposed development was within the jurisdiction of the planning board was premature. Although the board found it had jurisdiction, it also indicated the landowner could obtain a hardship exemption which would allow development: "Here, the Planning Commission's initial finding that the proposed subdivision constituted 'development' within the meaning of the Act (see Environmental Conservation Law § 57-0107[13]; see also Central Pine Barrens Comprehensive Land Use Plan § 4.3.5) did not constitute a final determination prohibiting the petitioners from subdividing the property in accordance with their proposal. As the Planning Commission's determination indicated, the petitioners may still obtain a hardship exemption, which would render the proposed residential use of the property authorized ... . Since the petitioners failed to adequately allege that they suffered an actual concrete injury, the Supreme Court properly granted the respondents' motion to dismiss the proceeding as premature ...". ***Matter of Equine Facility, LLC v. Pavacic*, 2017 N.Y. Slip Op. 08371, Second Dept 11-29-17**

THIRD DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY.

PLAINTIFF'S DAUGHTER DIED AFTER THE LAWSUIT HAD BEGUN, MOTION TO AMEND THE COMPLAINT TO ADD A CAUSE OF ACTION FOR WRONGFUL DEATH PROPERLY GRANTED, NO MEDICAL PROOF OF A CAUSAL CONNECTION BETWEEN THE DEATH AND THE ALLEGATIONS IN THE COMPLAINT REQUIRED.

The Third Department determined plaintiff's motion to amend the complaint to add a cause of action for wrongful death was properly granted. Plaintiff's daughter died after the lawsuit had begun. She had ingested a harmful substance at a festival and the complaint alleged the failure to prevent the use of drugs at the festival and the inadequacy of medical treatment facilities at the festival. Defendants argued there was insufficient evidence of a causal link between the ingestion of the harmful substance and plaintiff's daughter's death: "... [D]efendants failed to meet their burden of demonstrating either prejudice or hindrance and, on these facts, they cannot credibly claim surprise from the proposed amendment... . Moreover, we have previously recognized that plaintiff has a viable negligence cause of action based upon allegations that decedent's injuries were caused by defendants' failure to ensure that she received adequate and timely emergency medical care ... . Defendants have not demonstrated that the amendment, which adds a cause of action for wrongful death based upon that negligence ... , is 'palpably insufficient or patently devoid of merit' ... . To the extent that defendants argue that the motion for leave to amend to add a cause of action for wrongful death must be supported by competent medical proof showing a causal connection between their alleged negligence and decedent's death, they are incorrect. Prior decisions have held that, '[w]here a plaintiff seeks to amend a complaint *alleging medical malpractice* to add a cause of action for wrongful death, such motion must be accompanied by 'competent medical proof showing a causal connection between the alleged negligence and the decedent's death' ...". ***Matter of Bynum v. Camp Bisco*, LLC, 2017 N.Y. Slip Op. 08433, Third Dept 11-30-17**

CRIMINAL LAW, EVIDENCE.

PROSECUTION CAN NOT USE THE DOCTRINE OF COLLATERAL ESTOPPEL, BASED UPON A PRIOR ATTEMPTED MURDER CONVICTION, TO PROVE INTENT IN A MURDER PROSECUTION STEMMING FROM THE DEATH OF THE SAME VICTIM, EVIDENCE PRESENTED TO THE GRAND JURY INSUFFICIENT, INDICTMENT DISMISSED.

The Third Department, in a full-fledged opinion by Justice Mulvey, determined the prosecution could not use the doctrine of collateral estoppel to fulfill its proof requirements at the grand jury stage. Defendant had been convicted of attempted murder, which included the intent to kill. After the victim died, the People indicted the defendant for murder. The grand jury was told the intent element had already been proven and the grand jury need only consider causation. The Third Department noted the difference between the application of collateral estoppel in civil and criminal cases. From the defendant's perspective, using the collateral estoppel doctrine in this context violated defendant's constitutional rights: "While the People argue that their offensive use of collateral estoppel is fair play, in that had defendant been acquitted of attempted murder, he would defensively rely on collateral estoppel principles to argue against a subsequent murder trial, this analysis overlooks the obvious and critical difference between an accused's defensive use of this doctrine and a prosecutor's strategic use of it against an accused. An accused's defensive invocation of this doctrine implicates and protects constitutional rights — to a jury trial, to present a defense, to due process and to not be placed twice in jeopardy, among others — whereas the People's affirmative use is for matters of expediency and economy and lacks a constitutional imperative ... . A California intermediate appellate court that confronted this identical issue over 20 years ago similarly concluded that this strategic use of collateral estoppel was inconsistent with due process, noting that 'the pursuit of judicial economy and efficiency may never be used to deny a defendant . . . a fair trial,' and that instructing a jury that a murder trial was limited to causation created an impermissible 'gravitational pull towards a guilty verdict' ...". ***People v. Morrison*, 2017 N.Y. Slip Op. 08405, Third Dept 11-30-17**

DEBTOR-CREDITOR, CONTRACT LAW, CRIMINAL LAW.

ORAL AGREEMENT BETWEEN TWO BOOKMAKERS FOR REPAYMENT OF A $170,000 LOAN ENFORCEABLE, DESPITE THE MONEY-LAUNDERING PURPOSE.

The Third Department, over a two-justice dissent, determined that the trial court's finding that an oral agreement concerning the repayment of a $170,000 loan was enforceable, because the loan could have been paid off within a year (re: the statute of frauds). Both plaintiff and defendant were bookmakers who had been convicted of promoting gambling. The fact that plaintiff refused to answer questions about whether he paid income tax on the proceeds, based upon the Fifth Amendment, did not affect the result because there was nothing illegal about the loan agreement itself. The two dissenters argued the parties were engaged in money laundering and the loan agreement should not be enforced as a matter of public policy: "We are mindful that plaintiff testified that the source of the loan proceeds was cash obtained through his illegal bookmaking activities. Indeed, both plaintiff and defendant were convicted of promoting gambling and required to pay fines in the amount of $100,000 and $50,000, respectively. Although plaintiff asserted his Fifth Amendment right against self-incrimination when asked whether he ever reported the cash as income, we are not persuaded by defendant's contention that Supreme Court erred in failing to draw a negative inference because the source and/or taxable status of the funds was not probative of the issue presented. According due deference to Supreme Court's credibility assessments, we find ample evidence to support the determination that plaintiff and defendant agreed to the loan that defendant breached by failing to make all of the payments due... . Contrary to defendant's argument, because there was nothing prohibiting defendant from repaying the loan within one year, the statute of frauds did not bar enforcement of the oral agreement ... . We also find that defendant waived his right to challenge the loan on the basis of illegality because it was not raised as an affirmative defense ... . Were we to consider the issue, we would find that, because neither the agreement nor the performance of the agreement was illegal, the judgment was enforceable ...". ***Centi v. McGillin*, 2017 N.Y. Slip Op. 08430, Third Dept 11-30-17**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW.

TRANSFER OF ASSISTANT SUPERINTENDENT TO A LOWER PAYING JOB WAS NOT DISCIPLINE UNDER THE EDUCATION LAW AND DID NOT CONSTITUTE A DUE PROCESS VIOLATION.

The Third Department determined that the transfer of a school assistant superintendent to another job with lower pay did not violate the Education Law (pay reduction was not discipline) or due process (deprivation of property without due process of law): "... [W]e conclude that the term 'discipline[]' in Education Law § 3020 refers not merely to action that has an adverse impact, but adverse action that is motivated by a punitive intent. Case law applying and interpreting Education Law § 3020 supports our reading of the statute. 'The purpose of [Education Law § 3020] is to protect [tenured educators] from arbitrary imposition of formal discipline. It was not intended to interfere with the day-to-day operation of the educational system' ... . * * * Petitioner's reliance on cases involving employees covered under Civil Service Law § 75, which prohibits imposition of a 'disciplinary penalty' without a hearing, is misplaced. While it has been held that a lateral transfer of a tenured civil service employee that results in a diminution of salary or benefits constitutes a form of discipline requiring compliance with the procedural safeguards of Civil Service Law § 75 ... , this is so because Civil Service Law § 75 specifically

provides that a 'demotion in grade and title' constitutes a disciplinary penalty ... . No comparable statutory language exists within the Education Law. * * * Here, petitioner's right to receive the specific level of compensation earned in his position as Assistant Superintendent derived not from any tenure rights granted under the Education Law, but solely from the terms of his employment contract. Such contract expired on June 30, 2012, prior to the alleged deprivation. Moreover, the contract makes clear that it does not provide for the payment of salary beyond that date and that renewal or extension of its terms could only be effectuated by agreement of the Board. Under these circumstances, petitioner did not have a constitutionally protected property interest in the compensation and benefits derived from his employment contract beyond its June 30, 2012 expiration date ...". ***Matter of Soriano v. Elia*, 2017 N.Y. Slip Op. 08431, Third Dept 11-30-17**

EMPLOYMENT LAW, PUBLIC OFFICERS LAW, CRIMINAL LAW.

CORRECTIONS OFFICER'S OFFICIAL MISCONDUCT PLEA ALLOCUTION DID NOT ADDRESS ALL THE ALLEGATIONS IN THE INMATE'S CIVIL COMPLAINT AGAINST THE OFFICER, THEREFORE THE STATE WAS OBLIGATED TO DEFEND THE OFFICER IN THE CIVIL PROCEEDING.

The Third Department determined the state was obligated to defendant the petitioner, a corrections officer, in a civil action brought by an inmate against the petitioner. The state argued its obligation to defend the petitioner ended when petitioner pled guilty to official misconduct. The court found that the sparse plea allocution did not indicate the acts alleged in the civil complaint were outside the scope of petitioner's employment, the allegations in the bill of particulars could not be used to supplement the plea allocution, and the plea did not address at all some of the allegations in the civil complaint: "As is the case in the private insurance realm, the state's determination to disclaim financial responsibility for an employee's defense is rational only if it can be determined, as a matter of law, 'that there is no possible factual or legal basis on which the [s]tate may be obligated to indemnify the employee' ... . Pursuant to Public Officers Law § 17 (3) (a), the state has an obligation to indemnify its employees for any judgment or settlement obtained against them in state or federal court, so long as 'the act or omission from which [the] judgment or settlement arose occurred while the employee was acting within the scope of his [or her] public employment or duties' and 'the injury or damage [did not] result[] from intentional wrongdoing on the part of the employee.' Stated differently, the state will not have a duty to indemnify an employee if the act or omission giving rise to the civil judgment or settlement occurred outside the scope of his or her employment or was the product of intentional wrongdoing ... . Generally, 'a particular issue expressly or necessarily decided in a criminal proceeding may be given preclusive effect in a subsequent affected civil action' if 'the issue is identical in both actions, necessarily decided in the prior criminal action[,] . . . decisive in the civil action [and the defendant in the criminal action] had a full and fair opportunity . . . to litigate the now-foreclosed issue' ... . Contrary to respondent's contentions, neither petitioner's plea allocution nor the elements of official misconduct preclusively established that the acts alleged in the civil complaint occurred while petitioner was acting outside the scope of his employment or that the injuries or damages allegedly sustained by [the inmate] were the result of petitioner's intentional wrongdoing ...". ***Matter of Rademacher v. Schneiderman*, 2017 N.Y. Slip Op. 08416, Third Dept 11-30-17**

FAMILY LAW, EVIDENCE.

FAMILY COURT RELINQUISHED ITS FACT-FINDING FUNCTION TO THE BIASED FORENSIC EVALUATOR AND FAILED TO CONSIDER THE CUSTODY-RELOCATION MODIFICATION FACTORS.

The Third Department, in a full-fledged opinion by Justice Clark, modifying Family Court's custody/relocation ruling, determined Family Court relinquished its fact-finding role by adopting the findings and recommendations of the forensic evaluator, in the face of the evaluator's obvious bias in favor of the father. Family Court had granted sole custody to the father in North Carolina, without evaluating the custody/relocation-modification factors, despite the child's life-long residence in New York and evidence of a supportive home life: "In its decision and order, Family Court recognized that the testimony given by the forensic evaluator 'demonstrated[,] at times[,] a little less than neutral tone' and that it was apparent from her testimony that she was 'challenged in her dealings' with the mother and her husband. Nevertheless, Family Court wholly adopted the forensic evaluator's factual assertions, opinions, conclusions and recommendations, without any perceivable independent consideration given to the best interests of the child. In doing so, the court improperly delegated its fact-finding role and ultimate determination to the forensic evaluator... . We emphasize that '[t]he recommendations of court[-]appointed experts are but one factor to be considered' and, although entitled to some weight, such recommendations are not determinative and should not usurp the trial court's independent impressions of the evidence and conclusions drawn from that evidence ... . [I]n granting the father sole legal and primary physical custody of the child, Family Court did not engage in an assessment of the relocation factors ... . Had the court done so, it would have been apparent that the father's proof was lacking in this regard. Neither the father nor the forensic evaluator offered demonstrable proof, such as photographs or a home study, as to the suitability of the father's home. In commenting on the quality of the father's home environment, the forensic evaluator relied solely on her assumptions and the self-serving representations made by the father." ***Matter of Montoya v. Davis*, 2017 N.Y. Slip Op. 08434, Third Dept 11-30-17**

INSURANCE LAW.

QUESTION OF FACT ABOUT WHETHER THE FIRE DAMAGED PROPERTY WAS PLAINTIFF'S RESIDENCE REQUIRED DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS DISCLAIMER ACTION.

The Third Department determined plaintiff's motion for summary judgment in this action against a homeowner's insurance company for disclaiming coverage was properly denied. Coverage for fire damage was disclaimed based upon the allegation the property was not plaintiff's residence. Apparently plaintiff lived elsewhere, at least part of the time, while the house was being extensively renovated: "Plaintiff testified that she slept at the premises on several occasions, an average of two to four nights per week, and that she intended for the premises to be her permanent residence once renovations were completed. During his deposition, Larrea [the insurer's claim investigator] testified that he obtained a statement from plaintiff shortly after the fire in which she stated that she was not living at the premises. In opposition to the motion, defendant submitted an affidavit from Larrea, who averred that when he interviewed plaintiff by telephone eight days after the fire, she stated that at the time of the fire that she was in the process of relocating from her father's home to the apartment and, notably, that she had not been to the premises during the two weeks immediately preceding the fire and had stayed overnight at the premises only once. On this record, plaintiff's summary judgment motion was properly denied. The Court of Appeals has held that evidence similar to the record in this case presented issues of fact regarding residency that precluded the grant of summary judgment ... . Moreover, as Supreme Court correctly held, the contradictory statements that plaintiff made regarding the extent of her own physical presence at the premises are alone sufficient to create an issue of fact that may not be resolved by summary judgment." ***Sosenko v. Allstate Ins. Co.*, 2017 N.Y. Slip Op. 08425, Third Dept 11-30-17**

PERSONAL INJURY.

MANNER IN WHICH DECORATIONS WERE STACKED IN A STORE DID NOT PRESENT A FORESEEABLE RISK, RES IPSA LOQUITUR DOCTRINE DID NOT APPLY.

The Third Department determined defendant store's motion for summary judgment in this slip and fall case was properly granted because the manner in which Christmas decorations were stacked did not present a foreseeable risk. Plaintiff was taking down a Christmas decoration when things started to fall from the shelf: "Plaintiff testified that while taking down garland, she felt a snag on the garland and, when she turned back and saw that the garland was attached to a loop of garland above it, she saw — through her peripheral vision — 'stuff' starting to fall and, when she started to move her feet, she fell. Plaintiff further testified that she did not trip over anything and was not struck by anything before she fell, nor did she strike anything on the way down as she fell. In opposition to defendant's motion, plaintiff submitted defendant's Holiday Sales Planner and Stocking Procedural Manual. Plaintiff also submitted an affidavit of plaintiff's expert witness — a retail sales merchandising specialist, consultant and planner — who attested to the proper, correct and safe way to install, stock and display consumer products and merchandise for sale to the public in retail stores. However, such testimony failed to demonstrate how the location and stocking of the garland presented a foreseeable risk. Therefore, plaintiff failed to raise a triable issue of fact that plaintiff's injury was reasonably foreseeable ... . Supreme Court properly found that there was 'nothing about the nature of packages of garland falling from above that would lead a reasonable person to foresee said garland knocking a person to the ground and/or breaking a person's wrist.' Supreme Court also correctly found that the doctrine of res ipsa loquitur did not apply. 'The doctrine cannot be used where, as here, the defendant against whom the doctrine is asserted owes no duty in connection with the mechanism that caused the injury' ...". ***Parke v. Dollar Tree, Inc.*, 2017 N.Y. Slip Op. 08427, Third Dept 11-30-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DRIVER WITH RIGHT OF WAY HAD TIME TO TAKE EVASIVE ACTION TO AVOID A CAR CROSSING HIS PATH TO MAKE A LEFT TURN.

The Third Department determined a question of fact precluded summary judgment in favor of defendant in this truck-car intersection collision case. The defendant truck driver, Head, alleged the driver of the car in which plaintiff was a passenger (Sinclair) made a left turn across the truck's path and Head did not have time to avoid the collision. However an eyewitness, Fuller, testified there was sufficient time for the truck driver to take evasive action: "In this context, Head 'was bound to see what[,] by the proper use of [his] senses[,] [he] might have seen' and, if the circumstances were as described by Fuller, and if Head should have observed Sinclair's car turning left, 'then the accident would be a reasonably foreseeable risk and [Head] would have had a duty to avoid striking [Sinclair], if it were possible to do so'... . Fuller's materially different version of the accident, if credited, could support the conclusion that Head had adequate time and opportunity to observe Sinclair's turning car and take evasive action ... . That is, Head had 'a duty to use reasonable care to avoid a collision' and, unless he had 'only seconds to react' to Sinclair's failure to yield the right-of-way, an issue disputed by plaintiff's evidence, Head may be partly at fault ...". ***Debra F. v. New Hope View Farm*, 2017 N.Y. Slip Op. 08429, Third Dept 11-30-17**

TAX LAW.

HOTEL NOT ENTITLED TO CREDIT FOR SALES TAX FOR CONTINENTAL BREAKFASTS PURCHASED FROM A THIRD PARTY, CONTINENTAL BREAKFASTS WERE INCLUDED IN THE ROOM RENTAL AND WERE NOT PURCHASED FOR RESALE.

The Third Department determined the hotel (Washington Square) which included continental breakfast in its room rental was not entitled to a credit for sales tax paid by the hotel for the purchase of the continental breakfasts (from Cafe C-III): "Generally, sales tax must be paid upon the sale of all tangible personal property ... . However, '[c]ertain purchases which are made for resale are not subject to sales tax' ... . As such, a reseller may claim a tax credit for sales tax it paid upon purchases of personal property that will be resold ... . 'Where the question is whether certain purchases are entitled to the resale exemption, the purchaser must show, to avoid imposition of the sales tax on the entire transaction, that each of the items was purchased for one and only one purpose: resale' ... . * * * We conclude that Washington Square failed to satisfy its burden of establishing its entitlement to the benefit of the resale tax exemption ... . According to the hearing testimony of Washington Square's chief executive officer, Washington Square purchased continental breakfasts from Cafe C-III and such breakfasts were included in the hotel rental fee paid by the guests. Washington Square paid Cafe C-III regardless of whether a guest consumed the continental breakfast. More critically, the chief executive officer also stated that hotel guests would not be separately billed for the continental breakfasts ... . Nor do we find any merit in Washington Square's equitable estoppel argument. '[T]he doctrine of estoppel does not apply in tax cases unless unusual circumstances support a finding of manifest injustice' ... . The fact that Washington Square, in a prior audit, was not imposed an additional tax assessment where it sought the same tax credit as in this case does not rise to the level of a manifest injustice especially in light of the auditor's testimony that each audit stands on its own and does not bind a future audit ... . Washington Square's reliance on an audit of Cafe C-III is likewise unavailing." ***Matter of Washington Sq. Hotel LLC v. Tax Appeals Trib. of The State of New York*, 2017 N.Y. Slip Op. 08422, Third Dept 11-30-17**

WORKERS' COMPENSATION LAW, NEGLIGENCE.

NEGLIGENCE AND GROSS NEGLIGENCE CAUSES OF ACTION AGAINST AN ACTUARY FOR AN INSOLVENT WORKERS' COMPENSATION TRUST PROPERLY SURVIVED MOTIONS TO DISMISS.

The Third Department determined several motions to dismiss were properly denied in this action concerning an insolvent workers' compensation trust. Defendant Regnier provided actuarial services and prepared certain actuarial reports on an annual basis for the trust. In addition to many other causes of action not summarized here, the Third Department held that the negligence and gross negligence causes of action properly survived: "We reject Regnier's assertion that the negligence and gross negligence claims should have been dismissed in their entirety because plaintiff failed to allege that it owed the trust a duty of care. '[A]n actuary, possessing special knowledge, can be held liable for the negligent performance of its services' ... . The second amended complaint alleged that Regnier held itself out as a skilled and competent actuary, that Regnier prepared actuarial reports to the trust, and that Regnier failed to provide competent actuarial services. More critically, the second amended complaint further alleged that Regnier knew that the trust would be relying on the accuracy of such reports and that Regnier was aware that its services were employed to represent the trust's finances. Under these circumstances and viewing the allegations in a light most favorable to plaintiff, we conclude that there were sufficient allegations of near privity to survive a motion to dismiss with respect to the negligence and gross negligence claims ...". ***New York State Workers' Compensation Bd. v. Program Risk Mgt., Inc.*, 2017 N.Y. Slip Op. 08426, Third Dept 11-30-17**

ZONING, EDUCATION-SCHOOL LAW.

SCHOOLS ARE NOT IMMUNE FROM ZONING REGULATIONS, ZONING BOARD PROPERLY DENIED SCHOOL DISTRICT'S VARIANCE APPLICATION FOR AN ELECTRONIC SIGN.

The Third Department, in a full-fledged opinion by Justice McCarthy, rejected the school's argument that it was immune from zoning restrictions. The school had erected an electronic sign which violated the zoning code and the zoning board had denied the school's application for a variance: "... [T]he Court of Appeals noted that '... general rules . . . were interpreted by some courts to demand a full exemption from zoning rules for all educational and church uses' — an interpretation that "'s mandated neither by the case law of our [s]tate nor common sense' ... . The Court clarified that it never intended to 'render municipalities powerless in the face of a religious or educational institution's proposed expansion, no matter how offensive, overpowering or unsafe to a residential neighborhood the use might be,. and renewed its rejection of the existence of "any conclusive presumption of an entitlement to an exemption from zoning ordinances' for schools ... . The Court thus concluded that 'there are many instances in which a particular educational or religious use may actually detract from the public's health, safety, welfare or morals [and, i]n those instances, the institution may be properly denied' ... . Accordingly, the Court held that the presumed beneficial effects of schools and churches 'may be rebutted with evidence of a significant impact on traffic congestion, property values, municipal services and the like,' because the 'inherent beneficial effects . . . must be weighed against their potential for harming the community' ... . * * * The ZBA provided rational reasons for its

determination, including a concern for traffic safety due to the sign's brightness and potential to be more distracting and hazardous to passing motorists than an ordinary sign ... . That determination was not arbitrary or capricious." ***Matter of Ravena- Coeymans-Selkirk Cent. Sch. Dist. v. Town of Bethlehem*, 2017 N.Y. Slip Op. 08428, Third Dept 11-30-17**

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