CasePrepPlus

December 27, 2017

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

Editor: **Bruce Freeman**

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COURT OF APPEALS

CRIMINAL LAW, ATTORNEYS.

DETERMINATION OF MOTION TO TAKE A BUCCAL SWAB FOR DNA TESTING IS A CRITICAL STAGE OF THE PROCEEDINGS REQUIRING REPRESENTATION BY COUNSEL, BECAUSE DEFENSE COUNSEL HAD BEEN RELIEVED, DEFENDANT'S GUILTY PLEAS MUST BE VACATED.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over an extensive three-judge dissent, determined defendant was deprived of counsel at a critical stage of the prosecution, i.e., when the People made a motion to take a buccal swap for DNA testing. The appellate division properly vacated defendant's pleas, but should not have dismissed the indictment: "Here, the People filed their motion to compel the DNA test and served the motion on retained counsel in court. As the Appellate Division found, the trial court — in defendant's absence — subsequently granted both the retained defense counsel's motion to be relieved from representing defendant for failure to pay his fee and the People's DNA discovery motion, which it granted based on the 'putative consent' it inferred from retained counsel's silence. Later the same day that counsel was relieved, defendant appeared in court. Knowing defendant was unrepresented, the court, rather than remain neutral, proceeded to act in place of counsel throughout an extensive colloquy, telling defendant that there were no bases on which to challenge the DNA sample order. In response to the court, defendant stated that he had not spoken with his attorney about the prosecution's motion and did not wish to consent to giving a sample. Notwithstanding defendant's entreaties, the court rejected his repeated requests for an attorney to advise him regarding the motion. Instead, the court told defendant 'an attorney [was] not going to be able to help,' and that there was 'no basis for fighting [the test].' When defendant said he did not 'know the law,' the judge responded 'I know the law.' On these facts, the Appellate Division correctly determined that 'the pretrial proceedings concerning the DNA test were 'critical' within the meaning of the law ...' . Accordingly, defendant was deprived his right to counsel." ***People v. Smith*, 2017 N.Y. Slip Op. 08798, CtApp 12-19-17**

FAMILY LAW.

FAMILY COURT MAINTAINED JURISDICTION TO ISSUE A FINAL ORDER OF PROTECTION FOR VIOLATION OF A TEMPORARY ORDER OF PROTECTION AFTER THE FAMILY OFFENSES, WHICH LED TO THE TEMPORARY VIOLATION OF PROTECTION, HAD BEEN DISMISSED.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a two-judge dissent, determined that Family Court had jurisdiction to issue a final order of protection, based upon the violation of a temporary order of protection, after the underlying family offense petition (which led to the temporary order of protection) had been dismissed: "Family Court held a combined hearing on the family offense and consolidated violation petitions. ... Family Court dismissed the family offense petition, but sustained the violation petition and issued a one-year final order of protection … . Family Court Act §§ 846 and 846-a contain no language tying Family Court's authority to impose specific penalties for the willful violation of a temporary order of protection to the court's determination of whether or not the family offense petition, itself, should be sustained ... . Significantly, there is no basis in the statutory text upon which we may draw any distinction between Family Court's jurisdiction over violations of final orders of protection entered after a finding of a family offense, on the one hand, and violations of temporary orders of protection entered during the pendency of the family offense proceeding, on the other. Further, the statutory scheme makes clear that conduct constituting a violation of the order of protection need not necessarily constitute a separate family offense in order for the court to have jurisdiction over the violation. Indeed, section 846-a contains no such requirement." ***Matter of Lisa T. v. King E.T.*, 2017 N.Y. Slip Op. 08800, CtApp 12-19-17**

MUNICIPAL LAW, ADMINISTRATIVE LAW.

NYC WATER BOARD'S RATE HIKE AND BILL CREDIT WERE NOT IRRATIONAL, ARBITRARY OR CAPRICIOUS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge dissent, reversing the appellate division, determined the rate hike imposed by the NYC Water Board was not arbitrary and capricious. The board imposed a 2.1% rate increase, a bill credit, and assistance programs and low-consumption rate freeze. Petitioners — various landlords not eligible for the bill credit and a landlords' not-for-profit association — ... assert that the Water Board's determinations were irrational, arbitrary and capricious, and exceeded the Board's authority: "Our case law holds that a utility has 'unfettered

discretion to fix [rates] as it will so long as invidious illicit discriminations are not practiced and differentials are not utterly arbitrary and unsupported by economic or public policy goals, as it reasonably conceives them'... . A petitioner's task in demonstrating that the rate-setting agency's determination is unreasonable is appropriately described as a 'heavy burden' ... . It is clear from the governing statutes that water and sewer rates may be determined in accordance with public policy goals, and not only economic goals. The Water Board 'may take into consideration the views and policies of any elected official or body, or other person' and ultimately 'appl[ies] independent judgment in the best interest of the authority, its mission and the public' ... . Moreover, the statutory scheme gives the Board leeway to charge more than the bare minimum necessary for revenue recovery, by stating that the rates are to generate 'revenues which, together with other revenues available to the board, if any, shall be at least sufficient at all times so that such system or systems shall be placed on a self-sustaining basis' ... . In short, New York City's 'Water Board is granted broad authority to set rates for water usage' ... . Here, we cannot say that respondents' actions were 'utterly arbitrary and unsupported by economic or public policy goals, as it reasonably conceives them' ...". ***Matter of Prometheus Realty Corp. v. New York City Water Bd.*, 2017 N.Y. Slip Op. 08801, CtApp 12-19-17**

WORKERS' COMPENSATION LAW.

EVEN WHERE AN INJURED WORKER SETTLES WITH A THIRD-PARTY BEFORE THE WORKERS' COMPENSATION SCHEDULE LOSS OF USE IS DETERMINED, THE EMPLOYER'S CARRIER MUST SHARE IN THE LITIGATION COSTS.
The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the appellate division, determined the employer's workers' compensation carrier must share in the litigation costs incurred by an injured worker, even where the worker's settlement with a third-party precedes the workers' compensation schedule loss of use is determined: "Joseph Terranova, a foreman employed by the Lehr Construction Company, injured his right knee on a raised floor tile at a job site. He sought both workers' compensation benefits from Lehr's carrier, the New Hampshire Insurance Company (NHIC), and damages from the third-party contractor responsible for the defective tile. At the time of Mr. Terranova's settlement with the third party -- to which NHIC consented in a letter -- he had received $21,495.99 in workers' compensation payments and was litigating the extent of his schedule loss of use before a workers' compensation law judge. Proceedings before that judge continued after the third-party settlement and ultimately resulted in a finding that Mr. Terranova suffered a ten percent schedule loss of use of the right leg that entitled him to 28.8 weeks of benefits, or an additional $9,960. Despite Mr. Terranova's arguments to the contrary, the judge -- as well as the Board and the Appellate Division -- concluded that because his ultimate award was of a type we had indicated had an ascertainable present value, he was not entitled to the post-settlement apportionment of the litigation expenses contemplated for other types of awards in Burns v. Varriale (9 NY3d 207 [2007]). * * * Neither Kelly [60 NY2d 131] nor Burns contemplated the sequence involved here, in which a third-party settlement was consummated before an award was determined. Here, although the Board ultimately recognized the inequity of its initial determination, it first misinterpreted Kelly and Burns as requiring that litigation costs apportioned against all schedule loss of use awards be either assigned at the time of the third-party settlement or not at all. ... When, as here, the present value of the loss of use or other benefits is not finalized at the time of the claimant's recovery in the third-party matter, the carrier must pay its fair share once the present value is determined." ***Matter of Terranova v. Lehr Constr. Co.*, 2017 N.Y. Slip Op. 08799, CtApp 12-19-17**

FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT'S CONVICTION SUPPORTED BY THE WEIGHT OF THE EVIDENCE, DETAILED DISCUSSION OF THE WEIGHT OF THE EVIDENCE ANALYSIS, DISSENT DISAGREED.
The First Department, in a full-fledged opinion by Justice Kahn, over a two-justice dissenting opinion, determined that defendant's conviction in this murder case was supported by the weight of the evidence. The dissent argued that defendant's videotaped statement supported the justification defense and no other evidence presented by the People refuted it. The opinion includes a comprehensive discussion of the appellate court's weight of the evidence analysis: "Weight of the evidence review involves a two-step approach. (People v. Romero, 7 NY3d 633, 643 [2006]). First, the Court must determine whether, based on all the credible evidence, an acquittal would not have been unreasonable (id.; People v. Bleakley, 69 NY2d 490, 495 [1987]). If so, then the appellate court must weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony ... . That step is performed by weighing the evidence against the elements as charged to the jury ... . The evidence must be of such weight and credibility as to convince the Court that the jury's finding of the defendant's guilt beyond a reasonable doubt was justified ... . * * * Viewing all of the record evidence in light of the first prong of the Romero-Bleakley standard, had the jury credited defendant's account of the events surrounding the shooting, it could have reasonably found that defendant was, as the trial court instructed, 'justified in the use of deadly physical force, . . . hav[ing] honestly believed that it was necessary to defend himself from what he honestly believed to be the use or imminent use of such force by Steven Mari and [that] a reasonable person in the defendant's position, knowing what the defendant knew, and being in the same circumstances would have believed that too.' Thus, had

the jury credited defendant's statement, it would not have been unreasonable for the jury to have acquitted defendant ... . Turning to the second step of the Romero-Bleakley analysis, at the outset, there is no basis for disturbing the jury's rejection of defendant's videotaped statement. Defendant's statements ... were materially inconsistent, and defied credulity." ***People v. Sanchez*, 2017 N.Y. Slip Op. 08899, First Dept 12-21-17**

PERSONAL INJURY, FAMILY LAW.

NEGLIGENCE ACTION AGAINST THE AGENCY WHICH PLACED A BABY IN A FOSTER HOME WHERE THE BABY WAS INJURED BY THE TEENAGED BOYFRIEND OF THE FOSTER MOTHER'S DAUGHTER PROPERLY SURVIVED SUMMARY JUDGMENT.

The First Department, in a full-fledged opinion by Justice Gesmer, over a two-justice dissenting opinion, determined the negligence action against the Jewish Child Care Association (JCCA) properly survived summary judgment. The JCCA placed a 29-week-old child with a foster mother (Pineda). The child was left in the care of the teenaged boyfriend of Pineda's daughter and suffered brain damage at the hands of the boyfriend: "The record suggests that JCCA may have been negligent in at least five respects. First, the agency placed the child in Ms. Pineda's home when he was a newborn, even though it had previously determined that children under five should not be placed with her because she was working or looking for work, and that her home required 'stabilizing,' because her 16 year-old-daughter had recently given birth to a baby with special needs. Second, JCCA failed to ensure that an appropriate child care plan was in place after it had determined that Ms. Pineda was employed outside the home, as the applicable regulation requires... .. Moreover, there is no evidence that JCCA had ever advised Ms. Pineda that she needed to seek approval of her child care plan. Third, JCCA had notice, prior to the date on which the child was injured, that at least one unauthorized person was caring for him, but failed to take any action to rectify this, violating its own rules and the relevant regulation … . Fourth, JCCA's contract with Ms. Pineda stated merely that she was not to leave the infant plaintiff without competent supervision. This violates the applicable regulation, entitled 'Certification or approval of foster family homes,' which requires agencies to have foster parents acknowledge in writing that they will not 'leave children under the age of 10 years alone without competent adult supervision' ... . Moreover, Ms. Pineda testified that she was never advised that she was not permitted to leave a foster child in the care of someone under 18. Finally, ... JCCA had failed to visit the home for a three-month period, in violation of its own requirement of at least two contacts per month, with at least one to take place in the home. Under these circumstances, a jury could find that, had the agency followed the applicable regulations and its own rules, the special needs infant plaintiff might never have been left alone with a teenager already caring for his own special needs infant, and who was prohibited from caring for the infant foster child. Where the acts of a third person intervene between a defendant's negligent conduct and a plaintiff's injury, the causal connection between the two is not severed as a matter of law. Rather, liability turns on whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence." ***De'L. A. v. City of New York*, 2017 N.Y. Slip Op. 08897, First Dept 12-21-17**

SECOND DEPARTMENT

ATTORNEYS.

ATTORNEY WHO HIRED AN ASSOCIATE WHO PREVIOUSLY WORKED AS A PARALEGAL AT THE FIRM REPRESENTING DEFENDANTS SHOULD HAVE BEEN DISQUALIFIED.

The Second Department, reversing Supreme Court determined the disqualification of plaintiffs' counsel, D'Agostino, was required based on his hiring of an associate, Monteleon, who previously worked as a paralegal in the firm representing defendants. Even if Monteleon had not acquired client confidences, there existed the appearance of impropriety: "The Supreme Court should have granted the defendants' motions to disqualify D'Agostino as the plaintiffs' counsel in the instant actions. A party seeking to disqualify an attorney or a law firm for an opposing party on the ground of conflict of interest has the burden of demonstrating (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse ... . When the moving party is able to demonstrate each of these factors, an irrebuttable presumption of disqualification follows ... . The defendants established that there is an irrebuttable presumption that Monteleon, who was a paralegal and subsequently D'Agostino's associate, is subject to disqualification from representing the plaintiffs in these actions due to his prior employment. Where one attorney is disqualified as a result of having acquired confidential client information in his former employment (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9), there is a rebuttable presumption that the entirety of the attorney's current firm must be disqualified ... . There is a rebuttable presumption here that D'Agostino, who employed Monteleon as a paralegal and subsequently an associate in his solo practice, is disqualified from representing the plaintiffs. That presumption has not been rebutted by the plaintiffs, as they failed to disprove that Monteleon had the opportunity to acquire confidential information in his former employment. ... Even assuming that the irrebuttable presumption in favor of disqualification did not attach to Monteleon,

disqualification of D'Agostino nonetheless is warranted. ... Any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification ...". ***Moray v. UFS Indus., Inc.*, 2017 N.Y. Slip Op. 08822, Second Dept 12-20-17**

CIVIL PROCEDURE.

COURT HAS DISCRETION TO ACCEPT UNAUTHORIZED SURREPLIES.

The Second Department noted that a judge has the discretion to control motion practice and may accept substantive surreplies: "While unauthorized surreplies containing new arguments generally should not be considered, the Supreme Court has the authority to regulate the motion practice before it, as well as the discretion to determine whether to accept late papers or even surreply papers for 'good cause' (CPLR 2214[c] ...). Here, the Supreme Court did not improvidently exercise its discretion in determining that it would consider the supplemental evidence sought to be submitted by the plaintiff. The plaintiff proferred a valid excuse, the delay was minimal, and there was no prejudice as the court also determined that it would give the defendant a full opportunity to respond to, and submit further evidence addressing, the plaintiff's submissions ... ". ***U.S. Bank Trust, N.A. v. Rudick*, 2017 N.Y. Slip Op. 08874, Second Dept 12-20-17**

CIVIL PROCEDURE.

FAILURE TO OBJECT TO DISCOVERY DEMANDS REQUIRED THAT THE COURT GRANT THE MOTION TO COMPEL DISCOVERY.

The Second Department, reversing Supreme Court, determined the defendant's failure to object to plaintiff's discovery demands required the court to grant plaintiff's motion to compel discovery: "A defendant's failure to make a timely challenge to a plaintiff's document demand pursuant to CPLR 3122(a)(1) forecloses inquiry into the propriety of the information sought except with regard to material that is privileged pursuant to CPLR 3101 or requests that are palpably improper ... . Here, the defendant City of New York did not object to the plaintiff's requests for discovery dated February 4, 2014, and February 12, 2015, respectively, within the required time period, and it failed to either asserted a valid privilege or establish that the demands were palpably improper. Accordingly, the Supreme Court erred in denying the plaintiff's motion to compel the City to comply with those requests for discovery." ***Recine v. City of New York*, 2017 N.Y. Slip Op. 08870, Second Dept 12-20-17**

CRIMINAL LAW.

FAILURE TO ADEQUATELY QUESTION JUROR ABOUT HER ABILITY TO BE FAIR AFTER SHE INDICATED SHE DID NOT THINK A PERSON SHOULD RESPOND TO VIOLENCE WITH VIOLENCE REQUIRED REVERSAL.

The Second Department, reversing defendant's conviction, determined the court did not sufficiently question a juror about her ability to be fair after she indicated she didn't think a person should respond to violence with violence: "Here, during voir dire, a prospective juror indicated in response to questioning by defense counsel that she felt 'you are never in the right if you respond to aggression with physical violence' and should 'always turn the other cheek,' and that it was possible her belief could influence how she would decide the case. When the Supreme Court followed up by asking the prospective juror if her 'religious beliefs' affected her verdict when she previously served on a criminal jury, she stated 'I'm an atheist.' The court did not inquire further into the prospective juror's ability to render an impartial verdict. Under the circumstances of this case, the prospective juror's statements revealed a state of mind likely to preclude her from rendering an impartial verdict, and thus, it was incumbent upon the Supreme Court to ascertain that she would render an impartial verdict based on the evidence ... . The court failed to obtain an unequivocal assurance from the prospective juror, who never indicated that 'religious beliefs' might influence her decision, that she would render an impartial verdict based on the evidence despite her feelings about the use of violence ... . Further, the court's collective inquiry to the whole panel as to whether 'everybody here' could be fair and impartial was insufficient to constitute an unequivocal declaration of impartiality from the prospective juror at issue ...". ***People v. Francois*, 2017 N.Y. Slip Op. 08844, Second Dept 12-20-17**

CRIMINAL LAW, ATTORNEYS, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT WAS NOT AFFORDED EFFECTIVE COUNSEL AT THE SORA RISK LEVEL HEARING, COUNSEL DID NOT ADVOCATE FOR HIM AND DID NOT UNDERSTAND DOWNWARD DEPARTURE WAS AVAILABLE, NEW HEARING ORDERED.

The Second Department determined defendant was entitled to a new Sex Offender Registration Act (SORA) risk level hearing because his attorney did not advocate his position and did not understand the availability of downward departure: "A defendant has a right to the effective assistance of counsel in a SORA proceeding ... . Here, the defendant's counsel 'failed to litigate any aspect of the adjudication' ... , and, instead, affirmatively asserted that there was no basis on which to challenge or depart from the presumptive risk level. Moreover, defense counsel's comments suggested that there was no basis for a downward departure because the points 'add[ed] up validly,' thus demonstrating a misunderstanding of the law regarding downward departures from the presumptive risk level ... . These facts, as well as defense counsel's failure to seek a down-

ward departure under the circumstances of this case, operated to deprive the defendant of meaningful representation in the SORA proceeding ...". ***People v. Collins*, 2017 N.Y. Slip Op. 08866, Second Dept 12-20-17**

EDUCATION-SCHOOL LAW, NEGLIGENCE, CIVIL PROCEDURE.

ALTHOUGH CONTRACT ACTION AGAINST SCHOOL DEFENDANTS WAS PRECLUDED BY THE ARBITRATION AWARD, TORT ACTIONS AGAINST THE SCHOOL DEFENDANTS WERE NOT PRECLUDED, THE TORT ACTIONS AGAINST THE SCHOOL DEFENDANTS WERE NOT SUBJECT TO THE ARTICLE 78 STATUTE OF LIMITATIONS, DISMISSAL SHOULD NOT HAVE BE GRANTED ON A GROUND NOT RAISED BY THE PARTIES, DISMISSAL SHOULD NOT HAVE BEEN GRANTED IN FAVOR OF A DEFENDANT WHO DID NOT MOVE FOR DISMISSAL.

The Second Department, reversing (modifying) Supreme Court, determined, among other things, the arbitration of the breach contract claim did not preclude tort actions against the school defendants by a former student and his parents. The Second Department further determined Supreme Court should not have dismissed causes of action against the school on grounds not raised by the parties, should not have dismissed causes of action against a party which did not move for dismissal, and the four-month Article 78 statute of limitations, which usually applies to actions against schools, did not apply to the tort causes of action raised here. The allegations included bullying and an improper relationship between the student and certain defendants: "On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), 'the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail' ... . The complaint must be liberally construed in the light most favorable to the plaintiff, and all allegations must be accepted as true ... . Broadly construed, the allegations, inter alia, of an 'inappropriate relationship' between the plaintiff's son and Stowell, an instructor or teacher at Knox School, the allegations of multiple communications from Stowell to the son around the time of his temporary 'disappearance' from school and home in late 2012, and the allegations that Stowell refused to cooperate with a police investigation, suffice to state causes of action sounding in negligence ... , intentional infliction of emotional distress ... , and negligent infliction of emotional distress ...". ***Cheslowitz v. Board of Trustees of the Knox Sch.*, 2017 N.Y. Slip Op. 08807, Second Dept 12-20-17**

FAMILY LAW.

PROOF DID NOT SUPPORT TERMINATION OF FATHER'S PARENTAL RIGHTS.

The Second Department, reversing Family Court, determined the proof did not support the termination of father's parental rights: "An order terminating parental rights may be granted where the parent 'abandoned [the] child for the period of six months immediately prior to the date on which the petition is filed in the court' ... . Abandonment must be proven by clear and convincing evidence ... . Here, the agency failed to establish, by clear and convincing evidence, that during the relevant period of time the father evinced an intent to forgo his parental rights and obligations ... . The record demonstrates that once the father had sufficient reason to believe he might be the father, he took action to assert his paternity ... and sought to have contact with the child, filed petitions for custody, visited with the child on two occasions and attempted to visit on a third occasion, and brought the child snacks, toys, and clothes during the visits. In addition, the father spoke with the caseworker on the phone on multiple occasions, paid child support in the amount of $25 per month, and provided the caseworker with information about where he was living, who he was living with, and about a daycare where he would enroll the child. Under these circumstances, the Family Court should have denied the petition on the merits, and dismissed the proceeding ... ". ***Matter of Darrell J. D. J. (Kenneth R.)*, 2017 N.Y. Slip Op. 08826, Second Dept 12-2017**

FORECLOSURE, CIVIL PROCEDURE.

FORECLOSURE ACTION PROPERLY DISMISSED FOR FAILURE TO COMPLY WITH 90-DAY DEMAND AND OVERALL DELAY AND NEGLECT.

The Second Department determined this foreclosure proceeding was properly dismissed for failure to comply with a 90-day demand pursuant to CPLR 3216 (b)(3): "Where, as here, a plaintiff has been served with a 90-day demand pursuant to CPLR 3216(b)(3), that plaintiff must comply with the demand by filing a note of issue or by moving, before the default date, either to vacate the demand or to extend the 90-day period ... . The plaintiff failed to do either within the 90-day period. Therefore, in order to excuse the default, the plaintiff was required to demonstrate a justifiable excuse for its failure to timely file the note of issue or move to either vacate the demand or extend the 90-day period, as well as a potentially meritorious cause of action... . Nevertheless, it has been said that CPLR 3216 is 'extremely forgiving' ... , 'in that it never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed' ... . Under the circumstances of this case, the Supreme Court providently exercised its discretion in granting the defendant's motion pursuant to CPLR 3216 to dismiss the action insofar as asserted against him. The plaintiff took no action whatsoever in the five years from the time the case was released from the foreclosure settlement part on October 15, 2009, until the defendant served his 90-day demand on October 10, 2014. Moreover, after failing to comply with the 90-day deadline, the plaintiff took no action for five months before belatedly filing a note of issue. The plaintiff failed to provide a justifiable

excuse for its delay in filing a note of issue and failed to demonstrate a potentially meritorious cause of action. The plaintiff's further contention that dismissal was too harsh a sanction, and that a lesser sanction was more appropriate under the circumstances, is unavailing, given the plaintiff's 'pattern[ ] of persistent neglect, a history of extensive delay, evidence of an intent to abandon prosecution and lack of any tenable excuse for such delay' ...". ***Deutsche Bank Natl. Trust Co. v. Inga*, 2017 N.Y. Slip Op. 08810, Second Department 12-20-17**

FORECLOSURE, CIVIL PROCEDURE.

MOTION FOR SUMMARY JUDGMENT CANNOT BE BROUGHT WHERE DEFENDANT HAS ONLY FILED A NOTICE OF APPEARANCE, FORECLOSURE ACTION PROPERLY DISMISSED AS ABANDONED PURSUANT TO CPLR 3215.

The Second Department determined the bank's motion for summary judgment in this foreclosure proceeding could not be entertained because issue had not been joined, only a notice of appearance had been filed by defendant. The action was properly deemed abandoned pursuant to CPLR 3215: "Contrary to the plaintiff's contention, the Supreme Court properly denied those branches of its motion which were for summary judgment on the complaint and for an order of reference. 'A motion for summary judgment may not be made before issue is joined (CPLR 3212[a]) and the requirement is strictly adhered to' ... . Where, as here, a defendant has served a notice of appearance, but has not served 'a responsive pleading,' in this case, an answer (see CPLR 3011), issue has not been joined, and the plaintiff is barred from seeking summary judgment ... . Here, the defendants were served with the summons and complaint on December 30, 2010. The defendant had "twenty days after service of the summons" to appear 'by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer' (CPLR 320[a]). ... [T]he plaintiff's time to bring a motion for leave to enter a default judgment expired on February 3, 2012, a year after the defendants' default, but the plaintiff did not make such a motion until January 2015. The plaintiff contends that the 'sufficient cause shown' standard was met by the "significant delay" caused by an improper stipulation of discontinuance that was filed on February 22, 2013, and the proceedings it had to take to obtain an order dated August 15, 2013, vacating the stipulation and restoring the action to the calendar. However, ... actions taken in 2013 and thereafter "offer no excuse as to why no action was taken within one year of the default, as required by statute." In fact, this Court has held that '[a]n excuse which matures after the expiration of the statutory limit for entering a default judgment with the Clerk is legally insufficient to justify a plaintiff's failure to enter the default judgment' ... . For the same reason, there is no merit to the plaintiff's argument that the same proceedings in 2013 established that it had not abandoned the action ...". ***Jbbny, LLC v. Begum*, 2017 N.Y. Slip Op. 08816, Second Dept 12-20-17**

FORECLOSURE, EVIDENCE.

BANK WAS UNABLE TO DEMONSTRATE STANDING AND FAILED TO MEET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not demonstrate it had standing to foreclose. Therefore the bank's motion for summary judgment should not have been granted. Among other failings, the requirements of the business records exception to the hearsay rule were not met: "Here, the plaintiff produced the mortgage, the unpaid note, and evidence of the appellant's default. However, the plaintiff failed, prima facie, to establish its standing. Where, as here, the note has been endorsed in blank, the purported holder of the note must establish its standing by demonstrating that the original note was physically delivered to it prior to the commencement of the action ... . The plaintiff attempted to establish its standing through the affidavit of Myron D. Keyes, Vice President Loan Documentation of Wells Fargo Bank, N.A. (hereinafter Wells Fargo), the servicing agent to the plaintiff. However, Keyes averred only that the plaintiff was 'in possession of' the note. The plaintiff subsequently submitted a further affidavit from April J. Linn, another Vice President Loan Documentation of Wells Fargo. Unlike Keyes, Linn submitted documentary evidence showing that Wells Fargo was appointed the plaintiff's servicing agent on February 21, 2014. Linn further averred, based on her familiarity with the business records maintained by Wells Fargo, that the plaintiff 'had possession of the [note] as of November 28, 2006.' However, Linn's affidavit failed, among other things, to explain how a review of the business records of a servicing agent appointed in 2014 could prove that the plaintiff had obtained physical possession of the note more than seven years earlier. In sum, Keyes' affidavit, as well as Linn's subsequent affidavit, provided neither sufficient factual details to establish the physical delivery of the note to the plaintiff prior to the commencement of this action ... , nor the foundational knowledge required to admit such factual details under the business records exception to the hearsay rule ...". ***U.S. Bank N.A. v. Brody*, 2017 N.Y. Slip Op. 08873, Second Dept 12-20-17**

LABOR LAW-CONSTRUCTION LAW.

THREE-FOOT HEIGHT DIFFERENTIAL IN ROOF LEVELS WAS NOT THE TYPE OF ELEVATION HAZARD CONTEMPLATED BY LABOR LAW § 240(1).

The Second Department, reversing Supreme Court, determined that the three-foot height differential between roof levels did not present the type of elevation hazard contemplated by Labor Law § 240(1). Plaintiff climbed to the higher level to retrieve a ladder and fell off when his foot slipped on the edge of the higher level: "The plaintiff and his coworker climbed

to this higher level of the roof without using any equipment. When the plaintiff attempted to descend to the lower level of the roof, his right foot slipped on the lip of the upper level, and he fell onto the lower level. ... The defendants established ... that Labor Law § 240(1) does not apply because the three-foot- height differential between the two levels of the roof did not present the sort of elevation-related risk protected by that statute ...". ***Pita v. Roosevelt Union Free Sch. Dist.*, 2017 N.Y. Slip Op. 08869, Second Dept 12-20-17**

MENTAL HYGIENE LAW, EVIDENCE, MUNICIPAL LAW.

SEALED LOCAL GOVERNMENT RECORDS PROPERLY UNSEALED FOR CONSIDERATION IN THIS SEX OFFENDER CIVIL COMMITMENT PROCEEDING.

The Second Department determined sealed records were properly unsealed in this sex offender civil commitment hearing: "The Supreme Court properly granted the State's motion to unseal the records kept by the Office of the Suffolk County District Attorney and the Suffolk County Police Department regarding the defendant's 2001 arrest for rape in the first degree. Mental Hygiene Law § 10.08(c) provides, 'Notwithstanding any other provision of law, the commissioner, the case review panel and the attorney general shall be entitled to request from any agency, office, department or other entity of the state, and such entity shall be authorized to provide upon request, any and all records and reports relating to the respondent's commission or alleged commission of a sex offense, the institutional adjustment and any treatment received by such respondent, and any medical, clinical or other information relevant to a determination of whether the respondent is a sex offender requiring civil management.' 'The primary goal of the court in interpreting a statute is to determine and implement the Legislature's intent'... . Given the legislative purpose underlying Mental Hygiene Law § 10.08(c), we have construed this statute to permit authorized parties to obtain records from local government entities in addition to State entities ...". ***Matter of State of New York v. David B.*, 2017 N.Y. Slip Op. 08831, Second Dept 12-20-17**

PERSONAL INJURY.

PROPERTY OWNER DID NOT DEMONSTRATE LEAVES ON A STAIRWAY CONSTITUTED AN OPEN AND OBVIOUS CONDITION AND DID NOT DEMONSTRATE A LACK OF NOTICE OF THE CONDITION, SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined defendant property owner did not demonstrate leaves on a basement stairway constituted an open and obvious condition and did not demonstrative a lack of constructive notice of the condition in this slip and fall case. Defendant's motion for summary judgment was properly denied: "A defendant property owner has a duty to maintain its premises in a 'reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk' ... . However, it does not have a duty to protect against an open and obvious condition, which, as a matter of law, is not inherently dangerous ... . Whether a dangerous or defective condition exists on the property so as to give rise to liability depends on the particular circumstances of each case and is generally a question of fact for the jury ... . Similarly, whether a condition is open and obvious depends on the circumstances of the case, and something that ordinarily would be readily observable may be obscured by inadequate illumination ... . Here, the defendant failed to eliminate triable issues of fact as to whether the condition that allegedly caused the plaintiff to fall was open and obvious and not inherently dangerous ... . The plaintiff testified at her deposition that she fell on a two-inch thick pile of wet, matted down leaves on the seventh step of a staircase, consisting of 20 steps leading to a basement. The plaintiff further testified that the sky was overcast, that a light at the bottom of the staircase was not functioning, and that she could only see as far as the fifth step. The defendant also failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition ... . The plaintiff testified that she fell into a pile of leaves and other debris one-foot deep at the bottom of the staircase. [the building manager] testified that he could not remember whether he had checked the subject staircase on his last weekly inspection prior to the accident and that he did not know whether the landscaper or anyone else was responsible for removing leaves from the staircase. Thus, the defendant failed to establish, prima facie, that the subject condition had not been there for a sufficient period of time for the defendant to have discovered and remedied it ...". ***Bissett v. 30 Merrick Plaza, LLC*, 2017 N.Y. Slip Op. 08805, Second Dept 12-20-17**

PERSONAL INJURY.

SIGN ON A LIGHT POLE, WHICH PLAINTIFF STRUCK WHEN JUMPING TO CATCH A BALL, WAS A NON-ACTIONABLE OPEN AND OBVIOUS CONDITION.

The Second Department determined the sign which plaintiff struck when jumping to catch a ball was an open and obvious condition which was not actionable. The sign was six feet seven inches from the ground attached to a light pole: " 'A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property' ... . '[An] owner, however, has no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous' ... . Here, the defendant established, prima facie, that the sign that the plaintiff came into contact with was open and obvious, as it was not only readily observable by those employing the reasonable use of their senses, but was known to the plaintiff prior to

the accident and, as a matter of law, was not inherently dangerous ... . Contrary to his contentions on appeal, the plaintiff, in opposition, failed to raise a triable issue of fact as to whether the sign was inherently dangerous." ***Genefar v. Great Neck Park Dist.*, 2017 N.Y. Slip Op. 08812, Second Dept 12-20-17**

PERSONAL INJURY.

BUILDING OWNER, MANAGER, AND ELEVATOR MAINTENANCE COMPANY ENTITLED TO SUMMARY JUDGMENT IN THIS ELEVATOR MISLEVELING SLIP AND FALL CASE, NO NOTICE OF THE CONDITION.

The Second Department determined the building owner's, building manager's and elevator maintenance company's motions for summary judgment were properly granted in this elevator misleveling slip and fall case. The defendants demonstrated they did not have notice of the misleveling: "A property owner can be held liable for an elevator-related injury where there is a defect in the elevator, and the property owner has actual or constructive notice of the defect ... , or where it fails to notify the elevator company with which it has a maintenance and repair contract about a known defect... . 'An elevator company which agrees to maintain an elevator in safe operating condition can also be held liable to an injured passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found' ...". ***Goodwin v. Guardian Life Ins. Co. of Am.*, 2017 N.Y. Slip Op. 08814, Second Dept 12-20-17**

PERSONAL INJURY, MUNICIPAL LAW.

COUNTY DID NOT PRESENT SUFFICIENT PROOF THAT THE INJURY OF PLAINTIFF INMATE BY OTHER INMATES WAS NOT FORESEEABLE, THAT THE SAFETY PRECAUTIONS WERE ADEQUATE, OR THAT THE MEDICAL CARE WAS ADEQUATE, COUNTY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the county had not met its burden and its motion for summary judgment was properly denied. Plaintiff, an inmate at the county jail, alleged he was injured in a fight involving other inmates. The complaint alleged the failure to keep the inmate safe and the failure to provide adequate medical care. The proof offered by the county did not demonstrate the altercation was not foreseeable, the protective measures were adequate, or the medical care was adequate. The failure to offer sufficient proof addressing these issues required the denial of summary judgment: " 'Having assumed physical custody of inmates, who cannot protect and defend themselves in the same way as those at liberty can, the [municipality owes] a duty of care to safeguard inmates, even from attacks by fellow inmates' ... . 'Like other duties in tort, the scope of the . . . duty to protect inmates is limited to risks of harm that are reasonably foreseeable' ... . On its motion for summary judgment, the County had the burden of establishing that the assault of the plaintiff was not foreseeable ... . The County did not meet that burden, as it failed to eliminate triable issues of fact as to whether it knew or should have known of the dangerous propensity of certain inmates involved in the assault, or of prior similar incidents occurring while meals were being distributed by inmates. Evidence submitted by the County indicated that such altercations involving inmates distributing meals occurred monthly. Moreover, the County also failed to eliminate triable issues of fact as to the adequacy of the measures taken to prevent reasonably foreseeable harm ... . With respect to the second cause of action, which alleged a failure to provide the plaintiff with timely, adequate medical attention, a municipality owes a duty to its incarcerated citizens to provide them with adequate medical care ... . The County did not submit the affidavit of an expert attesting to the adequacy of the medical care provided to the plaintiff. Its attorney's conclusory assertion that the plaintiff received timely, adequate medical care, together with its submission of the plaintiff's medical records, failed to establish the County's prima facie entitlement to judgment as a matter law dismissing the second cause of action ... ". ***Adeleke v. County of Suffolk*, 2017 N.Y. Slip Op. 08803, Second Dept 12-20-17**

PERSONAL INJURY, MUNICIPAL LAW.

COUNTY DID NOT DEMONSTRATE PLAINTIFF'S SUICIDE ATTEMPT WAS NOT FORESEEABLE, PLAINTIFF WAS IN THE COUNTY JAIL AT THE TIME, SHE JUMPED OUT OF A SECOND STORY WINDOW, COUNTY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the county's motion for summary judgment in this action brought by a former jail inmate for injuries related to suicide attempt (by jumping out a window) was properly denied. The defendants failed to demonstrate the attempt was not foreseeable and that the medical care provided was adequate: "The County owes a duty of care to protect its prisoners, even from self-inflicted harm... . However, the County is not an insurer of prisoner safety and negligence cannot be inferred merely because an incident occurred... . Rather, the County's duty is limited to providing reasonable care to protect prisoners from risks of harm that are reasonably foreseeable, i.e., those that the County knew or should have known... . Here, the defendants, as the parties seeking summary judgment, bore the burden of establishing that the injured plaintiff's attempt to commit suicide was not foreseeable... . ... The defendants' submissions failed to eliminate triable issues of fact as to whether the defendants knew or should have known that the injured plaintiff posed a risk of harm to herself and whether the defendants 'failed to use adequate supervision to prevent that which was reasonably foreseeable'... . Moreover, the defendants' submissions failed to eliminate triable issues of fact as to whether they violated

42 USC § 1983 by depriving the injured plaintiff of her Fourteenth Amendment right to adequate medical care ... , and Mr. Iannelli's claim for loss of consortium ...". ***Iannelli v. County of Nassau*, 2017 N.Y. Slip Op. 08815, Second Dept 12-20-17**

PERSONAL INJURY, MUNICIPAL LAW.

TOWN DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE DANGEROUS CONDITION IN THIS SLIP AND FALL CASE, BUT IT DID NOT DEMONSTRATE IT DID NOT CREATE THE CONDITION, TOWN'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant town did not demonstrate it did not created the dangerous condition in this slip and fall case. The town's motion for summary judgment should not have been granted: "Here, the plaintiff alleged in his bill of particulars that the Town negligently caused, permitted, and allowed the barricade to be placed in such a way that a part of the barricade extended out into the line of pedestrian traffic. Thus, to establish its prima facie entitlement to judgment as a matter of law, the Town was required to establish, prima facie, both that it did not receive prior written notice of the condition and that it did not create the condition through an affirmative act of negligence ... . Although the Town established, prima facie, that it did not have prior written notice of the allegedly negligent positioning of the barricade, it failed to establish, prima facie, that it did not create the allegedly dangerous condition through an affirmative act of negligence. Since the Town's submissions failed to eliminate all triable issues of fact as to whether it was responsible for the allegedly negligent placement of the barricade, the motion for summary judgment should have been denied regardless of the sufficiency of the papers submitted in opposition ...". ***Toscano v. Town of Huntington*, 2017 N.Y. Slip Op. 08872, Second Dept 12-20-17**

REAL ESTATE, CONTRACT LAW.

DEFENDANTS HAD NOT CLEARED UP LIENS ON THE PROPERTY ON LAW DAY, SO THEY WERE NOT READY TO CLOSE AND WERE NOT ENTITLED TO KEEP PLAINTIFFS' DOWN PAYMENT, WHETHER DEFENDANTS HAD A DUTY TO SPEAK WHEN PLAINTIFFS ASKED FOR AN ADJOURNMENT OF THE CLOSING CANNOT BE DETERMINED ON A MOTION TO DISMISS.

The Second Department, reversing Supreme Court, determined defendants-sellers, in the context of a motion to dismiss the complaint, were not entitled to keep the down payment based upon plaintiffs' failure to attend the closing pursuant to a time of the essence demand. Defendants did not demonstrate they were able to close because there were outstanding liens on the property. In addition, there was a question whether defendants had a duty to speak when plaintiffs requested an adjournment of the closing, an issue that cannot be resolved in a motion to dismiss: "Here, the mortgage indebtedness on the subject property amounted to $11,265,000, nearly three times the portion of the purchase price due at the closing. The defendants only satisfied $8,850,000 of that indebtedness in October 2014, about six months after the law day. Further, in order to close, the defendants were required to clear other liens of up to $25,000, and deliver their corporation formation documents to the title company, which allegedly was not done. On the question of specific performance, a purchaser seeking specific performance of a real estate contract must demonstrate that he or she was ready, willing, and able to perform on the contract, regardless of any anticipatory breach by the seller ... . An anticipatory breach of the contract excuses the purchaser from tendering performance, but does not excuse the purchaser from the requirement that it be ready, willing, and able to perform ... . The defendants were not required to consent to the adjournment of a time-of-the-essence closing ... . However, the question here is whether the defendants had any obligation to respond. A duty to speak arises where there is a duty of fair dealing between the parties pursuant to a contractual relationship, and failure to speak is inconsistent with 'honest dealings' and misleads another... … Such a duty may be created by a course of conduct ... . Here, the plaintiff was a tenant of the defendants; therefore, there was a prior course of conduct not explored on this record, as well as opportunities to speak and actual communication between the parties with respect to this transaction one day prior to the law day." ***533 Park Ave. Realty, LLC v. Park Ave. Bldg. & Roofing Supplies, LLC*, 2017 N.Y. Slip Op. 08802, Second Dept 12-20-17**

REAL PROPERTY.

DEFENDANT DID NOT PROVE IT HAD A PRESCRIPTIVE EASEMENT ALLOWING EFFLUENT AND STORM WATER TO BE DISCHARGED ONTO PLAINTIFFS' PROPERTY, ON APPEAL PLAINTIFFS AWARDED JUDGMENT ON THEIR TRESPASS ACTION.

The Second Department, reversing Supreme Court, determined defendant Garden Homes did not demonstrate it had acquired a prescriptive easement over plaintiffs' (the Patels') land such that effluent and storm water could be discharged onto plaintiffs' property. The court further found plaintiffs' trespass action was proven and sent the matter back for trial on damages: " 'The essence of trespass is the invasion of a person's interest in the exclusive possession of land' ... . 'Accordingly, an action for trespass over the lands of one property owner may not be maintained where the purported trespasser has acquired an easement of way over the land in question' ... . An easement by prescription may be demonstrated by clear and convincing proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period ... , which is 10 years ... . '[T]he right acquired by prescription is commensurate with the right enjoyed' ... . Here, Garden Homes could acquire a prescriptive easement for the encroachment of components of its sewage treatment

system and the drainage of effluent and storm water only equal in area to that portion of the property actually used during the prescriptive period ... . However, the Supreme Court's determination, made after the nonjury trial, that Garden Homes established by clear and convincing evidence the continuous use of a particular portion of the Patels' property during the prescriptive period was not warranted by the facts. Accordingly, the court should not have found that Garden Homes had a prescriptive easement over a portion of the Patels' property ... … Moreover, as the Patels established a continuing trespass ... , the complaint in Action No. 1 must be reinstated, the Patels must be awarded judgment against the defendants in Action No. 1 on the issue of liability, and the matter must be remitted ... for a continued trial in that action on the issues of damages and injunctive relief, and the entry thereafter of an appropriate amended judgment." ***Patel v. Garden Homes Mgt. Corp.*, 2017 N.Y. Slip Op. 08839, Second Dept 12-20-17**

THIRD DEPARTMENT

CIVIL PROCEDURE, PRODUCTS LIABILITY, ATTORNEYS.

DISCOVERY OF THE COMPLETE DATABASE SHOWING THE DISTRIBUTION OF THE TYPE OF CLOTHES WHICH CAUGHT FIRE WAS APPROPRIATE, MOTION TO AMEND ANSWER PRECLUDED BY DISINGENUOUS BEHAVIOR WHICH PREJUDICED CODEFENDANTS.

The Third Department determined defendant Enerco was entitled to discovery of information demonstrating the retail distribution of the type of clothes distributed by defendant Star of India which had caught fire from a heater manufactured or distributed by defendant Enerco. The court held that Enerco did not have to rely on a printout created by Star of India purporting to demonstrate Star of India did not distribute the clothes in question. The court also held that Enerco's motion to amend its answer was properly denied. There was evidence Enerco had led parties to believe it was not going to assert the cross-claims it sought to include in the amended answer, thereby limiting questioning during a deposition: "... [T]he Enerco defendants do not rely on mere speculation for their discovery demand. Based upon this, together with the fact that the search results are entirely dependent upon the search terms that are used and that [the party] was unable to explain how the results she relied upon were generated, we find that the complete contents of the database from 2004 to 2009 'may be fairly characterized as useful and reasonable' ... .Furthermore, our review of the record does not suggest that disclosure of the contents of the database for this specific period would be unnecessarily onerous or impose any special burden on Star of India ... . The Enerco defendants asserted that their 2½-year delay in moving for leave to amend their answer was due to the fact that they were operating 'under the incorrect assumption that they had asserted cross claims against every co-defendant.' This proffered excuse, however, is belied by the affidavit of Amy Weissman, an attorney for one of the codefendants. The Weissman affidavit makes clear that the Enerco defendants induced the other defense attorneys in the second action not to ask questions at the deposition of the Enerco defendants' witnesses based on the explicit representation by counsel for the Enerco defendants that they had no cross claims against those codefendants. Thus, we view the proffered excuse to be disingenuous. ... These defendants have relied upon the Enerco defendants' representation to their prejudice by forgoing questioning of the Enerco defendants' witnesses, and they have been hindered in the preparation of their case ...". ***Palmatier v. Mr. Heater Corp.*, 2017 N.Y. Slip Op. 08918, Third Dept 12-21-17**

FAMILY LAW.

RECORD DID NOT SUPPORT REMOVING CHILD FROM MOTHER'S CUSTODY, FAMILY COURT REVERSED.

The Third Department, reversing Family Court, over a two-justice dissent, determined that the evidence did not support removing the child from the mother's custody: "Although a prolonged separation between a parent and child may support a finding of extraordinary circumstances... , here, the limited record does not warrant a finding of extraordinary circumstances on this basis. The grandmother was the primary physical custodian for most of the younger child's life, but there is no claim or evidence that the mother abdicated her responsibilities, and the record indicates that she had unsupervised parenting time with both children since 2004 and has been a joint custodian since at least December 2014 ... . The history of neglect is relevant ..., but the mother's history — though tragic — was remote and there was no evidence or claim that she has failed to comply with the recommendations and obtain the treatment offered by DSS in recent times or that she has failed to remain involved in the children's lives ... . … While we acknowledge that Family Court had due cause for concern, absent extraordinary circumstances, we necessarily must find that the mother is entitled to retain custody of the younger child ... . Although certainly not dispositive, it is important to recognize that the attorneys for the children have both supported the mother's appeal. Even were we to accept that the prior history established a basis for finding extraordinary circumstances, given that the grandmother allowed the children to reside with the mother since September 2015 and refused to resume her role as primary physical custodian, there has clearly been a change of circumstances ... . The record otherwise shows that the mother has provided a stable home and appropriate medical care for the younger child, who has maintained excellent grades in school and participates in positive extracurricular activities, such as the boy scouts. From our reading of the Lincoln hearing, we do not get the impression that the younger child's testimony was coached. As such, we would also

conclude that the placement of physical custody with the mother is in the younger child's best interests." ***Matter of Connie VV. v. Cheryl XX.*, 2017 N.Y. Slip Op. 08913, Third Dept 12-21-17**

FAMILY LAW.

MOTHER'S PETITION TO REGAIN CUSTODY FROM GRANDMOTHER SHOULD NOT HAVE BEEN DISMISSED FOR FAILURE TO DEMONSTRATE A CHANGE IN CIRCUMSTANCES BECAUSE THE AWARD OF CUSTODY TO GRANDMOTHER WAS BY CONSENT, GRANDMOTHER DEMONSTRATED EXTRAORDINARY CIRCUMSTANCES JUSTIFYING THE AWARD OF CUSTODY TO HER, MATTER REMITTED FOR HEARING TO DETERMINE BEST INTERESTS OF THE CHILD.

The Third Department determined grandmother had met her burden showing extraordinary circumstances warranting the award of custody to her. The matter was remitted for a determination whether the grandmother's custody was in the best interests of the child. The court noted that Family Court should not have dismissed mother's petition for custody for failure to show a change in circumstances. Custody was previously awarded to grandmother by consent: " '[W]here, as here, a parent seeks to regain custody from a nonparent . . .[,] it is well established that, unless a finding of extraordinary circumstances was made in a prior order, the parent is not required to prove a change in circumstances as a threshold matter' ... . A prior 'consent order, standing alone, does not constitute a judicial finding [or an admission] of surrender, abandonment, unfitness, neglect or other extraordinary circumstances' ... . As to the issue of extraordinary circumstances, as relevant here, a grandparent 'may make the requisite showing of extraordinary circumstances . . . by establishing that there has been an 'extended disruption of custody' ... . An extended disruption of custody includes, 'but [is] not limited to, a prolonged separation of the . . . parent and the child for a least [24] continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the . . . grandparent' ... . When considering whether the parent voluntarily relinquished care and control of the child and the child resided with the grandparent for the requisite period of time, factors to consider 'include the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the parent allowed such custody to continue without trying to assume the primary parental role' ... Once the maternal grandmother met her threshold burden, Family Court was obligated to determine what disposition would be in the child's best interests ...". ***Matter of Christy T. v. Diana T.*, 2017 N.Y. Slip Op. 08916, Third Dept 12-21-17**

FAMILY LAW, MUNICIPAL LAW.

FACT THAT FATHER'S SISTER WORKED FOR ST LAWRENCE COUNTY DSS (SLCDSS) DID NOT CREATE A CONFLICT OF INTEREST, SLCDSS CAN PROSECUTE THE NEGLECT PETITION.

The Third Department determined the fact that father's sister was a supervisor in St. Lawrence County Department of Social Services (SLCDSS) did not present a conflict of interest such that SLCDSS could not prosecute a neglect petition. Family Court had transferred the matter to the Jefferson County Department of Social Services (JCDSS): "In SLCDSS's papers submitted in response to petitioner's motion, SLCDSS noted that the father's sister is a grade A supervisor in its Child Preventive Services Unit and, in light of the neglect petition, the case would be transferred from the Child Protective Unit to the Child Preventive Services Unit. The mere fact, however, that the father's sister was employed with SLCDSS as a supervisor does not justify disqualifying SLCDSS from prosecuting the neglect petition, especially where SLCDSS does not demonstrate that such fact created actual prejudice or a substantial risk of an abuse of confidence ... . Moreover, the record discloses that since Family Court's order, SLCDSS has taken steps to ensure that the father's sister has no supervisory role in the father's case. In view of the foregoing, we find that no conflict of interest exists prohibiting SLCDSS from prosecuting the neglect proceeding ...". **Matter of Gage II. (Rachel JJ.), 2017 N.Y. Slip Op. 08931, Third Dept 12-21-17**

INSURANCE LAW.

BROKER NOT LIABLE FOR FAILURE TO PROCURE INSURANCE TO COVER INJURY TO CONSTRUCTION WORKERS, BROKER HAD NOTIFIED THE PROPERTY OWNER OF THE GAP IN COVERAGE, $6,000,000 VERDICT IN FAVOR OF PLAINTIFF CONSTRUCTION WORKER NOT COVERED.

The Third Department determined the action against the insurance broker, alleging the broker failed to procure the necessary insurance, was properly dismissed. Plaintiff was injured when he fell off a ladder and obtained a more than $6,000,000 verdict against the property owner. The property owner's insurance included an exclusion of coverage for construction workers. The broker had sent a letter to the property owner alerting the owner to the exclusion and stating that such coverage could be purchased: "At best, plaintiff established that [the property owner] made a generalized request for liability coverage, and it is well-settled that such a generalized request is insufficient to satisfy the requirement that a specific request for a particular type of coverage be made ... . Even assuming, without deciding, that plaintiff submitted sufficient proof demonstrating the existence of a special relationship [between the property owner and the defendant broker], the record demonstrates that defendant fulfilled any corresponding duty of advisement that it may have owed to plaintiff's assignors based upon defendant's unambiguous letter advising [the property owner], in writing, that additional insurance coverage for injuries to construction workers was available and could be procured upon request ... and [the property owner's] testimony that he was aware that injuries to construction workers were specifically excluded from the policy that he purchased.

Because the record is devoid of any specific request for such additional coverage ever having been made ... , we find that defendant's motion for summary judgment dismissing the complaint against it was appropriately granted ...". ***Cromer v. Rosenzweig Ins. Agency Inc.*, 2017 N.Y. Slip Op. 08926, Third Dept 12-21-17**

REAL PROPERTY.

TRESPASS AND NUISANCE ACTIONS BASED UPON WATER RUNOFF FROM NEIGHBORING PROPERTY SHOULD NOT HAVE BEEN DISMISSED, CRITERIA EXPLAINED.

The Third Department, reversing Supreme Court, determined plaintiffs' trespass and nuisance actions based upon water run-off from neighboring property should not have been dismissed: "It is well-settled that '[l]andowners making improvements to their land are not liable for damage caused by any resulting flow of surface water onto abutting property as long as the improvements are made in a good faith effort to enhance the usefulness of the property and no artificial means, such as pipes and drains, are used to divert the water thereon' ... . The diversion of water by artificial means, however, is not strictly limited to the use of pipes, drains and ditches and may otherwise be established where it is demonstrated that the net effect of defendants' improvements 'so changed, channeled or increased the flow of surface water onto [the] plaintiff[s]' land as to proximately cause damage[] to the property' ... . Based on the ... competing affidavits, we find that there are triable issues of fact as to whether defendants' improvements to the subject parcels diverted surface water onto plaintiffs' property by artificial means ... , were made in bad faith or otherwise altered the elevation and grade of the Town Homes' parcel with the express purpose of diverting water onto plaintiffs' property ... . Additionally, plaintiffs were not required to prove an intentional intrusion or intentional interference with their right to use and enjoy the property in order to sustain their private nuisance claim — such a claim being actionable upon proof that defendants' invasion was either intentional, negligent or reckless, or otherwise involved abnormally dangerous activities ... .. Further, to the extent that plaintiffs' nuisance cause of action relies entirely on proof of defendants' allegedly negligent conduct, the nuisance and negligence claims are essentially duplicative of one another and, therefore, Supreme Court's dismissal of plaintiffs' negligence claim was appropriate under the circumstances ...". ***517 Union St. Assoc. LLC v. Town Homes of Union Sq. LLC*, 2017 N.Y. Slip Op. 08925, Third Dept 12-21-17**

FOURTH DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, MUNICIPAL LAW, CONTRACT LAW.

SUPREME COURT DOES NOT HAVE THE POWER TO CONSIDER THE MERITS OF AN ARBITRATION AWARD, AWARD CONFIRMED.

The Fourth Department, reversing Supreme Court, determined the arbitrator had not exceeded her authority in interpreting the collective bargaining agreement (CBA) to require full medical coverage for retiring firefighters. The Fourth Department explained the limited review powers of a court with respect to arbitration awards: " 'It is well settled that judicial review of arbitration awards is extremely limited'... . The court must vacate an arbitration award where the arbitrator exceeds a limitation on his or her power as set forth in the CBA ... . The court, however, lacks the authority to 'examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one'... . Here, the arbitrator merely interpreted and applied the provisions of the CBA, as she had the authority to do. The court is powerless to set aside that interpretation merely because the court disagrees with it, and we may not countenance such an action. In any event, we conclude that the plain language of the CBA supports the arbitrator's reasoning." ***Matter of Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO (City of Lackawanna)*, 2017 N.Y. Slip Op. 08994, Fourth Dept 12-22-17**

CIVIL PROCEDURE.

MOTION TO AMEND THE COMPLAINT SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED, CIVIL CONSPIRACY CLAIM PROPERLY ALLEGED.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion to amend the complaint should have been granted. The underlying claim is the defendant's alleged violation of a non-export agreement in which defendant agreed not to resell a car (purchased from plaintiff) for export to another country. Upon discovery it was learned that defendant was essentially buying cars on behalf of an outfit (Superior) which exported them. Plaintiff sought to amend the complaint to add Superior as a defendant and to add causes of action for civil conspiracy, breach of contract and tortious interference with contract. The Fourth Department explained the analytical criteria for motions to amend a complaint, as well as the necessary allegations for civil conspiracy (which, standing alone, is not a recognized tort in New York): " 'Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' ... Although defendant contends that plaintiff was required to ' make an evidentiary showing that the

claim[s] [could] be supported' ... , or to submit an affidavit of merit ... , plaintiff correctly relies on the more recent cases from this Court, which provide that '[a] court should not examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face' ... . In denying that part of the motion seeking leave to amend the complaint, the court concluded that plaintiff could not demonstrate any actual damages as a result of the breach of the Nonexport Agreement. We agree with plaintiff that the court improperly decided the merits of a disputed issue of fact in the context of a motion seeking leave to amend the complaint ... . Contrary to defendant's further contention, the proposed causes of action for civil conspiracy and tortious interference with a contract are not patently lacking in merit. Although 'New York does not recognize civil conspiracy to commit a tort as an independent cause of action' ... , such a 'claim' or 'cause of action' may be asserted where, as here, there are allegations of a ' primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury' ... Here, plaintiff alleged a primary tort of tortious interference with a contract ... , and the allegations supporting that tort as well as the cause of action for civil conspiracy are not 'palpably insufficient or patently devoid of merit' ...". ***Great Lakes Motor Corp. v. Johnson*, 2017 N.Y. Slip Op. 08970, Fourth Dept 12-22-17**

CIVIL PROCEDURE.

AN ATTEMPT TO SERVE WALTER WITKOWSKI JR AT THE ADDRESS OF WALTER WITKOWSKI SR DID NOT CHANGE THE FACT THAT PLAINTIFF INTENDED TO SERVE JUNIOR, SERVICE UPON JUNIOR WITHIN THE 120 DAY SERVICE PERIOD, BUT AFTER THE STATUTE OF LIMITATIONS HAD RUN, WAS VALID.

The Fourth Department, in a full-fledged opinion by Justice DeMoyer, reversing Supreme Court, determined Walter Witkowski, Jr., not Walter Witkowski, Sr., was the party plaintiff intended to serve in this traffic accident case. An attempt to serve was made at senior's house within the statute of limitations. Before the expiration of the 120 day service period, but after the expiration of the statute of limitations, junior was served at the correct address: "CPLR 306-b requires service of the summons and complaint upon the defendant—i.e., Junior and only Junior—"within [120] days after the commencement of the action." And that is precisely what occurred here. Junior freely concedes that he was served with the summons and complaint in November 2013, well within the statutory deadline for effecting service (which would have expired in February 2014). Moreover, there is no dispute that the November 2013 service constituted good and valid service under CPLR 308(2). Junior—the only defendant in the case—was thus properly served ... . True, it took plaintiff two separate tries to properly serve Junior. As noted above, plaintiff's first attempt at serving Junior in October 2013 was admittedly defective under CPLR 308 (2) because the commencement papers were delivered to an address where Junior did not reside (i.e., Senior's house). But this is inconsequential. Plaintiff cured his defective service by effecting unquestionably proper service within 120 days of commencement, and it is black letter law that 'plaintiff had the absolute statutory right to effect valid service at any point within the 120-day period [afforded by CPLR 306-b]' ... .Service, after all, is not a 'one strike and you're out' game." ***Martin v. Witkowski*, 2017 N.Y. Slip Op. 09014, Fourth Dept 12-22-17**

CIVIL PROCEDURE, LANDLORD-TENANT, REAL PROPERTY LAW.

TENANT DID NOT COUNTERCLAIM FOR ATTORNEY'S FEES IN THE EVICTION PROCEEDINGS, TENANT'S BRINGING A PLENARY ACTION FOR ATTORNEY'S FEES AFTER SUCCESSFULLY DEFENDING THE EVICTION DID NOT VIOLATE THE PROHIBITION AGAINST CLAIM SPLITTING.

The Fourth Department, in a full-fledged opinion by Justice DeMoyer, refusing to follow the First Department, determined the tenant, who was a defendant in a failed eviction action, had the right to bring a plenary action to recover attorney's fees without violating the prohibition against claim splitting. It is significant that the tenant did not counterclaim for attorney's fees in the answer to the eviction action. The fact that the answer included a boilerplate request for attorney's fees in the wherefore clause did not amount to a counterclaim (which is authorized by Real Property Law § 234: "Applying the traditional understanding of the claim splitting rule discussed above and embodied in the landlord-tenant case law, the landlord's bid for dismissal on claim splitting grounds must fail. It was the landlord, not the tenant, who instituted the two prior proceedings in Village Court. The tenant successfully defended herself against the landlord's claims, but she did not assert an affirmative claim until the instant plenary action. Indeed, the landlord's appellate brief explicitly concedes that the tenant did not interpose a Real Property Law § 234 counterclaim for attorneys' fees in either of the two prior proceedings. Thus, because the instant action is the tenant's first assertion of an affirmative claim for relief under section 234, the claim splitting rule poses no bar to her recovery. Put simply, the tenant cannot be guilty of claim splitting because, until the instant action, there was no claim to split." ***Caracaus v. Conifer Cent. Sq. Assoc.*, 2017 N.Y. Slip Op. 08946, Fourth Dept 12-22-17**

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

PLAINTIFF FAILED TO COMPLY WITH THE STATUTORY REQUIREMENTS FOR SERVICE OF PROCESS ON AN UNAUTHORIZED FOREIGN LIMITED LIABILITY COMPANY, THE COURT NEVER ACQUIRED JURISDICTION.

The Fourth Department, reversing Supreme Court, determined that plaintiff did not strictly comply with the requirements for service of process on defendant unauthorized foreign limited liability company. Plaintiff had been granted a default judgment dismissing the foreclosure proceeding as time-barred. Defendant's motion to vacate the default judgment was denied. The Fourth Department dismissed the complaint (without prejudice) finding that the flaws in service deprived the court of jurisdiction: "Pursuant to [Limited Liability Company law 304], '[f]irst, service upon the unauthorized foreign limited liability company may be made by personal delivery of the summons and complaint, with the appropriate fee, to the Secretary of State ...'. That was done by plaintiff in this case. 'Second, in order for the personal delivery to the Secretary of State to be sufficient,' the plaintiff must also give the defendant direct notice of its delivery of the process to the Secretary of State, along with a copy of the process' ... . The direct notice may be given to the defendant personally... . That was attempted by plaintiff, but the process server was unable to make personal service inasmuch as the property was 'unoccupied.' In the alternative, '[t]he direct notice may be sent to the defendant by registered mail, return receipt requested'... . That was attempted by plaintiff in this case, but the mail was returned to plaintiff as undeliverable. ... [P]laintiff failed to comply with step two of Limited Liability Company Law § 304. ... Inasmuch as plaintiff failed to comply with step two, she necessarily also failed to comply with step three, which would show that a party complied with the service requirements of section 304." ***Chan v. Onyx Capital, LLC*, 2017 N.Y. Slip Op. 08966, Fourth Dept 12-22-1**

CRIMINAL LAW.

DEFENDANT'S REQUEST FOR A DARDEN HEARING SHOULD HAVE BEEN GRANTED, PEOPLE DID NOT DEMONSTRATE INFORMANT WAS LEGITIMATELY UNAVAILABLE.

The Fourth Department determined defendant's request for a Darden hearing should not have been denied. The People did not demonstrate the informant who provided information to support a search warrant application was legitimately unavailable for the hearing: "Where, as here, there is insufficient evidence to establish probable cause supporting a search warrant without the statements of a confidential informant, the People must make the informant available for questioning in camera ... . If, however, the informant cannot be produced despite the diligent efforts of the People, 'the People may instead establish the existence of [the] confidential informant[] through extrinsic evidence' after demonstrating that the informant is legitimately unavailable' ... . Here, the court summarily denied defendant's request upon the People's bare assertion that the informant was in California and thus unavailable. Although the People subsequently produced an unsworn letter, purportedly from the informant's drug treatment facility in California, stating that the informant required uninterrupted care, that letter, without more, is insufficient to demonstrate that the informant was legitimately unavailable. We conclude that the People failed to establish that an exception to the Darden rule is applicable, and thus the court erred in denying defendant's request for a Darden hearing ... . We therefore hold the case, reserve decision, and remit the matter to County Court to conduct an appropriate hearing, at which the People will not be precluded from offering evidence that the informant is currently unavailable." ***People v. Givans*, 2017 N.Y. Slip Op. 09066, Fourth Dept 12-22-17**

CRIMINAL LAW.

FAILURE TO INFORM DEFENDANT OF THE PERIOD OF POSTRELEASE SUPERVISION FOR ONE COUNT INFECTED THE PLEAS TO THE OTHER COUNTS AS WELL.

The Fourth Department, vacating defendant's guilty pleas, determined that the failure to inform the defendant of the period of postrelease supervision for one count infected the pleas to the other counts as well: "Defendant appeals from a judgment convicting her upon her plea of guilty of three counts of kidnapping in the second degree ... and one count of criminal possession of a weapon in the second degree ... . During the plea colloquy, County Court indicated that it would sentence defendant to concurrent indeterminate terms of 3 to 6 years pursuant to Penal Law § 60.12. Section 60.12 allows a court to impose indeterminate terms of imprisonment for certain defendants who are facing determinate terms of sentences under section 70.02 if the defendant has been the victim of domestic abuse. The court here in fact imposed concurrent, indeterminate terms of 3 to 6 years pursuant to section 60.12 (2) (a) for the kidnapping counts, but imposed a concurrent determinate sentence of 3½ years with 5 years of postrelease supervision on the weapon count pursuant to sections 70.02 (3) (b) and 70.45 (2) (f). The People correctly concede that the court failed to fulfill its obligation to advise defendant at the time of her plea that the sentence imposed upon her conviction of the weapon count would include a period of postrelease supervision... . We therefore reverse the judgment and vacate defendant's plea ... . Contrary to the People's contention, under the circumstances of this case, the entire plea must be vacated and not merely the plea on the weapon count. The entire plea agreement was infected by the court's error in failing to advise defendant of postrelease supervision, and this is not a case in which the counts may be treated separately ...". ***People v. Maxwell*, 2017 N.Y. Slip Op. 08986, Fourth Dept 12-22-17**

CRIMINAL LAW.

82 YEAR SENTENCE FOR THREE BURGLARIES AND RECKLESS ENDANGERMENT DEEMED TOO HARSH FOR THIS PERSISTENT FELONY OFFENDER, REDUCED TO 35 YEARS TO LIFE.

The Fourth Department affirmed defendant's burglary and reckless endangerment convictions and was properly determined to be a persistent violent felony offender. However, the aggregate sentence of 82 years to life was deemed too harsh and was reduced to 35 years to life. ***People v. Barnes*, 2017 N.Y. Slip Op. 09004, Fourth Dept 12-22-17**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INVALID.

The Fourth Department, over a two-justice dissent, determined defendant's waiver of the right to appeal was insufficient: "We agree with defendant that his waiver of the right to appeal was not valid because, during the plea colloquy, County Court 'conflated the appeal waiver with the rights automatically waived by the guilty plea' ... . The court indicated that the waiver of the right to appeal was '[o]ne other condition,' and that statement 'was immediately preceded by a colloquy concerning the rights automatically forfeited by a guilty plea'... . In addition, the court further muddied the distinction by indicating that the waiver of the right to appeal 'is separate and part [sic] from your plea of guilty,' rather than indicating that it was a condition of the guilty plea but separate from the rights that defendant automatically forfeited by the plea ... . Consequently, ' the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' ...". ***People v. Smith*, 2017 N.Y. Slip Op. 08949, Fourth Dept 12-22-17**

CRIMINAL LAW, APPEALS, ATTORNEYS.

PETITION FOR WRIT OF CORAM NOBIS GRANTED, APPEAL CONSIDERED DE NOVO, TRIAL COURT'S FAILURE TO PUT REASONS FOR RESTRAINING DEFENDANT ON THE RECORD REQUIRED REVERSAL AND A NEW TRIAL.

The Fourth Department granted the petition for a writ of coram nobis, considered the appeal (which had affirmed the conviction) de novo, and ordered a new trial in this attempted murder, assault case. The reversal was based upon the trial judge's failure to put on the record the reasons for restraining the defendant in the presence of the jury (an issue not raised in the appeal). The court rejected the People's argument that the applicable Court of Appeals ruling should not be applied retroactively: "… [W]e agree with defendant 'that the court erred in failing to make any findings on the record establishing that defendant needed to wear a stun belt during the trial . . . Contrary to the People's contention, harmless error analysis is not applicable' (... see People v. Buchanan, 13 NY3d 1, 4 [2009] ... . We therefore reverse the judgment and grant a new trial ... . We reject the People's further contention that defendant's conviction became final before the Court of Appeals's decision in Buchanan and that the decision should not be applied retroactively to allow a collateral attack on the judgment. In granting defendant's motion for a writ of error coram nobis, we vacated our prior order and are considering the appeal de novo ... . This appeal is therefore not a collateral attack on the judgment. In addition, we are not persuaded by the People's position that Buchanan should be applied prospectively only. Buchanan did not announce ' new rules of law that represent sharp departures from precedent or raise concerns about the orderly administration of justice' ... . Instead, we apply the 'traditional common-law' rule of deciding this appeal in accordance with the law as it now exists...'." ***People v. Hall*, 2017 N.Y. Slip Op. 09074, Fourth Dept 12-22-17**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, QUESTIONS SUFFICIENTLY RAISED ABOUT WHETHER DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INTERVIEW ALIBI WITNESSES AND DEFENDANT'S ACTUAL INNOCENCE.

The Fourth Department, reversing County Court, determined defendant's motion to vacate his conviction should not have been denied without a hearing. The affidavits in support of the motion raised a question whether defense counsel was ineffective for failing to interview alibi witnesses and sufficiently raised a claim of actual innocence: "We agree with the contention of defendant in his main and supplemental pro se briefs that he was entitled to a hearing on his claims of ineffective assistance of counsel and actual innocence. With respect to defendant's claim of ineffective assistance of counsel, we conclude that nonrecord facts may support defendant's contention that his trial counsel failed to investigate two potential alibi witnesses and was ineffective in failing to present the testimony of one or both of those witnesses. It is well settled that '[a] defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation and preparation of defense witnesses' ... . Here, defendant's CPL 440.10 motion was supported by the police investigation report, which demonstrated that the alibi witnesses had been interviewed by the police and made statements supporting defendant's alibi. We note that the police report was annexed to the People's CPL 710.30 notice. In addition, defendant submitted his own affidavit and an affidavit from one of the alibi witnesses likewise asserting facts supporting defendant's alibi claim. While

a hearing may ultimately reveal that 'counsel made reasonably diligent efforts to locate the [alibi] witness[es]' and present their testimony at trial ... , or that there was a strategic reason for the failure to do so... , we agree with defendant that his submissions raised factual issues requiring a hearing ... . Additionally, we conclude that County Court erred in denying defendant's motion without holding a hearing to address defendant's claim that the judgment of conviction should be vacated pursuant to CPL 440.10 (1) (h) based on his actual innocence of the crimes of which he was convicted... . We conclude that defendant made a prima facie showing of actual innocence sufficient to warrant a hearing on the merits ... . Specifically, in support of his claim of actual innocence, he submitted competent evidence establishing an alibi through, inter alia, witnesses who, although identified before trial in a police report attached to the People's 710.30 notice, did not testify at trial." ***People v. Pottinger*, 2017 N.Y. Slip Op. 08972, Fourth Dept 12-22-17**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

GRAND JURY EVIDENCE OF SERIOUS PHYSICAL INJURY PRESENTED THROUGH THE VICTIM'S TESTIMONY WAS SUFFICIENT, PROSECUTORIAL MISCONDUCT DURING THE GRAND JURY PROCEEDINGS WARRANTED DISMISSAL OF THE INDICTMENT.

The Fourth Department determined the evidence of serious physical injury, an element of the gang assault charge, was supported by sufficient evidence presented to the grand jury. However, prosecutorial misconduct during the grand jury proceedings warranted dismissal of the indictment (the People may represent however): "We agree with the People that the evidence before the grand jury was legally sufficient to establish that the victim sustained a serious physical injury. While the medical records introduced in evidence were uncertified and were thus hearsay, the victim himself was competent to testify to 'readily apparent external physical injuries of which he obviously [had] personal knowledge' ... We agree with the court, however, that the prosecutor engaged in a pervasive pattern of improper conduct at the grand jury proceeding that warranted dismissal of the indictment on the ground that the integrity of the proceeding was impaired ... .. The prosecutor acted improperly in repeatedly asking leading questions of his witnesses ... , and in introducing hearsay evidence ... . During his cross-examination of defendants, the prosecutor improperly asked them whether other witnesses were lying ... , and he asked Blauvelt, without any evident good faith basis, whether defendants used illegal drugs on the night of the altercation and whether they used steroids in general ... .. 'Most egregiously,' as described by the court, the prosecutor acted as an unsworn witness by stating personal opinions relevant to material issues during his instructions to the grand jury, i.e., that younger people are more likely than older people to start fights, and that the victim's injuries must have resulted from 'a substantial beating' ... . We remind the People that a prosecutor owes 'a duty of fair dealing to the accused' at a grand jury proceeding and, more generally, that a prosecutor 'serves a dual role as advocate and public officer,' and must 'not only . . . seek convictions but [must] also . . . see that justice is done' ...". ***People v. Blauvelt*, 2017 N.Y. Slip Op. 08948, Fourth Dept 12-21-17**

CRIMINAL LAW, EVIDENCE.

ACQUISITION OF CELL PHONE LOCATION DATA, PLACING DEFENDANT NEAR THE MURDER SCENE, DID NOT REQUIRE A WARRANT SUPPORTED BY PROBABLE CAUSE.

The Fourth Department, in a full-fledged opinion by Justice Whalen, determined the acquisition of data indicating the location of defendant's cell phone close in time to the murder did not require a warrant supported by probable cause. The court also found that the reason for the prosecutor's elimination of a juror, offered in response to defendant's Batson challenge, was not pretextual. With respect to the cell phone location data, the court wrote: "... [W]e conclude that the acquisition of the cell site location information was not a search under the Fourth Amendment to the federal constitution because defendant's use of the phone constituted a voluntary disclosure of his general location to his service provider, and a person does not have a reasonable expectation of privacy in information voluntarily disclosed to third parties ... . In contending otherwise, defendant relies on United States v. Jones (565 US 400 [2012]) — particularly Justice Sotomayor's concurring opinion in that case (565 US at 413-418) — and Riley v. California (___ US ___, 134 S Ct 2473 [2014]). In our view, that reliance is misplaced. Jones is distinguishable because it involved direct surveillance of the defendant by the police using a GPS device as opposed to information that the defendant had voluntarily disclosed to a third party ... Notwithstanding Justice Sotomayor's suggestion that 'it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties' ... , we remain bound by the third-party doctrine when interpreting the Fourth Amendment '[u]ntil a majority of justices on the [Supreme] Court instructs us otherwise' ... . Riley, in turn, is distinguishable because it involved an inspection of the contents of the defendant's phone, rather than mere location information ...". ***People v. Jiles*, 2017 N.Y. Slip Op. 08944, Fourth Dept 12-22-17**

CRIMINAL LAW, EVIDENCE.

POLICE OFFICER DID NOT HAVE REASON TO REACH INSIDE DEFENDANT'S POCKET DURING A FRISK FOR WEAPONS, THE PEOPLE DID NOT DEMONSTRATE THE INVENTORY SEARCH OF A VEHICLE WHICH LACKED A VALID INSPECTION STICKER WAS PROPER.

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the police officer did not have the authority to reach inside defendant's pocket and the People did not demonstrate the defendant's vehicle was searched pursuant to a valid inventory search. The officer approached the defendant who was sitting in a parked vehicle lacking a valid inspection: "With respect to the marihuana seized from defendant's pocket, we agree with defendant that the police officer lacked any basis upon which to search defendant's person. The police officer observed defendant sitting inside a parked vehicle lacking a valid inspection. The officer approached the vehicle and, upon seeing a kitchen knife on the floorboard of the vehicle, asked defendant to exit the vehicle. Without any further provocation from defendant, the officer conducted a search of defendant's person, discovering a small amount of marihuana in defendant's pocket. That search was unlawful for a variety of reasons. First, the search cannot be justified as a frisk for officer safety inasmuch as there was no evidence that, after defendant exited the vehicle, the officer .reasonably suspected that defendant was armed and posed a threat to [the officer's] safety'... . Second, even assuming, arguendo, that the officer was entitled to conduct a protective frisk, we conclude that he was not entitled to search defendant's pockets. 'A protective frisk is an intrusion tailored to discover the presence of concealed weapons, usually consisting of a pat-down of a person's outer clothing . . . [It] should not be extended beyond its purpose of securing the safety of the officer and preventing an escape' ... . Where, as here, there is no evidence that the officer believed that the individual's pockets contained weapons, the search of those pockets is unlawful ... . . We likewise agree with defendant that the court erred in refusing to suppress the physical evidence found inside the uninspected vehicle inasmuch as the People failed to establish that the purported inventory search was valid ... . Even if we were to conclude that the uninspected vehicle could be impounded and subjected to an inventory search, a questionable proposition at best, the People failed to establish the existence of any departmental policy concerning inventory searches or that the officer properly conducted the search in compliance with established and standardized procedures ...". ***People v. Solivan*, 2017 N.Y. Slip Op. 09021, Fourth Dept 12-22-17**

CRIMINAL LAW, EVIDENCE, APPEALS.

EVIDENCE DEFENDANT CONSTRUCTIVELY POSSESSED DRUGS THAT WERE LOCATED IN HIS SISTER'S (NOT HIS) RESIDENCE SUFFICIENT, SENTENCE REDUCED IN THE INTEREST OF JUSTICE.

The Fourth Department determined the evidence of constructive possession of drugs found in defendant's sister's (not defendant's) residence was sufficient. Defendant's sentence was deemed too harsh, even for a repeat offender, and was reduced in the interest of justice: " ' Constructive possession can be established by evidence that the defendant had dominion and control over the [drugs and drug paraphernalia] or the area in which [they were] found' . . . Exclusive access, however, is not required to sustain a finding of constructive possession' ... . Here, the drugs and drug paraphernalia were recovered from various locations inside a residence in which defendant's sister, her boyfriend and her children resided. It is undisputed that defendant did not reside in that residence. Nevertheless, there was ample evidence that defendant constructively possessed the contraband. * * * Unlike other constructive possession cases, where the testimony at trial is limited to physical evidence linking a defendant to a location and possession of the drugs must be inferred from the defendant's ties to the residence ... , here there was testimony that defendant on three occasions admitted that the drugs in the house belonged to him, and the sister's boyfriend testified that the drugs in his residence belonged to defendant. Moreover, the evidence established that defendant had sold cocaine from that residence less than three weeks before the search warrant was executed." ***People v. Tuff*, 2017 N.Y. Slip Op. 08971, Fourth Dept 12-22-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT PROPERLY ASSESSED 80 POINTS FOR CHILD PORNOGRAPHY IN THIS SEX OFFENDER REGISTRATION ACT (SORA) RISK LEVEL PROCEEDING, CRITERIA EXPLAINED, DETERMINATION REVERSED HOWEVER BECAUSE COUNTY COURT DID NOT CONSIDER DOWNWARD DEPARTURE REQUEST.

The Fourth Department, reversing County Court, determined defendant's request for a downward departure in this Sex Offender Registration Act (SORA) risk level assessment should have been considered. Defendant was properly assessed 80 points in this child pornography case: "The Court of Appeals has noted that 'the children depicted in child pornography are necessarily counted as victims under [risk] factor 3, and nothing in that factor's plain terms suggests otherwise. After all, factor 3 permits the assessment of 30 points [where, as here,] [t]here were three or more victims' involved in a defendant's current sex crime' ... . The Court of Appeals has also made it clear that 'the plain terms of [risk] factor 7 authorize the assessment of points based on a child pornography offender's stranger relationship with the children featured in his or her child pornography files, and thus points can be properly assessed under that factor due to an offender's lack of prior

acquaintance with the children depicted in the files' ... . Here, the People established by clear and convincing evidence that the children depicted in the images on defendant's computer were strangers to defendant. Consequently, the court properly concluded that 'defendant should be assessed 30 points under risk factor 3, number of victims,' based on the numerous child victims depicted in the images he possessed . . . and 20 points under risk factor 7, relationship with victim, stranger,' [inasmuch] as defendant did not know his child victims.' We agree with defendant, however, that the court erred in failing to consider his request for a downward departure from the presumptive level two risk yielded by his 80-point total score on the risk assessment instrument ... . We therefore reverse the order and remit the matter to County Court for a determination of whether defendant met his 'initial burden of (1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence' ... and, if so, for the court to exercise its discretion whether to grant defendant's request for a downward departure ... ". ***People v. Tutty*, 2017 N.Y. Slip Op. 09029, Fourth Dept 12-22-17**

FAMILY LAW.

SEPARATION AGREEMENTS UNCONSCIONABLE, MATTER REMITTED FOR NEW EQUITABLE DISTRIBUTION AND MAINTENANCE FINDINGS.

The Fourth Department, reversing Supreme Court, determined the separation agreements were unconscionable. Defendant wife was represented by counsel in the divorce, plaintiff husband was not, there was a vast difference in assets, wife's pensions were not valued, and financial disclosure was not complete. The matter was sent back for new rulings on equitable distribution and maintenance: "A separation agreement should be set aside as unconscionable where it is 'such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other . . . , the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense' ... . We note that the unconscionability or inequality of a separation agreement may be the result of overreaching by one party to the detriment of another ... . Here, at the time the parties entered into the agreements, defendant wife was represented by counsel but plaintiff was not, which, while not dispositive, is a significant factor for us to consider ... . Another factor to consider is that the agreements did not make a full disclosure of the finances of the parties ... . … Based on our consideration of all the factors, we conclude that the agreements here are unconscionable and were the product of overreaching by defendant and thus should be set aside ...". ***Tuzzolino v. Tuzzolino*, 2017 N.Y. Slip Op. 08991, Fourth Dept 12-22-17**

FAMILY LAW.

EVIDENCE DID NOT SUPPORT NEGLECT FINDING BASED UPON CORPORAL PUNISHMENT.

The Fourth Department, reversing Family Court, determined the evidence of corporal punishment was not sufficient to justify a finding of neglect: "According to the testimony of the father, he was called into the school by the child's teachers in March 2014 because the child was misbehaving. When the father stated that he was taking the child home, the child began running around the classroom. The father chased the child around the classroom and, in attempting to grab him, accidentally caught him in the face with his hand, causing the marks. The father further testified, consistent with the child's statement to the caseworker, that the child sustained a bruise in January 2014 while roughhousing with his siblings. '[A] finding of neglect requires proof that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired' as a result of the parent's failure to exercise a minimum degree of care' ... .Although the use of excessive corporal punishment constitutes neglect ... , a parent has the right to use reasonable physical force to instill discipline and promote the child's welfare ... . Here, we conclude that petitioner failed to establish that the father intentionally harmed the child or that his conduct was part of a pattern of excessive corporal punishment ... , and petitioner thus failed to meet its burden of establishing by a preponderance of the evidence that the child was in imminent danger ...". ***Matter of Damone H., Jr. (Damone H., Sr.)*, 2017 N.Y. Slip Op. 09023, Fourth Dept 12-22-17**

PERSONAL INJURY.

DEFENDANT MADE A LEFT TURN IN FRONT OF AN ONCOMING CAR IN VIOLATION OF VEHICLE AND TRAFFIC LAW, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT.

The Fourth Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment finding defendant negligent in this traffic accident case. Defendant made a left turn in front of an oncoming car and testified he did not see the oncoming car. That constituted negligence as a matter of law, irrespective of whether defendant stopped at a stop sign before the accident: "Plaintiffs met their initial burden by establishing that defendant was negligent in violating Vehicle and Traffic Law § 1142 (a) by turning left at an intersection directly into the path of an oncoming vehicle and that defendant's violation of the statute was unexcused ... . Additionally, inasmuch as defendant admitted in his deposition tes-

timony that he never saw the oncoming vehicle prior to the collision, we conclude that defendant was negligent as a matter of law in failing to see what was there to be seen and in crossing in front of an oncoming vehicle when it was hazardous to do so ... . Although we agree with defendant that there are conflicting accounts concerning whether he stopped at the posted stop sign prior to the accident, we conclude that this minor discrepancy does not raise an issue of fact precluding an award of summary judgment in plaintiffs' favor on the issue of defendant's negligence because in either scenario defendant was negligent as a matter of law ...". ***Peterson v. Ward*, 2017 N.Y. Slip Op. 09024, Fourth Dept 12-22-17**

PERSONAL INJURY, EMPLOYMENT LAW, VEHICLE AND TRAFFIC LAW.

ALTHOUGH THE EMPLOYEE OF THE OWNER OF THE TRUCK WAS NOT ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT, THERE WAS A QUESTION OF FACT WHETHER THE EMPLOYEE WAS USING THE TRUCK WITH THE COMPANY'S PERMISSION, RENDERING THE COMPANY LIABLE PURSUANT TO VEHICLE AND TRAFFIC LAW § 388.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the complaint against the company which owned a truck which struck plaintiff should not have been dismissed. The driver of the truck, an employee, was using it for personal purposes (driving bar to bar) at the time of the accident and was not acting within the scope of his employment. The company was not liable under the doctrine of respondeat superior. However, there was a question of fact whether the driver was using the truck with the company's permission at the time of the accident, rendering the company liable pursuant to the Vehicle and Traffic Law: " 'It is well settled that Vehicle and Traffic Law § 388 (1) creates a strong presumption that the driver of a vehicle is operating it with the owner's permission and consent, express or implied, and that presumption continues until rebutted by substantial evidence to the contrary' ... . Even in the case of substantial evidence to the contrary, the issue of implied permission is ordinarily a question of fact for a jury ... . The Court of Appeals … went so far as to state that 'uncontradicted statements of both the owner and the driver that the driver was operating the vehicle without the owner's permission will not necessarily warrant a court in awarding summary judgment for the owner' ...". ***Baker v. Lisconish*, 2017 N.Y. Slip Op. 08943, Fourth Dept 12-22-17**

PERSONAL INJURY, FORECLOSURE, REAL PROPERTY.

DEFENDANTS LOST TITLE TO THE PROPERTY WHEN THE FORECLOSURE SALE TOOK PLACE, NOT WHEN THE JUDGMENT OF FORECLOSURE WAS ENTERED, THEREFORE PLAINTIFFS' ALLEGED EXPOSURE TO LEAD PAINT TOOK PLACE WHEN THE DEFENDANTS STILL HELD TITLE.

The Fourth Department, reversing Supreme Court, determined that the lead-paint exposure complaint should not have been dismissed because, although the exposure occurred after the judgment of foreclosure on the property, it occurred before the foreclosure sale, when defendants still held title: "... [D]efendants sought partial summary judgment dismissing those claims because defendants had lost title to the property by order of foreclosure entered on that date. We agree with plaintiff that the court erred in granting that part of defendants' motion. Although defendants established in support of that part of their motion that a judgment of foreclosure had been entered, it is well settled that '[t]he entry of a judgment of foreclosure and sale does not divest the mortgagor of its title and interest in the property until [a] sale is actually conducted' ... . It is undisputed that the actual sale of the property did not take place until April 1993, after plaintiff had allegedly been exposed to lead paint, and thus defendants failed to meet their burden on that part of their motion." ***Nero v. Kendrick*, 017 N.Y. Slip Op. 08980, Fourth Department 12-22-17**

PERSONAL INJURY, MEDICAL MALPRACTICE.

PLAINTIFFS' BATTERY AND MEDICAL MALPRACTICE ACTIONS PROPERLY SURVIVED SUMMARY JUDGMENT, DEFENDANTS PAPERS, WHICH INCLUDED PLAINTIFF'S TESTIMONY, DEMONSTRATED TRIABLE ISSUES OF FACT.

The Fourth Department determined plaintiffs' battery and medical malpractice causes of action properly survived summary judgment. The court noted that the defendants had submitted plaintiff's testimony in support of summary judgment and thereby demonstrate triable issues of fact. With respect to the battery cause of action, the court wrote: "It is 'well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided no consent at all' ... . Here, plaintiffs allege in the complaint that 'defendant physician knew that . . . she was exceeding the scope of . . . plaintiff's consent by performing a medical procedure that . . . plaintiff had not authorized' ... and, inasmuch as defendants do not challenge the battery claim with respect to the element of causation, we conclude that plaintiffs have stated such a claim." ***Tirado v. Koritz*, 2017 N.Y. Slip Op. 08954, Fourth Dept 12-22-17**

PERSONAL INJURY, MUNICIPAL LAW.

IN THIS SLIP AND FALL CASE, COLLAPSE OF PAVEMENT NEAR A STORM DRAIN WAS CAUSED BY WATER FLOWING INTO THE DRAIN OVER TIME AND WAS NOT THE IMMEDIATE RESULT OF ACTION TAKEN BY THE VILLAGE, THE CONDITION WAS NOT ACTIONABLE.

The Fourth Department, reversing Supreme Court, determined the village's motion for summary judgment in this slip and fall case should have been granted. Where a municipality has a written notice requirement which has not been met, it still can be liable for a dangerous condition it created. However a defect which develops gradually over time, as opposed to immediately after some act by the municipality, is not actionable. Here the collapse of pavement near a storm drain was caused by water over time: "There is no dispute that defendant established that it lacked prior written notice, thus shifting the burden to plaintiff to demonstrate that an exception to the general rule is applicable ... . Such an exception exists where 'the municipality affirmatively created the defect through an act of negligence' ... . That exception, however, applies only 'to work by the [municipality] that immediately results in the existence of a dangerous condition' ... . Here, plaintiff failed to raise an issue of fact because his expert opined that the dangerous condition developed over time as a result of the intake of storm water, not that the dangerous condition was the immediate result of allegedly negligent work ...". ***Malek v. Village of Depew*, 2017 N.Y. Slip Op. 08998, Fourth Dept 12-22-17**

PERSONAL INJURY, MUNICIPAL LAW, EMPLOYMENT LAW.

CITY NOT LIABLE FOR ACTIONS OF OFF-DUTY POLICE OFFICER WHO WAS ACTING OUTSIDE THE SCOPE OF HIS EMPLOYMENT DURING THE ENCOUNTER WITH PLAINTIFF.

The Fourth Department, reversing Supreme Court, determined that an off-duty police officer (Rodriguez) working security at a bar was not acting within the scope of his employment during the encounter with plaintiff. Therefore the causes of action against the city based upon vicarious liability or respondeat superior, alleging negligence, assault and false imprisonment, should have been dismissed: "... [W]here there are no material disputed facts and there is no question that the employee's acts fall outside the scope of his or her employment, the determination is one of law for the court and not one of fact for the jury ... . A municipality may be held vicariously liable for the conduct of a member of its police department if the officer was engaged in the performance of police business... . Here, in support of their motion, the City defendants established that Rodriguez was at all relevant times off-duty, was engaged in other employment as a private citizen, was not in uniform, did not arrest plaintiff, and did not display his police badge. We thus conclude that the City defendants met their prima facie burden of establishing that Rodriguez was not acting within the scope of his employment as a police officer during the encounter with plaintiff ... . In opposition, plaintiff failed to raise a triable issue of fact ... . We reject plaintiff's contention that Rodriguez's identification of himself as a police officer during the encounter raised an issue of fact sufficient to defeat the motion with respect to the issue of scope of employment ...". **Maloney v. Rodriguez, 2017 N.Y. Slip Op. 08993, Fourth Dept 12-22-17**

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