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FIRST DEPARTMENT

CRIMINAL LAW, APPEALS.

FAILURE TO INSTRUCT JURY THAT AN ACQUITTAL ON THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE PRECLUDED CONSIDERATION OF THE REMAINING CHARGES REQUIRED REVERSAL IN THE INTEREST OF JUSTICE.

The First Department, reversing Supreme Court in the interest of justice (error not preserved), determined that the judge's failure to instruct the jury that a not guilty verdict on the top count based on the justification defense precluded consideration of the remaining charges was reversible error. The top count was attempted murder and defendant was convicted of assault second degree: "... [T]the court's charge failed to convey that an acquittal on the top count of attempted second-degree murder based on a finding of justification would preclude consideration of the remaining charges. We find that this error was not harmless and that it warrants reversal in the interest of justice ...". ***People v. Marcucci*, 2018 N.Y. Slip Op. 00634, First Dept 2-1-18**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION.

DEFENDANT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE WAS TOLD ONLY OF POTENTIAL IMMIGRATION CONSEQUENCES OF HIS PLEA, MATTER REMANDED TO ALLOW DEFENDANT TO MAKE A MOTION TO VACATE HIS PLEA.

The First Department determined defendant was not afforded effective assistance of counsel because he was told only that his plea had potential immigration consequences when in fact deportation was mandatory: "Defendant was deprived of effective assistance when his counsel advised him that his plea would have 'potential immigration consequences,' where it is clear that his drug-related conviction would trigger mandatory deportation under 8 USC § 1227(a)(2)(B)(I) ... . The remarks made by counsel on the record are sufficient to permit review on direct appeal ... . Thus, we hold this matter in abeyance to afford defendant the opportunity to move to vacate his plea upon a showing that there is a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea." ***People v. Pequero*, 2018 N.Y. Slip Op. 00619, First Dept 2-1-18**

CRIMINAL LAW, CONSTITUTIONAL LAW.

CLOSURE OF COURTROOM BASED UPON WITNESS'S FEAR WAS PROPER.

The First Department noted that the closure of the courtroom during a prosecution witness's testimony was proper in this gang-related murder case: "The record established an overriding interest in partially, and later completely, closing the courtroom during the testimony of an identifying eyewitness (see Waller v. Georgia, 467 US 39, 48 [1984]), and the other requirements of Waller were likewise satisfied as to both closures. The witness's 'extreme fear of testifying in open court was sufficient to establish an overriding interest' ... , because the witness's inability to testify without the closures at issue 'could have severely undermined the truth seeking function of the court' ... in this gang-related murder case. ... ... [T]he court conducted a hearing at which the witness testified that he previously had been threatened for cooperating with the prosecution in another trial, that he had heard threats made against potential prosecution witnesses in the present case, and that he and his family lived in the same neighborhood where the shooting occurred. The court was entitled to credit the witness's testimony that he felt threatened by defendant's cousin and could not testify in his presence ... . Although the cousin did not make any direct threats to the witness, he appeared to be closely associated with a person who did so." ***People v. Sharp*, 2018 N.Y. Slip Op. 00623, First Dept 2-1-18**

CRIMINAL LAW, EVIDENCE.

INTENT REQUIREMENT OF ATTEMPTED GRAND LARCENY DOES NOT ATTACH TO THE VALUE OF THE PROPERTY, GRAND LARCENY COUNTS SHOULD NOT HAVE BEEN DISMISSED AND REDUCED BASED ON THE GRAND JURY EVIDENCE WHICH DID NOT INCLUDE EVIDENCE OF THE INTENT TO STEAL PROPERTY OF A CERTAIN VALUE.

The First Department, reversing Supreme Court, determined the attempted grand larceny counts should not have been dismissed and reduced based upon the grand jury evidence. The defendant was attempting to remove mail from a mailbox in which envelopes containing money orders had been planted by the police. There was no evidence any of the envelopes defendant had removed contained the planted money orders. The motion court reduced the grand larceny counts because it could not be proven defendant intended to steal property of a certain value. The First Department held that the intent requirement does not attach to the value element of the offense: "The court erred in dismissing one count of the indictment, and reducing another, on the ground that the People were required to present proof of intent with regard to the property value elements of attempted grand larceny in the third and fourth degrees. These elements are strict liability aggravating factors when the completed crimes are charged. While the Penal Law definitions of attempt (Penal Law § 110.00) and intentionally (Penal Law § 15.05[1]) may be susceptible to the interpretation accorded them by the motion court, any ambiguity has been resolved by the Court of Appeals' holding in People v. Miller (87 NY2d 211 [1995]), that a strict liability aggravating factor of a completed crime is not a 'result' to which an intent requirement attaches when an attempt to commit the completed crime is charged. Accordingly, the mental culpability requirements for an attempt and a completed crime are identical... , and the court erred in finding that the attempted grand larceny charges required evidence of intent to steal property of a certain value." ***People v. Deleon*, 2018 N.Y. Slip Op. 00531, First Dept 1-30-18**

CRIMINAL LAW, IMMIGRATION.

COURT WAS REQUIRED TO INFORM DEFENDANT OF THE DEPORTATION CONSEQUENCES OF HIS PLEA, DESPITE DEFENDANT'S ERRONEOUS STATEMENT TO THE COURT THAT HE IS A US CITIZEN, DEFENDANT ALLOWED TO MOVE TO VACATE HIS PLEA.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over an extensive dissent, determined defendant should be afforded the opportunity to move to vacate his guilty plea because the court did not inform him of the deportation consequences. Although the probation report indicated defendant was not a US citizen and was undocumented, the defendant, who had a history of mental illness, told the court, when asked, the he was a US citizen. The First Department held that all defendants must be informed of the deportation consequences for non-citizens: "In People v. Peque (22 NY3d 168 [2013]...), the Court of Appeals held that before accepting a plea, due process requires that a court 'apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony' ... . The Court reasoned that 'fundamental fairness . . . requires a trial court to make a noncitizen defendant aware of the risk of deportation because deportation frequently results from a noncitizen's guilty plea and constitutes a uniquely devastating deprivation of liberty' ... . Accordingly, 'a noncitizen defendant convicted of a removable crime can hardly make a voluntary and intelligent choice among the alternative courses of action' unless informed of the possibility of deportation ... . Defendant's statement to the court that he was a citizen did not absolve the court of its obligations pursuant to Peque. Notably, Peque did not condition the need to give this warning on whether or not the court has reason to believe the defendant is not a citizen. The warning mandated by Peque is required whether the defendant is a citizen or not. Indeed, the Court of Appeals recognized that in order to protect the rights of the large number of noncitizen defendants pleading guilty to felonies in the state, it was necessary to 'make all defendants aware that, if they are not United States citizens,' pleading guilty to a felony might lead to deportation ...". ***People v. Palmer*, 2018 N.Y. Slip Op. 00638, First Dept 1-2-18**

MUNICIPAL LAW, MEDICAL MALPRACTICE, PERSONAL INURY.

ALTHOUGH DEFENDANT NYC HEALTH AND HOSPITALS CORPORATION (HHC) DID NOT HAVE TIMELY KNOWLEDGE OF THE ACTUAL FACTS CONSTITUTING PETITIONER'S MEDICAL MALPRACTICE CLAIM, THE FAILURE TO PROVIDE THE MEDICAL RECORDS UPON REQUEST JUSTIFIED GRANTING THE PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM.

The First Department, over an extensive dissent, determined Supreme Court properly allowed petitioner (Townsend) to file a late notice of claim against the NYC Health and Hospitals Corporation (HHC). Petitioner had been treated for a lacerated thumb. Petitioner did not learn a tendon had been torn until after the 90-day period for filing a notice of claim had passed. He hired an attorney shortly thereafter. The attorney requested petitioner's medical records from HHC but had not received them by the time the statute of limitations was about to run out. At that point the attorney petitioned for leave to file a late notice of claim. Although HHC did not have timely actual knowledge of the nature of the malpractice claim, because the torn tendon was not mentioned in the HHC medical records, the petitioner's excuse for not filing the notice of claim (HHC's failure to provide the medical records) was deemed sufficient: "The actual knowledge requirement 'contemplates actual knowledge of the essential facts constituting the claim,' not knowledge of a specific legal theory' ... . Facts found in medi-

cal records that merely 'suggest' the possibility of malpractice are insufficient, as a plaintiff must demonstrate a hospital's actual knowledge of negligent acts or omissions which result in injury to a plaintiff ... . Supreme Court correctly found that HHC did not acquire actual knowledge of Townson's malpractice claim through the medical records. The dissent concedes that Townson ... did not learn of [the] torn tendon until March 19, 2015, after the 90-day period had expired. The dissent argues that Townson's excuse may have been reasonable had he requested leave to file shortly after March 19, 2015, when he learned of the torn tendon. In the dissent's view the delay in serving the notice of claim is not excusable. We disagree. Townson's claim of malpractice is premised upon a theory that the emergency room failed to evaluate whether internal, connective soft tissue damage resulted from the deep laceration. Townson's counsel, at the time he was retained, which was immediately after Townson had learned of the torn tendon, promptly sent a request to HHC for the medical records to discern the viability of Townson's malpractice claim, but HHC failed to respond on multiple occasions ...". ***Matter of Townson v. New York City Health & Hosps. Corp.*, 2018 N.Y. Slip Op. 00607, First Dept 2-1-18**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA OF THE FALL WAS LAST CLEANED OR INSPECTED, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED IN THIS SLIP AND FALL CASE, POINTING TO GAPS IN PLAINTIFFS' CASE NOT ENOUGH.

The First Department, reversing Supreme Court, determined summary judgment should not have been granted to defendant in this slip and fall case. The defendant did not demonstrate when the area of the fall was last cleaned or inspected. Therefore no prima facie case was made out. Reliance on gaps in plaintiffs' case is not enough in the summary-judgment context. "In this slip and fall action, defendant sought to demonstrate its entitlement to summary judgment by merely pointing to perceived gaps in plaintiffs' case ... . Defendant failed to establish its prima facie entitlement to judgment as a matter of law by demonstrating when the area in question was last cleaned or inspected relative to the time when plaintiff fell ...". ***Vargas v. Riverbay Corp.*, 2018 N.Y. Slip Op. 00520, First Dept 1-30-18**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW.

NEGLIGENCE AND LABOR LAW § 200 CAUSES OF ACTION IN THIS ELECTROCUTION CASE SHOULD HAVE BEEN DISMISSED, NO CODE VIOLATIONS, DEFENDANTS NEVER NOTIFIED THE TRANSFORMERS IN THE ELEVATOR CONTROL ROOM CONSTITUTED A DANGEROUS CONDITION.

The First Department, reversing Supreme Court, over a two-justice dissent, determined the negligence and Labor Law § 200 causes of action based upon allegations of "poor lighting" and the failure to provide a cover to protect against electrocution should have been dismissed. Plaintiff's decedent was an elevator mechanic who was electrocuted when he came into contact with a transformer in the elevator control room. There were no witnesses to the accident. Plaintiffs did not allege the level of lighting constituted a code violation. The absence of a cover over the transformer did not violate any applicable code and defendants were never notified of a problem with the transformers, which had been routinely inspected: "With regard to the issue of whether defendants caused or created a hazardous condition, there is no dispute that [defendants] not design or manufacture the elevator control cabinet, or any of its electrical components, including the transformers ... . As to whether defendants had notice of the alleged dangerous condition ... the building's property manager... testified that he was never informed that there was any problem with the elevator control cabinet or that the transformers lacked a proper cover either by the DOB or by United despite the fact that both DOB (NYC Department of Buildings) and [the defendant elevator consultant service] conducted inspections of the ninth floor motor room. [The consultant-service president] testified that a cover was not required on the transformers because the transformers were in an enclosed cabinet. ... Even if the elevator control cabinet did not comply with the [American National Standards Institute (ANSI)] standard because the transformers did not have a cover, plaintiffs have failed to establish that defendants were required by law to comply with the ... ANSI standard. Indeed, the ... ANSI standard has not been adopted by or incorporated into New York City's elevator code and ANSI itself is not a statute, ordinance or regulation. Thus, a violation thereof is not evidence of negligence ...". ***Bradley v. HWA 1290 III LLC*, 2018 N.Y. Slip Op. 00516, First Dept 1-30-18**

SECOND DEPARTMENT

CIVIL PROCEDURE, TRUSTS AND ESTATES.

MOTION TO DISMISS MADE BY DECEASED DEFENDANT'S FORMER ATTORNEY PURPORTEDLY ON DECEDENT'S BEHALF WAS A NULLITY, MOTIONS TO DISMISS MADE BY OTHER DEFENDANTS ARGUING THAT PLAINTIFFS DID NOT TAKE TIMELY STEPS TO SUBSTITUTE A REPRESENTATIVE FOR THE DECEASED DEFENDANT SHOULD HAVE BEEN GRANTED.

The Second Department determined plaintiffs failure to take timely steps to substitute a representative for a defendant who had died required the dismissal of the complaint against that defendant. A motion to dismiss made by decedent's former attorney, purportedly on behalf of the decedent, was a nullity and should not have been granted. Motions to dismiss made

by the other defendants should have been granted: " 'The death of a party divests the court of jurisdiction and stays the proceedings until a proper substitution has been made pursuant to CPLR 1015(a). Moreover, any determination rendered without such substitution will generally be deemed a nullity' ... . The death of a party terminates his or her attorney's authority to act on behalf of the deceased party... . Although the determination of a motion pursuant to CPLR 1021 made by the successors or representatives of a party or by any party is an exception to a court's lack of jurisdiction, here, one of the motions pursuant to CPLR 1021 was made by the former attorney for the decedent purportedly on behalf of the decedent. Since the former attorney lacked the authority to act, the Supreme Court lacked jurisdiction to consider that motion to dismiss ... . Accordingly, so much of the order as granted the motion purportedly made on behalf of the decedent is a nullity. Nonetheless, the Supreme Court had jurisdiction to consider the other defendants' separate motions to dismiss pursuant to CPLR 1021 and to consider the plaintiffs' cross motion. CPLR 1021 provides, in pertinent part, that '[i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate' ... . Here, the Supreme Court providently exercised its discretion in determining that substitution of the decedent was not made within a reasonable time. As such, the court providently exercised its discretion in denying those branches of the plaintiffs' cross motion which were to appoint a representative for the decedent and, upon appointment, substitute the representative for the decedent as a defendant. Given that substitution was not made within a reasonable time, dismissal of the complaint as against the decedent, 'the party for whom substitution should have been made' (CPLR 1021), was proper. However, contrary to the court's determination, CPLR 1021 did not authorize dismissal of the complaint as against any of the other defendants." ***Vicari v. Kleinwaks*, 2018 N.Y. Slip Op. 00576, Second Dept 1-31-18**

CRIMINAL LAW, APPEALS.

WAIVER OF RIGHT TO APPEAL INVALID.

The Second Department determined defendant's waiver of his right to appeal was not valid: "... [T]he record of the plea proceeding did not demonstrate that the defendant knowingly, voluntarily, and intelligently waived his right to appeal. The Supreme Court, after inquiring of counsel whether the defendant had executed a written waiver, advised the defendant: '[Y]ou have just executed the waiver of appeal. And by doing so, you have given up your right to appeal, which means there will be no appeal with regards to anything in your case.' Instead of ascertaining whether the defendant had made a knowing, voluntary, and intelligent choice to waive his right to appeal as a condition of his plea, the court merely informed the defendant that he had already waived his right to appeal by executing the appeal waiver and then confirmed that the defendant understood this established fact. '[A] defendant does not validly waive his or her right to appeal where the colloquy suggests that waiving the right to appeal [is] mandatory rather than a right which the defendant [is] being asked to voluntarily relinquish' ... . Moreover, the court failed to establish on the record that the defendant read and understood the written waiver, or discussed the waiver with his counsel ... ". ***People v. Johnson*, 2018 N.Y. Slip Op. 00567, Second Dept 1-31-18**

CRIMINAL LAW, ATTORNEYS.

FAILURE TO REQUEST THAT THE JURY BE CHARGED ON A LESSER INCLUDED OFFENSE AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL, THE EVIDENCE OF THE CHARGED OFFENSE WAS WEAK, THE LESSER INCLUDED OFFENSE WAS PLAUSIBLE, AND THE SENTENCING DISPARITY WAS ENORMOUS.

The Second Department determined defense counsel's failure to ask that the jury be charged with the lesser included offense of trespass in this burglary prosecution constituted ineffective assistance. The court noted that, because defendant was a persistent violent felony offender he faced a minimum sentence of 16 to life on the burglary conviction, but a trespass conviction would entail only one year in jail. The evidence that defendant intended to steal something was weak, the mistaken-identification defense put forth by defense counsel was weak, so trespass would have been a viable alternative for the jury: "In deciding whether to ask for submission of the lesser included offense, defense counsel was obligated to consider the possible consequences of that decision for his client. The defendant was a persistent violent felony offender who, upon his conviction of burglary in the second degree (see Penal Law § 70.02[1][b]), faced a minimum sentence of 16 years to life imprisonment ... . By contrast, upon conviction of criminal trespass in the second degree, which, like the remaining charge, criminal mischief in the fourth degree, was a class A misdemeanor, the defendant faced a maximum of one year in jail. That is not to say that counsel would have been required to argue the lesser included offense in summation, but it was not reasonable for counsel to deprive the jury of the opportunity to consider it ... . Given the weakness of the mistaken-identification defense, the plausibility of the lesser included offense, and the enormous sentencing disparity between a burglary conviction and a criminal trespass conviction, counsel's failure to request submission of the lesser included offense cannot be considered part of a legitimate all-or-nothing strategy. Under the circumstances, counsel's failure to request submission of the lesser included offense deprived the defendant of his right to meaningful representation ... " ***People v. Orama*, 2018 N.Y. Slip Op. 00571, Second Dept 1-31-18**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL, BY TAKING A POSITION ADVERSE TO THAT OF THE DEFENDANT WITH RESPECT TO DEFENDANT'S PRO SE MOTION TO SET ASIDE THE VERDICT, DEPRIVED DEFENDANT OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, MATTER REMITTED FOR CONSIDERATION OF THE MOTION.

The Second Department determined defendant was entitled to consideration of his pro se motion to set aside the verdict on ineffective assistance grounds. Defense counsel told the court he did not adopt the motion and didn't think it was correct. By taking a position adverse to his client's, defense counsel had deprived defendant of effective assistance: "Defense counsel, by taking a position adverse to that of his client on the motion to set aside the verdict pursuant to CPL 330.30, deprived the defendant of effective assistance of counsel ... . Accordingly, since the appellant has not addressed the merits of the CPL 330.30 motion in his brief, but rather, requests remittitur to the Supreme Court, we remit the matter for further proceedings on the merits of the motion and thereafter a report to this Court limited to the Supreme Court's findings with respect to the motion and whether the defendant has established his entitlement to the relief sought in his motion. We express no opinion as to the merits of the defendant's motion and we decide no other issues at this time." ***People v. Freire*, 2018 N.Y. Slip Op. 00564, Second Dept 1-31-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S ATTEMPTED ASSAULT CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, reversing defendant's conviction, determined the attempted assault conviction was against the weight of the evidence: "The only witness who identified the defendant prior to trial admitted to being intoxicated at the time of the stabbing incident. That witness failed to identify the defendant at trial. Although the People presented the testimony of three other witnesses who identified the defendant at the trial, those witnesses did not identify the defendant at any point prior to the trial, even though they were present at the scene of the crime when the defendant was apprehended and they appeared at a police precinct for questioning later that day. Two of the witnesses' descriptions of the perpetrator's clothing varied significantly from the clothing worn by the defendant upon his apprehension, which occurred within minutes of the incident. At the scene, those witnesses provided no further description of the defendant. Despite testimony that the victim began 'gush[ing]' blood after he was stabbed during a physical struggle, the arresting officer did not remember having seen any blood on the defendant's person or clothing when he was apprehended. That police officer testified that, after witnesses pointed to the perpetrator, he briefly "lost sight" of that person before apprehending the defendant." ***People v. Serrano*, 2018 N.Y. Slip Op. 00573, Second Dept 1-31-18**

CRIMINAL LAW, EVIDENCE, LANDLORD-TENANT.

ONCE THE LOCKS ON THE APARTMENT WERE CHANGED PURSUANT TO A LEGAL POSSESSION, DEFENDANT NO LONGER HAD A LEGITIMATE EXPECTATION OF PRIVACY IN HIS BEDROOM, DEFENDANT DID NOT DEMONSTRATE THE LEGAL POSSESSION WAS ILLEGAL, DEFENDANT DID NOT HAVE STANDING TO SEEK SUPPRESSION OF THE FIREARMS FOUND IN HIS BEDROOM.

The Second Department, in a full-fledged opinion by Justice Cohen, in a matter of first impression, determined the defendant did not have standing to move to suppress firearms found in his bedroom in an apartment. Defendant had been living with the family who leased the apartment. Based on failure to pay rent, the marshal changed the locks, leaving the possessions inside, thereby tendering "legal possession" of the apartment to the landlord. Answering a complaint of trespass, police officers entered the apartment and found one of the family members who had been renting it inside. The police searched the apartment and seized several handguns in defendant's room. The defendant argued that the People did not demonstrate the eviction (legal possession) had been done legally, and therefore he had standing to move to suppress. But the Second Department noted that defendant, who had relied on the evidence presented by the People, did not demonstrate the eviction (legal possession) was illegal and therefore did not meet his burden of proof on that issue. The defendant also argued that he had an expectation of privacy in the bedroom at the time it was searched. But the Second Department determined once the legal possession was accomplished, defendant had no right to enter the apartment, and therefore had no expectation of privacy in his former bedroom: "... [T]he defendant, to establish his standing, relied on the evidence presented by the People regarding the execution of the warrant of eviction.... [W]hile the defendant is correct that the "Marshal's Legal Possession" letter did not establish that the legal possession had been obtained legally, it likewise did not establish that the legal possession had been obtained illegally. ... [T]he defendant failed to satisfy his burden of establishing that he had standing to challenge the search of his former bedroom and seizure of the guns and ammunition based upon the alleged illegality of the legal possession ... . * * * Here, the legal possession gave the landlord the right to possess the apartment and remove the tenants and occupants. Although their belongings remained in the apartment, thereby necessarily creating a bailment, the tenants and occupants no longer had a legal right to possess or control the subject apartment, nor to enter or remain therein. Given that the defendant had no legal right to possess or control the subject apartment after the landlord was given

legal possession thereof, any subjective expectation of privacy he manifested in the bedroom which he had occupied in the apartment was not objectively reasonable ...". ***People v. McCullum*, 2018 N.Y. Slip Op. 00570, Second Dept 1-31-18**

FORECLOSURE, CIVIL PROCEDURE.

FILING A 90 DAY NOTICE AND THEN DISCONTINUING THE FORECLOSURE ACTION IN 2014 DID NOT REVOKE THE ELECTION TO ACCELERATE REPRESENTED BY THE FILING OF THE SUMMONS AND COMPLAINT IN 2008, FORECLOSURE ACTION PROPERLY DISMISSED AS UNTIMELY.

The Second Department determined the foreclosure action was untimely. The summons and complaint operated to accelerate the debt, triggering the six-year statute of limitations. The fact that the plaintiff bank filed a 90-day notice within the six years and then subsequently discontinued the foreclosure action did not revoke the election to accelerate: "The filing of the summons and complaint seeking the entire unpaid balance of principal in the prior foreclosure action constituted a valid election by the plaintiff to accelerate the maturity of the debt... . This established that the mortgage debt was accelerated on April 11, 2008, and that the applicable six-year statute of limitations had expired by the time the plaintiff commenced the instant action on July 8, 2014 ... . In opposition, the plaintiff failed to raise a triable issue of fact as to whether it affirmatively revoked its election to accelerate the mortgage debt within the six-year limitations period ... . The plaintiff voluntarily discontinued the prior foreclosure action on April 23, 2014, after the statute of limitations had expired, and it failed to demonstrate that its April 8, 2014, 90-day notice, as a matter of law, 'destroy[ed] the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt' ...". ***Deutsche Bank Natl. Trust Co. v. Adrian*, 2018 N.Y. Slip Op. 00543, Second Dept 1-31-18**

LANDLORD-TENANT.

TENANT'S MOTHER HAD SUCCESSION RIGHTS TO A RENT STABILIZED APARTMENT PURSUANT TO THE RENT STABILIZATION CODE AND PUBLIC HOUSING LAW, NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL HAD MISINTERPRETED THE APPLICABLE CODE PROVISION.

The Second Department, in a full-fledged opinion by Justice Hall, determined the New York State Division of Housing and Community Renewal (DHCR) misinterpreted the Rent Stabilization Code when it found that the tenant's (Scherley's) mother (Marie) did not have succession rights in a rent stabilized apartment. Mare had lived in the apartment with Scherley since 2003. Scherley was the named tenant on the lease and Marie was listed as an occupant. Scherley moved out in 2008 when she got married but she continued to pay the rent, executed a renewal lease, and Marie continued to live there: "We can discern no reason why the DHCR would intend to deny succession rights to a family member who had been residing in a unit for a long period of time merely because there was a period of time when the named tenant no longer resided there but still maintained some connection to the property. In this case, it is undisputed that Marie would have been entitled to succession if she had sought it immediately after her daughter moved out of the apartment in 2008. We see no rational reason to treat her differently solely because the named tenant later executed a renewal lease and continued to pay the rent while no longer residing there. We thus conclude that this was not the intent of the DHCR in promulgating the regulation." ***Matter of Jourdain v. New York State Div. of Hous. & Community Renewal*, 2018 N.Y. Slip Op. 00556, Second Dept 1-31-18**

LANDLORD-TENANT, CONTRACT LAW, APPEALS.

CLAUSE IN THE COMMERCIAL LEASES WHICH WAIVED THE AVAILABILITY OF DECLARATORY RELIEF WAS VALID AND ENFORCEABLE AND EXTENDED TO PRECLUDE THE AVAILABILITY OF A *YELLOWSTONE* INJUNCTION IN THIS LEASE TERMINATION PROCEEDING, WHETHER WAIVER VIOLATED PUBLIC POLICY, ALTHOUGH NOT RAISED BELOW, PROPERLY CONSIDERED ON APPEAL.

The Second Department, in a full-fledged opinion by Justice Dillon, over an extensive dissenting opinion, determined the waiver-of-declaratory-relief clause in the commercial leases was enforceable and precluded both the plaintiffs' declaratory judgment action and the availability of a *Yellowstone* injunction (which would have stayed termination of the lease while the merits are considered). Although not raised below, the appellate court had the authority to consider whether the waiver violated public policy (no public policy violation found). The plaintiffs' (tenants') declaratory judgment and *Yellowstone* injunction actions were in response to the landlord's notice to cure, which gave the tenants' 15 days to cure certain alleged lease violations before termination of the leases. The waiver clause included a statement that the parties intended all disputes to be dealt with in summary proceedings: "Paragraph 67(H) in the rider of each lease provided that the tenant: 'waives its right to bring a declaratory judgment action with respect to any provision of this Lease or with respect to any notice sent pursuant to the provisions of this Lease. Any breach of this paragraph shall constitute a breach of substantial obligations of the tenancy, and shall be grounds for the immediate termination of this Lease. It is further agreed that in the event injunctive relief is sought by Tenant and such relief shall be denied, the Owner shall be entitled to recover the costs of opposing such an application, or action, including its attorney's fees actually incurred, it is the intention of the parties hereto that their disputes be adjudicated via summary proceedings.' * * * ... '[W]here a contract provision is arguably void as against public policy, that issue may be raised for the first time at the Appellate Division by a party, or by the court on its own motion' ... . We therefore reach the merits of the public policy issue raised on appeal. * * * Here, the parties were sophisticated entities

that negotiated at arm's length and entered into lengthy and detailed leases defining each party's rights and obligations with great apparent care and specificity." ***159 MP Corp. v. Redbridge Bedford, LLC*, 2018 N.Y. Slip Op. 00537, Second Dept 1-31-18**

MUNICIPAL LAW, INSURANCE LAW, VEHICLE AND TRAFFIC LAW.

VEHICLE AND TRAFFIC LAW § 370 DID NOT EXEMPT COUNTY FROM PROVIDING UNINSURED MOTORIST COVERAGE FOR PERSONS DRIVING COUNTY CARS.

The Second Department, reversing Supreme Court, determined the county was obligated to provide uninsured motorist coverage to respondent, who was injured by an uninsured driver while driving a county car. The county argued it was exempt from providing uninsured motorist coverage pursuant to Vehicle and Traffic Law § 370: " '[T]he Legislature has specifically declared its grave concern that motorists who use the public highways be financially responsible to ensure that innocent victims of motor vehicle accidents be recompensed for their injuries and losses' ... . Thus, although the Legislature authorized municipalities to be self-insured pursuant to the exception in Vehicle and Traffic Law § 370(1), it did not exculpate them from the responsibility of providing uninsured motorist protection ...". ***Matter of County of Suffolk v. Johnson*, 2018 N.Y. Slip Op. 00552, Second Dept 1-31-18**

PERSONAL INJURY, LANDLORD-TENANT.

ALTHOUGH THE OUT OF POSSESSION LANDLORDS WERE OBLIGATED TO MAKE REPAIRS, THEY DEMONSTRATED THEY DID NOT CREATE THE ALLEGED DANGEROUS CONDITION AND DID NOT HAVE NOTICE OF IT, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant out-of-possession landlord's motion for summary judgment in this slip and fall case should have been granted. Although the lease obligated defendants to make repairs, defendants established they did not create the alleged hazardous condition and did not have actual or constructive notice of it: "The plaintiff allegedly was injured when he tripped and fell off of the front stoop of a house that he was renting from the defendants, who owned the house. The plaintiff testified at a deposition that, as he exited the house, he stepped out onto the landing, and then down one stair. When he realized that he forgot to lock the interior door to the house, he stepped back onto the landing and attempted to open the outer door to the house. He alleged that the outer door extended beyond the edge of the landing, which made it difficult to stand on the landing and open the door at the same time. He further alleged that, as he tried to open the outer door, he lost his footing and began to fall. He grabbed the handrail to stop his fall, but the handrail broke. 'An out-of-possession landlord that has assumed the obligation to make repairs to its property cannot be held liable for injuries caused by a defective condition at the property unless it either created the condition or had actual or constructive notice of it' ...". ***Amster v. Kromer*, 2018 N.Y. Slip Op. 00538, Second Dept 1-31-18**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE.

ALTHOUGH THE EMPLOYER HAD CAUSE TO FIRE CLAIMANT FOR TARDINESS AND ABSENCES, CLAIMANT'S ACTIONS DID NOT DISQUALIFY HER FROM RECEIVING UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined that, although the employer had cause to fire the claimant for tardiness and absences, substantial evidence supported the Board's finding her tardiness and absences did disqualify her from receiving unemployment benefits. Although claimant had been informed that her tardiness and absences were not acceptable, she was never informed that she could be fired as a result. Claimant was not fired until after she put in a claim for workers' compensation benefits after an injury at work: "... '[W]hether a claimant's actions rise to the level of disqualifying misconduct is a factual issue for the Board to resolve, and not every mistake, exercise of poor judgment or discharge for cause will rise to the level of misconduct' ... . The Board's determination in this regard will not be disturbed if it is supported by substantial evidence ... . The record reveals that, although claimant's tardiness and attendance problems began in December 2014, she was not served with any notices of discipline until May 4, 2015, just after her work-related injury. Claimant's immediate supervisor testified that she instructed claimant on the proper procedure for entering her work hours into the computer system and told her that she had to be at work between the hours of 9:00 a.m. and 5:00 p.m. In fact, claimant received emails in December 2014 and March 2015 reminding her of these requirements. She was not, however, advised that adverse employment consequences would result if she did not follow the proper protocol. Likewise, the notices of discipline did not set forth the disciplinary measures that would be taken if claimant continued to engaged in the objectionable behavior. Furthermore, claimant's termination occurred shortly after she was placed on suspension without affording her an opportunity to correct her behavior ... . Under the circumstances presented, although the employer had cause to discharge claimant, she did not exhibit a willful and wanton disregard of the employer's interest rising to the level of disqualifying misconduct ...". ***Matter of Jelic (Ama Research Labs. Inc.--Commissioner of Labor)*, 2018 N.Y. Slip Op. 00588, Third Dept 2-1-18**

UNEMPLOYMENT INSURANCE.

CLAIMANT ENROLLED IN A BARBER TRAINING PROGRAM AFTER HIS REGULAR UNEMPLOYMENT BENEFITS HAD RUN OUT, HE WAS NOT ENTITLED TO ADDITIONAL BENEFITS.

The Third Department determined claimant was not entitled to additional unemployment benefits in connection with his enrolling in a barber training program. Claimant did not enroll in the program until after his regular unemployment benefits had been exhausted: " 'Labor Law § 599 provides an avenue whereby a claimant who participates in an approved training program may be eligible for additional unemployment insurance benefits after his or her regular benefits are exhausted' ... . However, in order to receive benefits under this statute, the claimant 'must have been accepted into an approved program, or demonstrated an application for such a program, while still receiving regular unemployment benefits' ... . Here, it is undisputed that claimant's regular unemployment benefits were exhausted more than a month before he filed his application for additional benefits under Labor Law § 599. In view of this, and in the absence of any legal authority excusing the delay, we find that substantial evidence supports the Board's decision." ***Matter of Simpson (Commissioner of Labor),* 2018 N.Y. Slip Op. 00594, Third Dept 2-1-18**

WORKERS' COMPENSATION.

SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE BOARD'S FINDING THAT CLAIMANT'S SHOULDER INJURY WAS AN OCCUPATIONAL DISEASE, AS OPPOSED TO AN ACCIDENTAL INJURY.

The Third Department determined substantial evidence did not support the Board's conclusion that claimant's shoulder injury was an occupational disease, as opposed to an accidental injury. Claimant alleged his torn rotator cuff was caused by unloading a wheelbarrow, which he did as part of his job filling potholes: "The employer contends that substantial evidence does not support the Board's establishment of the claim as an occupational disease. Rather, it maintains that the shoulder injury should be classified as an accidental injury and, as such, the claim is untimely under Workers' Compensation Law § 18. An occupational disease is statutorily defined as 'a disease resulting from the nature of the employment and contracted therein' ... . Significantly, in order to establish an occupational disease, a claimant must demonstrate a 'recognizable link' between his or her affliction and a 'distinctive feature' of his or her employment ... . * * * Even accepting, as did the Board, that claimant injured his shoulder unloading the wheelbarrow, we agree with the employer that the injury should be classified as accidental and not as an occupational disease. The proof failed to demonstrate that claimant's shoulder injury was attributable to repetitive movements associated with moving heavy wheelbarrow loads of asphalt or performing other manual duties during his short period of employment as a laborer with the highway department. To the contrary, claimant testified that the onset of shoulder pain occurred during a definitive event at work when he was emptying a wheelbarrow filled with asphalt. Consequently, we find that there is a lack of substantial evidence evincing a recognizable link between claimant's shoulder injury and a distinctive feature of his job as is necessary to establish his claim for an occupational disease ... ". ***Matter of Yonkosky v. Town of Hamburg,* 2018 N.Y. Slip Op. 00586, Third Dept 2-1-18**

FOURTH DEPARTMENT

ANIMAL LAW.

TWO ATTACKS MINUTES APART CONSTITUTED A SINGLE EVENT IN THIS DOG BITE CASE, DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE DOG'S VICIOUS PROPENSITIES, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment should not have been granted and defendants' cross-motion for summary judgment should have been granted in this dog bite case. Defendant Garrett was dog-sitting Lily, a pit bull owned by defendant Hunt ,in a fenced yard. Plaintiff brought her dog, Chloe, into the yard and Lily lunged at Chloe. A few minutes later Lily again lunged at Chloe and plaintiff was bitten. The Fourth Department found that the two attacks constituted a single event and defendants demonstrated they were not aware of Lily's vicious propensities: "... [D]efendants established as a matter of law that they lacked actual or constructive knowledge that Lily had any vicious propensities ... . We agree with defendants that the confrontation between the dogs was only one event, rather than two separate incidents as found by the court. Given the fact that only minutes passed between the two confrontations, we conclude that defendants did not acquire actual or constructive notice of any vicious propensities based on the initial confrontation. We likewise conclude that the court erred in denying that part of defendants' cross motion for summary judgment dismissing the negligence cause of action. It is well settled that ' [c]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence' ...". ***Russell v. Hunt,* 2018 N.Y. Slip Op. 00750, Fourth Dept 2-2-18**

ANIMAL LAW.

DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE DOG'S VICIOUS PROPENSITIES, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS DOG BITE CASE.

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment in this dog bite case should have been granted. Defendants demonstrated they did not have actual or constructive notice of the dog's vicious propensities: "Since at least 1816 ... , 'the law of this state has been that the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities' ... . '[T]here is no cause of action in negligence as against the owner of a dog who causes injury, but one may assert a claim in strict liability against a dog owner for harm caused by the dog's vicious propensities when the owner knew or should have known of those propensities' ...". ***S.K. v. Kobee*, 2018 N.Y. Slip Op. 00770, Fourth Dept 2-2-18**

ATTORNEYS, TRUSTS AND ESTATES.

SURROGATE'S COURT, IN AWARDING ATTORNEY'S FEES FOR THE PETITION FOR JUDICIAL SETTLEMENT AND FINAL ACCOUNTING REGARDING A TRUST, DID NOT MAKE THE REQUIRED FINDINGS, MATTER REMITTED.

The Fourth Department remitted the matter to Surrogate's Court for a determination of the reasonableness of the attorney's fees Surrogate's Court had awarded petitioner. Petitioner trustee filed a petition for judicial settlement and final accounting regarding a trust. Surrogate's Court awarded attorney's fees to the petitioner but did not make the required findings: "We ... agree with objectants that the Surrogate erred in approving the attorneys' fees, costs and disbursements requested by petitioner without considering the required factors. 'It is well settled that, in determining the proper amount of attorneys' fees and costs, the court should consider the time spent, the difficulties involved in the matters in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained' ... .Here, the Surrogate failed to make any findings with respect to the Potts factors [Matter of Potts, 213 App Div 59, 62], and we are therefore unable to review the Surrogate's implicit determination that the attorneys' fees, costs and disbursements are reasonable ... . We therefore modify the decree by vacating the award of attorneys' fees, costs and disbursements, and we remit the matter to Surrogate's Court for a determination whether those fees, costs and disbursements are reasonable, following a hearing if necessary ... ". ***Matter of JPmorgan Chase Bank, N.A.*, 2018 N.Y. Slip Op. 00775, Fourth Dept 2-2-18**

CIVIL PROCEDURE.

MOTION TO RENEW, BASED UPON A CHANGE IN THE LAW, MADE WHEN THE CASE WAS NO LONGER PENDING, WAS UNTIMELY.

The Fourth Department determined the plaintiff's motion to renew, based upon a change in the law, made when the case was no longer pending, was properly denied as untimely. A case relied upon in deciding the motion had been disavowed by the Second Department: "CPLR 2221 (e) does not impose a time limit on motions for leave to renew, unlike motions for leave to reargue, which must be made before the expiration of the time in which to take an appeal ... . A motion based on a change in the law formerly was considered a motion for leave to reargue, with the same time limit, i.e., before the time to appeal the order expired ... . Over time, the rule evolved to allow such a motion 'where the case was still pending, either in the trial court or on appeal' .. . The Court of Appeals explained ... that denying as untimely a motion for leave to reargue based on a change in the law 'might at times seem harsh, [but] there must be an end to lawsuits' ... . After the statute was amended in 1999 to specify that a motion based on a change in the law is a motion for leave to renew, courts have nevertheless properly continued to impose a time limit on motions based on a change in law ... ... '[T]here is no indication in the legislative history of an intention to change the rule regarding the finality of judgments' ... . Here, the case was no longer pending when plaintiff made his motion for leave to renew based on a change in the law, and we therefore conclude that the motion insofar as it sought leave to renew was untimely ...". ***Redeye v. Progressive Ins. Co.*, 2018 N.Y. Slip Op. 00763, Fourth Dept 2-2-18**

CIVIL PROCEDURE.

GOOD CAUSE FOR DELAY IN FILING A DISPOSITIVE MOTION CAN NOT BE RAISED FOR THE FIRST TIME IN REPLY PAPERS, COURT SHOULD NOT HAVE CONSIDERED THE MOTION.

The Fourth Department, reversing Supreme Court, determined that it is improper for a court to consider whether there was "good cause" for making an untimely dispositive motion when the "good cause" argument is raised for the first time in the reply papers: "Defendants' summary judgment motion was made 618 days after the deadline set forth in the court's scheduling order and 204 days after the filing of the note of issue. Defendants did not make the motion in time to be heard on the court's November 21, 2016 motion calendar. Nonetheless, defendants' moving papers failed to address the issue of 'good cause' required to make a summary judgment motion more than 120 days after the filing of the note of issue or after the date established by the court in a scheduling order (CPLR 3212 [a]...). Plaintiffs opposed the motion on the ground that it was untimely. It was only in reply papers that defendants addressed the issue of 'good cause.' The court considered the merits of the motion, granted summary judgment to defendants and dismissed the complaint. That was error. It is well

settled that it is improper for a court to consider the 'good cause' proffered by a movant if it is presented for the first time in reply papers... . Defendants also failed to move to vacate the note of issue. The motion should thus have been denied as untimely (see CPLR 3212 [a]), and the court should have declined to reach the merits." ***Mitchell v. City of Geneva*, 2018 N.Y. Slip Op. 00740, Fourth Dept 2-2-18**

CIVIL PROCEDURE.

DEFENDANT DOCTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN GRANTED, DEFENDANT RELIED ON PLAINTIFF'S SUBMISSIONS, WHICH SHOULD NOT HAVE BEEN CONSIDERED, A RARE EXPLANATION OF HOW APPELLATE COURTS ANALYZE SUMMARY JUDGMENT MOTIONS.

The Fourth Department, reversing Supreme Court, determined that defendant doctor's motion for summary judgment on statute of limitations grounds in this medical malpractice action should not have been granted. If the action had sounded in battery, it would have been untimely. But the doctor's papers did not demonstrate the action sounded in battery, as opposed to medical malpractice. Therefore the motion should have been denied without considering plaintiff's papers, on which defendant relied for the "battery" argument: "It is well established that '[a] party moving for summary judgment must demonstrate that the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor' ... . Thus, 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact' ... . 'This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party' ... , 'and every available inference must be drawn in the [non-moving party's] favor' ... . "The moving party's [f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires 'denial of the motion, *regardless of the sufficiency of the opposing papers*' ...". ***Palumbo v. Bristol-Myers Squibb Co.*, 2018 N.Y. Slip Op. 00749, Fourth Dept 2-2-18**

CIVIL PROCEDURE, CONTRACT LAW.

PLAINTIFF WAS ENTITLED TO A JURY TRIAL ON THE ISSUE OF THE APPROPRIATE DISCOUNT RATE TO BE APPLIED TO A JURY VERDICT IN THIS BREACH OF CONTRACT ACTION.

The Fourth Department, reversing Supreme Court, in a case sent back by the Court of Appeals for a determination of the appropriate discount rate on a jury verdict in a breach of contract action, held the plaintiff's request for a jury trial on the issue should have been granted: "... [I]t is undisputed that, prior to the original trial in this matter, plaintiff demanded a jury trial on all issues. During that trial, '[o]ver the [plaintiff's] objection, the jury was provided with a verdict form that did not allow for any damages discount' ... . Although the Court of Appeals remitted the matter for the purpose of establishing a discount rate, it did not indicate whether the discount rate should be determined by the trial court or a jury. Nevertheless, prior to the trial that is the subject of this appeal, plaintiff renewed its request for a jury, which the court denied. Contrary to defendant's contention, neither article 50-A nor article 50-B of the CPLR requires that the discount rate be determined by the court. As the Court of Appeals stated, this is a breach of contract action ... . Article 50-A deals with periodic payment of judgments in actions concerning medical and dental malpractice, and article 50-B deals with periodic payment of judgments in actions concerning personal injury, injury to property, and wrongful death. Furthermore, we conclude that Toledo v. Iglesia Ni Christo (18 NY3d 363 [2012]) does not require the trial court to determine the discount rate in this case inasmuch as Toledo was a wrongful death case within the purview of CPLR article 50-B." ***Village of Herkimer v. County of Herkimer*, 2018 N.Y. Slip Op. 00756, Fourth Dept 2-2-18**

CIVIL PROCEDURE, TRUSTS AND ESTATES.

DEFENDANTS IN THIS WRONGFUL DEATH CASE WERE ENTITLED TO DISCOVERY OF TAX RETURNS TO DETERMINE WHETHER THE MOTHER AND FATHER WERE MARRIED AT THE TIME OF MOTHER'S DEATH, IF SO, THE STATUTE OF LIMITATIONS HAD PASSED.

The Fourth Department, reversing Supreme Court, determined defendants in this wrongful death case were entitled to discovery of tax returns to determine whether the parents of the plaintiff-children were married. If the parents were married when mother died, the statute of limitations had passed: "Individual tax returns are generally not discoverable unless the movant makes a ' requisite showing that [the] tax returns [are] indispensable to [the] litigation and that [the] relevant information possibly contained therein [is] unavailable from other sources' "... . A wrongful death action has a two-year statute of limitations from the date of the decedent's death... Where the sole distributee is an infant, the statute is tolled 'until appointment of a guardian or the majority of the sole distributee, whichever is earlier'... . Where, however, the decedent is married and the surviving spouse is thus a distributee of the estate, the infancy toll does not apply because the spouse 'was available both to seek appointment as the personal representative of the estate and to commence an action on behalf of the children in a timely fashion' ...". ***Has K'Paw Mu v. Lyon*, 2018 N.Y. Slip Op. 00687, Fourth Dept 2-2-18**

CRIMINAL LAW.

INCOMPLETE JURY INSTRUCTION ON THE DEFINITION OF 'BUILDING' REQUIRED A NEW TRIAL IN THIS BURGLARY PROSECUTION.

The Fourth Department determined defendant was entitled to a new trial because the court did not properly instruct the jury on the definition of a "building" within the meaning of the burglary statute: "... '[T]he court instructed the jurors that a dwelling is a building which is usually occupied by a person lodging therein at night. A bedroom in a home, where there is more than one tenant, may be considered independent of the rest of the house and may be considered a separate dwelling within a building.' The court, however, failed to include the part of the definition of building that would require the jury to determine whether the house at issue consisted of two or more units' and whether the bedroom at issue was a unit that was separately secured or occupied' (Penal Law § 140.00 [2]). Consequently, given the omission of the definition of ['unit'] and/or ['separately secured or occupied,'] the instruction did not adequately convey the meaning of ['building'] to the jury and instead created a great likelihood of confusion such that the degree of precision required for a jury charge was not met' ...". ***People v. Downey*, 2018 N.Y. Slip Op. 00758, Fourth Dept 2-2-18**

CRIMINAL LAW.

PETITION TO PROHIBIT RETRIAL OF A MANSLAUGHTER COUNT DENIED, ALTHOUGH THE FOURTH DEPARTMENT DISMISSED THE COUNT AFTER DETERMINING THE VERDICT WAS REPUGNANT, THE COURT OF APPEALS, AGREEING THAT THE VERDICT WAS REPUGNANT, HELD THAT THE PEOPLE COULD SEEK A SECOND INDICTMENT.

The Fourth Department dismissed an Article 78 petition seeking to prohibit retrial in a manslaughter case. The Fourth Department had dismissed the manslaughter count after determining the verdict was repugnant. The Court of Appeals agreed the verdict was repugnant but held that dismissal of the was not required: "Petitioner was convicted of manslaughter in the first degree as a hate crime ... and criminal possession of a weapon in the third degree ... . On appeal from the judgment of conviction, we determined that the verdict convicting him of manslaughter in the first degree as a hate crime yet acquitting him of manslaughter in the first degree was inconsistent, i.e., ' legally impossible,' inasmuch as all of the elements of manslaughter in the first degree are elements of manslaughter in the first degree as a hate crime ... . We thus modified the judgment by reversing that part convicting him of manslaughter in the first degree as a hate crime and dismissing that count of the indictment. The Court of Appeals agreed that 'the jury's verdict was inconsistent, and thus repugnant' ... , but disagreed with our remedy of dismissal. The Court explained that there is 'no constitutional or statutory provision that mandates dismissal for a repugnancy error,' ... and that 'a repugnant verdict does not always signify that a defendant has been convicted of a crime on which the jury actually found that he did not commit an essential element' ... . As a result, the Court determined that the People could 'resubmit the crime of first-degree manslaughter as a hate crime to a new grand jury' ...". ***Matter of DeLee v. Brunetti*, 2018 N.Y. Slip Op. 00742, Fourth Dept 2-2-18**

CRIMINAL LAW, APPEALS.

PERIODS OF POSTRELEASE SUPERVISION MERGE AND CANNOT RUN CONSECUTIVELY, ILLEGAL SENTENCE MUST BE CORRECTED EVEN IF ISSUE NOT RAISED ON APPEAL.

The Fourth Department noted that periods of postrelease supervision cannot run consecutively. An illegal sentence must be corrected even if the issue is not raised on appeal: "... [T]he court erred in directing that the periods of postrelease supervision run consecutively to the periods of postrelease supervision imposed in appeal No. 1 ... . 'Penal Law § 70.45 (5) (c) requires that the periods of postrelease supervision merge and are satisfied by the service of the longest unexpired term' ... . We cannot allow an illegal sentence to stand ... and we therefore modify the judgment ... accordingly." ***People v. Mcmillian*, 2018 N.Y. Slip Op. 00649, Fourth Dept 2-2-18**

CRIMINAL LAW, APPEALS.

ALTHOUGH THERE WAS NO ABUSE OF DISCRETION BY COUNTY COURT, APPELLATE COURT VACATED THE CONVICTION AND ADJUDICATED DEFENDANT A YOUTHFUL OFFENDER IN THE INTEREST OF JUSTICE.

The Fourth Department vacated defendant's conviction and adjudicated defendant a youthful offender in the interest of justice (no abuse of discretion). The only factor weighing against youthful offender treatment was the seriousness of the crime, an armed felony: "In determining whether to afford such treatment to a defendant, a court must consider 'the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life' ... . Here, the only factor weighing against affording defendant youthful offender treatment is the seriousness of the crime ... . Defendant was 17 years old at the time of the crime and had no prior criminal record or history of violence. Defendant has accepted responsibility for his actions and expressed genuine remorse. The presentence report recommended youthful offender treatment, and the record establishes that defendant has the capacity for a productive and law-abiding

future. Although we do not conclude, after weighing the appropriate factors, that the court abused its discretion in denying defendant youthful offender status, we nevertheless choose to exercise our discretion in the interest of justice by reversing the judgment, vacating the conviction, and adjudicating defendant a youthful offender, and we remit the matter to County Court for sentencing on the adjudication ...". ***People v. Keith B.J.*, 2018 N.Y. Slip Op. 00734, Fourth Dept 2-2-18**

CRIMINAL LAW, APPEALS.

SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A FELONY DEFINED IN THE CORRECTIONS LAW, AS OPPOSED TO THE PENAL LAW, ILLEGAL SENTENCE MUST BE CORRECTED EVEN WHERE THERE IS A WAIVER OF APPEAL AND THE ISSUE WAS NOT RAISED BELOW OR ON APPEAL.

The Fourth Department noted than an illegal sentence must be corrected even where there has been a waiver of appeal, and even where the issue was not raised below or on appeal. Here defendant was sentenced as a second felony offender, which is not proper when the underlying felony is defined in the Correction Law, not in the Penal Law: "... [I]t is well settled that 'even a valid waiver of the right to appeal will not bar [review of] an illegal sentence' ... , and we note that the sentence imposed by the court on count three of the superior court information, i.e., a determinate term of incarceration for failure to register internet identifiers as a class D felony, is illegal. That crime is defined in the Correction Law, and 'only a person convicted of a felony defined by the Penal Law may be sentenced as a second felony offender' to a determinate term of incarceration ... . 'Although [the] issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' ...". ***People v. Mcdonald*, 2018 N.Y. Slip Op. 00657, Fourth Dept 2-2-18**

CRIMINAL LAW, EVIDENCE.

CODEFENDANT WAS SEEN ENTERING A CAR WITH A WEAPON WHICH WAS LATER FOUND ON THE SIDE OF THE ROAD, STATUTORY PRESUMPTION THAT THE WEAPON WAS POSSESSED BY ALL IN THE CAR DID NOT APPLY, DEFENDANT'S POSSESSION OF A WEAPON CONVICTION REVERSED.

The Fourth Department, reversing defendant's conviction for possession of a weapon, determined the evidence was legally insufficient to support the conviction. A co-defendant was seen (by the police) getting into a car with the weapon. Defendant also got into the car. The police followed. Before the police pulled the car over, when the car was out of sight, the weapon was thrown out of the car. A cell phone found near the weapon was tied to the defendant, but the weapon was not. The statutory presumption that a weapon in a vehicle is possessed by all in the vehicle did not apply because the weapon was in the possession of a codefendant when he got into the car: "We agree with defendant that the evidence is legally insufficient to support the conviction. There is no evidence that he owned or was operating the vehicle, nor is there evidence that he engaged in any other activity that would support a finding that he constructively possessed the weapon... Furthermore, the statutory presumption of possession set forth in Penal Law § 265.15 (3) also does not apply here. The statute provides that '[t]he presence in an automobile, other than a stolen one or a public omnibus, of any firearm . . . is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon . . . is found'" ... . The statute further provides, however, that the presumption does not apply, inter alia, 'if such weapon . . . is found upon the person of one of the occupants therein' (§ 265.15 [3] [a]). Here, the weapon was not found in the vehicle, and the codefendant was holding it while he was observed entering the vehicle. Consequently, 'the evidence is clearcut and leads to the sole conclusion that the weapon was . . . upon the person' of the codefendant ... . The People's contention that defendant threw the weapon out the window, or assisted the codefendant in doing so, because it was found on the right side of the vehicle is based on speculation. Finally, the People introduced no evidence that would support a finding that defendant possessed the weapon as an accomplice." ***People v. Willingham*, 2018 N.Y. Slip Op. 00733, Fourth Dept 2-2-18**

CRIMINAL LAW, EVIDENCE.

NO WARRANT NEEDED FOR CELL SITE LOCATION INFORMATION; THE TERM 'PERSON' IN THE ARSON SECOND STATUTE REFERS TO A LIVING PERSON, BECAUSE THE VICTIMS WERE NOT ALIVE WHEN THE FIRE WAS SET, THE CONVICTION WAS REDUCED TO ARSON THIRD.

The Fourth Department, in a comprehensive decision dealing with several substantive issues not summarized here, affirmed defendant's first degree murder (four counts) and burglary convictions, and reduced the arson second degree conviction to arson third degree. The victims were not alive when the fire was set. The definition of "person" (in the Arson second statute) was interpreted to refer to a living person. In addition, the court held that the motion to suppress the cell site location information (CSLI), which the police obtained without a warrant, and which placed defendant in the town where the crime was committed at the time of the crime, was properly denied: "As the Fifth Circuit Court of Appeals has written, '[w]e understand that cell phone users may reasonably want their location information to remain private, just as they may want their trash, placed curbside in opaque bags . . . or the view of their property from 400 feet above the ground . . . to remain so. But the recourse for these desires is in the market or the political process: in demanding that service providers

do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections. The Fourth Amendment, safeguarded by the courts, protects only reasonable expectations of privacy' (Application of U.S. for Historical Cell Site Data, 724 F3d at 615). With respect to defendant's state constitutional challenge, we conclude that 'there is no sufficient reason' to afford cell site location information at issue here greater protection under the state constitution than it is afforded under the federal constitution' ...". ***People v. Taylor*, 2018 N.Y. Slip Op. 00709, Fourth Dept 2-2-18**

CRIMINAL LAW, EVIDENCE.

POSSESSION OF A FORGED INSTRUMENT CONVICTION REVERSED, NO FOUNDATION FOR TWO CATEGORIES OF HEARSAY EVIDENCE.

The Fourth Department, reversing defendant's conviction for possession of a forged instrument (counterfeit check), determined two categories of hearsay evidence were improperly admitted without foundation: "... [T]he court 'erred in admitting in evidence a printout of electronic data that was displayed on a computer screen [after] defendant presented a check, the allegedly forged instrument, to a bank teller. The People failed to establish that the printout falls within the business records exception to the hearsay rule . . . [because they] presented no evidence that the data displayed on the computer screen, resulting in the printout, was entered in the regular course of business' ... . [T]he court improperly admitted an investigator's testimony about the results of a search he ran in a credit bureau's commercial database for email addresses and a telephone number contained in a cover letter that enclosed the counterfeit check defendant tried to cash. The People failed to establish the requisite foundation for this testimony inasmuch as the investigator did not testify that he 'is familiar with the practices of [the] company that produced the records at issue' and that he 'generally relies upon such records' ...". ***People v. Jones*, 2018 N.Y. Slip Op. 00710, Fourth Dept 2-2-18**

CRIMINAL LAW, EVIDENCE.

MURDER CONVICTION REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE.

The Fourth Department, reversing defendant's conviction and dismissing the indictment, over a two-justice dissent, determined the defendant's murder conviction was against the weight of the evidence. The majority stated that the evidence, which was deemed entirely circumstantial, demonstrated the defendant was probably guilty, but did not rise to proof beyond a reasonable doubt. The dissenters stated they "agreed" with the majority's "implicit" determination that there was sufficient evidence to support the verdict, but they disagreed with the majority's conclusion that the conviction was against the weight of the evidence. The decision describes the evidence in great detail which cannot be fairly summarized here. In a nutshell, there was evidence the defendant went into a motel room with the victim, where the victim was found dead. But the majority noted there was other evidence to suggest the victim had left the motel room at some point and someone other than the defendant was also in the room: "The People's case … rested on three pillars of circumstantial evidence: (1) the fact that defendant entered the hotel with the victim at approximately 7:00 p.m., some 15 hours before his dead body was found in the hotel room; (2) the fact that defendant repeatedly lied to the police when he said that he did not know the victim and had never met him; and (3) the fact that the victim's vehicle was found abandoned on a city street approximately six-tenths of a mile from defendant's residence. ... [D]efendant's presence in the room, although incriminating, is by no means conclusive considering that other people may have been in the room with the victim and that the Medical Examiner could not determine the time of death. As for defendant's lies to the police, it appears that he may not have been living as an openly gay man—he had a girlfriend and children from different women— and he may have said that he did not know the victim so as not to reveal his sexual orientation. Finally, although the presence of the vehicle so close to defendant's residence is suspicious, the victim was known to drive around the city looking for sexual partners ... . * * * **From the dissent:** We agree with the implicit determination of our colleagues that there is sufficient evidence to support the jury's verdict of murder in the second degree ... , but we respectfully disagree with their conclusion that the verdict is against the weight of the evidence." ***People v. Carter*, 2018 N.Y. Slip Op. 00711, Fourth Dept 2-2-18**

CRIMINAL LAW, EVIDENCE.

FRISK OF DEFENDANT WAS NOT JUSTIFIED BY REASONABLE SUSPICION, SEIZED WEAPON SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing Count Court, determined the arresting officer did not have cause to frisk the defendant, which revealed a weapon. The motion to suppress the weapon should have been granted. The officer had responded to a call about a shooting at a bar which described the suspect as a male Hispanic. The officer found a bullet fragment and some blood in a parking lot and he approached a group of people who were about 10 to 25 feet away. One person in the group appeared to the officer to be a male Hispanic. Someone in the group said they didn't hear or see anything. The officer then frisked the defendant, who is black, not Hispanic: "... [T]he police had an objective, credible reason to approach the group of five people in the parking lot and to request information in light of the report of a shooting at or near that location at

some unidentified earlier time. Thus, we conclude that the police encounter was lawful at its inception... . The People correctly concede, however, that the officer's encounter with defendant constituted a level three forcible detention under the four-tiered De Bour framework ..., and thus required 'a reasonable suspicion that [defendant] was involved in a felony or misdemeanor' ... . We conclude that, '[b]ecause of the lack of correspondence between defendant's appearance and the description of the suspected [shooter that was] transmitted to the officer[] . . . , the officer[] had no basis for concluding that the reported crime had been committed by defendant' ... . 'Nor can the [frisk of defendant] and seizure of the gun be justified as having been in the interests of the officer['s] safety, since there was no testimony that the officer[] believed defendant to be carrying a weapon' ... ,and the People presented no other evidence establishing that the officer had reason to fear for his safety ...". ***People v. Roberts*, 2018 N.Y. Slip Op. 00725, Fourth Dept 2-2-18**

DEBTOR-CREDITOR, CIVIL PROCEDURE.

DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT ON THE GROUND THAT THE ISSUING COURT DID NOT HAVE PERSONAL JURISDICTION SHOULD NOT HAVE BEEN DISMISSED EVEN THOUGH THE JUDGMENT HAD BEEN SATISFIED BY A PROPERTY EXECUTION, IF DEFENDANT CAN DEMONSTRATE A LACK OF PERSONAL JURISDICTION, THE JUDGMENT WILL BE A NULLITY.

The Fourth Department, reversing Supreme Court, determined the defendant did have standing to move to vacate a default judgment on the ground that the court which issued the judgment did not have personal jurisdiction over the defendant. The judgment had been satisfied by a property execution on the defendant's bank account: "Where, as here, a defendant moves to vacate a default judgment on the ground that the court that rendered the judgment lacked personal jurisdiction over the defendant ... a finding in favor of the defendant would mean that the judgment was 'a nullity' . It necessarily follows that, 'if a judgment is a nullity, it never legally existed so as to become extinguished by payment' ... . In addition, inasmuch as plaintiff levied the judgment amount with interest by a property execution on defendant's bank account, we conclude that defendant did not voluntarily pay and satisfy the judgment ... . Thus, it cannot be said that she waived the defense of lack of personal jurisdiction ...". ***Cach, LLC v. Ryan*, 2018 N.Y. Slip Op. 00755, Fourth Dept 2-2-18**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER WAS DENIED HIS RIGHT TO CALL WITNESSES, NEW HEARING ORDERED.

The Fourth Department annulled the determination and ordered a new disciplinary hearing because petitioner was denied his right to call witnesses: " 'An inmate has a right to call witnesses at a disciplinary hearing so long as the testimony is not immaterial or redundant and poses no threat to institutional safety or correctional goals' ... . Respondent correctly concedes that the Hearing Officer violated petitioner's right to call witnesses as provided in the regulations ... . Inasmuch as a good faith reason for denying the witnesses appears in the record, only petitioner's regulatory right, not his constitutional right, to call those witnesses was violated, and thus the proper remedy is a new hearing ...". ***Matter of Adams v. Annucci*, 2018 N.Y. Slip Op. 00695, Fourth Dept 2-2-18**

EMPLOYMENT LAW, CONTRACT LAW.

NON-SOLICITATION AGREEMENT WAS THE PRODUCT OF OVERREACHING AND WILL NOT BE ENFORCED.

The Fourth Department determined Supreme Court correctly found, after a bench trial, that a non-solicitation agreement between defendant Johnson and her employers (plaintiffs) should not be enforced because the agreement was the product of overreaching: "Plaintiffs had the burden of demonstrating that, in imposing the terms of the non-solicitation covenant, they did not engage in 'overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but ha[d] in good faith sought to protect a legitimate interest' ... , and they did not meet that burden. The evidence established that the non-solicitation covenant was imposed as a condition of Johnson's employment, after she had left her former employer and her position there had been filled, which belies plaintiffs' contention that Johnson's bargaining position was equal or superior to theirs... . In addition, plaintiffs required all employees, regardless of position, to sign an agreement containing a non-solicitation covenant as a condition of employment, which undercuts plaintiffs' contention that the covenant was necessary to protect their legitimate business interests … . Finally, the fact that the agreement provides for partial enforcement of the non-solicitation covenant, which is clearly over-broad under New York law, casts doubt on plaintiffs' good faith in imposing the covenant on Johnson ...". ***Brown & Brown, Inc. v. Johnson*, 2018 N.Y. Slip Op. 00728, Fourth Dept 2-2-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF TESTIFIED HE DID NOT CHECK THE POSITION OR LOCKING MECHANISM OF THE A-FRAME LADDER HE FELL FROM, PLAINTIFF'S SUMMARY JUDGMENT MOTION IN THIS LABOR LAW § 240(1) ACTION SHOULD NOT HAVE BEEN GRANTED, DISSENT DISAGREED.

The Fourth Department, reversing Supreme Court, over a two-justice well-reasoned dissent, determined plaintiff's motion for summary judgment in this Labor Law § 240(1) action should not have been granted. Plaintiff was injured when he fell from the A-frame ladder. Plaintiff testified that he might not have checked the positioning of the ladder or the locking mechanism: "We agree with defendant that Supreme Court erred in granting plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1). 'In order to establish his entitlement to judgment on liability as a matter of law, plaintiff was required to show that the statute was violated and the violation proximately caused his injury' ... . Plaintiff did not know why the ladder wobbled or shifted, and he acknowledged that he might not have checked the positioning of the ladder or the locking mechanism, despite having been aware of the need to do so. We thus conclude that plaintiff failed to meet his initial burden on the motion. '[T]here is a plausible view of the evidence—enough to raise a fact question—that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident' ... . **From the dissent:** The fact that plaintiff could not identify why the ladder shifted does not undermine his entitlement to partial summary judgment because a plaintiff who falls from a ladder that 'malfunction[s] for no apparent reason' is entitled to 'a presumption that the ladder . . . was not good enough to afford proper protection' ... . Although plaintiff testified at his deposition that he did not recall whether he checked the positioning of the ladder or checked that it was 'locked into place,' he also testified that the ladder was upright and 'fully open' near the middle of a small room, and we conclude that it would be unduly speculative for a jury to infer from plaintiff's testimony that the sole proximate cause of the accident was his alleged failure to check its positioning or its locking mechanism ...". ***Bonczar v. American Multi-Cinema, Inc.*, 2018 N.Y. Slip Op. 00712, Fourth Dept 2-2-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE LABOR LAW §§ 240(1), 241(6) AND 200 CAUSES OF ACTION WERE PROPERLY DISMISSED BECAUSE PLAINTIFF WAS NOT INVOLVED IN THE RELEVANT WORK, HOWEVER THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED BECAUSE IT WAS BASED ON THE CREATION AND NOTICE OF A DANGEROUS CONDITION.

The Fourth Department determined the Labor Law §§ 240(1), 241(6) and 200 causes of action were properly dismissed, but the common law negligence cause of action should not have been dismissed. Plaintiff, a funeral director, was inspecting a grave which had been covered with plywood when he stepped on the plywood and fell into the grave. The Labor Law causes of action did not apply because plaintiff was not engaged in any relevant work at the time of the fall. However there were questions of fact whether defendants created or had notice of a dangerous condition: "With respect to Labor Law § 240 (1), defendants met their burden of establishing as a matter of law that plaintiff 'was neither among the class of workers . . . nor performing the type of work . . . that Labor Law § 240 (1) is intended to protect' ... , and plaintiffs failed to raise a triable issue of fact... . Defendants further established that plaintiff was not entitled to the protection of Labor Law § 241 (6) inasmuch as his inspection of the grave site in his capacity as a funeral director had no direct connection with the alteration or excavation work ... , and plaintiffs failed to raise a triable issue of fact ... . Finally, the court properly granted summary judgment dismissing the Labor Law § 200 claim because, while that statute is not limited to construction work ... , it does not apply where, as here, the plaintiff was 'not permitted or suffered to work on a building or structure at the accident site' … . … [D]efendants 'were required to establish as a matter of law that they did not exercise any supervisory control over the general condition of the premises or that they neither created nor had actual or constructive notice of the dangerous condition on the premises'... . Defendants' own submissions establish that each had some level of supervisory control over the premises. Moreover, it is undisputed that [defendant] Wolcott dug the grave and placed plywood over it, thus creating and having actual notice of the condition that plaintiffs allege was dangerous. Further, while [defendant] Oakwood established that it did not create the dangerous condition, it 'failed to establish as a matter of law that the condition was not visible and apparent or that it had not existed for a sufficient length of time before the accident to permit [Oakwood] or [its] employees to discover and remedy it,' and it thereby failed to establish that it lacked constructive notice of it ...". ***Solecki v. Oakwood Cemetery Assn.*, 2018 N.Y. Slip Op. 00692, Fourth Dept 2-2-18**

MENTAL HYGIENE LAW, MUNICIPAL LAW, ATTORNEYS.

PETITIONER, UPSTATE UNIVERSITY HOSPITAL, SHOULD NOT HAVE BEEN ORDERED TO PAY THE ALLEGED INCAPACITATED PERSON'S (AIP'S) COURT-APPOINTED ATTORNEY'S FEES OR THE COURT EVALUATOR'S FEE IN THIS SUCCESSFUL MENTAL HYGIENE LAW PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN.

The Fourth Department, reversing Supreme Court, determined that the court should not have directed the petitioner, Upstate University Hospital, to pay the court-appointed attorney's fees and the court evaluator's fees in this proceeding to appoint a guardian for an alleged incapacitated person (AIP). The petition to appoint a guardian was successful and the AIP did not die during the proceedings. The court-appointed attorney should be paid pursuant to the County Law article 18-b, and the court did not have the authority to require petitioner to pay the court evaluator's fee. The Fourth Department further determined Supreme Court did not abuse its discretion by failing to appoint Mental Hygiene Legal Services to represent the AIP: "Article 81 of the Mental Hygiene Law provides that the court may appoint an attorney to represent the AIP, and that petitioner may be directed to pay for such services where the petition is dismissed or the AIP dies before the proceeding is concluded ... . In all cases, '[t]he court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to' that statute … . Nevertheless, 'the statute is silent as to the source of funds for payment of counsel [where, as here,] the AIP is indigent'... . Despite that silence, it is well settled that 'the Legislature, by providing for the assignment of counsel for indigents in the Mental Hygiene Law, intended, by necessary implication, to authorize the court to compensate counsel' ... , and it is likewise well settled that the court should direct that requests for such compensation should be determined 'in accordance with the procedures set forth in County Law article 18-B' ... . Thus, the court erred in directing petitioner to pay those fees. We also agree with the contention of petitioner … that the court erred in directing it to pay the fees requested by the court evaluator. Where, as here, a court appoints a court evaluator pursuant to Mental Hygiene Law § 81.09 (a) and then 'grants a petition, the court may award a reasonable compensation to a court evaluator, including the mental hygiene legal service, payable by the estate of the allegedly incapacitated person' ... . The statute further provides that a court may direct petitioner to pay for the services of a court evaluator only where the court 'denies or dismisses a petition,' or the AIP 'dies before the determination is made in the petition' ... . Therefore, 'notwithstanding Supreme Court's broad discretion to award reasonable fees in Mental Hygiene Law article 81 proceedings . . . , [inasmuch as] petitioner was successful [and the AIP is alive], the court was without authority to ascribe responsibility to petitioner for payment of the court evaluator's fees' ...". ***Matter of Buttiglieri (Ferrel J.B.)*, 2018 N.Y. Slip Op. 00738, Fourth Dept 2-2-18**

MUNICIPAL LAW, PERSONAL INJURY.

IN THIS SLIP AND FALL CASE, PLAINTIFF DID NOT DEMONSTRATE THE ALLEGED DANGEROUS CONDITION WAS CREATED IMMEDIATELY AFTER THE CITY COMPLETED WORK, THE CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the city's motion for summary judgment in this slip and fall case should have been granted. Plaintiff alleged that work done on the area (between the curb and the sidewalk) where she fell created a dangerous condition. The work was done a year before the fall. The city would be liable only if the dangerous condition was immediately created by the work, not if the condition developed over time: "Although plaintiff submitted evidence that defendant may have created the sinkhole by improperly excavating and backfilling the excavated area, we agree with defendant that plaintiff failed to proffer evidence that the depression 'was present immediately after completion of the work' ... . Indeed, it is well settled that the affirmative negligence exception 'does not apply to conditions that develop over time' ...". ***Burke v. City of Rochester*, 2018 N.Y. Slip Op. 00769, Fourth Dept 2-2-18**

MUNICIPAL LAW, PERSONAL INJURY.

VERBAL NOTICE TO CITY ABOUT POTHOLES, EVEN IF REDUCED TO WRITING, DOES NOT SATISFY THE WRITTEN NOTICE PREREQUISITE FOR CITY LIABILITY, PLAINTIFF ALLEGED A TRAFFIC ACCIDENT WAS CAUSED BY POTHOLES.

The Fourth Department, reversing Supreme Court in this traffic accident case, noted that verbal notice to the city about potholes, even if reduced to writing, does not satisfy the written notice prerequisite for the city's liability: "Defendant established that it lacked prior written notice of a defective or unsafe condition in the road, and plaintiff failed to meet its burden of demonstrating that an exception to the general rule is applicable… . Contrary to plaintiff's contention, it is well established that 'verbal or telephonic communication to a municipal body that is reduced to writing [does not] satisfy a prior written notice requirement' ...". ***Tracy v. City of Buffalo*, 2018 N.Y. Slip Op. 00704, Fourth Dept 2-2-18**

MUNICIPAL LAW, PROPERTY DAMAGE.

CITY'S OWN PAPERS RAISED A QUESTION OF FACT WHETHER FLOODING WAS CAUSED BY A FAILURE TO MAINTAIN A STORM DRAINAGE SYSTEM, CITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant city's motion for summary judgment in this drainage-system maintenance case should not have been granted. Plaintiff alleged the city's failure to maintain a storm drainage system caused flooding. The city argued the flooding was caused by an "act of God." The Fourth Department noted that city's own papers raised a question of fact whether the failure to clean the system regularly caused the flooding: "Defendant submitted the affidavits of its commissioner of public works and its senior engineer, who averred that there is a 'trash rack' located in the rear of plaintiff's property that is used to filter debris from the water entering the underground drainage system from a nearby ravine. If too much debris builds up in the trash rack, it will block the flow of water into the drainage system and flood plaintiff's premises. According to the deposition testimony of a member of plaintiff limited liability company, which testimony defendant also submitted, such flooding occurred previously in 2006 and caused severe property damage. The senior engineer averred that, to prevent flooding on plaintiff's property, defendant's employees periodically inspect and maintain the ravine. Plaintiff's member, however, testified that defendant's employees rarely came to the property to clear debris from the trash rack." ***2305 Genesee St., LLC v. City of Utica*, 2018 N.Y. Slip Op. 00745, Fourth Dept 2-2-18**

PERSONAL INJURY, COURT OF CLAIMS.

TRAFFIC ACCIDENT CASE REMITTED FOR A DETERMINATION WHETHER THE STATE WAS LIABLE UNDER A SECOND IMPACT THEORY, EVEN THOUGH THE STATE WAS NOT RESPONSIBLE FOR CAUSING THE DRIVER TO COLLIDE WITH THE STEEL BEAMS ACROSS THE ENTRANCES TO THE CLOSED BRIDGE, THE STEEL BEAMS WELDED TO THE BRIDGE AT A HEIGHT WHICH ALLOWED A CAR TO PASS UNDER THEM CONSTITUTED A DANGEROUS CONDITION AS A MATTER OF LAW.

The Fourth Department, modifying (reversing) the Court of Claims, determined the "dangerous condition" cause of action brought on behalf of plaintiff's decedent should not have been dismissed. The driver passed two signs indicating the bridge ahead was closed, drove through a sign that was in the middle of the road flanked by barricades, and then struck a beam at the entrance to the bridge which spanned the width of the bridge. The driver was killed instantly but the car continued and struck another similar beam spanning the other end of the bridge, injuring plaintiff's decedent (who died the next day). The plaintiff alleged, under a "second impact" theory, the beams, which were welded at a height which allowed a vehicle to pass under under them, constituted a dangerous condition which was the proximate cause of death. The Fourth Department determined the beams constituted a dangerous condition as a matter of law: "... [T]he court erred in dismissing the claim insofar as it alleges that defendants created a dangerous condition that constituted a proximate cause of decedent's injuries. We therefore modify the judgment accordingly. Although defendant State of New York is not an insurer of its roads and highways ... , it 'has an obligation to provide and maintain adequate and proper barriers along its highways' ... . Here, we conclude that defendants' decision to weld a steel box beam across the front of the Bridge, at a height that allowed a motor vehicle to proceed under the beam, constituted the creation of a dangerous condition as a matter of law ... . [C]laimant proceeded under a 'second-impact theory whereby she contended, not that [defendants] caused the accident, but that [their] negligence . . . was [a] proximate cause of . . . decedent's injury'... . The fact that no negligent act of defendants caused the vehicle to collide with the steel box beam is irrelevant. The point to be addressed is whether the steel box beam was a substantial factor in aggravating decedent's injuries and causing his death ...". ***Reames v. State of New York*, 2018 N.Y. Slip Op. 00713, Fourth Dept 2-2-1**

PERSONAL INJURY, EVIDENCE.

POLICE REPORT WAS NOT AUTHENTICATED AND WAS NOT SUBMITTED IN ADMISSIBLE FORM, THEREFORE IT COULD NOT BE CONSIDERED ON THE SUMMARY JUDGMENT MOTION IN THIS CAR-BICYCLE ACCIDENT CASE, PLAINTIFF DID NOT ELIMINATE A QUESTION OF FACT ABOUT WHETHER SHE WAS COMPARATIVELY NEGLIGENT IN NOT SEEING WHAT SHOULD HAVE BEEN SEEN.

The Fourth Department determined defendants' motion for summary judgment in this car-bicycle accident case was properly denied. The police report was not authenticated and was not submitted in admissible form, so it could not be considered. The defendant driver failed to eliminate a question of fact whether she was comparatively negligent for failing to see what should have been seen: "Although 'reports of police officers made upon their own observation and while carrying out their police duties are generally admissible in evidence'... , the report in this case was inadmissible because it was 'not authenticated' and, '[b]ecause the report was not submitted in evidentiary form, it should not have been considered on the summary judgment motion' ... . Here ... the parties failed to 'provide[] an acceptable excuse' for failing to tender the evi-

dence in admissible form ... . With respect to the merits, '[w]hether a plaintiff [or defendant] is comparatively negligent is almost invariably a question of fact and is for the jury to determine in all but the clearest cases' ... . In support of their motion, defendants submitted the deposition testimony of defendant, which raised a question of fact regarding her attentiveness as she drove her vehicle... . It is well settled that every driver of a motor vehicle has 'the common-law duty to see that which he [or she] should have seen . . . through the proper use of his [or her] senses' ... , and that 'a motorist is required to keep a reasonably vigilant lookout for bicyclists, . . . and to operate the vehicle with reasonable care to avoid colliding with anyone on the road' ... . Here, the evidence submitted by defendants established that defendant had an unobstructed view of the street as plaintiff's bicycle approached her vehicle, yet she failed to see him or his bicycle prior to the collision. Thus, we conclude that defendants 'failed to establish that there was nothing [defendant] could do to avoid the accident and therefore failed to establish that she was free of comparative fault ...". ***Chilinski v. Maloney*, 2018 N.Y. Slip Op. 00744, Fourth Dept 2-2-18**

PERSONAL INJURY, PRODUCTS LIABILITY.

QUESTIONS OF FACT (1) WHETHER DEFENDANTS WERE CASUAL SELLERS OF THE GAS PUMPS SOLD TO A SCRAP YARD AND THEREFORE OWED NO DUTY OF CARE TO THE INJURED PLAINTIFF AND (2) WHETHER DEFENDANTS OWED PLAINTIFF A DUTY OF CARE BECAUSE THE PRESENCE OF GASOLINE IN THE PUMP WHICH EXPLODED WAS NOT OPEN AND OBVIOUS.

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment should not have been granted. Defendants sold used gas pumps to a scrap yard, stating that the pumps had been drained of gasoline. When one of the pumps was sent to the shredder it exploded, injuring plaintiff. The other pumps were found to have one to two gallons of gasoline in them. The Fourth Department held there was a question of fact whether defendants were casual sellers of gas pumps and therefore did not owe plaintiff a duty of care. The Fourth Department further held that, even if defendants were casual sellers of gas pumps, there was a question of fact whether they owed a duty of care to plaintiff because the hazard was not open and obvious: "Although it is well settled that casual or occasional sellers of products do 'not undertake the special responsibility for public safety assumed by those in the business of regularly supplying those products'... , the evidence submitted by defendants in support of their motion failed to establish that their sale of gas pumps was 'wholly incidental' to their business of installing and servicing petroleum distribution systems ... . Even assuming, arguendo, that defendants were merely casual sellers of used gas pumps, we cannot conclude as a matter of law that defendants owed no duty to plaintiff. Even casual sellers owe a duty to warn of dangers that are not open and obvious or readily discernable ...". ***Rosario v. Monroe Mech. Servs., Inc.*, 2018 N.Y. Slip Op. 00732, Fourth Dept 2-2-18**

PERSONAL INJURY, ANIMAL LAW.

PLAINTIFF COLLIDED WITH DEFENDANTS' BLACK ANGUS BULL IN THE ROADWAY ON A DARK RAINY NIGHT, EVEN ASSUMING DEFENDANTS' NEGLIGENCE PURSUANT TO THE DOCTRINE OF RES IPSA LOQUITUR, PLAINTIFF DID NOT DEMONSTRATE HER FREEDOM FROM COMPARATIVE NEGLIGENCE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this car-animal accident case should not have been granted. Although, based upon the doctrine of res ipsa loquitur, the presence of defendants' black angus bull in the roadway may have constituted negligence, plaintiff did not demonstrate she could not have avoided the accident by lowering her speed on that dark and rainy night: "Cattle are classified as 'domestic animal[s]' in Agriculture and Markets Law § 108 (7), and it is well established that 'a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal—i.e., a domestic animal as that term is defined in Agriculture and Markets Law § 108 (7)—is negligently allowed to stray from the property on which the animal is kept' ... . Here, 'defendants were in exclusive control of the [bull] and the fences surrounding the pasture where [it was] kept' and, because cattle 'do not generally wander unattended on public streets in the absence of negligenc'"... , we conclude that the court properly inferred defendants' negligence as a starting point in determining their motion. We further conclude that defendants failed to rebut the inference of negligence inasmuch as they failed to submit proof that 'the animal's presence on the [road] was not caused by [their] negligence' ... , or 'that something outside of [defendants'] control' allowed the bull to escape ... . Plaintiff's burden on her motion was to establish both that defendants were negligent as a matter of law, and that she was free of comparative fault ... . Even assuming, arguendo, that plaintiff met her burden with respect to defendants' alleged negligence, we conclude that she failed to meet her burden with respect to her own alleged comparative negligence. ... [T]here is an issue of fact whether slower travel would have enabled plaintiff to avoid the collision, and that issue must be determined by a jury ...". ***Catalano v. Heiden Val. Farms*, 2018 N.Y. Slip Op. 00759, Fourth Dept 2-2-18**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFFS' MOTION TO SET ASIDE THE JURY'S DAMAGES AWARD IN THIS PERSONAL INJURY CASE SHOULD NOT HAVE BEEN GRANTED, THE JURY WAS FREE TO DISREGARD EXPERT OPINION.

The Fourth Department, modifying Supreme Court, reinstated the jury's damages award in this personal injury case. Plaintiffs moved to set aside the damages award unless the defendant stipulated to an increased amount and Supreme Court granted the motion. The Fourth Department explained that the jury was free to disregard expert opinion and the jury could have concluded that plaintiff had exaggerated her injuries or that the injuries were preexisting: " 'It is well settled that the amount of damages to be awarded for personal injuries is primarily a question for the jury . . . , the judgment of which is entitled to great deference based upon its evaluation of the evidence, including conflicting expert testimony' ... .. Thus, 'even in cases where there is evidence which could support a conclusion different from that of a jury, its verdict will still be accorded great deference and respect so long as there is credible evidence to support its interpretation' ... . In addition, ' a jury is at liberty to reject an expert's opinion if it finds the facts to be different from those which formed the basis for the opinion or if, after careful consideration of all the evidence in the case, it disagrees with the opinion' ... . In short, '[w]here the verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view' ...". ***Mecca v. Buffalo Niagara Convention Ctr. Mgt. Corp.*, 2018 N.Y. Slip Op. 00735, Fourth Dept 2-2-18**

TRUSTS AND ESTATES.

RELEASE SIGNED BY ONE OF THE BENEFICIARIES OF THE WILL, RELEASING THE EXECUTOR FROM LIABILITY STEMMING FROM THE ADMINISTRATION OF THE ESTATE, WAS NOT VALID BECAUSE THE BENEFICIARY WAS NOT FULLY INFORMED ABOUT THE VALUE OF THE SECURITIES IN THE ESTATE, AND THE EFFECTS OF LEAVING A TRUST UNFUNDED, SURROGATE'S COURT IMPROPERLY PLACED THE BURDEN OF DEMONSTRATING THE RELEASE WAS INVALID ON THE BENEFICIARY.

The Fourth Department, reversing Surrogate's Court, determined that a release drawn up by the initial executor, who died, was not valid because the objectant, a beneficiary of the will who signed the release, was not informed that the value of the securities in the estate had declined significantly and was not informed of the ramifications of the executor's decision to leave a trust unfunded. Surrogate's Court had erroneously placed the burden of demonstrating the release was invalid on the objectant: "... [T]he Surrogate improperly shifted the burden from petitioners to objectant to prove that the release was fraudulently obtained and erred in determining that the release is valid. With releases, 'as in other instances of dealing between a fiduciary and the person for whom he [or she] is acting, there must be proof of full disclosure by the [executor] of the facts of the situation and the legal rights of the beneficiary' ... . A release should be subject to careful scrutiny, and the executor must affirmatively demonstrate full disclosure of 'material facts which he [or she] knew or should have known' ... . ' The mere absence of misrepresentation, fraud, or undue influence in the obtaining of a release is not sufficient to insulate the release from a subsequent attack by the beneficiaries; the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars' ... . Here, petitioners' burden of proving that full disclosure was provided was improperly shifted to objectant, i.e., the beneficiary who challenged the validity of the release. Decedent's will contemplated equal bequests to objectant and his sister (decedent's children). There was a substantial discrepancy in the value of the properties decedent left to each child, however, and most of objectant's inheritance was to come from the liquidation of the estate's securities. The will also directed that the trust be funded in the maximum sum allowable to benefit decedent's children and their descendants. Objectant and the executor were named as co-trustees of the trust. Accurate information concerning the current value of the estate's securities and the propriety of defunding the trust in contravention of the will was therefore highly material to objectant." ***Matter of Alford*, 2018 N.Y. Slip Op. 00752, Fourth Dept 2-2-18**

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