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COURT OF APPEALS

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR AGREEING TO ANNOTATIONS ON THE VERDICT SHEET WHICH SERVED TO DISTINGUISH COUNTS ALLEGING SIMILAR BEHAVIOR IN THIS AGGRAVATED HARASSMENT CASE, COUNTY COURT REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined defense counsel was not ineffective for agreeing to annotations on the verdict sheet which served to distinguish the aggravated harassment counts from one another, many of which involved similar behavior. County Court's reversal of this City Court case on ineffective assistance grounds was reversed: "The trial court provided the jury with a four-page verdict sheet. To help the jurors distinguish between the many similar allegations covering more than three hundred different acts committed over twelve distinct time periods, the court annotated each count on the verdict sheet with a date or date range and a short description of the alleged criminal conduct. For example, the fourth aggravated harassment charge included the annotation 'Between June 26, 2011 and July 6, 2011 (emailing approximately 15 times)' and the fourth criminal contempt charge read 'On July 12, 2012 (occurrence in small claims court).' ... CPL 310.20 permits trial courts to annotate verdict sheets containing two or more counts charging offenses set forth in the same article of the law with 'the dates, names of complainants, or specific statutory language . . . by which the counts may be distinguished' (CPL 310.20 [2]). Those annotations are intended to 'enhance the ability of deliberating juries to distinguish between seemingly identical or substantially similar counts'. If the court believes different or further annotations would be instructive, it may 'furnish an expanded or supplemental verdict sheet'... , although it may do so 'only . . . with the consent of the parties' ... . Both common sense and defense counsel's summation demonstrate that trial counsel had a sound strategic reason for consenting to the annotations: they encouraged the jury to think about each count and the relevant evidence (restricted by date and type) independently, instead of concluding that Mr. O'Kane's egregious behavior warranted a conviction on every seemingly identical count." ***People v. O'Kane*, 2018 N.Y. Slip Op. 00859, CtApp 2-8-18**

FIRST DEPARTMENT

CIVIL PROCEDURE, DEBTOR-CREDITOR, CORPORATION LAW.

PLAINTIFF DID NOT DEMONSTRATE ANY BASIS FOR IN PERSONAM OR IN REM JURISDICTION BY THE NEW YORK COURTS, PROCEEDING TO ENFORCE AN ALBANIAN MONEY JUDGMENT PURSUANT TO ARTICLE 53 OF THE CPLR SHOULD HAVE BEEN DISMISSED.

The First Department, in an extensive full-fledged opinion by Justice Friedman, reversing Supreme Court, determined New York courts did not have jurisdiction to enforce an Albanian judgment. The opinion is too detailed to fairly summarize here. The court explained the criteria for the enforcement of foreign money judgments under article 53 of the CPLR (Uniform Foreign Money-Judgments Recognition Act), and the applicability of Daimler AG v. Bauman, 571 US ___, 134 S Ct 746 (2014) and Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contr. & Fin. Servs. Co.m 117 AD3d 609 (1st Dept 2014) to a CPLR article 53 proceeding. The plaintiff did not claim it had any basis for in personam or in rem jurisdiction in New York and relied upon the Abu Dhabi case for the argument such a jurisdictional demonstration was not required: "To go beyond Abu Dhabi and hold, as [plaintiff] urges, that no jurisdictional nexus is ever required for a proceeding under article 53, even if the defendant asserts substantive defenses to recognition of the foreign judgment, would be a substantial departure from the prior general understanding of the law. For example, the Restatement (Third) of Foreign Relations Law takes the position that the creditor on a foreign country judgment 'must establish a basis for the exercise of jurisdiction by the enforcing court over the judgment debtor or his property' (§ 481, Comment g)." ***AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 2018 N.Y. Slip Op. 00928, First Dept 2-8-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S SUMMARY JUDGMENT MOTION PROPERLY GRANTED IN THIS LABOR LAW § 240(1) ACTION, PLAINTIFF WAS ATTEMPTING TO EMPTY A 300 POUND BIN INTO A DUMPSTER, FIVE TO SEVEN FOOT HEIGHT DIFFERENTIAL NOT DE MINIMUS.

The First Department determined plaintiff's motion for summary judgment in this Labor Law § 240(1) action was properly granted. Plaintiff was attempting to lift a 300-pound laundry bin to empty debris into a dumpster. There were no safety devices and the five-to-seven foot height differential was not de minimus. ***Miller v. 177 Ninth Ave. Condominium*, 2018 N.Y. Slip Op. 00905, First Dept 2-8-18**

TRUSTS AND ESTATES, CORPORATION LAW.

NOT-FOR-PROFIT CORPORATION LAW PETITION TO DISINTER THE REMAINS OF ARCHBISHOP FULTON SHEEN AND MOVE THEM FROM ST PATRICK'S CATHEDRAL TO PEORIA ILLINOIS SHOULD NOT HAVE BEEN GRANTED WITHOUT A HEARING.

The First Department, in a full-fledged opinion by Justice Richter, over a two-justice dissent, determined a hearing must be held to decide whether the remains of Archbishop Fulton Sheen should be removed from St. Patrick's Cathedral in New York City to Peoria, Illinois, in anticipation of Archbishop Sheen's Sainthood. The affidavits submitted by Archbishop Sheen's relatives, stating that the Archbishop would have wanted his remains moved to Illinois, and the Archbishop's long-time close friend, stating that the Archbishop expressed a wish that his remains be in New York, required a hearing. The petition court had granted the petition for removal of the remains to Illinois: "In June 2016, petitioner brought a proceeding pursuant to Not-For-Profit Corporation Law § 1510(e) seeking to disinter the remains of Archbishop Sheen for removal and transfer to a crypt located in St. Mary's Cathedral in Peoria. Petitioner submitted the affidavits of her three siblings, all of whom fully support and consent to the transfer ... . A body may be disinterred upon the consent of the cemetery owner, the owners of the lot, and certain specified relatives of the deceased (Not-For-Profit Corporation Law § 1510[e]). If such consent cannot be obtained, a court may grant permission to disinter … . There must be a showing of '[g]ood and substantial reasons' before disinterment is allowed ... . Although 'each case is dependent upon its own peculiar facts and circumstances' ... , '[t]he paramount factor a court must consider in granting permission to disinter is the known desires of the decedent' ... . 'Among other factors, a court must also consider the desires of the decedent's next of kin' … . Where issues of fact have been raised concerning the decedent's wishes, the court should order a hearing ...". ***Matter of Cunningham v. Trustees of St. Patrick's Cathedral*, 2018 N.Y. Slip Op. 00815, First Dept 2-6-18**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

OKAY FOR BANK TO SUBMIT RENEWED POWER OF ATTORNEY IN REPLY PAPERS, POWER OF ATTORNEY SUBMITTED WITH MOTION PAPERS HAD APPARENTLY EXPIRED AND DEFENDANTS RAISED THE ISSUE IN ANSWERING PAPERS.

The Second Department determined Supreme Court properly considered the submission of a renewed power of attorney in reply papers in this foreclosure proceeding. Apparently the power of attorney submitted with the bank's motion papers had expired: "Contrary to the appellants' contention, the Supreme Court properly considered a renewed power of attorney submitted by the plaintiff in reply to the appellants' opposition to its motion. 'The function of reply papers is to address arguments made in opposition to the position taken by the movant'... . Here, the renewed power of attorney submitted by the plaintiff was offered in response to the appellants' argument made in opposition that the plaintiff's affidavit of merit, signed by the assistant vice president of its servicing agent, was invalid because it was signed after the original power of attorney submitted by the plaintiff had expired. The renewed power of attorney merely clarified that the plaintiff's servicing agent continued to have the authority to act on behalf of the plaintiff at the time the affidavit was signed ...". ***Bank of N.Y. Mellon v. Hoshmand*, 2018 N.Y. Slip Op. 00818, Second Dept 2-7-18**

CONTRACT LAW, LIMITED LIABILITY COMPANY LAW, ATTORNEYS.

UNEXECUTED CONTRACT THAT COULD NOT BE COMPLETED WITHIN A LIFETIME NOT ENFORCEABLE, ATTORNEY WHO REPRESENTED THE DEFENDANT LLC SHOULD HAVE BEEN DISQUALIFIED IN THIS ACTION BROUGHT ON BEHALF OF A DECEASED MEMBER.

The Second Department, modifying Supreme Court, determined plaintiff's breach of contract action based upon an unexecuted contract which could not be completed within a lifetime was properly granted. Plaintiff's decedent was a member of a limited liability company (Ocean Rich) which had taken out a life insurance policy for plaintiff's decedent, payable to Ocean State. The agreement which was never signed would have required that the proceeds of the policy be used to buy out plaintiff's decedent's share of the LLC. The Second Department further determined counsel for the defendant LLC should be disqualified because he had represented the LLC before plaintiff's decedent's death: "... [T]he defendants demonstrated

their prima facie entitlement to judgment as a matter of law dismissing the causes of action to recover damages for breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with contract, by submitting evidence that the agreement was never executed by the members of Ocean Rich, and therefore does not satisfy the statute of frauds. ... Since the alleged promise upon which the plaintiff relied—that Ocean Rich would purchase the decedent's interest in it from his estate with the proceeds of the subject insurance policy—could not, by its terms, "be completed before the end of a lifetime," the Supreme Court properly granted [defendants' motion for summary judgment]. ... ... [T]he plaintiff alleged in an affidavit that the defendants' counsel was involved in the formation of Ocean Rich, and the defendants' counsel admitted that he had represented Ocean Rich in 'various past matters.' Counsel's prior representation of Ocean Rich 'was in fact represent[ation of] its [three] shareholders,' whose competing interests are at issue in this action ... . Likewise, counsel's involvement in the formation of Ocean Rich and his representation of it against third parties was 'substantially related' to the present action... . Since the defendants' counsel was 'in a position to receive relevant confidences' from the decedent, whose estate's interests 'are now adverse to the defendant[s'] interests,' the Supreme Court should have granted that branch of the plaintiff's cross motion which was to disqualify the defendants' counsel ...". ***Deerin v. Ocean Rich Foods, LLC*, 2018 N.Y. Slip Op. 00820, Second Dept 2-7-18**

CONTRACT LAW, MEDICAL MALPRACTICE.

COMPLAINT ALLEGING BREACH OF A CONTRACT TO PROVIDE MEDICAL SERVICES PROPERLY DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

The Second Department determined plaintiff's breach of contract action in this medical malpractice case was properly dismissed for failure to state a cause of action: "... [A] cause of action to recover damages for breach of contract to provide medical services 'will withstand a test to its legal sufficiency only where it is based upon an express special promise to effect a cure or to accomplish some definite result'... . Here, the plaintiff's allegations, even supplemented by her affidavit submitted in opposition to the defendants' motion to dismiss the complaint, failed to state a cause of action to recover damages for breach of contract to provide medical services. The plaintiff's allegations as to the formation and terms of any alleged contract are vague and entirely conclusory. Moreover, the alleged damages, which are in the nature of pain and suffering, are not recoverable in a cause of action to recover damages for breach of contract to provide medical services ...". ***Detringo v. South Is. Family Med., LLC*, 2018 N.Y. Slip Op. 00821, Second Dept 2-7-18**

CRIMINAL LAW.

FOR INMATES WHO COMMITTED CRIMES AS JUVENILES, THEIR YOUTH MUST BE TAKEN INTO CONSIDERATION IN PAROLE DETERMINATIONS.

The Second Department affirmed Supreme Court's ruling sending the matter back for a de novo parole interview. Petitioner was 17 when he committed murder and is now 50. Pursuant to a decision from the Third Department, the parole board has decided to include an inmate's youth at the time of the crime in making parole determinations: "... [W]e deem it appropriate to affirm the judgment that annulled the Parole Board's determination and remitted the matter to the Parole Board for a de novo interview before a different panel. The petitioner is entitled to a meaningful opportunity for release in which the Parole Board considers, inter alia, his youth at the time of the commission of the crimes and its attendant circumstances ...". ***Matter of Putland v. New York State Dept. of Corr. & Community Supervision*, 2018 N.Y. Slip Op. 00837, Second Dept 2-7-18**

CRIMINAL LAW, ADMINISTRATIVE LAW.

CHAIRMAN OF THE BOARD OF PAROLE SHOULD NOT HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO HOLD A DE NOVO PAROLE HEARING AS ORDERED BY THE ARTICLE 78 COURT, THE EXECUTIVE LAW DOES NOT CALL FOR A HEARING IN THIS CONTEXT, ONLY AN INTERVIEW.

The Second Department, reversing Supreme Court, determined the chairperson of the Board of Parole should not have been held in civil contempt for a purported failure to follow Supreme Court's order. After an inmate contested the denial of parole in an Article 78 action, Supreme Court granted the inmate's petition and ordered the parole board to hold a de novo parole "hearing." The parole board conducted a parole "interview." The inmate then moved to hold the parole board chairperson in contempt for failing to conduct a "hearing." The opinion is comprehensive and too detailed to fairly summarize here. In a nutshell, the Second Department determined the Executive Law does not call for a "hearing" in this context, only an "interview:" "Pursuant to the relevant provisions of the Executive Law governing the Board's procedures, we conclude that the court was without authority to order a de novo evidentiary 'hearing,' as the petitioner was only entitled to a de novo parole release 'interview' and review (see Executive Law § 259-i[2][a][i]). Applying our well-established contempt jurisprudence, it cannot be said that the language employed in the judgment ... , was clear and unambiguous since the Board could have reasonably understood and interpreted the judgment as directing it to conduct a de novo interview consistent with the requirements of the controlling statutory language. Contempt findings are inappropriate where, as here, there can be a legitimate disagreement about what the terms of an order or judgment actually mean ... . The Board endeavored to comply with the judgment ... , by providing a de novo parole release interview with a reconsideration of the petitioner's record

consistent with its statutory mandate under the Executive Law and consistent with its common practices." ***Matter of Banks v. Stanford*, 2018 N.Y. Slip Op. 00829, Second Dept 2-7-18**

CRIMINAL LAW, ATTORNEYS.

PROSECUTOR'S FAILURE TO PROVIDE THE DEFENSE WITH INFORMATION ABOUT FAVORABLE TREATMENT AFFORDED A WITNESS IN EXCHANGE FOR HIS TESTIMONY, AND THE PROSECUTOR'S FAILURE TO CORRECT THE WITNESS'S MISLEADING TESTIMONY, REQUIRED REVERSAL AND A NEW TRIAL.

The Second Department, reversing Supreme Court, determined defendant's motion to vacate his conviction, based upon the People's failure to provide exculpatory information and correct a witness's testimony, required reversal and a new trial. A witness, Avitto, called by the People testified defendant made inculpatory statements (re: the murder charge) while they were in jail together. At trial the Avitto testified he received no benefit from the People in exchange for his testimony. However, after a hearing, it appeared there had been an informal agreement to provide Avitto with favorable treatment in return for his testimony. Avitto was facing a serious charge and needed to complete a drug program to qualify for a shorter sentence. Even though Avitto was not doing well in the drug program, and in fact had left the program, he was allowed to stay out of jail and continue to attempt to complete the program: "The evidence at issue here—Avitto's immediate contact with the police ... , after leaving the drug program, his subsequent court appearance with detectives and the prosecutor ... , when he was released on his own recognizance, as well as his ability to remain out of custody despite poor progress in his drug treatment and numerous violations—was of such a nature that the jury could have found that, despite Avitto's protestations to the contrary, 'there was indeed a tacit understanding' between Avitto and the prosecution that he would receive or hoped to receive a benefit for his testimony ... . This evidence was material in nature, and its nondisclosure prejudiced the defendant, as it constituted impeachment material and tended to show a motivation for Avitto to lie ... . Accordingly, the prosecutor was not only required to disclose this evidence to the defendant, but was further required to clarify 'the record by disclosing all the details of what had actually transpired' between the District Attorney's office and Avitto ... . The prosecutor further had the obligation to correct any misleading or false testimony given by Avitto at trial regarding his contact with detectives and the prosecutor, and his progression in drug treatment ... . These errors were further compounded when the prosecutor reiterated and emphasized Avitto's misleading testimony during summation ...". ***People v. Giuca*, 2018 N.Y. Slip Op. 00846, Second Dept 2-7-18**

FREEDOM OF INFORMATION LAW (FOIL).

TRAFFIC AND PARKING VIOLATIONS AGENCY IS A HYBRID AGENCY PLAYING BOTH JUDICIAL AND PROSECUTORIAL ROLES, ALTHOUGH DOCUMENTS RELATING TO THE JUDICIAL ROLE ARE EXEMPT FROM FOIL DISCLOSURE, DOCUMENTS RELATING TO THE PROSECUTORIAL ROLE ARE NOT.

The Second Department sent the matter back to Supreme Court to determine whether documents sought by petitioner under the Freedom of Information Law (FOIL) were exempt from disclosure. The documents (re: the photo speed monitoring system) are held by the Nassau Court Traffic and Parking Violations Agency (TPVA). Supreme Court found that the TPVA was exempt from as part of the judiciary. However, although part of the TPVA's role is judicial, there are aspects of the agency which are prosecutorial. Supreme Court should have reviewed the documents to see whether the judiciary exemption applies to all the requested documents: "FOIL applies to 'agency' records, but its definition of 'agency' expressly excludes the 'judiciary' ... . FOIL defines 'judiciary' as 'the courts of the state, including any municipal or district court, whether or not of record' ... , the Court of Appeals stated that for purposes of jurisdiction over certain matters, the TPVA is 'an arm of the District Court,' so that matters pending in the TPVA are considered to be pending in the District Court. Accordingly, it is indisputable that, at least for certain purposes, the TPVA is part of the judiciary. The Supreme Court erred, however, in holding that the TPVA is entirely judicial and thus not subject to FOIL at all. The Court of Appeals expressly recognized in Matter of Dolce v. Nassau County Traffic & Parking Violations Agency that the TPVA is a 'hybrid agency that exercises both prosecutorial and adjudicatory responsibilities,' and that the prosecutorial function is 'distinct from the adjudicatory function' (id. at 498). Accordingly, to the extent that a TPVA record concerns the nonadjudicatory responsibilities of the TPVA, it is not exempt from disclosure under the definition of "agency" in Public Officers Law § 86(3). Without examination of the records that the petitioner seeks, the Supreme Court cannot make a determination as to whether they are exempt from disclosure as records of the 'judiciary' ...". ***Matter of Law Offs. of Cory H. Morris v. County of Nassau*, 2018 N.Y. Slip Op. 00835, Second Dept 2-7-18**

INTENTIONAL TORTS, CIVIL CONSPIRACY.

CIVIL CONSPIRACY CANNOT BE BROUGHT AS AN INDEPENDENT TORT IN NEW YORK.

The Second Department, in affirming the dismissal of a complaint, noted that a civil conspiracy cause of action cannot be brought as a stand-alone tort in New York. There must be a conspiracy to commit an underlying tort. Because the underlying tort cause of action here, fraud, was dismissed, the civil conspiracy must also be dismissed: "New York does not recognize civil conspiracy to commit a tort as an independent cause of action ... . However, a plaintiff may plead the existence of

a conspiracy in order to connect the actions of the individual defendants with an actionable, underlying tort, and establish that those actions were part of a common scheme ... . Under New York law, '[i]n order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement' ... . Here, since the underlying tort of fraud was properly dismissed, the cause of action alleging civil conspiracy to commit fraud was also properly dismissed, since it stands or falls with the underlying tort ...". ***McSpedon v. Levine*, 2018 N.Y. Slip Op. 00826, Second Dept 2-7-18**

TRUSTS AND ESTATES, FAMILY LAW.

FLAWED ACKNOWLEDGMENTS IN A PRENUPTIAL AGREEMENT, WHICH DID NOT INCLUDE THE STATEMENT THAT THE PARTIES WERE KNOWN TO THE NOTARIES, CAN BE CURED BY AFFIDAVITS SUBMITTED TO THE COURT BY THE NOTARIES.

The Second Department, in a full-fledged opinion by Justice Austin, determined Surrogate's Court properly denied the wife's (Irene's) motion to dismiss the husband's estate's petition to invalidate Irene's notice of spousal election. Irene and her husband who had both been married before, signed a prenuptial agreement that they would not make a claim to each other's estates. There was no question both parties signed the agreement, but essential language was missing from the acknowledgments, taken by their respective attorneys as notaries. Both attorneys submitted affidavits stating that the signers were known to them at the time of signing, the information missing from the acknowledgments. The question came down to whether, by submitting the prenuptial agreement with the invalid acknowledgments, Irene demonstrated conclusively that the petition could not succeed. The Second Department determined the flaw in the acknowledgments can be cured, and the motion to dismiss was therefore properly denied: "In Galetta v. Galetta (21 NY3d 186), the Court of Appeals left unanswered the question of whether a defective acknowledgment of a prenuptial agreement could be remedied by extrinsic proof provided by the notary public who took a party's signature. For the reasons that follow, we conclude that such proof can remedy a defective acknowledgment. Accordingly, we affirm the order of the Surrogate's Court, which denied the appellant's motion to dismiss a petition to invalidate her notice of spousal election." ***Matter of Koegel*, 2018 N.Y. Slip Op. 00833, Second Dept 2-7-18**

THIRD DEPARTMENT

CONTRACT LAW, FRAUD, CIVIL PROCEDURE.

PLAINTIFF ALLEGED CONTINUING BREACHES OF CONTRACT, AIDING AND ABETTING FRAUD, NEGLIGENT MISREPRESENTATION AND AIDING AND ABETTING BREACH OF FIDUCIARY DUTY FOR THE DURATION OF THE DEBT-RIDDEN WORKERS' COMPENSATION TRUST, WHICH WAS TERMINATED 25 DAYS BEFORE THE EXPIRATION OF THE SIX YEAR STATUTE OF LIMITATIONS, THOSE CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Third Department, modifying Supreme Court, determined the causes of action for breach of contract, aiding and abetting fraud and negligent misrepresentation, and aiding and abetting a breach of fiduciary duty should not have been dismissed as time barred. The underlying suit is based on the allegation that defendant insurance broker was on the board of a Workers' Compensation trust, which plaintiff had joined, and which was $82 million in debt. The Third Department held that the six-year statute of limitations applied to all the (above-described) causes of action and the complaint alleged continuing breaches throughout the period of membership in the trust, which terminated 25 days before the expiration of the statute of limitations (i.e., the six-year period before the suit was brought extended back to March 24, 2008, and the trust was terminated on April 17, 2008): "... [T]he amended complaint alleges continuing contractual obligations on the part of defendant and specifies that the various acts and omissions constituting the breaches occurred '[t]hroughout the entire course of [p]laintiff's membership in the [t]rust.' Deeming these allegations as true and according them every favorable inference, as we must ... , we conclude that defendant failed to make the requisite prima facie showing that plaintiff's breach of contract claim is time-barred in its entirety ... . [P]laintiff's causes of action for negligent misrepresentation and aiding and abetting fraud are timely insofar as they allege conduct occurring [during the 25 day window]. ... ... [W]e disagree with Supreme Court's conclusion that the entirety of plaintiff's aiding and abetting breach of fiduciary duty claim is governed by a three-year statute of limitations. Because plaintiff does not seek equitable relief, a six-year statute of limitations period applies to a breach of fiduciary duty cause of action if 'an allegation of fraud is essential to' such claim ... . While a claim of fraud generally requires an affirmative misrepresentation, 'fraud may also result from a fiduciary's failure to disclose material facts when the fiduciary had a duty to disclose and acted with the intent to deceive' ...". ***Krog Corp. v. Vanner Group, Inc.*, 2018 N.Y. Slip Op. 00876, Third Dept 2-8-18**

WORKERS' COMPENSATION LAW.

BACK AND NECK INJURIES PROPERLY RULED AN OCCUPATIONAL DISEASE RESULTING FROM REPETITIVE LIFTING AND CARRYING.

The Third Department determined claimant demonstrated his back and neck injuries constituted an occupational disease related to his lifting and mix heavy containers of compound and applying the compound to walls and ceilings: " 'In order for an occupational disease to be established, the claimant must establish a recognizable link between his or her condition and a distinctive feature of his or her employment'... . Claimant testified that his job required lifting and carrying containers of plastering compound weighing roughly 50 pounds and using the compound to hang sheetrock for eight hours a day, five or six days a week, for over 30 years. Samuel Kim, a neurosurgeon, opined that claimant suffered from chronic neck and back pain and degenerative disc disease in his cervical and lumbar spine and that the condition was consistent with a history of repetitive movement, and Yong Kim, claimant's treating physician, attributed claimant's back pain to 'repetitive use at work.' In light of the foregoing, and given that no contrary medical opinions were presented, the Board's determination that claimant suffered from an occupational disease resulting from repetitive stress is supported by substantial evidence and will not be disturbed ...". ***Matter of Garcia v. MCI Interiors, Inc.*, 2018 N.Y. Slip Op. 00873, Third Dept 2-8-18**

FOURTH DEPARTMENT

CIVIL PROCEDURE, CONSTITUTIONAL LAW.

OHIO GUN DEALER WHO SOLD GUN USED TO SHOOT PLAINTIFF IN NEW YORK DID NOT HAVE THE REQUISITE MINIMUM CONTACTS WITH NEW YORK, EXERCISING JURISDICTION OVER THE OHIO GUN DEALER, THEREFORE, WOULD VIOLATE DUE PROCESS.

The Fourth Department, in a full-fledged opinion by Justice Peradotto, reversing Supreme Court, determined New York courts could not exercise jurisdiction over an Ohio gun dealer, Brown, who, in Ohio, sold a handgun to an illegal gun trafficker from New York (Bostic). The handgun was ultimately used in New York to shoot the plaintiff. The Fourth Department, applying a federal due process "minimum contacts" analysis, concluded that to exercise jurisdiction over Brown would violate due process: "... CPLR 302 (a) (3) (ii) requires an evaluation of whether Brown 'expect[ed] or should reasonably [have] expect[ed his] act[s] to have consequences in [New York].' ... * * * ... [W]e conclude that Brown lacks the minimum contacts with New York that are a prerequisite to the exercise of jurisdiction over him. Brown's submissions established that Great Lakes was an Ohio retailer permitted to sell guns within Ohio only and, during the relevant period from 1996 to 2005, it did not maintain a website, had no business telephone listing, did not advertise in New York, and made its retail sales and transfers to customers present in Ohio ... . The evidence submitted by plaintiffs in opposition does not tend to establish that Brown 'purposefully reach[ed] out beyond' Ohio and into New York ... . Brown did not, for example, engage in a purposeful distribution arrangement thereby evincing an effort to serve the market for firearms in New York ... . Brown's knowledge that guns sold to Bostic might end up being resold in New York if Bostic's ostensible plan or hope came to fruition in the future is insufficient to establish the requisite minimum contacts with New York because such circumstances demonstrate, at most, Brown's awareness of the mere possibility that the guns could be transported to and resold in New York ...". ***Williams v. Beemiller, Inc.*, 2018 N.Y. Slip Op. 00939, Fourth Dept 2-9-18**

CIVIL PROCEDURE, CORPORATION LAW, EVIDENCE.

PLAINTIFF CORPORATION'S FAILURE TO MAKE A REASONABLE EFFORT TO PRODUCE A FORMER EMPLOYEE FOR DEPOSITION BY DEFENDANT WARRANTED PRECLUDING PLAINTIFF FROM PRESENTING TESTIMONY BY THE FORMER EMPLOYEE PURSUANT TO CPLR 3126, HOWEVER PRECLUSION OF SECONDARY AND HEARSAY EVIDENCE RELATING TO THE FORMER EMPLOYEE, WHICH WOULD PRECLUDE PLAINTIFF FROM ASSERTING ITS CLAIM, WAS AN ABUSE OF DISCRETION.

The Fourth Department determined Supreme Court properly found that plaintiff corporation did not make sufficient efforts to produce a former employer to be deposed by defendant in this breach of contract action, and therefore properly precluded plaintiff from presenting the former employee's testimony. However, the Fourth Department held that Supreme Court abused its discretion when it precluded any secondary or hearsay evidence related to the former employee, which would preclude plaintiff from asserting its claim: "Generally, where there is no evidence that a corporation exercises control over a former employee, that corporation cannot be held responsible for the former employee's refusal to appear for a deposition ... . Here, however, the firm representing plaintiff undertook the representation of that former employee, implicitly conceding control over the former employee ... . When the court ordered plaintiff's attorney to make every reasonable effort to secure the former employee's appearance for a deposition, plaintiff's attorney merely sent a letter notifying the former employee that the attorney was supposed to make additional efforts to secure her presence. There is no evidence that any actual efforts to secure her appearance were made. We thus agree with the court that plaintiff should be precluded from presenting testimony from the former employee. We conclude, however, that the court abused its discretion in precluding plaintiff from relying on any secondary or hearsay evidence related to the former employee. There was no order compelling

the production of such evidence that plaintiff was alleged to have violated, and the court did not find a willful failure to disclose such evidence. ***Hypercel Corp. v. Stampede Presentation Prods., Inc.*, 2018 N.Y. Slip Op. 00936, Fourth Dept 2-9-**

CRIMINAL LAW.

SECOND FELONY OFFENDER STATUS CANNOT BE BASED UPON A PRIOR FEDERAL DRUG CONSPIRACY CONVICTION.

The Fourth Department determined defendant should not have been sentenced as a second felony offender based upon a prior federal drug conspiracy conviction: " 'It is well settled that, under New York's strict equivalency standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes' ... . We therefore modify the order by granting that part of defendant's motion pursuant to CPL 440.20 seeking to vacate the sentence, and we remit the matter to Supreme Court to resentence defendant as a nonpredicate felon ...". ***People v. Hamn*, 2018 N.Y. Slip Op. 00961, Fourth Dept 2-9-18**

CRIMINAL LAW.

DEFENDANT'S MOTION TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS SHOULD NOT HAVE BEEN GRANTED, THE UNAVAILABILITY OF A WITNESS AND THE RELATED ADJOURNMENT SHOULD NOT HAVE BEEN CHARGED TO THE PEOPLE.

The Fourth Department, reversing County Court, determined defendant's motion to dismiss the indictment on speedy trial grounds should not have been granted. The delay attributed to the unavailability of a witness and the related adjournment should not have been charged to the People: "We agree with the People that a witness's one-day unavailability while her father is undergoing heart surgery is an excludable delay that was 'occasioned by exceptional circumstances' ... . Moreover, the ensuing 21-day adjournment until February 2, 2017 was attributable to the court and not chargeable to the People ... , inasmuch as the People had requested a one-day adjournment and 'any period of an adjournment in excess of that actually requested by the People is excluded' ...". ***People v. Barnett*, 2018 N.Y. Slip Op. 00968, Fourth Dept 2-9-18**

CRIMINAL LAW.

SENTENCING COURT IS OBLIGATED TO CONSIDER YOUTHFUL OFFENDER STATUS, DESPITE THE ABSENCE OF ANY MENTION OF IT IN THE PLEA OFFER.

The Fourth Department, vacating defendant's sentence, noted that the failure to mention youthful offender treatment in a plea offer does not constrain the court from considering it: "There is no dispute that defendant was eligible ... for youthful offender treatment (see CPL 720.10). Nevertheless, based on comments that the court made in denying defendant's request for youthful offender treatment, it appears that the court believed that it was constrained to deny defendant's request simply because it was not contemplated by the People's plea offer. ... 'Compliance with CPL 720.20 (1) requires the sentencing court to actually consider and make an independent determination of whether an eligible youth is entitled to youthful offender treatment' ... . Inasmuch as the Court of Appeals has held that CPL 720.20 (1) mandates 'that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant . . . agrees to forgo it as part of a plea bargain' ... , a new sentencing proceeding is required...". ***People v. Hobbs*, 2018 N.Y. Slip Op. 00995, Fourth Dept 2-9-18**

CRIMINAL LAW, EVIDENCE.

INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD, MOTHER TRANSPORTED DEAD BODY IN A CAR IN WHICH FOUR-YEAR-OLD DAUGHTER WAS RIDING, TWO JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined the evidence was not sufficient to support endangering the welfare of a child. The child's mother was convicted of killing the victim and transporting the victim's body in a car when her four-year-old daughter was in the car: "We agree with defendant, however, that her conviction of endangering the welfare of a child is not based on legally sufficient evidence, and we therefore modify the judgment accordingly. The charge arose from defendant allegedly having her four-year-old child accompany her when she transported the victim's body to her mother's house. Viewing the evidence in support of that charge in the light most favorable to the People ... , we conclude that the People failed to establish beyond a reasonable doubt that the child's riding in the car with the victim's body was likely to result in harm to the physical, mental, or moral welfare of the child ... . Specifically, the People presented no evidence that the child was aware that the victim's body was in the car or that the child was upset or bothered by any smells or sights in the car or later at his grandmother's house ...". ***People v. Chase*, 2018 N.Y. Slip Op. 00935, Fourth Dept 2-9-18**

DEFAMATION, PRIVILEGE.

COMPETENCE ASSESSMENT WRITTEN BY DEFENDANT CONCERNING PLAINTIFF, A DOCTOR WHOSE PATIENT DIED DURING SURGERY, WAS PROTECTED BY THE COMMON INTEREST QUALIFIED PRIVILEGE AND WAS AN EXPRESSION OF PURE OPINION.

The Fourth Department, reversing Supreme Court, determined a report written by defendant concerning plaintiff-doctor's competence was protected by the common interest qualified privilege and was the expression of pure opinion. The competence assessment was done after one of plaintiff's patients died during surgery: "Plaintiff, a doctor employed by defendant Kaleida Health (Kaleida), performed a surgery in which the patient died. As a result of this incident, and pursuant to Kaleida policy, plaintiff underwent a neuropsychological competence assessment by Ralph Benedict, M.D. (defendant). Defendant thereafter submitted a written report detailing his findings and opinions to both Kaleida's internal review body and plaintiff's personal physician. ... 'It is well settled that summary judgment is properly granted [dismissing a defamation cause of action] where a qualified privilege obtains and the plaintiff[] offer[s] an insufficient showing of actual malice' ... . Here, defendant established as a matter of law that his written report and associated oral commentary were protected both by the 'common interest' qualified privilege ... . In opposition, plaintiff failed to raise a triable issue of fact on the issue of actual malice ... . We further agree with defendant that the court erred in denying that part of his motion with respect to the defamation causes of action on the alternative ground that the allegedly defamatory statements are expressions of pure opinion ... . 'Expressions of opinion . . . are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation' ...". ***Shenoy v. Kaleida Health*, 2018 N.Y. Slip Op. 01008, Fourth Dept 2-9-18**

EMPLOYMENT LAW, ACCOUNTANT MALPRACTICE.

SEEKING ATTORNEY'S FEES FOR THE CLASS ACTION PURSUANT TO THE FEDERAL FAIR LABOR STANDARDS ACT (FLSA) CONSTITUTED SEEKING INDEMNIFICATION WHICH IS PROHIBITED BY THE ACT, THE BREACH OF CONTRACT ACTION IS NOT DUPLICATIVE OF THE ACCOUNTANT MALPRACTICE ACTION.

The Fourth Department, modifying Supreme Court, determined the request for attorney's fees in this accountant malpractice action constituted a request for indemnification which was prohibited by the Federal Fair Labor Standards Act (FLSA). Plaintiffs alleged they hired defendant-accountants to make sure plaintiffs were in compliance with overtime compensation and wage notice requirements of the FLSA. Plaintiffs were subsequently sued on related claims and sought recover of the attorney's fees expended to settle the suit. The Fourth Department noted that the breach of contract action was not the same as the accountant malpractice action, but that the negligence and breach of fiduciary duty actions were duplicative of the breach of contract action: "It is well established that "there is no right of contribution or indemnity for employers found liable under the FLSA" ... , and the FLSA preempts any conflicting provisions of state labor laws, including those of New York ... . A party may not avoid this bar on indemnity by seeking indemnification damages through other legal theories ... . In view of the foregoing, we agree with defendants that seeking attorneys' fees associated with that underlying class action is a request for indemnity ... . * * * ... . [W]e reject defendants' contention that the breach of contract cause of action is duplicative of the accounting malpractice cause of action. The breach of contract cause of action is based on allegations that defendants breached their agreements with plaintiffs by failing to perform certain services, and that plaintiffs are entitled to recover all compensation paid to defendants for those unperformed services. That is separate and distinct from the allegations in the accounting malpractice cause of action, which seeks damages based on allegations that defendants did perform services pursuant to the contract but failed to comply with the accepted standards of care." ***Delphi Healthcare PLLC v. Petrella Phillips LLP*, 2018 N.Y. Slip Op. 01012, Fourth Dept 2-9-18**

ENVIRONMENTAL LAW, CIVIL PROCEDURE.

NONPARTY, WHICH WISHED TO PURCHASE PROPERTY FOR USE AS A LAND FILL, PROPERLY ALLOWED TO INTERVENE IN A LAWSUIT BY THE PROPERTY OWNERS SEEKING TO DECLARE INVALID A LOCAL LAW WHICH PROHIBITED EXPANSION OF THE LAND FILL.

The Fourth Department determined a waste management company (Sealand), which had sought to purchase property for use as a land fill, was properly allowed to intervene in an action to determine the validity of a local law which prohibited expansion of the existing land fill: "Upon a timely motion, a nonparty is permitted to intervene as of right in an action involving property where the nonparty 'may be affected adversely by the judgment' ... . Additionally, after considering 'whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party,' a court may, in its discretion, permit a nonparty to intervene when, inter alia, the nonparty's 'claim or defense and the main action have a common question of law or fact' ... . 'Whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings' ... . * * * Here, although Sealand did not seek to intervene until several years after it knew its interests in the property may be implicated in the dispute, we conclude that the court did not abuse its discretion in granting the motion inasmuch as Sealand's intervention will not delay resolution of the action and defendants will not suffer prejudice ... . Sealand does not seek to assert any new claims or to conduct extensive additional discovery but rather, in essence, seeks only to continue

the challenge to the 2007 Law on causes of action that remain unresolved despite lengthy litigation ... . Where, as here, there is no 'showing of prejudice resulting from delay in seeking intervention, the motion should not be denied as untimely' ...". ***Jones v. Town of Carroll*, 2018 N.Y. Slip Op. 01010, Fourth Dept 2-9-18**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT SHOULD NOT HAVE REFUSED TO ALLOW A SETTLEMENT OF THIS CHILD SUPPORT PROCEEDING, MOTHER AGREED FATHER'S JAIL SENTENCE SHOULD BE SUSPENDED IN RETURN FOR FATHER'S AGREEMENT TO PAY.

The Fourth Department, reversing Family Court, determined Family Court should not have refused to allow a settlement of this child support proceeding by stipulation. The court had directed that father be jailed for six months for failure to pay child support. Mother agreed that the jail sentence should be suspended in return for immediate payment of $3000 and future payments father could make because of a construction job he had just started: "We agree with the father that the court erred in refusing to allow the parties to enter into the settlement agreement ... . 'Stipulations of settlement are favored by the courts and not lightly cast aside' ... . 'As a general matter, open court stipulations are especially favored by the courts inasmuch as they promote efficient dispute resolution, timely management of court calendars, and the integrity of the litigation process' ... Under the circumstances of this case, we conclude that the court erred in refusing to allow the parties to settle the matter, and we therefore reverse the order and remit the matter to Family Court for further proceedings. If the parties no longer wish to settle, we direct the court to hold a new confirmation hearing." ***Matter of Soldato v. Feketa*, 2018 N.Y. Slip Op. 00989, Fourth Dept 2-9-18**

FAMILY LAW, EVIDENCE.

NEGLECT FINDING NOT SUPPORTED BY THE EVIDENCE.

The Fourth Department, reversing Family Court, determined the evidence did not support the neglect finding: "... [W]e agree with the mother that the court erred in determining that she neglected the child inasmuch as the AFC [attorney for the child] failed to meet her burden of establishing by a preponderance of the evidence that the 'child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired' as a consequence of the mother's failure to exercise a minimum degree of care ... . It is well established that 'any impairment to the child[ ] must be clearly attributable to the unwillingness or inability of the mother to exercise a minimum degree of care toward' [the child] . . . , rather than what may be deemed undesirable parental behavior' ' ... . 'Indeed, the statutory test is minimum degree of care — not maximum, not best, not ideal' ... . Here, the court concluded that, 'on one hand, [the mother] may simply be a mother determined to protect her child. On the other hand, she may be a woman determined to cause emotional harm to the father of their child. In either case, the consequence of this course of action may be emotional harm to [the child]' … . While the record establishes that the mother's conduct has been troubling at times, 'there is no indication in the record that the child was . . . impaired or in imminent danger of impairment of her physical, mental, or emotional condition as a result of any acts committed by [the mother]' ...". ***Matter of Ellie Jo L.H.*, 2018 N.Y. Slip Op. 00934, Fourth Dept 2-9-18**

LABOR LAW-CONSTRUCTION LAW.

QUESTIONS OF FACT WHETHER DEFENDANT WAS A GENERAL CONTRACTOR OR AGENT OF THE OWNER, WHETHER DEFENDANT HAD CONTROL OVER THE WORK SITE AND NOTICE OF A DANGEROUS CONDITION, AND WHETHER THE INJURY WAS THE RESULT OF THE ABSENCE OR FAILURE OF A SAFETY DEVICE IN THIS LABOR LAW §§ 240(1), 241(6) AND 200 ACTION.

The Fourth Department, over a two-justice partial dissent, determined that there were questions of fact whether defendant BGB was liable under Labor Law §§ 240(1) and 241(6) as a general contractor or agent of the owner, and whether BGB was liable under Labor Law 200 because of its control over the work site and notice of the dangerous condition. In addition the Fourth Department determined there was a question of fact whether the lintel over a doorway fell on plaintiff because of the absence of a safety device (Labor Law 240 (1)). The dissent argued that no safety device was required as a matter of law. With respect to whether BGB was a general contractor or agent of the owner, and whether BGB could be liable under Labor Law 200, the court wrote: " 'An entity is a contractor within the meaning of Labor Law § 240 (1) and § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors . . . , and an entity is a general contractor if, in addition thereto, it was responsible for coordinating and supervising the . . . project' ... . In addition, an entity that serves as 'a construction manager may be vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury' ... . Here, BGB's own submissions raise triable issues of fact whether BGB had the authority to supervise or control the injury-producing work, and thus whether it may be held liable as a general contractor or an agent of the owner ... . With regard to plaintiff's Labor Law § 200 and common-law negligence causes of action against BGB, we conclude that, contrary to BGB's contention on its cross appeal, it failed to eliminate triable issues of fact whether it had ' control over the work site and actual or constructive notice of the dangerous condition' that allegedly caused plaintiff's injuries ...". ***Robinson v. Sprague Wash. Sq., LLC*, 2018 N.Y. Slip Op. 01007, Fourth Dept 2-9-18**

MEDICAL MALPRACTICE, PERSONAL INJURY.

ALTHOUGH THE RESIDENT SEVERED PLAINTIFF'S NERVE DURING SURGERY, THE RESIDENT WAS UNDER THE SUPERVISION OF PLAINTIFF'S SURGEON AND EXERCISED NO INDEPENDENT JUDGMENT, MALPRACTICE ACTION AGAINST THE RESIDENT SHOULD HAVE BEEN DISMISSED.

The Fourth Department, modifying Supreme Court, determined the medical malpractice against the resident (O'Donnell) who assisted the plaintiff's surgeon (Weise) should have been dismissed. Although the resident severed a nerve during the bone drilling procedure, the resident was under the supervision of the surgeon and exercised no independent judgment. Therefore the action against the resident and the hospital (Crouse Hospital), as the resident's employer, should have been dismissed: "It is well settled that a 'resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene' ... . Even where a resident 'play[s] an active role in [plaintiff's] procedure,' the resident cannot commit malpractice unless he or she was shown to have exercised some ' independent medical judgment' ... . Here, it is undisputed that plaintiff was Wiese's patient, and Wiese determined the type of surgery to be performed on plaintiff. The deposition testimony of O'Donnell and Wiese establishes that O'Donnell was acting as a resident under Wiese's direction and supervision during the procedure. Indeed, Wiese testified at his deposition and averred in his affidavit that he supervised O'Donnell's selection of the location and angle of the drill, and that he made the decision to stop drilling. We therefore conclude that O'Donnell and Crouse Hospital met their burden on the motion by establishing that O'Donnell did not exercise independent medical judgment with respect to his operation of the drill, and plaintiff failed to raise an issue of fact ..."..

***Blendowski v. Wiese*, 2018 N.Y. Slip Op. 00973, Fourth Dept 2-9-18**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFF'S ASSERTION OF A NEW THEORY OF LIABILITY IN THE PAPERS ANSWERING DEFENDANT HOSPITAL'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN CONSIDERED, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the hospital's (Crouse Hospital's) motion for summary judgment in this medical malpractice action should have been granted. The defendant doctor was not a hospital employee and no hospital employee was named in the complaint or bill of particulars. The plaintiff, in answering the hospital's summary judgment motion, claimed for the first time that two nurses were negligent. That new theory of recovery could not defeat the motion: "Following discovery, the hospital moved for summary judgment dismissing the complaint against it, contending that the physician defendant was not its employee and that the hospital therefore could not be held vicariously liable for his alleged negligence. In opposing the motion, plaintiff did not address the hospital's contention with respect to the physician defendant's employment status and instead argued for the first time that two of the hospital's nurses were negligent and that the hospital was vicariously liable for their actions. In our view, that is a new theory of recovery and thus could not be used by plaintiff to defeat the hospital's motion ... . We note that plaintiff did not move to amend the bill of particulars to allege that the hospital was vicariously liable for the nurses' negligence. Inasmuch as plaintiff did not dispute that the hospital was not vicariously liable for the alleged negligence of the physician defendant, there was no basis to deny the motion, which we now grant."

***DeMartino v. Kronhaus*, 2018 N.Y. Slip Op. 00974, Fourth Dept 2-9-18**

MENTAL HYGIENE LAW.

INSUFFICIENT SHOWING THAT SEX OFFENDER'S VIOLATION OF NON-SEXUAL TERMS OF HIS STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) JUSTIFIED A FINDING HE IS UNABLE TO CONTROL SEXUAL MISCONDUCT, COMMITMENT TO LOCKED FACILITY REVERSED.

The Fourth Department, in a full-fledged opinion by Justice DeMoyer, reversing County Court, determined that there was an insufficient showing that respondent sex offender's non-sexual violations of the terms of his strict and intensive supervision and treatment (SIST) (alcohol abuse) justified a finding he has an inability to control sexual misconduct: "... [A] Mental Hygiene Law § 10.03 (e) finding of 'inability' based on nonsexual SIST violations will satisfy the Michael M. [24 NY3d 649] standard only when such violations bear a close causative relationship to sex offending. Such a relationship is missing here. It is simply not true — as the State claims — that 'there is a significant link between respondent's alcohol use disorder and his sex offenses' or that his sex offending is 'fueled by his drug and alcohol use.' A review of the record citations upon which the State relies for those propositions reveals only that respondent was intoxicated during his sex offending decades ago, and that alcohol use 'increases his impulsivity and makes [him] more likely to act out.' ... [N]o expert has testified that respondent's substance abuse is 'strongly fused' or otherwise inextricably intertwined with his sex offending ... . At most, the expert testimony in this case shows that respondent's alcohol use is colocated with his sex offending (and, for that matter, with every other facet of his life), and that alcohol disinhibits him from resisting the urge to offend sexually. But this testimony is virtually identical to the expert testimony ... is inadequate to meet the State's burden under Michael M."

***Matter of State of New York v. George N.*, 2018 N.Y. Slip Op. 00942, Fourth Dept 2-8-16**

PERSONAL INJURY.

QUESTION OF FACT WHETHER BEGINNING SAILOR ASSUMED THE RISK OF INJURY WHEN TRYING TO RIGHT A CAPSIZED BOAT, DEFENDANTS PROVIDED NO CAPSIZE-RECOVERY TRAINING.

The Fourth Department determined defendants' motion for summary judgment was properly denied because there was a question of fact whether the assumption of the risk defense applied in this boating accident case. Plaintiff was in a beginner's sailing program. Her boat capsized and she was struck by the boom when she attempt to right it. Defendants had not provided any capsize-recovery training: " 'The assumption of [the] risk doctrine applies as a bar to liability where a consenting participant in sporting or recreational activities is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' ... . 'However, the doctrine of primary assumption of [the] risk will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased' ... . Here, even assuming, arguendo, that defendants established as a matter of law that plaintiff assumed the risks inherent in sailing, we conclude that plaintiff raised triable issues of fact whether defendants unreasonably increased the risks associated with sailing by failing to provide any capsize recovery training to plaintiff and by letting plaintiff sail on the lake under the weather conditions present on the day of the accident ...". ***Ulin v. Hobart & William Smith Colls.*, 2018 N.Y. Slip Op. 00985, Fourth Dept 2-9-18**

PERSONAL INJURY.

PLAINTIFF STRUCK BY A LACROSSE BALL THROWN BY A COACH DURING PRACTICE, THE ACTION WAS NOT PRECLUDED BY EITHER THE SIGNED WAIVER OR THE DOCTRINE OF ASSUMPTION OF THE RISK.

The Fourth Department determined plaintiff lacrosse player's action was not barred by a waiver or the doctrine of assumption of the risk. Plaintiff was in a ground ball drill when a coach through a ball at her head, injuring her. The coach's act was arguably grossly negligent, reckless or intentional, and therefore not covered by the waiver or the doctrine of assumption of the risk: "Here, plaintiff's complaint and affidavit include allegations that the actions of defendants were grossly negligent and extremely reckless. Contrary to defendants' contention, the written waiver does not bar plaintiff's action inasmuch as a waiver is not enforceable with respect to allegations of grossly negligent conduct ... . [I]t is well settled that a person who voluntarily participates in a recreational activity such as lacrosse 'consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation'... . 'Such a person, however, will not assume the risks of reckless or intentional conduct, nor will a claim be barred where the conditions caused by the defendants' negligence are unique and created a dangerous condition over and above the usual dangers that are inherent' in the activity' ...". ***Tauro v. Gait*, 2018 N.Y. Slip Op. 00952, Fourth Dept 2-9-18**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

ABUTTING PROPERTY OWNER PROPERLY GRANTED A LICENSE PURSUANT TO REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 881 TO ENTER NEIGHBOR'S PROPERTY TO PAINT A FENCE.

The Fourth Department determined Supreme Court properly granted petitioner a license pursuant to Real Property Actions and Proceedings Law (RPAPL) 881 to enter respondent's property to paint petitioner's fence. The fact that petitioner built the fence too close to the property line did not preclude the granting of the license: "... [W]e conclude that, in the absence of a statutory definition, the usual and commonly understood meaning of the words 'improvement' and/or 'repair' encompasses the painting of the wooden fence in this case ... .That interpretation is supported by the legislative history, which establishes that the legislature—in recognition that the nature of abutting properties often requires property owners to access the neighboring property in order to make improvements or repairs to their own—intended to encourage such improvements or repairs by removing unreasonable obstacles to efforts to prevent blight and deterioration ...". ***Stuck v. Hickmott*, 2018 N.Y. Slip Op. 01013, Fourth Dept 2-9-18**

TRUSTS AND ESTATES.

BECAUSE THERE WAS ONLY ONE ORIGINAL WILL, NOT MULTIPLE ORIGINALS, THE INABILITY TO FIND A WILL UPON DECEDENT'S DEATH DID NOT GIVE RISE TO THE PRESUMPTION OF REVOCATION BY THE DECEDENT.

The Fourth Department affirmed Surrogate's Court's finding that there was only one original will, a finding made upon remittal from the Court of Appeals. Because no will was found upon decedent's death, and because, in the initial Surrogate's Court proceeding, there was conflicting evidence about whether there was one will, with three copies, or four original wills, the presumption of revocation by the decedent had not been rebutted (she could have possessed an original will). In the post-remittal proceeding, Surrogate's Court determined petitioner, the sole beneficiary of the will, had proven there was only one will, not multiple original wills. Because, upon remittal, Surrogate's Court found there was only one original will, the presumption of revocation by the decedent did not arise (the decedent could not have possessed an original will). The wills were drawn for decedent and her ex-husband. Petitioner, the ex-husband's father, was made alternate beneficiary. When decedent and her ex-husband were divorced, the will as it related to the ex-husband was revoked by operation of law, triggering the petitioner's alternate beneficiary status. The objectants are decedent's parents and brothers: "Contrary to objectants' contention, it cannot be said that the Surrogate erred in crediting the ex-husband's testimony that he and

decedent each signed one original will, one original power of attorney, and one original health care proxy, and that the attorney's office made three photocopies of each of those estate planning documents. Despite the uncertainty with respect to the ex-husband's testimony at the initial hearing, his testimony at the hearing upon remittal unequivocally clarified that there was only one original of each of six estate planning documents, i.e., his will, power of attorney, and health care proxy, and decedent's will, power of attorney, and health care proxy. We conclude that the other instances of inconsistent testimony alleged by objectants have no bearing on the issue whether decedent executed only one original will and were otherwise adequately clarified by the ex-husband." ***Matter of Lewis*, 2018 N.Y. Slip Op. 00941, Fourth Dept 2-9-18**

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