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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

FRYE HEARING PROPERLY ORDERED, CRITERIA EXPLAINED; DOUBLE HEARSAY ABOUT PRIOR THREAT TO KILL SHOULD NOT HAVE BEEN ADMITTED, ERROR HARMLESS.

The Court of Appeals determined the trial court properly ordered a *Frye* hearing in this strangulation/drowning murder case. The court further found that testimony about an argument between defendant and the victim a month before the murder, in which the defendant threatened to kill the victim, was double hearsay and was not admissible under any hearsay exception. The error was deemed harmless. The Court explained the criteria for ordering a *Frye* hearing: "Under the Frye standard, expert testimony is admissible only if a scientific 'principle or procedure has gained general acceptance' in its specified field' ... . The process is meant to assess 'whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally"'... . Absent a novel or experimental scientific theory, a Frye hearing is generally unwarranted. 'The Frye inquiry is separate and distinct from the admissibility question applied to all evidence — whether there is a proper foundation — to determine whether the accepted methods were appropriately employed in a particular case' ... . The proper procedure for addressing concerns about foundation can include an in limine hearing where the trial court determines whether ' there is simply too great an analytical gap between the data and the opinion proffered' ... . The question is whether the expert's opinion sufficiently relates to existing data or 'is connected to existing data only by the ipse dixit of the expert' ... . To the extent that the trial court improperly employed the Frye procedure to rule on the foundation of the defense expert's testimony, any such error was harmless." ***People v. Brooks*, 2018 N.Y. Slip Op. 01956, CtApp 3-22-18**

CRIMINAL LAW, EVIDENCE.

REVERSING THE APPELLATE DIVISION, THE COURT OF APPEALS HELD THAT THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE JUSTIFICATION DEFENSE, STRONG TWO-JUDGE DISSENT.

The Court of Appeals, reversing the appellate division, over a two-judge dissenting opinion, determined the trial court properly refused to instruct the jury on the justification defense. The dissent laid out the facts. At the time of the shooting defendant (Sanchez), who had just been beaten up, and defendant's friends were confronted by several people who apparently had a knife and broken bottles. Although the defendant had retrieved a gun from a car and returned to the confrontation, it was defendant's friend who took the gun and fired: "Viewing the evidence in the light most favorable to defendant ... , the trial court properly declined to charge the jury on the justification defense because, even assuming that the jury could rationally find that defendant subjectively believed he had been threatened with the imminent use of deadly physical force, 'the jury could not rationally conclude that his reactions were those of a reasonable [person] acting in self-defense' ... . Further, on this record, there was no reasonable view of the evidence that defendant could not safely retreat at the time that deadly physical force was used ... . **From the dissent:** Lurking somewhere beneath the majority's opinion is the thought that you mustn't bring a gun to a knife fight. We should keep in mind that, although there is no evidence that the group threatening Mr. Sanchez and his friends was armed with guns, courts of this state have held that the threat of deadly force may exist when a group of people attacking an individual is not armed at all ... or when, in a one-on-one altercation, an unarmed victim 'grabs' at a defendant's gun ... . Courts have also characterized a variety of items as dangerous instruments which, if used as part of a real or threatened attack, might justify the use of deadly force ...". ***People v. Sanchez*, 2018 N.Y. Slip Op. 01957, CtApp 3-22-18**

FIRST DEPARTMENT

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE.

NEW YORK COURTS HAVE JURISDICTION OVER A NEW JERSEY RADIOLOGIST IN THIS MISDIAGNOSIS MEDICAL MALPRACTICE ACTION PURSUANT TO TWO PROVISIONS OF CPLR 302(a).

The First Department determined New York courts had jurisdiction over a New Jersey radiologist (Daulto) in this failure-to-diagnose-cancer medical malpractice action: "Plaintiff alleges that defendant Dauito, a radiologist, negligently read

her sonogram, leading to a delay in the diagnosis and treatment of her breast cancer. Dr. Dauito avers that, at all relevant times, he was a New Jersey resident and worked only at an office in New Jersey. However, he acknowledges that he was licensed to practice medicine in New York and that he contracted with defendant Madison Avenue Radiology, P.C., a New York corporation, to provide radiology services to some of its New York patients. Plaintiff's sonogram was performed in New York, Dr. Dauito relayed his diagnostic findings to Madison Avenue Radiology in New York, and Madison Avenue Radiology issued a report based on his findings that was allegedly relied upon by plaintiff and her doctors. Under these circumstances, New York courts may exercise jurisdiction over Dr. Dauito pursuant to CPLR 302(a)(1), notwithstanding his lack of physical presence in New York, because he transacted business with Madison Avenue Radiology and provided radiology services to patients in New York, including plaintiff, projecting himself into the State by electronically or telephonically transmitting his diagnostic findings ... . New York courts may also exercise jurisdiction over Dr. Dauito pursuant to CPLR 302(a)(3), because, as alleged, Dr. Dauito's negligent misdiagnosis resulted in a delay in plaintiff's treatment, thereby causing injury to plaintiff in New York, and Dr. Dauito should reasonably expect his out-of-state negligent misdiagnosis in plaintiff's case to have consequences in New York ...". ***Allen v. Institute for Family Health*, 2018 N.Y. Slip Op. 01998, First Dept 3-22-18**

CORPORATION LAW.

ALTHOUGH THE COMPLAINT BY SHAREHOLDERS AGAINST DIRECTORS DID NOT SUFFICIENTLY ALLEGE THE BREACH OF A FIDUCIARY DUTY, IT DID ALLEGE A BREACH OF THE SUFFICIENT INFORMATION DUTY.

The First Department, modifying Supreme Court, determined that, although it did not sufficiently allege the breach of a fiduciary duty, the complaint by shareholders alleged the breach of the "sufficient information duty" owed to shareholders by the directors: "The complaint ... fails to allege 'a special factual relationship between the directors and the shareholders ... bring[ing] the directors of the company into direct and close contact with the shareholders in a manner capable of generating fiduciary obligations' with regard to either the dividend policy that is the subject of the third cause of action or the merger transaction that is the subject of the fourth cause of action ... . However, to the extent the director defendants gave shareholders an information statement providing information and recommendations about the merger transaction, they owed the shareholders a 'sufficient information duty' ... . This is not a duty of loyalty, which would require the directors to subordinate their interests to the shareholders' interests, but 'if [the directors] are going to invite the shareholders to a meeting, common fairness requires that they explain what the purpose of the meeting is' in a 'clear and comprehensible' manner ... . The complaint alleges that the information statement failed to disclose that two directors on the special committee negotiating merger terms had ties to the investor defendants, who proposed the merger, that it failed to disclose any details about the search for alternate proposals, which was illusory, that it failed to provide a meaningful valuation of ordinary shares using industry standards for the insurance business, and that it failed to disclose the impact on the stock value of a parallel bond transaction. Moreover, the complaint alleges that, while the information statement warned that the investor defendants could wipe out the ordinary shareholders by redeeming their convertible cumulative preferred participating shares, it misrepresented the likelihood of that occurrence." ***Davis v. Scottish Re Group Ltd.*, 2018 N.Y. Slip Op. 01867, First Dept 3-20-18**

CORPORATION LAW.

UNDER CAYMAN ISLANDS LAW, THE SHAREHOLDER'S DERIVATIVE CAUSES OF ACTION WERE PROPERLY DISMISSED.

The First Department, in a full-fledged opinion by Justice Acosta, in a case sent back by the Court of Appeals, affirmed Supreme Court's dismissal of the shareholder's derivative causes of action. The derivative action was initially dismissed for failure to comply with a Cayman Islands rule. The Court of Appeals held that the rule was procedural and did not apply in New York courts. The First Department determined the derivative causes of action must be dismissed because plaintiff does not have standing pursuant to Foss v. Harbottle, 67 Eng Rep 189 (1843), as interpreted under Cayman Islands law: "Under Cayman Islands law interpreting Foss, 'derivative claims are owned and controlled by the company, not its shareholders' ... . Thus, 'a shareholder is not permitted to bring a derivative action on behalf of that company' ... . Cayman Islands law recognizes only four narrow exceptions to the Foss rule: "(1) if the conduct infringed on the shareholder's personal rights; (2) if the conduct would require a special majority to ratify; (3) if the conduct qualifies as a fraud on the minority; or (4) if the conduct consists of ultra vires acts ... . Here, the only exception at issue is the 'fraud on the minority' exception. In order to invoke that exception, plaintiff must plead and prove that the alleged wrongdoers controlled a majority of the stock with voting rights and that those wrongdoers committed fraud ... . Control may be sufficiently pleaded by showing that the wrongdoers own a majority of the corporation's voting shares or have acquired de facto control of those voting shares ... . We agree with the motion court that the complaint is devoid of any allegations establishing either form of control." ***Davis v. Scottish Re Group Ltd.*, 2018 N.Y. Slip Op. 01889, First Dept 3-20-18**

CRIMINAL LAW.

TRIAL COURT PROPERLY REFUSED TO DISCHARGE A JUROR AND DECLARE A MISTRIAL AFTER JUROR CONDUCTED ONLINE RESEARCH ABOUT FALSE CONFESSIONS AND SHARED THE INFORMATION WITH OTHER JURORS.

The First Department determined the trial court properly refused to discharge a juror and declare a mistrial after the juror conducted online research about false confessions and shared the information with other jurors: "After a jury note revealed that one juror had conducted online research on false confessions and shared it with the rest of the jury, the court providently exercised its discretion in denying defendant's request to discharge the offending juror and concomitantly declare a mistrial. Defendant did not preserve his contention that the court should have conducted one or more individual inquiries ... , and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. The court took adequate curative measures by thoroughly admonishing the jury to disregard the information obtained by a juror, not to conduct any outside research, and to decide the case solely based on the evidence presented at trial ... . The jury presumably followed these instructions ... . The court also granted defense counsel's request for individual polling of the jurors as to whether they had reached the verdict based only on the evidence and the law as instructed by the court, and not based on any outside influence, to which all jurors answered in the affirmative. Under the circumstances, the juror's misconduct in researching and telling the other jurors about false confessions did not prejudice defendant." ***People v. Jimenez*, 2018 N.Y. Slip Op. 02018, First Dept 3-22-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

SUMMARY JUDGMENT PROPERLY GRANTED ON THE LABOR LAW § 240(1) CAUSE OF ACTION BASED UPON A FALL FROM AN UNSECURED LADDER, IT DID NOT MATTER WHETHER PLAINTIFF LOST HIS BALANCE BEFORE OF AFTER THE LADDER WOBBLED.

The First Department determined plaintiff's motion for summary judgment on the Labor Law § 240(1) cause of action was properly granted. The complaint alleged the unsecured ladder wobbled while plaintiff was attempting to install steel wall panels. The court offered a particularly clear explanation of liability stemming from the use of unsecured ladders: "...[P]laintiff ... was injured when he fell from an unsecured ladder while installing steel wall panels in the lobby of a building ... . 'It is well settled that failure to properly secure a ladder to insure that it remains steady and erect while being used, constitutes a violation of Labor Law § 240(1)' ... . It is irrelevant whether plaintiff initially lost his balance before or after the ladder wobbled because it is uncontested that the precipitating cause of both was that the suction cup that he had affixed to the panel and gripped to pull the panel into place came loose ... . Under either scenario, the ladder failed to remain steady under plaintiff's weight as he performed his work. Furthermore, even if plaintiff gripped the suction cup incorrectly, causing it to come loose, any such misuse of the suction cup was not the sole proximate cause of the accident where the unsecured ladder moved ...". ***Plywacz v. 85 Broad St. LLC*, 2018 N.Y. Slip Op. 01883, First Dept 3-20-18**

MUNICIPAL LAW, CIVIL RIGHTS LAW (42 U.S.C. § 1983), NEGLIGENCE, INTENTIONAL TORTS, EMPLOYMENT LAW.

COMPLAINT STATED CAUSES OF ACTION AGAINST A POLICE OFFICER AND/OR THE CITY FOR CIVIL RIGHTS VIOLATIONS, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND NEGLIGENT SUPERVISION AND RETENTION, SUPREME COURT REVERSED.

The First Department, in a full-fledged opinion by Justice Moulton, reversing Supreme Court, determined the complaint stated causes of action against the city and a city police officer (DeBellis) in connection with, inter alia, warrantless home visits by the officer purportedly concerning the well-being of plaintiff's child and allegedly false complaints by the officer to the Administration for Children's Services (ACS): "... [A]lthough not expressly pleaded, the factual allegations in the complaint fit within a cause of action against DeBellis for intentional infliction of emotional distress based on her alleged malicious or reckless false reporting to ACS and malicious campaign of harassment. ... ...[W]e cannot say, as a matter of law, that DeBellis's actions did not rise to the requisite level of outrageous conduct. The facts alleged by plaintiff describe both (1) a deliberate and malicious campaign of harassment and intimidation and (2) an abuse of power. ... Plaintiff has also stated a claim against defendants under 42 USC § 1983 for deprivation of plaintiff's constitutional rights, specifically, her right under the Fourth Amendment to be free from warrantless and unlawful entries into the home ... . Despite ... allegations of repeated notice to DeBellis's superiors of her actions, there is no indication ... any action was taken to restrain her. Accordingly ... plaintiff has stated a claim for holding the City liable under § 1983 on account of its gross negligence or deliberate indifference to DeBellis's unconstitutional actions ... .[Plaintiff] states a claim against the City for negligent supervision and retention of DeBellis ... . Under this theory, an employer may be liable for the acts of an employee outside the scope of his or her employment ... . Contrary to the City's argument, the facts permit an inference that DeBellis was acting outside of the scope of her employment, and, as plaintiff argues, 'had some personal axe to grind' " ***Scollar v. City of New York*, 2018 N.Y. Slip Op. 02032, First Dept 3-22-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

NOTICE OF CROSS MOTION DID NOT INCLUDE THE RELIEF SOUGHT OR THE GROUNDS FOR RELIEF AS REQUIRED BY CPLR 2214 (a), CROSS MOTION PROPERLY DISMISSED.

The Second Department determined Supreme Court properly dismissed a cross-motion for failure to specify the relief sought and the grounds for relief as required by CPLR 2214 (a): "CPLR 2214(a) provides that a notice of motion shall 'specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor' ... . Here, the Supreme Court providently exercised its discretion in denying the plaintiff's cross motion on the ground that the plaintiff's notice of cross motion was deficient ... . The plaintiff's notice of cross motion failed to sufficiently specify the relief sought, against whom it was sought, and the grounds therefor ... . Although the plaintiff's supporting papers supplied the missing information, a court is not required to comb through a litigant's papers to find information that is required to be set forth in the notice of motion ...". ***Abizadeh v. Abizadeh*, 2018 N.Y. Slip Op. 01892, Second Dept 3-21-18**

CRIMINAL LAW.

JURY SHOULD NOT HAVE BEEN INSTRUCTED ON THE AUTOMOBILE PRESUMPTION OF POSSESSION OF A WEAPON, THE WEAPON WAS SEEN IN THE POSSESSION OF A PASSENGER IN THE CAR.

The Second Department, reversing defendant's possession of a weapon convictions, determined the jury should not have been instructed on the automobile presumption of possession of a weapon. The weapon was seen in the possession of a passenger: "Both police officers who pursued the vehicle being driven by the defendant testified that the gun was seen solely in the physical possession of the other occupant of the vehicle who threw it out the rear passenger side window. This clear-cut evidence that the gun was observed exclusively in the possession of an identified occupant of the vehicle renders the automobile presumption inapplicable and it was error for the court to have charged that presumption ... . The error in giving the charge was not harmless since it is impossible to determine whether the guilty verdict was based on this improper jury charge rather than the proper charges pertaining to the People's alternative theories of constructive possession and acting in concert ... . Accordingly, we must vacate the defendant's convictions of criminal possession of a weapon in the second degree and the sentences imposed thereon and order a new trial on those counts of the indictment." ***People v. Drayton-Archer*, 2018 N.Y. Slip Op. 01934, Second Dept 3-21-18**

ENVIRONMENTAL LAW, ZONING.

APPLICATIONS FOR A NATURAL RESOURCES SPECIAL PERMIT AND A VARIANCE FOR THE CONSTRUCTION OF RETAINING WALLS IN AN AREA OF PROTECTED BEACH VEGETATION PROPERLY DENIED, DIFFERENCE BETWEEN A NATURAL RESOURCES SPECIAL PERMIT AND A VARIANCE EXPLAINED.

The Second Department determined the zoning board of appeals (ZBA) properly denied petitioner's application for a natural resources special permit for the construction of retaining walls. The walls had been construction without applying for the permit. The petitioner's application for a variance was properly denied because the criteria for a variance are more stringent than the criteria for a natural resources special permit. The retaining wall was built in an area of protected beach vegetation: 'Unlike a variance which gives permission to an owner to use property in a manner inconsistent with a local zoning ordinance, a special exception gives permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right' ... . Thus, the burden of proof on the applicant seeking a special use permit 'is lighter than that on an applicant seeking a variance, the former only being required to show compliance with any legislatively imposed conditions on an otherwise permitted use, while the latter must show an undue hardship in complying with the ordinance' ... . 'A denial of a special use permit must be supported by evidence in the record and may not be based solely upon community objection' ... . 'However, where evidence supporting the denial exists, deference must be given to the discretion of the zoning board, and a court may not substitute its own judgment for that of the zoning board, even if a contrary determination is supported by the record' ...". ***Matter of 278, LLC v. Zoning Bd. of Appeals of the Town of E. Hampton*, 2018 N.Y. Slip Op. 01913, Second Dept 3-21-18**

FAMILY LAW.

SEPARATION AGREEMENT MET THE CRITERIA OF THE ADOPTION STATUTE, PETITION TO ADOPT SHOULD NOT HAVE BEEN DISMISSED FOR LACK OF STANDING.

The Second Department, reversing Supreme Court, determined the separation agreement met the statutory requirement of the adoption statute. The petitioner therefore had standing to adopt without her spouse and her petition should not have been dismissed: "Domestic Relations Law § 110 dictates who has standing to adopt, and should be strictly construed in harmony with the legislative purpose that adoption is a means of securing the best possible home for a child ... . As relevant

here, an 'adult married person who is living separate and apart from his or her spouse . . . pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded . . . may adopt another person' without his or her spouse ... . A separation agreement may contain substantive provisions settling marital issues such as equitable distribution and maintenance ... . However, '[t]he agreement is simply intended as evidence of the authenticity and reality of the separation' ... . Thus, for example, where the substantive provisions of a separation agreement have been invalidated as unconscionable, the agreement 'generally . . . may still be accepted for the sole purpose of evidencing the parties' agreement to live separate and apart, thus satisfying the statutory requirement in respect to a separation agreement' in providing grounds for a conversion divorce under Domestic Relations Law § 170(6) ... . Here, the separation agreement evidences the parties' agreement to live separate and apart. The agreement is in writing, subscribed by the parties thereto, and acknowledged in the form required to entitle a deed to be recorded ... . Therefore, it satisfies the statutory requirement of the adoption statute with respect to a separation agreement ...". ***Matter of Jason (Sonia O.),* 2018 N.Y. Slip Op. 01922, Second Dept 3-21-18**

FAMILY LAW.

GRANDPARENTS HAD AUTOMATIC STANDING TO SEEK VISITATION UPON DEATH OF FATHER, VISITATION WAS IN THE BEST INTERESTS OF THE CHILDREN DESPITE THE ANIMOSITY OF MOTHER.

The Second Department determined the paternal grandparents had automatic standing to seek visitation upon father's death. The court further determined visitation was in the best interests of the children, despite the animosity of mother (not caused by the grandparents): "When a grandparent seeks visitation pursuant to Domestic Relations Law § 72(1), the court must make a two-part inquiry ... . First, it must find that the grandparent has standing, based on the death of a parent or equitable circumstances ... . 'Where either parent of the grandchild has died, the grandparents have an absolute right to standing' ... . Once the court concludes that the grandparent has established standing to petition for visitation, the court must then determine if visitation is in the best interests of the child ... . Animosity alone is insufficient to deny visitation ... .Here, the estrangement between the paternal grandparents and the children resulted from the animosity between the mother and the paternal grandparents, and the record supported the forensic evaluator's determination that the paternal grandparents' conduct was not the cause of the animosity ...". ***Matter of Mastronardi v. Milano-Granito,* 2018 N.Y. Slip Op. 01923, Second Dept 3-21-18**

FORECLOSURE, CIVIL PROCEDURE.

ALTHOUGH THE FIRST FORECLOSURE ACTION SHOULD NOT HAVE BEEN DISMISSED, DEFENDANT WAS NOT RESPONSIBLE FOR THE ACCRUAL OF INTEREST DURING THE FOUR YEARS UNTIL THE FORECLOSURE ACTION WAS REFILED, DEFENDANT'S MOTION TO AMEND THE ANSWER TO ADD THE DEFENSE OF LACK OF STANDING SHOULD HAVE BEEN GRANTED, NO PREJUDICE.

The Second Department, reversing Supreme Court, determined defendant's (Jackson's) motion to toll the accrual of interest during the four years between the filing of the first foreclosure action, which was erroneously dismissed, and the second foreclosure action should have been granted. The court further found that defendant's motion to amend the answer to assert the lack of standing defense should have been granted: "Although the initial October 2010 RJI may have been rejected erroneously, the plaintiff fails to explain the ensuing four-year delay between the initial October 2010 filing and the subsequent filing on November 6, 2014. Under the unusual circumstances of this case, since Jackson was prejudiced by this unexplained delay, during which time interest had been accruing, the interest on the loan should have been tolled from December 22, 2010 (that is, 60 days after the alleged initial October 2010 RJI was filed, the time period during which a settlement conference would be scheduled), through the date that the plaintiff filed the subsequent RJI on November 6, 2014 ... . 'Leave to amend a pleading shall be freely given,' provided that the amendment is not palpably insufficient as a matter of law, does not prejudice or surprise the opposing party, and is not patently devoid of merit' ... . 'Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine' ...". ***BAC Home Loans Servicing, L.P. v. Jackson,* 2018 N.Y. Slip Op. 01896, Second Dept 3-21-18**

FORECLOSURE, CIVIL PROCEDURE.

DEFENDANT RAISED A QUESTION OF FACT WHETHER THE BANK MADE A REASONABLE EFFORT TO REACH A RESOLUTION AT THE SETTLEMENT CONFERENCE.

The Second Department, reversing Supreme Court, determined defendant (Nimkoff) was entitled to a hearing on whether plaintiff bank (Hudson City Savings Bank) made a good faith effort to resolve the foreclosure action pursuant to CPLR 3408 (f): "... Nimkoff submitted ... his own affidavit in which he averred that the plaintiff refused to negotiate with him for the stated reason that another entity, Hudson City Savings Bank (hereinafter Hudson City), was the holder of the mortgage and did not allow loan modifications. In opposition, the plaintiff contended that its counsel properly appeared at the two foreclosure settlement conferences and advised the court that Hudson City does not participate in the home affordable modification program. The plaintiff submitted ... the master mortgage loan purchase and servicing agreement (hereinafter

PSA) between the plaintiff and Hudson City to establish that the plaintiff was the servicer of the subject mortgage and Hudson City was the purchaser. However, the PSA also authorized the plaintiff to modify the terms of the subject mortgage loan with Hudson City's consent. In any event, the statute requires the parties to negotiate in good faith to reach a mutually agreeable resolution. There is no evidence in the record that the plaintiff attempted to gain Hudson City's consent to offer a loan modification or offered Nimkoff another nonretention solution, such as a deed in lieu of foreclosure. In fact, there is no evidence in the record that any effort was made to reach a resolution at the two foreclosure settlement conferences." ***Citimortgage, Inc. v. Nimkoff*, 2018 N.Y. Slip Op. 01900, Second Dept 3-21-18**

INSURANCE LAW.

INSURER WAS ENTITLED TO A FRAMED ISSUE HEARING TO DETERMINE WHETHER A HIT-AND-RUN VEHICLE WAS INVOLVED IN THE ACCIDENT.

The Second Department determined the insurer (petitioner) was entitled to a framed issue hearing in this traffic accident case. The appellant was involved in a multi-vehicle accident but claimed he was cut off by a vehicle which left the scene. After a framed issue hearing was held to determine whether a hit-and-run vehicle was involved, appellant appealed arguing the insurer was not entitled to a framed issue hearing: "According to the appellant ... , another vehicle, which he described as a "pick-up truck with a landscaping trailer attached," initially struck his vehicle and then left the scene. Under a policy of insurance issued by the petitioner, the appellant demanded arbitration of his claim for uninsured motorist benefits for the injuries he allegedly sustained in the accident. The petitioner thereafter commenced this proceeding, inter alia, to permanently stay arbitration of the appellant's claim. ... ' The party seeking a stay of arbitration has the burden of showing the existence of sufficient evidentiary facts to establish a preliminary issue which would justify the stay'" ... "Thereafter, the burden shifts to the party opposing the stay to rebut the prima facie showing' ... . 'Where a triable issue of fact is raised, the Supreme Court, not the arbitrator, must determine it in a framed-issue hearing, and the appropriate procedure under such circumstances is to temporarily stay arbitration pending a determination of the issue' ... . 'Physical contact is a condition precedent to an arbitration based upon a hit-and-run accident involving an unidentified vehicle' ... . 'The insured has the burden of establishing that the loss sustained was caused by an uninsured vehicle, namely, that physical contact occurred, that the identity of the owner and operator of the offending vehicle could not be ascertained, and that the insured's efforts to ascertain such identity were reasonable'... . Here, the petitioner, by submitting the police accident report containing the appellant's statement that his vehicle was cut off by an unknown vehicle with a red trailer, raised a triable issue of fact as to whether physical contact occurred between the appellant's vehicle and the alleged unidentified hit-and-run vehicle ... . Contrary to the appellant's contention, the Supreme Court properly directed a framed-issue hearing to determine whether a hit-and-run vehicle was involved in the accident ..". ***Matter of Allstate Ins. Co. v. Deleon*, 2018 N.Y. Slip Op. 01915, Second Dept 3-21-18**

MUNICIPAL LAW, CONTRACT LAW, LANDLORD-TENANT.

EXTENSION OF A LEASE WITH A MUNICIPALITY WAS RATIFIED BY THE MUNICIPALITY'S ACCEPTANCE OF RENT PAYMENTS.

The Second Department, reversing Supreme Court, determined a cell phone tower lease with a municipality did not expire. An extension of the lease was ratified by the municipality when it continued to accept lease payments after the expiration of the first five-year term: "... [I]n seeking a declaration that the lease expired ... , the plaintiffs alleged that the Village's Board of Trustees ... only authorized the lease for a term of five years. Indeed, the resolution provided that 'the term of the leases [sic] shall not exceed a period of five (5) years from the date upon which it is executed.' The lease, however, provided that the initial term of the lease 'will be five (5) years from the Commencement Date' ... , 'and shall automatically renew for up to ten (10) additional terms of five (5) years each.' Verizon and AG separately moved for summary judgment, arguing that the lease did not expire ... , because the Village ratified the lease by accepting rental payments, issuing building permits, and granting variance applications in connection with the construction of the cell tower. ... 'A contract that is not approved by a relevant municipal or governmental body, as required by law, rule, or regulation, may be ratified by the municipality or government body by subsequent conduct, such as by making payments pursuant to the contract' ...". ***Giunta v. AG Towers, Inc.*, 2018 N.Y. Slip Op. 01905, Second Dept 3-21-18**

PERSONAL INJURY.

HEIGHT DIFFERENTIAL WAS NOT A DANGEROUS CONDITION AND WAS READILY OBSERVABLE, SLIP AND FALL ACTION PROPERLY DISMISSED.

The Second Department determined the difference in elevation which caused plaintiff to fall was not inherently dangerous and was readily observable: "... [T]he plaintiff, while walking on a walkway after parking his car at a lot located on the Citi Field complex in Queens, allegedly was injured within the defendants' exterior grounds when he fell due to a difference in elevation between the walkway, which consisted of patio pavers, and an abutting tree bed ... . [T]here is no duty to protect or warn of conditions that are not inherently dangerous and that are readily observable by the reasonable use of one's senses ... . Here, the defendants established, prima facie, that the difference in elevation between the surface of the

walkway and the surface of the tree bed was not inherently dangerous and was readily observable by the reasonable use of one's senses ...". ***Costidis v. City of New York*, 2018 N.Y. Slip Op. 01901, Second Dept 3-21-18**

PERSONAL INJURY.

PLAINTIFF'S SUBMISSIONS, INCLUDING CERTIFIED CLIMATOLOGICAL DATA AND THE DEPOSITION OF A NONPARTY, RAISED QUESTIONS OF FACT ABOUT THE PRESENCE OF ICE AND THE DEFENDANTS' NOTICE OF IT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that, although defendants made out a prima facie case that they did not create or have notice of the icy condition where plaintiff fell, the plaintiff, with submissions which included certified climatological data and the deposition of the nonparty witness, raised questions of fact about the weather conditions, the presence of ice and defendants' notice: "The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they neither created the alleged ice condition nor had actual or constructive notice of it ... . In opposition, however, the plaintiff submitted certified climatological data and the deposition testimony of the nonparty witness Fredy Calle, which raised triable issues of fact as to what the weather conditions were like preceding the accident, whether ice was present on the landing at the time of the accident, how long the ice may have been present, and whether the defendants had notice of the alleged ice condition that proximately caused the plaintiff to fall ...". ***Monje v. Guaraca*, 2018 N.Y. Slip Op. 01911, Second Dept 3-21-18**

PERSONAL INJURY, MUNICIPAL LAW.

CITY NOT LIABLE FOR AN INMATE ON INMATE ASSAULT, ATTACK NOT FORESEEABLE.

The Second Department determined the negligent supervision lawsuit against the city by an inmate who was assaulted by another inmate was properly dismissed. The attack was not foreseeable from the standpoint of the correctional facility personnel: "A municipality owes a duty of care to inmates in correctional facilities to safeguard them from attacks from other inmates ... . This duty, however, does not place the municipality in the role of insurers of inmate safety ... . Rather, 'the scope of the [municipality's] duty to protect inmates is limited to risks of harm that are reasonably foreseeable' ... . Foreseeability includes what the defendant municipality knew or should have known ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the assault upon the plaintiff was not reasonably foreseeable. In this regard, the defendants' submissions demonstrated that the plaintiff's assailant was not a known gang member, had no prior incidents of fighting or aggressive behavior while at Rikers Island, and was not classified as high risk for fighting. Additionally, their submissions established that the plaintiff did not know or see his assailant, who, without provocation, punched him in the jaw, and that at the time there was a correction officer present providing the proper level of supervision in accordance with the applicable standard of "active supervision" as defined in the State Commission of Correction Minimum Standards and Regulations for Management of County Jails and Penitentiaries ...". ***McAllister v. City of New York*, 2018 N.Y. Slip Op. 01909, Second Dept 3-21-18**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

PLEA COLLOQUY INSUFFICIENT, CONVICTION REVERSED IN THE INTEREST OF JUSTICE.

The Third Department, reversing defendant's conviction by guilty plea, determined the plea was not knowing, voluntary and intelligent: "Although the claim has not been preserved for our review given the absence of an appropriate postallocution motion by defendant, we nevertheless exercise our interest of justice jurisdiction and take corrective action under the particular circumstances presented... . 'While there is no mandatory catechism required of a pleading defendant, there must be an affirmative showing on the record that the defendant waived his or her constitutional rights' ... . Here, the record reveals the absence of a meaningful plea colloquy and that defendant entered his guilty plea without County Court providing any instruction on its implications or the rights that he was waiving by entering it ...". ***People v. Schmitz*, 2018 N.Y. Slip Op. 01960, Third Dept 3-22-18**

CIVIL PROCEDURE, FORECLOSURE.

MORTGAGE COMPANY SHOULD HAVE BEEN ALLOWED TO AMEND ITS COMPLAINT IN THIS FORECLOSURE ACTION TO SEEK EQUITABLE SUBROGATION TO THE WIFE'S INTEREST IN THE SUBJECT PROPERTY; CRITERIA FOR AMENDING A COMPLAINT, RATIFICATION OF THE EXECUTION OF A MORTGAGE, AND EQUITABLE SUBROGATION EXPLAINED.

The Third Department, reversing (modifying) Supreme Court, over a partial dissent, determined plaintiff mortgage company should have been allowed to amend its complaint to seek equitable subrogation in this foreclosure action. Defendants husband (Feller) and wife had a mortgage on the subject property. Plaintiff's predecessor in interest subsequently provided a mortgage loan to defendant husband alone and the proceeds were used to pay off the first mortgage. Plaintiff's predeces-

sor then procured a judgment in foreclosure, but only with respect to defendant husband's interest in the property. Plaintiff sought to amend its complaint alleging it was entitled to the wife's interest in the property (equitable subrogation). The court further found that defendant wife did not ratify the execution of the husband's mortgage and explained the criteria for ratification: "As we recently clarified, the party seeking leave to amend a pleading 'need not establish the merits of the proposed amendment' ... . Rather, the appropriate standard to be applied on a motion for leave to amend a pleading is that, 'in the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' ... . Ratification ... is the express or implied 'adoption of the acts of another by one for whom the other assumes to be acting, but without authority' ... .[P]laintiff has not alleged any unauthorized act on the part of Feller. It is undisputed that Feller and defendant held the property at issue as tenants by the entirety, and 'there is nothing in New York law that prevents one of the co-owners from mortgaging or making an effective conveyance of his or her own interest in the tenancy. To the contrary, each tenant may sell, mortgage or otherwise encumber his or her rights in the property, subject to the continuing rights of the other' ... . Here, plaintiff's predecessor in interest, Countrywide, provided funds through a second mortgage on the subject property to pay off a first mortgage securing a loan that both defendant and Feller were obligated to pay. Defendant would therefore be unjustly enriched if the doctrine of equitable subrogation were not applied, as denial of this equitable remedy 'would provide a windfall to [defendant] by allowing [her] to have [her] original mortgage debt extinguished while at the same time maintain a right to the subject property that is superior to the mortgagee that furnished the funds that extinguished the first mortgage' ...". ***Green Tree Servicing, LLC v. Feller*, 2018 N.Y. Slip Op. 01973, Third Dept 3-22-18**

UNEMPLOYMENT INSURANCE.

AUTO DAMAGE APPRAISER NOT AN EMPLOYEE, UNEMPLOYMENT INSURANCE APPEAL BOARD REVERSED.
The Third Department, reversing the Unemployment Insurance Appeal Board, determined claimant appraiser was not an employee of SCA Enterprises and was not entitled to unemployment insurance benefits: "SCA Enterprises Inc. is engaged in the business of connecting appraisers with its clients, which are insurance carriers, to assist in processing automobile damage claims across the United States. Although it conducts the majority of its business through designated franchisees who perform appraisals in specific geographic regions, it also utilizes independent appraisers in areas that are not covered by its franchise agreements. SCA uses a computerized operating system, known as the dashboard, to match franchisees and independent appraisers with assignments that are posted by its insurance carriers. Claimant, doing business as New Hartford Appraisal Service, is an independent appraiser who obtained assignments through SCA and filed a claim for unemployment insurance benefits after those assignments ended. ... ... SCA does not withhold taxes from the compensation that it pays to the independent appraisers, reimburse them for expenses or provide them with fringe benefits, training, equipment, tools, uniforms, business cards, supplies or office space. It also does not supervise their work, require them to attend meetings or review their final appraisal reports. Moreover, the independent appraisers set their own work schedules, are free to work for competitors, may take time off without SCA's permission and refuse assignments without penalty. The requirements of the assignment, including the deadline by which the final report must be submitted, are dictated by the insurance carriers, not SCA. If there is a problem with an appraisal report, SCA simply passes the information on to the independent appraiser. The provisions of the service contract that the independent appraisers sign with SCA designate them as independent contractors and underscore their autonomy." ***Matter of Courto (SCA Enters. Inc.--Commissioner of Labor)*, 2018 N.Y. Slip Op. 01970, Third Dept 3-22-18**

WORKERS' COMPENSATION LAW.

FALL ON SIDEWALK NEAR PLACE OF EMPLOYMENT NOT COMPENSABLE, CRITERIA EXPLAINED.
The Third Department determined claimant was not entitled to workers' compensation benefits stemming from a fall on a sidewalk near her place of employment. The relevant criteria were explained: "As a general rule, 'accidents that occur in public areas away from the workplace and outside of work hours are not compensable' ... and, thus, 'injuries sustained during travel to and from the place of employment' are not compensable... . Where, as here, the accident occurred near the claimant's place of employment, 'there develops a gray area where the risks of street travel merge with the risks attendant with employment and where the mere fact that the accident took place on a public road or sidewalk may not ipso facto negate the right to compensation' ... . Under these circumstances, injuries will be compensable only if there was '(1) a special hazard at the particular off-premises point and (2) a close association of the access route with the premises, so far as going and coming are concerned' ... , permitting the conclusion that 'the accident happened as an incident and risk of employment' ... . 'Notably, the Board in the exercise of its fact-finding powers has the authority to make a discretionary determination of the risks attendant to employment under the particular circumstances of a case'... . Here, there is no evidence that there was any special hazard on the uneven sidewalk where claimant fell, which was open to and used by the public, as the danger 'existed to any passerby traveling along the street in that location' ... . The sidewalk was near the privately-owned building where claimant worked, but the building housed many businesses and a restaurant and was open to the public, and there was 'no showing that it was otherwise controlled by the employer, that workers were encouraged to use it or that it existed solely to provide access to [her] workplace' ... . As substantial evidence supports the Board's determination that

claimant's accident did not occur in the course of her employment, it will not be disturbed." ***Matter of Brennan v. New York State Dept. of Health*, 2018 N.Y. Slip Op. 01974, Third Dept 3-22-18**

FOURTH DEPARTMENT

CIVIL PROCEDURE, JUDGES.

SUA SPONTE DISMISSAL OF PETITION WAS AN ABUSE OF DISCRETION, LACK OF STANDING IS NOT A JURISDICTIONAL DEFECT.

The Fourth Department, reversing Supreme Court, noted that lack of standing is not a jurisdictional defect and held that the court's sua sponte dismissal of an Article 78/declaratory judgment petition was and abuse of discretion: "We agree with petitioners that the court improvidently exercised its discretion in sua sponte dismissing the petition. '[U]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances'... . No such extraordinary circumstances are present in this case. Contrary to the court's determination, 'a party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint' ... . We therefore reverse the judgment insofar as appealed from in the exercise of discretion and reinstate the petition ...". ***Matter of Associated Gen. Contrs. of NYS, LLC v. New York State Thruway Auth.*, 2018 N.Y. Slip Op. 02075, Fourth Dept 3-23-18**

COURT OF CLAIMS.

NOTICE OF INTENTION INSUFFICIENTLY SPECIFIC ABOUT THE TIME AND PLACE OF THE ALLEGED SEXUAL HARASSMENT AND EMPLOYMENT DISCRIMINATION, CLAIMS PROPERLY DISMISSED.

The Fourth Department determined sexual harassment and employment discrimination claims against a former NYS Assemblyman were properly dismissed because the notice of intent were insufficiently specific: "... [T]he statute requires that a 'claim shall state the time when and place where such claim arose, the nature of same, [and] the items of damage or injuries claimed to have been sustained[,] . . . [and a] notice of intention to file a claim shall set forth the same matters' (Court of Claims Act§ 11 [b]). 'With regard to the requisite specificity as to the place where the claim arose, we note that [w]hat is required is not absolute exactness, but simply a statement made with sufficient definiteness to enable [defendant] to be able to investigate the claim promptly and to ascertain its liability under the circumstances' ... . Here, the relevant notice of intention did not set forth ... the place where any of the alleged misconduct occurred ... . We reject claimants' contention that the claims ... should not have been dismissed because the alleged misconduct occurred wherever they were working at any particular time and defendant could easily ascertain such information from its records. 'The Court of Claims Act does not require [defendant] to ferret out or assemble information that section 11 (b) obligates the claimant to allege' ...". ***Snickles v. State of New York*, 2018 N.Y. Slip Op. 02042, Fourth Dept 3-23-18**

CRIMINAL LAW.

ALTHOUGH THE PEOPLE STATED THERE WERE NO IDENTIFICATION PROCEDURES REQUIRING NOTICE TO THE DEFENDANT, THE EVIDENCE INDICATES THERE MAY HAVE BEEN IDENTIFICATION PROCEDURES AT THE POLICE STATION BY A POLICE OFFICER, CASE SENT BACK FOR A HEARING.

The Fourth Department, sending the case back to Supreme Court, found that a hearing was necessary to determine whether the police officers engaged in identification procedures at the police station and, if so, whether the identifications were confirmatory. The People did not notify the defendant of any identification procedures in their CPL 710.30 notice: "... [T]he People provided a blank CPL 710.30 notice to defendant and, in response to that part of his omnibus motion seeking preclusion, asserted that '[t]here were no identification procedures which would require a CPL 710.30 notice.' The record before us establishes ... that the officer and his partner may have engaged in showup identification procedures undertaken "at the deliberate direction of the State" that required notice pursuant to CPL 710.30 ... . The evidence at the suppression hearing established that defendant fled from the front passenger seat of the parked vehicle and was unsuccessfully pursued by the officer, and that the officer knew defendant was apprehended because the officer saw defendant after he was later taken into custody by a third officer. The record further indicates, and the People do not dispute, that, after defendant was arrested and brought to the police station by the third officer at the officer's direction, the officer identified defendant as the front seat passenger who fled from the parked vehicle. ... Although the People contend that any police station identifications were merely confirmatory, and it appears from the record that the officer and his partner may have been familiar with defendant prior to the subject incident, we are precluded from affirming on that ground inasmuch as the court did not rule on that issue ...". ***People v. Davis*, 2018 N.Y. Slip Op. 02051, Fourth Dept 3-23-18**

CRIMINAL LAW.

DEFENDANT, WHO HAD SERVED THE FULL FOUR YEARS OF HIS 1 1/3 TO FOUR YEAR SENTENCE FOR DWI, COULD NOT BE SENTENCED TO MORE PRISON TIME FOR A PROBATION VIOLATION.

The Fourth Department, reversing County Court, determined defendant could not be sentenced to more prison time for a violation of probation in this driving while intoxicated case. Defendant had served the full four years of his 1 1/3 to 4 year sentence when he violated probation by driving while intoxicated, unlicensed operation, refusal of a breath test and operating without an ignition interlock device: "[In *People v. Coon*, 156 AD3d 105, the] Third Department held that, 'where [the defendant] has already served and completed the one-year definite sentence imposed for the DWI conviction, County Court was not authorized to impose an additional term of imprisonment upon his violation of the conditional discharge terms' ... . In reaching that conclusion, the Third Department noted that '[t]he statutory framework governing sentencing does not cover these factual circumstances,' and there were 'no corresponding statutes or amendments to already existing statutes that delineated the types of sanctions that courts could impose in a case such as this one' ... . While here defendant was sentenced to an indeterminate term of imprisonment followed by probation instead of a definite jail term followed by a conditional discharge, we conclude that those distinctions are immaterial. Defendant served the maximum term of imprisonment imposed, i.e., four years on his sentence of 1⅓ to 4 years, and we conclude that he cannot be subjected to additional prison time under the guise of a sentence based on a probation or conditional discharge violation when, in fact, he was resentenced for the initial offense." ***People v. Zirbel*, 2018 N.Y. Slip Op. 02064, Fourth Dept 3-23-18**

CRIMINAL LAW, APPEALS.

PLEA TO A PURPORTEDLY AMENDED COUNT MUST BE VACATED BECAUSE THE COUNT HAD BEEN DISMISSED; WAIVER OF APPEAL INVALID DESPITE THE EXECUTION OF A WRITTEN WAIVER.

The Fourth Department determined the plea to attempted sex trafficking charged in an amended indictment count must be vacated because the count which was purportedly amended had been previously dismissed. The court further held that the waiver of appeal was invalid: "... [W]e conclude ... that the court erred in eliciting defendant's plea of guilty to attempted sex trafficking under the purported amended count 3 of the second indictment because of the previous dismissal of the underlying count... . Inasmuch as '[a] valid and sufficient accusatory instrument is a nonwaivable jurisdictional prerequisite to a criminal prosecution' ... , and the court lacked authority to amend a previously dismissed count and elicit defendant's plea thereto, the judgment of conviction ... must be reversed and the plea vacated ... . We agree with defendant ... that his purported waiver of the right to appeal is not valid inasmuch as 'the perfunctory inquiry made by [County] Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' ... . Although '[a] detailed written waiver can supplement a court's on-the-record explanation of what a waiver of the right to appeal entails, . . . a written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal'... . Here, although defendant signed such a written waiver, 'the record establishes that County Court did not sufficiently explain the significance of the appeal waiver or ascertain defendant's understanding thereof' ... . We thus conclude that, 'despite defendant's execution of a written waiver of the right to appeal, he did not knowingly, intelligently or voluntarily waive his right to appeal as the record fails to demonstrate a full appreciation of the consequences of such waiver' ...". ***People v. Wilson*, 2018 N.Y. Slip Op. 02060, Fourth Dept 3-23-18**

CRIMINAL LAW, APPEALS.

MATTER MUST BE SENT BACK FOR RESENTENCING, DESPITE FAILURE TO RAISE THE ISSUE ON APPEAL, BECAUSE THE LENGTH OF PROBATION WAS NOT SPECIFIED.

The Fourth Department noted that the matter must be sent back for resentencing, despite the failure to raise the issue on appeal, because the length of probation was not specified: "Although not raised by the parties, we note that the judgment must be modified by vacating the sentence and the matter must be remitted to County Court for resentencing because the court did not specify the length of the term of probation ...". ***People v. Petrangelo*, 2018 N.Y. Slip Op. 02074, Fourth Dept 3-23-18**

CRIMINAL LAW, APPEALS.

DEFENDANT'S STATEMENTS DURING THE PLEA COLLOQUY DENYING THAT HE SOLD COCAINE AND DESCRIBING THE PROCEEDINGS AS CORRUPT WARRANTED FURTHER INQUIRY BY THE COURT, CONVICTION REVERSED DESPITE FAILURE TO PRESERVE THE ISSUE FOR APPEAL.

The Fourth Department, reversing defendant's conviction by guilty plea, determined defendant's statements denying he sold cocaine and describing the proceedings as corrupt mandated further inquiry by the court. The failure to preserve the error by a postallocution motion did not, under the facts, prevent the court from reaching the issue on appeal: "During the plea colloquy, defendant admitted to possessing cocaine with the intent to sell, but he denied that he sold the cocaine. After County Court stated that it would not accept his plea, it again asked defendant whether he sold the cocaine, and defendant

answered 'yes'" Defendant informed that court, however, that he was pleading guilty only because he could 'no longer go forward to proceed to trial with the level of corruption and maliciousness being used to prosecute' him. The court nevertheless accepted his plea. Although defendant never moved to withdraw his guilty plea, this case falls within the exception to the preservation requirement that was carved out by the Court of Appeals in People v. Lopez (71 NY2d 662, 666 [1988]), which permits appellate review of the sufficiency of a plea allocution despite the absence of such a motion, where the recitation of facts elicited during the plea allocution 'clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea.' Under such circumstances, if the court fails to conduct 'further inquiry to ensure that [the] defendant understands the nature of the charge and that the plea is intelligently entered . . . , the defendant may challenge the sufficiency of the allocution on direct appeal, notwithstanding that a formal postallocution motion was not made' ...". ***People v. Daniels*, 2018 N.Y. Slip Op. 02094, Fourth Dept 3-23-18**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENDANT SHOULD NOT HAVE BEEN REQUIRED TO PROCEED PRO SE ON THE PEOPLE'S MOTION TO COMPEL A BUCCAL SWAB FOR DNA TESTING.

The Fourth Department determined Supreme Court should not have required defendant to proceed pro se on the People's motion to compel him to submit to a buccal swab for DNA testing: "We ... agree with defendant that the court erred in requiring him to proceed pro se on the People's motion to compel him to submit to a buccal swab for DNA testing ... . Contrary to the People's contention, the court's error cannot be deemed harmless, inasmuch as the evidence apart from the DNA evidence is not overwhelming, and there is a reasonable possibility that the error contributed to the conviction ... . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for further proceedings on the People's motion following the assignment of counsel to represent defendant thereon." ***People v. Pressley*, 2018 N.Y. Slip Op. 02114, Fourth Dept 3-23-18**

CRIMINAL LAW, EVIDENCE.

HEARING REQUIRED ON DEFENDANT'S MOTION TO VACATE HIS CONVICTION EVEN THOUGH THE ISSUES WERE OR COULD HAVE BEEN RAISED IN A PRIOR MOTION TO VACATE, DEFENDANT RAISED QUESTIONS WHETHER FALSE TESTIMONY WAS GIVEN BY A POLICE OFFICER AND WHETHER EXCULPATORY EVIDENCE WAS WITHHELD FROM THE DEFENSE.

The Fourth Department, reversing Supreme Court, determined a hearing should have been held on defendant's motion to vacate his conviction, even though the issues were raised or could have been raised in a prior motion to vacate. The defendant presented evidence that defendant's cell phone was pinged, not defendant's girlfriend's cell phone. Therefore defendant had standing to challenge the pinging of the cell phone. The defendant's motion raised the issue whether a police officer lied when he testified the girlfriend's cell phone was pinged, and whether evidence that the girlfriend's phone was broken at the relevant time (presented to the grand jury) was withheld from the defendant: "... [D]efendant submitted police reports wherein the officer who had testified at the suppression hearing (testifying officer) stated that law enforcement officers were 'pinging' a phone that belonged to defendant. Defendant further submitted affidavits from the minor [his girlfriend] and her grandmother, who had sought the aid of law enforcement, indicating that the minor's phone had broken days before the police action and that they had informed the testifying officer and prosecutor of that fact either the day on which the police pinged the cell phone or, at the very least, at some date before the suppression hearing. Indeed, the minor averred that she had testified before the grand jury that her phone had broken and that defendant's cell phone was the only phone that she and defendant had used during the relevant time period. Defendant contends that the minor's grand jury testimony constituted exculpatory evidence that was not disclosed to the defense despite a specific request therefor. It is well settled that prosecutors have the duty 'not only to disclose exculpatory or impeaching evidence but also to correct the knowingly false or mistaken material testimony of a prosecution witness'... . Defendant has submitted credible documentary evidence establishing that the testifying officer's testimony at the suppression hearing was false and that the prosecutor knew or should have known that the testimony was false ... . Moreover, defendant has submitted credible documentary evidence establishing that the prosecutor failed to disclose material, exculpatory evidence ...". ***People v. Reed*, 2018 N.Y. Slip Op. 02068, Fourth Dept 3-23-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT ENTITLED TO A HEARING ON HIS MOTION TO WITHDRAW HIS GUILTY PLEA BASED ON THE PEOPLE'S FAILURE TO TURN OVER BRADY MATERIAL, A DEFENDANT DOES NOT WAIVE THE RIGHT TO ASSERT A BRADY VIOLATION BY PLEADING GUILTY (OVERRULING PRECEDENT).

The Fourth Department determined defendant was entitled to a hearing on his motion to withdraw his guilty plea based upon the People's failure to disclose the autopsy and toxicology reports relating to the two persons on a motorcycle who died after colliding with defendant's truck. The reports indicated high blood alcohol levels. The Fourth Department noted that the reports constituted *Brady* material and held that a defendant does not waive a *Brady* violation by pleading guilty. Prior Fourth Department decisions to the contrary are no longer to be followed: "... [W]e reject the People's contention

that defendant forfeited his right to raise the alleged Brady violation by pleading guilty ... . Brady is premised upon considerations of fairness and due process ... , and we conclude that it would undermine the prosecutor's Brady obligations if a defendant is deemed to have forfeited his or her right to raise an alleged Brady violation by entering a plea without the knowledge that the People possessed exculpatory evidence... . To the extent that our prior decisions hold that a defendant, by pleading guilty, forfeits the right to raise an alleged Brady violation (see e.g. People v. Brockway, 148 AD3d 1815, 1816 [4th Dept 2017]; People v. Chant, 140 AD3d 1645, 1648 [4th Dept 2016], lv denied 28 NY3d 970 [2016]; People v. Chinn, 104 AD3d 1167, 1168 [4th Dept 2013], lv denied 21 NY3d 1014 [2013]), they are no longer to be followed. ... We reject the People's contention that the reports do not contain exculpatory material and that they were thus under no obligation to disclose them. Rather, we agree with defendant that evidence of the motorcycle operator's intoxication is relevant with respect to the cause of the fatal accident and defendant's culpability therefor and, here, the toxicology report states that two blood samples obtained from the motorcycle operator indicated blood alcohol concentrations of .081 and .098. Moreover, the exculpatory value of that evidence is enhanced by defendant's initial account of the accident to State Police officers at the scene, wherein defendant asserted that the accident occurred when the motorcycle was passing another vehicle and suddenly appeared 'right in front of him.' " ***People v. Wilson*, 2018 N.Y. Slip Op. 02106, Fourth Dept 3-23-18**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

ALLOWING THE JURY TO HEAR INADMISSIBLE EVIDENCE OF DEFENDANT'S ADMISSIONS TO THE COMMISSION OF UNRELATED CRIMES WAS DEEMED A VALID DEFENSE STRATEGY, DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR LETTING THE EVIDENCE COME IN, STRONG TWO-JUSTICE DISSENT.

The Fourth Department, over a strong two-justice dissent, affirmed defendant's murder conviction despite the introduction of highly prejudicial evidence of unrelated crimes and defense counsel's failure to object to that inadmissible propensity evidence. The majority decided not to address the inadmissible propensity evidence because defense counsel did not object to it (error not preserved for appeal). The majority further determined that allowing the jury to hear the inadmissible propensity evidence was a valid defense strategy (painting the admission to the charged crime and other crimes as merely tough talk): "We conclude, contrary to the view of our dissenting colleagues, that defendant received effective assistance of counsel. It is well settled that 'a reviewing court must avoid confusing true ineffectiveness with mere losing tactics' ... . It 'is not for [the] court to second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation' ... . Crucially, we note that the evidence in question is the very same evidence upon which defendant relied to establish his defense at trial. The defense theory of the case, as articulated in defense counsel's summation, was that defendant did not kill the victim; he was merely 'talking tough' because he was afraid of being in jail. Indeed, as defendant told the investigators, he was just 'trying to sound bigger than he really was.' Defense counsel urged the jury to find defendant's statements unworthy of belief because defendant was frightened and 'puffing.' In an effort to deflect the jury's attention from defendant's admissions to the charged crime, defense counsel made a deliberate choice, as a matter of trial strategy, to leave those admissions in the context of the gratuitous boasting in which they arose. Although the evidence in question would have been excludable upon a motion by defendant, we conclude that the evidence was consistent with the defense strategy. Moreover, the redaction of such material from the letter and audio recording would have highlighted defendant's confession to the [charged] homicide. In other words, extracting defendant's admissions from the extraneous talk that was consistent with the puffing defense would have undercut the defense theory and focused the jury's attention on defendant's admissions of guilt." ***People v. Anderson*, 2018 N.Y. Slip Op. 02105, Fourth Dept 3-23-18**

FAMILY LAW.

FATHER'S PETITION TO MODIFY THE VISITATION ORDER, WHICH ALLOWED VISITATION AS MUTUALLY AGREED, SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, FATHER ALLEGED THE MUTUALLY AGREED VISITATION HAD BECOME UNTENABLE.

The Fourth Department determined father's motion to modify visitation should not have been denied without a hearing. The existing order allowed father visitation under mutually agreed circumstance. Father alleged mother had prohibited visitation for three years: "Although '[a] court cannot delegate its authority to determine visitation to either a parent or a child' ... , it may order visitation as the parties may mutually agree so long as such an arrangement is not untenable under the circumstances ... . Where, as here, a prior order provides for visitation as the parties may mutually agree, a party who is unable to obtain visitation pursuant to that order 'may file a petition seeking to enforce or modify the order' ... . We agree with the father that the court erred in dismissing the modification petition without a hearing inasmuch as the father made 'a sufficient evidentiary showing of a change in circumstances to require a hearing'... . Contrary to the mother's contention, upon giving the petition a liberal construction, accepting the facts alleged therein as true, and according the father the benefit of every favorable inference... , we conclude that the father adequately alleged a change of circumstances insofar as the

visitation arrangement based upon mutual agreement was no longer tenable given that the mother purportedly denied the father any contact with the child ... . In addition, we note that, although the father is now incarcerated, there is a rebuttable presumption that visitation is in the child's best interests ...". ***Matter of Kelley v. Fifield*, 2018 N.Y. Slip Op. 02110, Fourth Dept 3-23-18**

FAMILY LAW, ATTORNEYS.

COURT DOES NOT HAVE THE POWER TO IMPUTE INCOME TO A PARTY IN FAMILY COURT ACT CUSTODY-VISITATION PROCEEDINGS FOR THE PURPOSE OF DETERMINING THE PARTY'S ELIGIBILITY FOR ASSIGNED COUNSEL, SUPREME COURT REVERSED.

The Fourth Department, in a full-fledged opinion by Justice Peradotto, reversing Supreme Court, determined the court did not have the power to impute income to the defendant for the purpose of determining defendant's eligibility for assigned counsel in a Family Court Act custody/visitation matter. Defendant was a PhD student living with his parents and had very little income. After a hearing, Supreme Court imputed $50,000 in annual income to the defendant, making him ineligible for assigned counsel: "... [A] person facing potential jail time for willfully violating court orders has a significant stake in the proceedings, and the legislature has guaranteed an equal playing field between the parties by providing such a person with assigned counsel if he or she is financially unable to obtain private counsel... . Moreover, to the extent that the court is concerned that defendant could bring serial modification petitions with impunity, thereby causing plaintiff to repeatedly expend her personal funds, we note that sanctions may be imposed for frivolous conduct ... and, in an appropriate case, a court may preclude a party from filing new petitions without permission of the court where the record establishes that the party has abused the judicial process by engaging in meritless, frivolous or vexatious litigation ... . We thus conclude that the court erred in determining that it was authorized to impute income to defendant in determining his eligibility for assigned counsel and, based upon the documentation provided by defendant indisputably establishing that he 'is financially unable to obtain' counsel ...". ***Carney v. Carney*, 2018 N.Y. Slip Op. 02034, Fourth Dept 3-23-18**

FAMILY LAW, CIVIL PROCEDURE.

ALTHOUGH FATHER COULD NOT SEEK MODIFICATION OF A NEW JERSEY SUPPORT ORDER UNDER THE UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA) HE COULD SEEK MODIFICATION UNDER THE FULL FAITH AND CREDIT FOR CHILD SUPPORT ORDERS ACT (FFCCSOA) WHICH PREEMPTS THE UIFSA.

The Fourth Department determined that, although father could not seek modification of an out of state support order under the Uniform Interstate Family Support Act (UIFSA), he could seek modification under the Full Faith and Credit for Child Support Orders Act (FFCCSOA), which was deemed to preempt the UIFSA: "In order to modify an out-of-state child support order under the Uniform Interstate Family Support Act ([UIFSA] Family Ct Act art 5-B), the order must be registered in New York and, in relevant part, the following conditions must be present: '(i) neither the child, nor the obligee who is an individual, nor the obligor resides in the issuing state; (ii) a petitioner who is a nonresident of this state seeks modification; and (iii) the respondent is subject to the personal jurisdiction of the tribunal of this state' ... . Although the New Jersey child support order was registered in New York, the father is the petitioner and he is a resident of New York. Therefore, under the UIFSA, the father could not properly bring the petition for modification of the New Jersey child support order in New York. The father could, however, properly bring the petition for modification in New York under the Full Faith and Credit for Child Support Orders Act ... . Under the FFCCSOA, a New York court may modify an out-of-state child support order if 'the court has jurisdiction to make such a child support order pursuant to [28 USC § 1738B] subsection (i)' and, in relevant part, 'the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant' ... . Here, neither the parties nor the child continued to reside in New Jersey, and New Jersey therefore ceased to have continuing, exclusive jurisdiction ... . Although the UIFSA and the FFCCSOA 'have complementary policy goals and should be read in tandem'... , the UIFSA and the FFCCSOA conflict when applied to these facts, and we conclude that the FFCCSOA preempts the UIFSA here. The FFCCSOA 'is so comprehensive in scope that it is inferable that Congress intended to fully occupy the field of its subject matter' ...". ***Matter of Reynolds v. Evans*, 2018 N.Y. Slip Op. 02077, Fourth Dept 3-23-18**

INSURANCE LAW.

USING THE COURT'S OWN DEFINITION OF SURFACE WATER, THE COURT DETERMINED THE SURFACE WATER DAMAGE EXCLUSION IN THE PROPERTY INSURANCE POLICY DID NOT APPLY, SUPREME COURT REVERSED.

The Fourth Department, reversing Supreme Court, determined the insurer's cross motion for summary judgment should not have been granted and the insured's motion for summary judgment should have been granted. Plaintiffs' home was damaged by water. The policy excluded damage from surface water and coverage was denied on that ground. Without describing the facts, the Fourth Department noted that the term "surface water" was not defined in the policy and, using the

court's own definition, held that the water which caused the damage was not surface water: " 'An insurance agreement is subject to principles of contract interpretation' ... , and '[a]ny . . . exclusions or exceptions from policy coverage must be specific and clear in order to be enforced. They are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction' ... . Inasmuch as the term 'surface water' is not defined in the policy, 'we afford that term its plain and ordinary meaning' ... . We have previously defined surface water as ' the accumulation of natural precipitation on the land and its passage thereafter over the land until it either evaporates, is absorbed by the land or reaches stream channels' ... .We thus conclude that, under the clear and unambiguous terms of the policy, the water that entered the plaintiffs' residence was not surface water, and defendant therefore erroneously denied coverage under that policy exclusion." ***Smith v. Safeco Ins. Co. of Am.*, 2018 N.Y. Slip Op. 02055, Fourth Dept 3-23-18**

MEDICAL MALPRACTICE, CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

REPORT RELATED TO CITING DEFENDANT HEALTH SYSTEM FOR FAILURE TO INFORM PLAINTIFF AND HIS FAMILY OF THE UNINTENTIONAL DISCONNECTION OF THE HEART-LUNG MACHINE IS CONFIDENTIAL AND NOT DISCOVERABLE UNDER CPLR ARTICLE 31, EDUCATION LAW § 6527 AND PUBLIC HEALTH LAW § 2805-m.

The Fourth Department determined a report concerning an investigation by the Department of Health which cited defendant health system for failure to inform plaintiff and his family of the unintentional disconnection of a heart-lung machine was not subject to disclosure: "Defendant met its burden of establishing that the information contained in the report was ' generated in connection with a quality assurance review function pursuant to Education Law § 6527 (3) or a malpractice prevention program pursuant to Public Health Law § 2805-j' ... . Thus, the information contained in the report is expressly exempted from disclosure under CPLR article 31 pursuant to the confidentiality conferred on information gathered by defendant in accordance with Education Law § 6527 (3) and Public Health Law § 2805-m ... . Contrary to plaintiff's contention that the privilege is 'negated' because the report purportedly contains information that was improperly omitted from Pasek's [plaintiff's] medical records, it is well settled that 'information which is privileged is not subject to disclosure no matter how strong the showing of need or relevancy'... . Indeed, the purpose of the privilege 'is to enhance the objectivity of the review process' and to assure that medical review [or quality assurance] committees may frankly and objectively analyze the quality of health services rendered' by hospitals . . . , and thereby improve the quality of medical care' ...". ***Pasek v. Catholic Health Sys., Inc.*, 2018 N.Y. Slip Op. 02069, Fourth Dept 3-23-18**

MEDICAL MALPRACTICE, FRAUD, CIVIL PROCEDURE, PERSONAL INJURY.

MEDICAL MALPRACTICE ACTION BASED UPON CANCER MISDIAGNOSIS PRIOR TO THE RELEVANT AMENDMENT OF THE STATUTE OF LIMITATIONS WAS TIME-BARRED, FRAUD-RELATED CAUSES OF ACTION BASED UPON THE MEDICAL MALPRACTICE REJECTED.

The Fourth Department, reversing Supreme Court, determined that plaintiff's medical malpractice cause of action based upon a cancer misdiagnosis was time-barred. The misdiagnosis was made before the statute of limitations for cancer misdiagnosis was changed (it now runs from when the plaintiff knew or should have known of the misdiagnosis). The court rejected the attempt to extend the statute of limitations by asserting fraud-related causes of action based upon the malpractice and alleged concealment of the misdiagnosis: "Defendants ... contend that plaintiff failed to state a cause of action for fraud or fraudulent concealment, and that they are not estopped from invoking the statute of limitations against plaintiff's medical malpractice cause of action. We agree. 'The elements of a cause of action for fraud in connection with charges of medical malpractice are knowledge on the part of the physician of the fact of his [or her] malpractice and of [the] patient's injury in consequence thereof, coupled with a subsequent intentional, material misrepresentation by [the physician] to [the] patient known by [the physician] to be false at the time it was made, and on which the patient [justifiably] relied to his [or her] damage' ... . 'The damages resulting from the fraud must be separate and distinct from those generated by the alleged malpractice' ... . Additionally, 'a defendant may be estopped to plead the [s]tatute of [l]imitations where [the] plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action'... . However, 'without more, concealment by a physician or failure to disclose his [or her] own malpractice does not give rise to a cause of action in fraud or deceit separate and different from the customary malpractice action, thereby entitling the plaintiff to bring his [or her] action within the longer period limited for such claims' ...". ***Forbes v. Caris Life Sciences, Inc.*, 2018 N.Y. Slip Op. 02086, Fourth Dept 3-23-18**

MUNICIPAL LAW, EMPLOYMENT LAW, CIVIL SERVICE LAW.

VILLAGE EMPLOYEE'S TERMINATION BECAUSE HE DID NOT HAVE A COMMERCIAL DRIVER'S LICENSE WAS ARBITRARY AND CAPRICIOUS, JOB DESCRIPTION DID NOT EXPLICITLY REQUIRE A COMMERCIAL DRIVER'S LICENSE.

The Fourth Department determined that the termination of a village employee (Jakubowicz) was arbitrary and capricious. The employee was fired because he did not have a commercial driver's license. However, the Mechanic II position does not explicitly require a commercial driver's license: "The Village, as limited by its brief, contends that a commercial driver's license is a minimum qualification for Jakubowicz's position as a Mechanic II in the Village and that his failure to maintain such minimum qualification required the termination of his employment. We reject that contention. The Mechanic II position in the Village requires, inter alia, '[p]ossession, at time of appointment and during service in this classification, of a valid NYS Motor Vehicle Operator's license appropriate for the type of vehicles which the employee may from time to time operate.' '[B]oth due process and fundamental fairness require that a qualification or requirement of employment be expressly stated in order for an employer to bypass the protections afforded by the Civil Service Law or a collective bargaining agreement and summarily terminate an employee' ... . Here, the requirement of a commercial driver's license is not 'expressly stated' ... . Furthermore, while 'an employee charged with failing to possess a minimum qualification of his or her position is only entitled to notice of the charge and the opportunity to contest it' ... , the Village here offered Jakubowicz a hearing 'to afford [him] the opportunity to present information to the Village why [he] should not be administratively terminated from employment.' There is no dispute that a hearing was never held." ***Matter of Jakubowicz v. Village of Fredonia*, 2018 N.Y. Slip Op. 02059, Fourth Dept 3-23-18**

PERSONAL INJURY.

REAR-MOST DRIVER IN A CHAIN-REACTION ACCIDENT LIABLE TO PLAINTIFF WHO WAS IN THE LINE OF STOPPED CARS, REAR-MOST DRIVER NOT LIABLE FOR PLAINTIFF'S SUBSEQUENT INJURY WHEN HE WAS STRUCK BY ANOTHER DRIVER AFTER GETTING OUT OF HIS CAR.

The Fourth Department determined plaintiff was entitled to summary judgment in his action against the rear-most driver (Lipome) which struck a stopped car (Foley's car) causing chain-reaction collisions. Plaintiff was subsequently struck by another car (driven by Hourt) after he got out of his car to check on the other drivers. The rear-most driver who caused the chain-reaction accident (Lipome) was not liable for the subsequent accident (when plaintiff was on foot and struck by Hourt): " '[T]he rearmost driver in a chain-reaction collision bears a presumption of responsibility' ... , and '[i]t is well established that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident'... . Here, plaintiff met his initial burden of demonstrating that Lipome was negligent in rear-ending Foley's vehicle, which undisputedly caused the chain-reaction accident. Lipome has not provided any nonnegligent explanation for the collision and, indeed, it appears from the record that Lipome essentially admitted that she was at fault for rear-ending Foley's vehicle. ... We agree with Lipome, however, that she is entitled to partial summary judgment dismissing the complaint against her insofar as it relates to the accident between plaintiff and Hourt, and we therefore further modify the order accordingly. Lipome's negligence in the chain-reaction accident 'did nothing more than to furnish the condition or give rise to the occasion by which [plaintiff's] injury was made possible and which was brought about by the intervention of a new, independent and efficient cause' ... , i.e., plaintiff's conduct in walking back to the accident scene. Prior to plaintiff's accident with Hourt, the situation resulting from the initial rear-end accident 'was a static, completed occurrence,' . . . [and] [t]he risk undertaken by plaintiff' [in walking back to the rear-end accident scene] was created by himself' ...". ***Gustke v. Nickerson*, 2018 N.Y. Slip Op. 02087, Fourth Dept 3-23-18**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SCHOOL COULD NOT HAVE FORESEEN ASSAULT ON PLAINTIFF BY A CLASSMATE IN GYM CLASS, THE CLASSMATE'S VIOLENT ACTIONS WHEN HE WAS YOUNGER, THREE YEARS BEFORE, DID NOT PUT THE SCHOOL ON NOTICE THAT THE CLASSMATE POSED A DANGER.

The Fourth Department, reversing Supreme Court, determined that the defendant school district could not have foreseen the incident in which the plaintiff's high school classmate injured plaintiff in gym class. The classmate put plaintiff in a choke hold from behind and plaintiff fell to the floor on his face. The classmate's violent behavior when he was younger, three years before the gym class incident, was deemed insufficient to put the school on notice of the classmate's propensity for violence: " 'In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated' ... . 'Actual or constructive notice to the school of prior similar conduct is generally required because, obviously,

school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily' ... . Thus, 'an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act' ... . 'Summary judgment must be granted if the proponent makes 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,' and the opponent fails to rebut that showing' ... . Defendant's submissions ... established that there were no prior incidents and no history of any animosity between the two students ... . Indeed, the classmate testified that he intended only to "horse around" and that he '[d]idn't mean anything by it.' Moreover, the classmate had never engaged in disorderly, insubordinate, disruptive, or violent conduct in any of the gym teacher's classes prior to the subject incident. ... [W]e agree with defendant that the classmate's overall disciplinary record is insufficient to create an issue of fact whether the subject incident could reasonably have been anticipated …". ***Hale v. Holley Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 02033, Fourth Dept 3-23-18**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

QUESTION OF FACT WHETHER THE RECKLESS DISREGARD OR NORMAL NEGLIGENCE STANDARD APPLIES IN THIS POLICE CAR TRAFFIC ACCIDENT CASE.

The Fourth Department determined there was a question of fact whether the defendant police officer involved a traffic accident with plaintiff was proceeding through a red light or a green light on his way to an (another) accident scene. If the light was red, the reckless disregard standard would apply to the officer's driving. If the light was green, the normal negligence standard would apply: "We reject defendants' contention that the color of the traffic light is not a material issue of fact precluding summary judgment. If the factfinder determines that defendant officer was engaged in the exempt conduct of proceeding past a steady red signal (see Vehicle and Traffic Law § 1104 [b] [2]), then the reckless disregard standard of care would apply under the circumstances presented herein ... . If, however, the factfinder credits defendant officer's account that he was proceeding through a green light, then the alleged injury-causing conduct by defendant officer would be governed by principles of ordinary negligence... . Inasmuch as the resolution of that factual issue will determine the standard of care by which the factfinder must evaluate defendant officer's conduct ... , we conclude that the court erred in determining on the submissions before it that the reckless disregard standard applies as a matter of law. Furthermore, the determination of the color of the traffic light at the time of the collision, and each driver's compliance with the standard of care that will apply upon resolution of that material factual issue, depends on the memory and credibility of witnesses ... . Inasmuch as a court's role in deciding a motion for summary judgment is 'issue-finding, rather than issue-determination' ... , we reject defendants' contention that they are entitled to summary judgment at this juncture ...". ***Oddo v. City of Buffalo*, 2018 N.Y. Slip Op. 02041, Fourth Dept 3-23-18**

REAL PROPERTY LAW, CIVIL PROCEDURE.

NUISANCE AND TRESPASS ACTIONS BASED UPON SURFACE WATER WERE NOT CONTINUING TORTS AND WERE THEREFORE TIME-BARRED, CRITERIA FOR CONTINUING TORTS IN THIS CONTEXT EXPLAINED.

The Fourth Department determined the nuisance and trespass actions based upon the alleged diversion of surface water were not continuing torts and were therefore time-barred: "Defendants established that the nuisance and trespass causes of action accrued, at the latest, in June 2010, which is when plaintiff received the information from the USACE [US Army Corps of Engineers] and the damage to its property was apparent ... . Plaintiff contends that, because the water flows continually onto its property, the torts are continuous in nature and, as a result, plaintiff's causes of action for nuisance and trespass are not time-barred. We reject that contention. Courts will apply the continuing wrong doctrine in cases of 'nuisance or continuing trespass where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed' ... . Here, plaintiff's allegations establish that its damages may be traced to a specific, objectionable act, i.e., the implementation of the remedial plan. Where, as here, there is an original, objectionable act, 'the accrual date does not change as a result of continuing consequential damages" ...". ***EPK Props., LLC v. PFOHL Bros. Landfill Site Steering Comm.*, 2018 N.Y. Slip Op. 02085, Fourth Dept 3-23-18**

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