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COURT OF APPEALS

CORPORATION LAW, INTELLECTUAL PROPERTY.

IN THIS MISAPPROPRIATION OF TRADE SECRETS, UNFAIR COMPETITION, UNJUST ENRICHMENT ACTION, DAMAGES CANNOT BE MEASURED BY THE DEVELOPMENT COSTS AVOIDED BY THE COMPANY WHICH MISAPPROPRIATED THE TRADE SECRETS.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over an extensive three-judge dissenting opinion, determined that the "cost avoidance" measure of damages should not be applied in this misappropriation of trade secrets, unfair competition and unjust enrichment action. Plaintiff proved at trial that former employees defected to defendant rival company, bringing trade secrets with them. Plaintiff's only proof of damages was its expert's opinion about how much it would have cost the rival company to develop the product without the misappropriated trade secrets ("avoided costs"): "... [T]he measure of damages in a trade secret action must be designed, as nearly as possible, to restore the plaintiff to the position it would have been in but for the infringement. Whether those losses are measured by the defendant's profits, revenues, cost savings or any other measure of unjust gain, there is "no presumption of law or of fact" that such a figure will adequately approximate the losses incurred by the plaintiff ... . A plaintiff therefore may not elect to measure its damages by the defendant's avoided costs in lieu of its own losses. * * * ... [D]amages in trade secret actions must be measured by the losses incurred by the plaintiff, and ... damages may not be based on the infringer's avoided development costs. * * * ... [W]here a defendant saves, through its unlawful activities, costs and expenses that otherwise would have been payable to third parties, those avoided third-party payments do not constitute funds held by the defendant 'at the expense of' the plaintiff. Therefore, a plaintiff bringing an unjust enrichment action may not recover as compensatory damages the costs that the defendant avoided due to its unlawful activity in lieu of the plaintiff's own losses." ***E.J. Brooks Co. v. Cambridge Sec. Seals*, 2018 N.Y. Slip Op. 03171, CtApp 5-1-18**

CRIMINAL LAW.

MERE USE OF ANOTHER'S PERSONAL IDENTIFYING INFORMATION, LIKE A CREDIT CARD NUMBER, ESTABLISHES A VIOLATION OF NEW YORK'S IDENTITY THEFT STATUTE, THERE IS NO NEED TO PROVE THE DEFENDANT ASSUMED THE VICTIM'S IDENTITY IN SOME ADDITIONAL WAY.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissent, determined that New York's identity theft statute is violated by the use of personal identifying information, like a credit card number, without more. The First Department case, which was reversed, had held the mere use of personal identifying information is insufficient, and the People must establish a defendant both used the victim's personal identifying information and assumed the victim's identity. The First Department concluded the proof had established that defendant used the personal identifying information of the victim but not that he assumed her identity. (The defendant in the First Department case had assumed the identity of a fictitious person.) The Fourth Department case, which was affirmed, concluded defendant's use of the victim's name and bank account number established she assumed his identity within the meaning of the statute, and the phrase "assumes the identity of another person" is not a discrete element of the identity theft statute: "The common issue presented in these appeals is whether the People may establish that a defendant 'assumes the identity of another,' within the meaning of New York's identity theft statute, by proof that the defendant used another's personal identifying information, such as that person's name, bank account, or credit card number. Defendants ... argue that the use of personal identifying information does not automatically establish that a defendant assumes another's identity, and thus the People bear the burden of establishing independently both a defendant's use of protected information and assumptive conduct. The Appellate Division departments have split on the proper interpretation of the disputed statutory text. The First Department adopted the construction advanced here by defendants, leading to its conclusion that [the] conviction of identity theft was unsupported by sufficient evidence. By contrast, the Fourth Department concluded that the statute applies when a defendant uses the personal identifying information of another, upholding [the] conviction. We now reject defendants' decontextualized interpretation of the statutory language and conclude that the law defines the use of personal identifying information of another as one of the express means by which a defendant assumes that person's identity." ***People v. Roberts*, 2018 N.Y. Slip Op. 03172, CtApp 5-1-18**

CRIMINAL LAW, APPEALS.

APPEAL FROM LOCAL CRIMINAL COURT NOT PROPERLY TAKEN, THE PROCEEDINGS WERE NOT TRANSCRIBED AND NO AFFIDAVIT OF ERRORS WAS SERVED OR FILED.

The Court of Appeals reversed the Appellate Term, noting that the appeal from a local court was not properly taken. The proceedings were not transcribed by a court stenographer and no affidavit of errors had been filed or served: "On review of submissions pursuant to section 500.11 of the Rules, order reversed, and case remitted to the Appellate Term, Second Department, Ninth and Tenth Judicial Districts, for further proceedings. Because the case originated in a local criminal court and the proceedings were not transcribed by a court stenographer, the appeal was not properly taken due to the failure to serve or file an affidavit of errors (see CPL 460.10[3])." ***People v. Epakchi*, 2018 N.Y. Slip Op. 03095, CtApp 5-1-18**

CRIMINAL LAW, EVIDENCE.

BEFORE CONSENTING TO A BREATHALYZER BLOOD-ALCOHOL TEST IN THIS DWI CASE, MORE THAN TWO HOURS AFTER DEFENDANT'S ARREST, DEFENDANT WAS INACCURATELY TOLD A TEST REFUSAL WOULD BE ADMISSIBLE AT TRIAL, DEFENDANT'S CONSENT TO THE TEST WAS THEREFORE NOT VOLUNTARY, EVIDENCE PROPERLY SUPPRESSED.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a concurrence and a three-judge extensive dissent, determined that the warnings given defendant driver about the consequences of refusing to take the breathalyzer blood-alcohol test were inaccurate, rendering the defendant's consent to the test involuntary and requiring the suppression of all evidence. The warnings, which were given more than two hours after defendant's DWI arrest, inaccurately stated that evidence of defendant's test refusal would be admissible at trial: "... [B]ecause the breathalyzer test was not performed within two hours of defendant's arrest, and the requirements necessary to obtain a court order pursuant to Vehicle and Traffic Law § 1194 (3) were not met, the test results were not admissible under the statutory scheme (see Vehicle and Traffic Law § 1195 [1]; see also Smith, 18 NY3d at 550-551 [holding that, absent compliance with the statute, even evidence of a refusal must be suppressed]). Nevertheless, ... the test results may still be admissible if defendant voluntarily consented to take the test because 'the two-hour limitation . . . has no application' when the 'defendant [has] expressly and voluntarily consented to administration of the [breath] test' ... . The issue before us, then, is whether defendant gave his voluntary consent to the administration of the test, which generally presents a mixed question of law and fact ... . However, it is undisputed that defendant expressly consented only after the expiration of the two-hour period and after being warned about the consequences of failing to do so; the parties' dispute here turns on whether the warnings were legally accurate and, consequently, whether his consent was voluntary ... .We conclude that, because more than two hours had passed since defendant's arrest, the warning that evidence of his refusal to take the breathalyzer test would be admissible at trial was inaccurate as a matter of law and, therefore, the record supports the conclusion of the courts below that his consent to the test was involuntary." ***People v. Odum*, 2018 N.Y. Slip Op. 03173, CtApp 5-3-18**

CRIMINAL LAW, EVIDENCE, INTELLECTUAL PROPERTY.

CONVICTION FOR UNLAWFUL USE OF SECRET SCIENTIFIC MATERIAL, STEMMING FROM DEFENDANT'S UPLOADING OF HIGH FREQUENCY TRADING SOURCE CODE OWNED BY GOLDMAN SACHS, AFFIRMED, SOURCE CODE HAD A PHYSICAL FORM AND WAS APPROPRIATED WITHIN THE MEANING OF THE STATUTE.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, affirming the Appellate Division, determined the evidence was sufficient to convict the defendant of violating Penal Law 165.07 (unlawful use of secret scientific material). Just before leaving the employ of Goldman Sachs to begin work at another company, the defendant had uploaded (copied) to a German server source code used by Goldman Sachs for high frequency trading. There was no evidence anyone other than the defendant had access to the uploaded source code. The major issues were whether the source code had a 'physical form' or was 'appropriated' within the mean of the statute: "... [W]e conclude that viewing the facts in the light most favorable to the People, a rational jury could have found that the 'reproduction or representation' that defendant made of Goldman's source code, when he uploaded it to the German server, was tangible in the sense of 'material' or 'having physical form.' The jury heard testimony that the representation of source code has physical form. ... [T]he computer engineer ... testified that while source code, as abstract intellectual property, does not have physical form, the '[r]epresentation of it' is material. He explained that when computer files are stored on a hard drive or CD, they are physically present on that hard drive or disc, and further stated that data is visible 'in aggregate' when stored on such a medium. The jury also heard testimony that source code that is stored on a computer 'takes up physical space in a computer hard drive.' Given that a reproduction of computer code takes up space on a drive, it is clear that it is physical in nature. In short, the changes that are made to the hard drive or disc, when code or other information is stored, are physical. * * * We conclude that there is legally sufficient evidence that defendant created a tangible copy of the source code on the German server in violation of Penal Law § 165.07. * * * ... [W]e must decide is whether there is legally sufficient evidence that [defendant] had the necessary mens rea of 'intent to appropriate . . . the use of secret scientific material' (Penal Law § 165.07). * * * Appropriation does not imply depriving another of property. In fact, larceny in general is defined as involving either intent to appropriate or intent to deprive, with

the clear implication that the two terms refer to separate concepts. * * * ... [D]efendant may have intended to 'appropriate' the source code without intending to deprive Goldman of all possession or use." ***People v. Aleynikov*, 2018 N.Y. Slip Op. 03174, CtApp 5-3-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

SUPPRESSION OF ALL EVIDENCE IN THIS TRAFFIC STOP CASE AFFIRMED, EXTENSIVE DISSENT QUESTIONED CONTINUED VIABILITY OF THE *DEBOUR* STREET STOP ANALYSIS, ORAL SUPPRESSION RULING APPEALABLE.

The Court of Appeals affirmed the Appellate Division's determination that suppression of all evidence was required in this traffic stop case. Judge Garcia wrote an extensive dissenting opinion questioning the continued viability of the *DeBour* criteria for the analysis of encounters with the police. The dissenting opinion is well-worth reading but is not summarized here. The majority noted that a suppression ruling that is not reduced to writing is appealable: "The Appellate Division did not err in rejecting the People's argument that defendant could not challenge on appeal a suppression ruling that was not reduced to writing. Record evidence supports the Appellate Division's suppression determination and, accordingly, that determination is beyond this Court's further review. To the extent the dissent questions the continued utility of the DeBour paradigm for analyzing encounters between police and members of the public (People v. DeBour, 40 NY2d 210 [1976]) and suggests that People v. Garcia (20 NY3d 317 [2012]) was wrongly decided, those questions are not presented here where the parties litigated this case within the framework of our existing precedent." ***People v. Gates*, 2018 N.Y. Slip Op. 03096, CtApp 5-1-18**

ENVIRONMENTAL LAW.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) HAS THE POWER TO UNILATERALLY UNDERTAKE THE REMEDIATION OF A HAZARDOUS WASTE SITE, WITHOUT THE PARTICIPATION OF THE CORPORATION WHICH RELEASED THE WASTE.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reversing the Appellate Division, determined the Department of Environmental Conservation (DEC) had the power to unilaterally undertake the remediation of a hazardous waste site, without the participation of the corporation (FMC) which released the waste. The fact that FMC had been operating under an interim permit (for 38 years) did not insulate FMC from the consequences of violating the permit. "The only reasonable interpretation consistent with the statutory scheme and legislative purpose is that permittees and prospective permittees who exceed the terms of their permit or violate the performance standards required of those operating under interim status violate [Environmental Conservation Law (ECL) section 27—0914. * * * ,,, [T]itle 13 [of the ECL] provides an avenue for DEC to use the state superfund to unilaterally remediate the relevant properties ... . [T]hat statute requires DEC, absent exigent circumstances, to have first made 'all reasonable efforts to secure voluntary agreement to pay the costs of necessary remedial actions from owners' ... . Here, DEC's conducting a year of negotiations only to be told that FMC cannot see any mutually-agreed upon path forward is more than the statute requires. The statute's other requirement—that DEC later make 'all reasonable efforts to recover the full amount of any funds expended' ... —will be fulfilled in a CERCLA cost recovery action in federal district court. That action will provide FMC with an opportunity for a hearing to dispute its liability, as DEC has repeatedly acknowledged throughout the course of this proceeding." ***Matter of FMC Corp. v. New York State Dept. of Envtl. Conservation*, 2018 N.Y. Slip Op. 03094, CtApp 5-1-18**

INSURANCE LAW, CIVIL PROCEDURE.

BECAUSE NO-FAULT BENEFITS PROVIDED BY A SELF-INSURER ARE A CREATURE STATUTE, NOT AN INSURANCE CONTRACT, THE THREE-YEAR (NOT SIX-YEAR) STATUTE OF LIMITATIONS APPLIES TO NO-FAULT CLAIMS AGAINST A SELF-INSURER.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a concurrence and a three-judge dissent, reversing the Appellate Division, determined the three-year statute of limitations applies to no-fault claims against a self-insurer. The court reasoned that the self-insurance option is a creature of statute, not a contract: "We conclude that the three-year statute of limitations as set forth in CPLR 214 (2), which governs disputes with respect to penalties created by statute, should control this case. There is no dispute 'that it is the gravamen or essence of the cause of action that determines the applicable Statute of Limitations' ... , or that a three-year limitations period applies to 'an action to recover upon a liability. . . created or imposed by statute' ... . Moreover, although the three-year period of limitation in 'CPLR 214 (2) does not automatically apply to all causes of action in which a statutory remedy is sought' ... , that condition does attach to instances in which 'liability would not exist but for a statute' … . The no-fault benefits in dispute are not provided by a contract with a private insurer. Instead defendant has met its statutory obligation by self-insuring. No-fault is a creature of statute ...". ***Contact Chiropractic*, P.C. v. New York City Tr. Auth., 2018 N.Y. Slip Op. 03093, CtApp 5-1-18**

FIRST DEPARTMENT

ATTORNEYS, LEGAL MALPRACTICE.

PLAINTIFF'S LEGAL MALPRACTICE ACTION PROPERLY SURVIVED A MOTION TO DISMISS, PLAINTIFF DEMONSTRATED THAT, 'BUT FOR' THE ATTORNEYS' WITHDRAWAL OF AN APPEAL, PLAINTIFF WOULD HAVE PREVAILED AND MAY NOT HAVE BEEN TERMINATED FROM HIS EMPLOYMENT.

The First Department determined the plaintiff's legal malpractice action properly survived the motion to dismiss. Plaintiff sufficiently alleged that "but for" the attorneys' withdrawing an appeal plaintiff would have been entitled to a pretermination hearing in his effort to keep his job as a police officer. Plaintiff was terminated after the appeal was withdrawn: "The allegations in the complaint establish that but for defendants' conduct in withdrawing the appeal from Justice Ecker's ruling, and in sending a different lawyer than the one promised to represent him at the reinstatement hearing, he would not have incurred damages ... . Plaintiff showed that he would have prevailed on the appeal had it not been withdrawn, because Justice Ecker erred in concluding that plaintiff's conviction of assault in the third degree, based on criminal negligence ... constituted a violation of his oath of office, i.e., arose from 'knowing or intentional conduct indicative of a lack of moral integrity,' and warranted termination without a hearing pursuant to Public Officers Law § 30(1)(e) ... . Had plaintiff prevailed on appeal, he would have obtained a pretermination hearing, which, ... in contrast to the reinstatement hearing he received, would have allowed him to argue for disciplinary measures other than termination. Plaintiff thus sufficiently alleged that defendants caused him actual ascertainable damages of lost salary and other benefits ...". ***Roth v. Ostrer*, 2018 N.Y. Slip Op. 03218, First Dept 5-3-18**

CIVIL PROCEDURE.

DEFENDANTS' MOTION TO CHANGE VENUE SHOULD HAVE BEEN GRANTED BASED UPON CONVENIENCE OF MATERIAL WITNESSES.

The First Department, reversing Supreme Court, determined defendants' motion to change venue should have been granted; "The motion court exercised its discretion in an improvident manner in light of defendants' demonstration that the convenience of material nonparty witnesses would be better served by the change ... . Defendants submitted the affidavits of four first responders and plaintiff's coworker, all of whom averred that they would testify as witnesses but would be inconvenienced by traveling to New York County. The accident occurred in Sullivan County, and other than one defendant's registered principal place of business, and one of plaintiff's physicians maintaining an office in the county, this matter has no contact with New York County (... . Plaintiff's argument that the affidavits submitted by defendants were not sufficiently detailed is unpersuasive, and plaintiff offers nothing to rebut defendants' assertions that his coworker, the first responders, and the sheriff who investigated the accident were material witnesses, as they averred in their affidavits ... . Furthermore, plaintiff's assertion that he has alleged violations of the Labor Law, and thus liability may be resolved prior to trial, is not relevant ...". ***Taylor v. Montreign Operating Co., LLC*, 2018 N.Y. Slip Op. 03222, First Dept 5-3-18**

CIVIL PROCEDURE.

JOHN DOE NAMED IN TIMELY COMPLAINT DID NOT REFER TO THE LLC NAMED IN THE COMPLAINT FILED AFTER THE STATUTE OF LIMITATIONS HAD RUN, MOTION TO DISMISS PROPERLY GRANTED.

The First Department determined that the "John Doe" defendant named in a timely filed complaint did not refer to the limited liability company named in the complaint filed after the statute of limitations had run: "The motion court properly dismissed the complaint on the ground that it was served after the statutory limitations period had expired. Plaintiff's claims arose on January 14, 2008. The original complaint in this action, which was filed on January 6, 2014 (just days before the six-year statute of limitations expired), did not name Stack's LLC as a defendant, nor did it name defendant Stack's LLC (Delaware). The amended complaint, which for the first time named Stack's LLC (Delaware) as a defendant, was not filed until January 24, 2014 — more than a week after the statute had run. Plaintiff cannot properly rely on CPLR 1024 as a shield from the statute of limitations. Even assuming that the appellation 'John Doe' referred to a corporation rather than a natural person, the complaint's description of the John Doe defendant was not described in such a way as to fairly apprise Stack's LLC (Delaware) that it was an intended defendant ... . Thus, the inadequate description rendered the action jurisdictionally defective ...". ***Markov v. Stack's LLC (Delaware)*, 2018 N.Y. Slip Op. 03238, First Dept 5-3-18**

CIVIL PROCEDURE, EVIDENCE.

COURT PROPERLY RELIED ON UNSIGNED COPIES OF A DEPOSITION TRANSCRIPT BECAUSE DEFENDANT DID NOT RETURN SIGNED COPIES WITHIN 60 DAYS AND DID NOT CHALLENGE THE ACCURACY OF THE TRANSCRIPT.

The First Department noted that the court, in awarding summary judgment to plaintiff, properly relied upon unsigned copies of the transcript of the deposition testimony of defendant's witness because the defendant failed to return signed copies

within 60 days and did not challenge the accuracy of the transcript (CPLR 3116(a)). ***Shackman v. 400 E. 85th St. Realty Corp.*, 2018 N.Y. Slip Op. 03223, First Dept 5-3-18**

CRIMINAL LAW.

RECORD OF DEFENDANT'S ACQUITTAL SHOULD NOT HAVE BEEN UNSEALED FOR USE IN A SENTENCING PROCEEDING, RECORD SHOULD BE RESEALED BUT ERROR WAS HARMLESS.

The First Department, over a two-judge concurrence, determined the record of defendant's acquittal should not have been unsealed for use by the sentencing court. The record should be resealed but the error did not require resentencing: "... [W]hile we agree with defendant that the unsealing was improper, we reject [defendant's] request for resentencing. In People v. Patterson (78 NY2d 711 [1991]), the Court of Appeals held that suppression was not required where the police obtained identification evidence in violation of CPL 160.50, and the witness then identified the defendant in court. The Court ruled that 'there is nothing in the history of CPL 160.50 or related statutes indicating a legislative intent to confer a constitutionally derived substantial right', such that the violation of that statute, without more, would justify invocation of the exclusionary rule with respect to subsequent independent and unrelated criminal proceedings' ... . We conclude that defendant is entitled to no greater relief based on the statutory violation that resulted in the court's consideration of the improperly unsealed information at sentencing than he would have been entitled to had the information been admitted at trial. ...". ***People v. Anonymous*, 2018 N.Y. Slip Op. 03097, First Dept 5-1-18**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

INTRA- OR INTER- AGENCY EXEMPTION TO DISCLOSURE UNDER THE FREEDOM OF INFORMATION LAW (FOIL) DID NOT EXTEND TO COMMUNICATIONS BETWEEN MAYOR DE BLASIO'S OFFICE AND A CONSULTANT RETAINED BY A PRIVATE ORGANIZATION (AS OPPOSED TO A CONSULTANT HIRED BY A GOVERNMENTAL AGENCY), PREVAILING PARTIES ENTITLED TO ATTORNEY'S FEES.

The First Department, in a full-fledged opinion by Justice Singh, determined that the intra- or inter-agency exemption from the Freedom of Information Law (FOIL) could not be stretched to include communications between Mayor de Blasio's office and an outside consultant retained by a private organization (Campaign for One New York or CONY), as opposed to a consultant hired by a government agency. Because the reporters seeking the information had substantially prevailed in seeking disclosure, they were entitled to attorney's fees: "It is well settled that for communications between a governmental agency and an outside consultant to fall under the agency exemption, the outside consultant must be retained by the governmental agency ... . Respondents seek to broaden the agency exemption to shield communications between a governmental agency and an outside consultant retained by a private organization and not the agency. This attempt expands the agency exemption and closes the door on government transparency. Requiring an agency to retain an outside consultant to protect its communications comports with the fundamental principle that FOIL exemptions should be 'narrowly interpreted so that the public is granted maximum access' to public records ...". ***Matter of Rauh v. de Blasio*, 2018 N.Y. Slip Op. 03115, First Dept 5-1-18**

INSURANCE LAW.

FAILURE TO ATTEND INDEPENDENT MEDICAL EXAMINATIONS SET UP BY NO-FAULT CARRIER IS AN ABSOLUTE DEFENSE TO COVERAGE.

The First Department, reversing Supreme Court, determined no-fault claimants' failure to attend independent medical examinations (IME's) was an absolute defense to coverage: "When an individual submits a personal injury claim for motor vehicle no-fault benefits, the insurance company may request that the individual submit to an IME, and if the individual fails to appear for that IME, it 'constitutes a breach of a condition precedent vitiating coverage' ... . Here, plaintiff established its entitlement to judgment as a matter of law by submitting the letters sent to each claimant notifying them about the date, time, and location of the initially scheduled IME and a second scheduled IME and affidavits of service for these letters. Plaintiff also submitted affidavits from each medical professional assigned to conduct the scheduled IME, with each stating that the medical professional was in his or her office at the date and time of the scheduled IME, the respective claimant failed to appear, the appointment was kept open until the end of the day, and at the end of the day, the medical professional filled out the affidavit acknowledging the nonappearance. Because Hereford sent the notices scheduling the IMEs prior to the receipt of each of the claims, the notification requirements for verification requests under 11 NYCRR 65-3.5 and 65-3.6 do not apply ... . Furthermore, plaintiff was not required 'to demonstrate that the claims were timely disclaimed since the failure to attend medical exams was an absolute coverage defense' ...". ***Hereford Ins. Co. v. Lida's Med. Supply, Inc.*, 2018 N.Y. Slip Op. 03226, First Dept 5-3-18**

INSURANCE LAW, CIVIL PROCEDURE.

FEDERAL RISK RETENTION GROUP (RRG) LAW PREEMPTS NEW YORK INSURANCE LAW'S TIMELY DISCLAIMER OF COVERAGE PROVISION, THEREFORE DEFENDANT FOREIGN RRG DID NOT NEED TO COMPLY WITH NEW YORK'S STATUTORY TIMELY DISCLAIMER REQUIREMENT.

The First Department, in a full-fledged opinion by Justice Singh, in a matter of first impression, determined that federal law, the Liability Risk Retention Act (LRRA), preempted New York's Insurance Law section 3420(d)(2). Therefore defendant foreign risk retention group (RRG) [Preferred Contractors Insurance Company Risk Retention Group LLC (PCIC)], did not need to comply with the timely notice of disclaimer requirement of Insurance Law § 3420(d)(2). Plaintiff general contractor, Nadkos, sued PCIC because PCIC claimed it had no duty to defend Nadkos in a construction-accident personal injury case brought by a subcontractor and PCIC had not provided the timely notice of disclaimer required by New York's Insurance Law. The legal argument is complex and no attempt to fairly summarize it is made here: "Application of Insurance Law § 3420(d)(2) to PCIC or to any other RRG would directly or indirectly regulate these groups in violation of 15 USC § 3902(a)(1). Section 3420(d)(2) alters the rights and obligations of the carrier and insured under the policy by creating additional rights for the injured party, that is not contemplated by the LRRA and not required by all other states. ... This heightened standard requirement in New York impairs an RRG's ability to operate on a nationwide basis 'without being compelled to tailor their policies to the specific requirements of every state in which they do business'... . As Congress has chosen to limit the power of nondomiciliary states to regulate RRGs, the LRRA clearly preempts Insurance Law § 3420(d)(2)." ***Nadkos, Inc. v. Preferred Contrs. Ins. Co. Risk Retention Group LLC*, 2018 N.Y. Slip Op. 03242, First Dept 5-3-18**

PERSONAL INJURY.

STORE'S MOTION FOR SUMMARY JUDGMENT IN THIS ESCALATOR SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED BASED UPON PROOF OF REGULAR MAINTENANCE AND INSPECTIONS AND NO REPORTS OF ACCIDENTS OR PROBLEMS.

The First Department, reversing Supreme Court, determined that defendant retail store's (Macy's) motion for summary judgment in this escalator slip and fall case should have been granted. Proof that the escalator was regularly maintained and inspected and there were no reports of accidents or problems warranted summary judgment and the plaintiff's claims that the escalator was wet and the rubber handrail pulled up did not raise a question of fact: "Macy's submitted, inter alia, deposition testimony of two of its employees, as well as the records of maintenance and inspections of the escalator by defendant Thyssenkrupp Corp. and the New York City Department of Buildings. Such evidence showed that the escalator was regularly maintained and inspected during the years prior to plaintiff's accident, and there were never any reports of accidents or other problems with the escalator... . In opposition, plaintiff failed to raise a triable of fact. Plaintiff's wife's hearsay statement that the stairs were wet does not indicate that they were wet long enough for Macy's to have notice of the condition. Similarly, plaintiff's testimony that the rubber handrail pulled up when he grasped at it as he slipped, does not raise an issue of fact that any such defect existed long enough for Macy's to have notice, particularly since there were no prior complaints and in light of the evidence of regular maintenance and City inspections showing no problems … . Furthermore, the opinion of plaintiff's expert engineer that the wooden escalator treads were more slippery than industry safety standards permit does not raise an issue of fact." ***Ahmed v. Macy's Inc.*, 2018 N.Y. Slip Op. 03231, First Dept 5-3-18**

PERSONAL INJURY, APPEALS.

ALTHOUGH THE APPELLATE COURT TOOK JUDICIAL NOTICE OF A REGULATION ALLOWING CITY SANITATION TRUCKS TO DOUBLE PARK (RAISED FOR THE FIRST TIME ON APPEAL), THERE WERE DISPUTED FACTS ABOUT WHETHER THE DOUBLE PARKED SANITATION TRUCK COULD HAVE BEEN PULLED TO THE CURB, THE CITY'S MOTION FOR SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the defendant city was not entitled to summary judgment based upon the van in which the plaintiff was a passenger striking the rear of a sanitation truck that was double parked. On appeal the city cited a regulation which allows sanitation trucks to double park. The existence of the regulation was raised for the first time on appeal. Although the regulation could have been considered on appeal if it raised a pure question of law, disputed facts about the possibility that the truck could have moved over to the curb foreclosed an appellate ruling: "While, as a matter of common sense, a City sanitation truck may under certain circumstances need to double park in order to perform its job of removing refuse, the City did not point to any regulation exempting sanitation trucks from City traffic rules, and therefore did not establish prima facie their lack of liability. On appeal, the City defendants bring to the Court's attention a City traffic regulation, applicable at the time of the accident, that excepts City refuse trucks from double parking rules under certain conditions, and we take judicial notice of that regulation ... . The regulation provides that the 'operator of a refuse collection vehicle working on behalf of the City' is allowed to 'temporarily stand on the roadway side of a vehicle parked at the curb, provided that no curb space is available within fifteen feet, while loading refuse . . .' ... . It is well-settled that '[w]here a party . . . raises [for the first time on appeal] a new legal argument which appeared upon the face of the re-

cord and which could not have been avoided . . . [s]o long as the issue is determinative and the record on appeal is sufficient to permit our review, [this Court may consider the argument]'... . Here, however, the City's argument that the regulation allowed their operator to double park is not a pure question of law, but depends on disputed facts in the record concerning whether there was a parking space available within fifteen feet of the pick up location." ***Nadella v. City of New York*, 2018 N.Y. Slip Op. 03103, First Dept 5-1-18**

SECOND DEPARTMENT

ADMINISTRATIVE LAW, MUNICIPAL LAW (NYC), CONSTITUTIONAL LAW.

ALLOWING UBER DRIVERS TO PICK UP PASSENGERS VIA SMARTPHONE APPLICATION IS NOT AN UNCONSTITUTIONAL TAKING OF THE PROPERTY OF TAXI CAB AND LIMOUSINE DRIVERS.

The Second Department determined the decision of the New York City Taxi and Limousine Commission (TLC) to allow companies such as Uber to pick up passengers via a smartphone application did not constitute an unconstitutional taking of the property of the petitioners, taxi cab and limousine drivers. The decision is complex and comprehensive, and cannot be fairly summarized here: "... [W]e agree with the Supreme Court's determination that the TLC's alleged decision to 'allow black cars to pick up e-hails' did not, as a matter of law, constitute an unconstitutional taking of the petitioners' property ... . The crux of the petitioners' claim is that the TLC's decision to 'allow black cars to pick up e-hails' has diminished the value of their medallions, decreased the number of taxicab trips per day, and reduced their medallion income. However, '[p]roperty' does not include a right to be free from competition'... . Accordingly, the TLC's decision to allow companies such as Uber to pick up passengers via a smartphone application does not interfere with a taxicab's use of its medallion or exclusive right to pick up passengers via street hail." ***Matter of Glyka Trans, LLC v. City of New York*, 2018 N.Y. Slip Op. 03129, Second Dept 5-2-18**

ADMINISTRATIVE LAW, MUNICIPAL LAW (NYC), CIVIL PROCEDURE.

CREDIT UNION WHICH HOLDS SECURITY INTERESTS IN OVER 1400 TAXICAB MEDALLIONS DID NOT HAVE STANDING TO CONTEST THE NEW YORK CITY TAXI AND LIMOUSINE COMMISSION'S (TLC'S) RULING ALLOWING UBER TO PICK UP PASSENGERS VIA SMARTPHONE.

The Second Department determined the petitioner credit union (Progressive) which holds security interests in over 1400 taxicab medallions as collateral for over $700 million in loans did not have standing to contest the New York City Taxi and Limousine Commissions (TLC) ruling allowing Uber to pick up passengers via smartphone: "Although it is clear that Progressive would suffer an injury different from that of the public at large, it failed to adequately allege that it would suffer direct harm as a result of the TLC's purported failure to enforce taxicab medallion owners' exclusive right to hails. Progressive's alleged injury—the 'deteriorating financial condition of [its] medallion loan portfolio'—is an indirect consequence of the injuries that it alleged were suffered by medallion owners ... . The alleged impairment of Progressive's security interests in thousands of taxicab medallions does not fall within the relevant zone of interests sought to be protected by the ... laws and rules [governing the TLC]. ... .Progressive failed to demonstrate that the interests it sought to assert, i.e., protecting medallion owners' exclusive right to hails, were germane to its organizational purposes and that its 'mission makes it an appropriate representative of its members' interests' ...". ***Matter of Melrose Credit Union v. City of New York*, 2018 N.Y. Slip Op. 03131, Second Dept 5-2-18**

ARBITRATION, FAMILY LAW, CONTRACT LAW, RELIGION.

ARBITRATION AWARD BY A RABBINICAL COURT IN THIS DIVORCE PROCEEDING SHOULD NOT HAVE BEEN VACATED, FAILURE TO FOLLOW THE EQUITABLE DISTRIBUTION LAW DID NOT VIOLATE PUBLIC POLICY, UNCONSCIONABILITY IS NOT A STATUTORY GROUND FOR VACATING AN ARBITRATION AWARD.

The Second Department, reversing Supreme Court, determined the arbitration award by a Rabbinical Court in this divorce proceeding should not have been vacated. The fact that the Equitable Distribution Law was not followed did not warrant vacation of the award because parties can elect to deviate from the Domestic Relations Law (no violation of public policy). The Second Department further held that unconscionability is not a statutory ground for reviewing or setting aside an arbitration award: "Judicial review of an arbitration award is extremely limited (see CPLR 7510, 7511...). 'Outside of the narrowly circumscribed exceptions of CPLR 7511, courts lack authority to review arbitral decisions, even where an arbitrator has made an error of law or fact' ... . 'An award is irrational only where there is no proof whatever to justify the award' ... . Moreover, that showing must be made by clear and convincing evidence ... . Here, the very limited record does not even reveal what evidence was submitted to the arbitrators regarding, among other things, the parties' assets and financial condition. Therefore, the Supreme Court lacked any basis upon which to conclude that the award was irrational. 'An arbitration award violates public policy only where a court can conclude, without engaging in any extended fact-finding or legal analysis, that a law prohibits the particular matters to be decided by arbitration, or where the award itself violates a well-defined constitutional, statutory, or common law of this state' ... . [W]e disagree with the Supreme Court's deter-

mination that the ... award was unconscionable on its face. Unconscionability is a doctrine grounded in contract law, which can be applied to invalidate an agreement to arbitrate ... or a marital agreement entered into before or during the marriage ... . The doctrine, which requires proof of both procedural unconscionability in the formation of the contract, as well as substantive unconscionability in the terms of the contract ... , is not a statutory ground upon which an arbitration award may be reviewed, let alone set aside... . If the arbitral procedure was tainted by corruption, fraud, or misconduct, or the partiality of an arbitrator appointed as a neutral, the proper remedy is to move to vacate the award pursuant to CPLR 7511(b)(1)(i) or (ii)." ***Zar v. Yaghoobzar*, 2018 N.Y. Slip Op. 03170, Second Dept 5-2-18**

BANKING LAW, UNIFORM COMMERCIAL CODE, EVIDENCE.

BANK DID NOT DEMONSTRATE IT ACTED IN ACCORDANCE WITH GENERAL BANKING RULES OR PRACTICES WHEN IT CASHED FORGED CHECKS, BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENCE ACTION PROPERLY DENIED.

The Second Department determined defendant bank's (Capital One's) motion for summary judgment in this forged-check negligence action was properly denied (without the need to consider the opposing papers). One of plaintiff corporation's employees forged company checks made out to herself amounting to over $84,000. Plaintiff sued the bank for negligence pursuant to Uniform Commercial Code (UCC) article 4: "Under article 4 of the UCC, with regard to repeated forgeries by the same wrongdoer, the customer's failure to exercise reasonable care and promptness in examining its bank statements and to timely notify the bank of the forgeries in accordance with UCC 4-406(2)(b) generally will result in the customer being precluded from asserting claims against the bank in connection with the loss associated with any such forgeries ... . However, the loss of repeated forgeries may be shifted back to the bank in the circumstance where the bank failed to use ordinary care in paying the forged checks ... . With regard to the issue of ordinary care, UCC 4-103(3) provides that 'in the absence of special instructions, action or non-action consistent with clearing house rules and the like or with a general banking usage not disapproved by this Article, prima facie constitutes the exercise of ordinary care.' Thus, under this 'safe harbor' provision, a bank can ensure that its conduct at least prima facie meets an ordinary care standard, by showing that it acted in accordance with general banking rules or practices ... . However, it is the bank, as the party that benefits from the 'safe harbor' provision, that bears the burden of proving general clearing house rules or general banking usage in order to establish ordinary care ... . Capital One did not meet its burden of showing that it acted in accordance with general banking rules or general clearing house rules, and therefore, it failed to demonstrate prima facie that it exercised ordinary care in paying the forged checks ... .Capital One's submissions failed to provide any evidentiary basis that its processing of the forged checks comported with general banking usage." ***Redgrave Elec. Maintenance, Inc. v. Capital One, N.A.*, 2018 N.Y. Slip Op. 0316, Second Dept 5-2-18**

CIVIL PROCEDURE, APPEALS.

MOTION TO REMOVE A PERSONAL INJURY ACTION FROM CIVIL COURT TO SUPREME COURT SHOULD NOT HAVE BEEN GRANTED BECAUSE IT WAS NOT ACCOMPANIED BY A REQUEST TO AMEND THE AD DAMNUM CLAUSE, NOTICE OF APPEAL WAS TIMELY BECAUSE DEFENDANT WAS NEVER SERVED WITH A NOTICE OF ENTRY.

The Second Department determined the motion to remove a personal injury action from Civil Court to Supreme Court (King's County) should not have been granted because no motion to amend the ad damnum clause was made. The court noted that because the defendant was never served with notice of entry of the order granting plaintiff's motion, the notice of appeal was timely filed: "The plaintiff ... moved pursuant to CPLR 325(b) to remove the action to the Supreme Court, Kings County. In the order appealed ... , the Supreme Court granted the motion. It is undisputed that a written notice of entry of the order ... was never served on the defendant. Since the defendant was not served with a proper notice of entry, the defendant's time to appeal never commenced running, and its notice of appeal was therefore timely filed (see CPLR 5513[a]...). A motion to remove an action from the Civil Court to the Supreme Court pursuant to CPLR 325(b) must be accompanied by a request for leave to amend the ad damnum clause of the complaint pursuant to CPLR 3025(b) ... . Here, the amount stated in the ad damnum clause was within the jurisdictional limits of the Civil Court, and no request for leave to amend the ad damnum clause was made. In the absence of an application to increase the ad damnum clause, the plaintiff's motion to remove the action to the Supreme Court should have been denied ...". ***Hart v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 03123, Second Dept 5-2-18**

CONTRACT LAW.

DEFENDANTS' OWN MOTION PAPERS RAISED A QUESTION OF FACT WHETHER THE PARTIES INTENDED TO BE BOUND BY AN UNSIGNED LLC OPERATING AGREEMENT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED WITHOUT REFERENCE TO THE OPPOSING PAPERS.

The Second Department determined defendants' own motion papers raised a question of fact whether defendants intended to be bound by an unexecuted limited liability company operating agreement. Therefore defendants' motion for summary judgment in this breach of contract action was properly denied without reference to the opposing papers: "Contrary to the

defendants' contention, the agreement does not, on its face, demonstrate that the parties did not intend to be bound absent formal execution ... . Moreover, in support of their motion, the defendants submitted emails exchanged between the parties and their respective attorneys. The defendants failed to eliminate triable issues of fact as to whether the parties had agreed upon the major terms of the agreement and whether the parties began to perform the agreement. Accordingly, they failed to establish, prima facie, that the parties did not intend to be bound by the terms of the agreement ... . Therefore, the defendants were not entitled to summary judgment, regardless of the sufficiency of the plaintiffs' opposition papers ...". ***223 Sam, LLC v. 223 15th St., LLC*, 2018 N.Y. Slip Op. 03118, Second Dept 5-2-18**

CONTRACT LAW, LANDLORD-TENANT, CIVIL PROCEDURE.

COMPLAINT DID NOT SUFFICIENTLY ALLEGE DEFENDANT HAD WAIVED THE REQUIREMENT OF WRITTEN NOTICE TO EXERCISE THE OPTION TO RENEW THE LEASE, PROPOSED AMENDMENT OF THE COMPLAINT WAS PALPABLY WITHOUT MERIT, MOTION TO AMEND WAS NOT FRIVOLOUS CONDUCT WARRANTING SANCTIONS.
The Second Department determined the allegations in the complaint were insufficient to allege there was a waiver of the requirement that the option to renew the lease be in writing. Therefore the complaint was properly dismissed for failure to state a cause of action. The motion to amend the complaint was properly denied because the amendment was palpably insufficient or patently devoid of merit. The proposed amendment did not allege the existence of a specific agreement with the defendant. However, the motion to amend was not frivolous conduct and Supreme Court should not have awarded sanctions to defendant: " 'Although a party may waive his or her rights under an agreement or decree, waiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence' ... . Moreover, with respect to the plaintiff's allegations that [defendant's representative] stated that the defendant would not object to the assignment [of the lease to the prospective purchaser of plaintiff's business], subject to, inter alia, a credit check, 'a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable' ... . … The plaintiff's proposed amended complaint was palpably insufficient and devoid of merit. The plaintiff failed to allege that (1) it actually came to an agreement with the proposed purchaser six months prior to the expiration of the lease, (2) it gave the defendant notice of its intention to exercise the option within six months of the expiration of the lease, irrespective of whether it came to an agreement with the proposed purchaser, or (3) the proposed purchaser was creditworthy. ... [T]he plaintiff's conduct in moving for leave to amend the complaint and/or replead was not, under the circumstances, 'frivolous' within the meaning of 22 NYCRR 130-1.1(c) ...". ***NHD Nigani, LLC v. Angelina Zabel Props., Inc.*, 2018 N.Y. Slip Op. 03135, Second Dept 5-2-18**

COURT OF CLAIMS, PERSONAL INJURY, ATTORNEYS.

MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS HIGHWAY ACCIDENT CASE SHOULD NOT HAVE BEEN GRANTED, LAW OFFICE FAILURE NOT AN ADEQUATE EXCUSE.
The Second Department determined the Court of Claims should not have granted claimant's motion for leave to file a late notice of claim in this highway accident case. Plaintiff's motorcycle skidded off the road and truck a guardrail. The accident report stated that plaintiff lost control of the motorcycle "for an unknown reason." The notice of claim should have filed within 90 days, but, due to law office failure, the attempt to file was made two and a half years late. Law office failure is not an adequate excuse. The accident report did not alert the state to the essential facts of the claim, and claimant did not show the state was not prejudiced by the delay: "Court of Claims Act § 10(3) requires that a claim to recover damages for personal injuries caused by the negligence of an officer or employee of the state must be served upon the attorney general within 90 days after the accrual of such claim. However, 'Court of Claims Act § 10(6) permits a court, in its discretion, upon consideration of the enumerated factors, to allow a claimant to file a late claim' ... . The enumerated factors are whether the delay in filing was excusable, the State had notice of the essential facts constituting the claim, the State had an opportunity to investigate the circumstances underlying the claim, the claim appears to be meritorious, the State is prejudiced, and the claimant has any other available remedy ... . 'No one factor is deemed controlling, nor is the presence or absence of any one factor determinative' ...". ***Casey v. State of New York*, 2018 N.Y. Slip Op. 03120, Second Dept 5-2-18**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INEFFECTIVE, DESPITE DEFENDANT'S SIGNING OF A WRITTEN WAIVER.
The Second Department determined defendant's waiver of appeal was ineffective, despite defendant's signing of a written waiver: "... [T]he record does not demonstrate that the defendant understood the distinction between the right to appeal and other trial rights forfeited incident to his plea of guilty ... . Furthermore, although the record on appeal reflects that the defendant executed written appeal waiver forms, the transcript of the plea proceedings shows that the court did not ascertain on the record whether the defendant had read the waivers or discussed them with defense counsel, or whether he was even aware of their contents ...". ***People v. Medina*, 2018 N.Y. Slip Op. 03151, Second Dept 5-2-18**

CRIMINAL LAW, MENTAL HYGIENE LAW.

DEFENDANT DEMONSTRATED HE PLED GUILTY WITHOUT BEING INFORMED HE MIGHT BE SUBJECT TO CONFINEMENT UNDER THE SEX OFFENDER MANAGEMENT AND TREATMENT ACT (SOMTA) AFTER COMPLETION OF HIS SENTENCE, HIS MOTION TO SET ASIDE HIS CONVICTION WAS PROPERLY GRANTED.

The Second Department determined defendant's motion to vacate his conviction by guilty plea was properly granted. Defendant demonstrated he was not informed of the possibility he would be subject to the Sex Offender Management and Treatment Act (SOMTA) which could result in further confinement pursuant to the Mental Hygiene Law upon the completion of his sentence: "... [T]he defendant, through evidence presented at the hearing, including his testimony, made the factual showing necessary to demonstrate that his plea of guilty was not knowing and voluntary. When the defendant pleaded guilty, he had already been adjudicated a level three predicate sex offender pursuant to the Sex Offender Registration Act ... based on a prior conviction. In addition, ... the defendant here was made the subject of a SOMTA proceeding. The defendant testified at the hearing that he would not have taken the plea bargain had he known of SOMTA. Under the circumstances of this case, the defendant showed that 'the prospect of SOMTA confinement was realistic enough that it reasonably could have caused him, and in fact would have caused him, to reject an otherwise acceptable plea bargain' ...". ***People v. Balcerak*, 2018 N.Y. Slip Op. 03138, Second Dept 5-2-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE MERE FACT THAT PLAINTIFF FELL FROM AN A-FRAME LADDER IS NOT ENOUGH TO WARRANT SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF ON A LABOR LAW § 240(1) CAUSE OF ACTION, PLAINTIFF'S MOTION PROPERLY DENIED BUT DEFENDANT'S MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined defendant's motion for summary judgment on plaintiff's Labor Law § 240(1) cause of action in this ladder-fall case should not have been granted. Plaintiff testified the A-frame ladder, which he had used before, shook and leaned before he fell. He also testified he did not notice any defects in the ladder. The Second Department held that plaintiff's motion for summary judgment was properly denied (but defendant's motion should not have been granted): " 'Under Labor Law § 240(1), owners and general contractors, and their agents, have a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites' ... . 'To prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries' ... . The mere fact that a plaintiff fell from a ladder does not, in and of itself, establish that proper protection was not provided, and whether a particular safety device provided proper protection is generally a question of fact for a jury ... . Here, the plaintiff's own submissions demonstrated that there are triable issues of fact as to how this accident occurred and it cannot be concluded, as a matter of law, that the alleged failure to provide the plaintiff with proper protection proximately caused his injuries ... . Accordingly, we agree with the Supreme Court's denial of the plaintiff's motion without regard to the sufficiency of the opposing papers... . In light of the inconsistencies as to how this accident occurred, we disagree with the Supreme Court's determination to grant that branch of the defendants' motion which was for summary judgment dismissing the Labor Law § 240(1) cause of action. On this record, the defendants failed to demonstrate as a matter of law that the ladder provided proper protection, or that the plaintiff was the sole proximate cause of his injuries ...". ***Yao Zong Wu v. Zhen Jia Yang*, 2018 N.Y. Slip Op. 03169, Second Dept 5-2-18**

LANDLORD-TENANT, ADMINISTRATIVE LAW.

NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR) ACTED ARBITRARILY AND CAPRICIOUSLY WHEN IT RULED THE MAXIMUM COLLECTIBLE RENT FOR AN APARTMENT IS $125 PER MONTH, THE RENT HAD REMAINED LOW FOR DECADES BECAUSE THE APARTMENT HOUSE HAD BEEN OWNED AND RESIDED IN BY FAMILY MEMBERS.

The Second Department, over an extensive dissent, determined the New York State Division of Housing and Community Renewal (DHCR) acted arbitrarily and capriciously when it held that the current maximum collectible rent for the subject apartment is $125 per month. The apartment house had been owned and resided in by family members since 1941. The petitioner bought property in 2000: "... [E]ven assuming that the petitioner was aware or should have been aware of the subject apartment's rent-controlled status at the time he purchased the building, this factor is not determinative. While an owner's lack of such awareness may be considered in determining the maximum rent ... , there is no requirement in 9 NYCRR 2202.7 that an owner lack prior knowledge of the regulated status of its premises in order to receive an increase in the maximum rent. Rather, ... that provision solely requires "the presence of unique or peculiar circumstances" ... , which are present in this case. Those circumstances have resulted in the same monthly rent of $125 being paid for the subject two-bedroom apartment since 1961, which is clearly substantially lower than rents generally prevailing in the same area for substantially similar housing accommodations ... , and "there are issues of fairness and equity" that must be considered in setting an appropriate present day rent for the subject apartment ...". ***Matter of Migliaccio v. New York State Div. of Hous. & Community Renewal*, 2018 N.Y. Slip Op. 03132, Second Dept 5-2-18**

PERSONAL INJURY.

PLAINTIFF BASKETBALL PLAYER WAS AWARE OF THE CRACK IN THE BASKETBALL COURT OVER WHICH HE TRIPPED AND FELL, SUIT WAS PRECLUDED BY THE DOCTRINE OF ASSUMPTION OF THE RISK, CONCURRING JUSTICE ARGUED THAT THE CRACK WAS NOT A RISK INHERENT IN THE SPORT, BUT WAS CONSTRAINED TO AGREE WITH THE MAJORITY BASED ON PRECEDENT.

The Second Department, with an extensive two-justice concurrence not summarized here, reversing Supreme Court, determined that plaintiff assumed the risk of injury from playing basketball with knowledge of a crack on the court which caused him to trip and fall: "The plaintiff, who was 19 years old at the time of the accident and an experienced basketball player, testified that he 'grew [up] playing on [the subject] court,' and that he was aware of the presence of cracks in the surface of the court prior to his accident. The plaintiff also indicated that he was previously aware of the particular crack over which he tripped. When the plaintiff was asked ... if he ever saw 'what [his] foot got caught in before this happened," he responded, "[w]e knew where it was before when it happened.' ... Thus, [defendant] demonstrated that it did not violate its duty to exercise ordinary reasonable care to protect the plaintiff from unassumed, concealed, or unreasonably increased risks, and that the plaintiff assumed the risk of injury by voluntarily participating in a basketball game on the outdoor court despite his knowledge that doing so could bring him into contact with an open and obvious crack in the playing surface ... . We note that this Court has consistently applied the primary assumption of risk doctrine in cases involving similar known or open and obvious conditions in the playing surfaces of various types of courts ... . **From the concurrence:** While the plaintiff was casually performing a pre-game layup, his foot allegedly got caught in a deep crack, causing his foot to turn and fracture. The cracked condition of the basketball court was not a risk inherent in the sport of basketball and, in my view, under these circumstances, the doctrine of primary assumption of risk is not applicable. However, this Court's precedent compels dismissal of the complaint, since the plaintiff was aware of the cracks on the court and voluntarily chose to play basketball at this location ...". ***Philius v. City of New York*, 2018 N.Y. Slip Op. 03161, Second Dept 5-2-18**

PERSONAL INJURY, MUNICIPAL LAW.

ABUTTING PROPERTY OWNER ENTITLED TO SUMMARY JUDGMENT IN THIS SIDEWALK SLIP AND FALL CASE, ALTHOUGH THE LOCAL CODE REQUIRED THE PROPERTY OWNER TO KEEP SIDEWALKS IN GOOD REPAIR, IT DID NOT IMPOSE TORT LIABILITY ON THE PROPERTY OWNER.

The Second Department determined the defendant abutting property owner's (Water View's) motion for summary judgment in this sidewalk slip and fall case was properly granted. The property owner proved it did not create the sidewalk defect and the local code which required abutting property owners to keep sidewalks in good repair did not explicitly impose tort liability on the property owner: " 'Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous [or] defective conditions to public sidewalks is placed on the municipality and not the abutting landowner' ... . 'An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places an obligation to maintain the sidewalk on the owner and expressly makes the owner liable for injuries caused by a breach of that duty' ... . Here, Water View established, prima facie, that it did not create the alleged condition or cause the condition through a special use of the sidewalk. Additionally, although ... the Code of the Village of Freeport requires an abutting landowner to keep a sidewalk in good and safe repair, it does not specifically impose tort liability for a breach of that duty ...". ***Bousquet v. Water View Realty Corp.*, 2018 N.Y. Slip Op. 03119, Second Dept 5-2-18**

PERSONAL INJURY, MUNICIPAL LAW, LABOR LAW.

PLAINTIFF FIREFIGHTER'S MOTION FOR SUMMARY JUDGMENT IN THIS GENERAL MUNICIPAL LAW § 205-a, LABOR LAW § 27-a, SLIP AND FALL CASE WAS PROPERLY DENIED, PLAINTIFF'S OWN SUBMISSIONS RAISED QUESTIONS OF FACT ABOUT DEFENDANT'S NOTICE OF THE ALLEGED DANGEROUS CONDITION.

The Second Department determined that plaintiff firefighter's motion for summary judgment in this General Municipal Law § 205-a, Labor Law § 27-a slip and fall case was properly denied. Plaintiff alleged he was injured when he fell because of a gap in a grate at the Homeport Pier. The court noted that the plaintiff's own submissions raised triable issues of fact about whether the gap was the result of defendant's (the city's) negligence: "General Municipal Law § 205-a(1) provides a right of action for firefighters who are injured 'as a result of any neglect, omission, willful or culpable negligence' of a defendant 'in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments.' To make out a valid claim under General Municipal Law § 205-a, a plaintiff must '[1] identify the statute or ordinance with which the defendant failed to comply, [2] describe the manner in which the firefighter was injured, and [3] set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter' ... . ,,, [T]he only statute, ordinance, or rule identified by the plaintiff which could support the imposition of liability pursuant to General Municipal Law § 205-a under the facts of this case was Labor Law § 27-a .... Labor Law § 27-a(3)(a)(1) provides that every employer shall furnish employment and a place of employment that are 'free from recognized hazards' that cause or are likely to cause death or serious physical harm to employees. This statute may serve as a predicate for a cause of action alleging a violation of General Municipal Law

§ 205-a ... . [T]he plaintiff's submissions failed to establish, prima facie, that the gap in the grates was a result of negligence by the City. His submissions included evidence that (1) the Homeport Pier was inspected regularly, (2) gaps in the grates were sometimes caused by expansion and contraction of the metal and shifting due to vehicles driving over them, (3) any gaps over an inch were rectified when discovered during regular inspections, and (4) the Homeport Pier and the grates were inspected within two days prior to the plaintiff's accident." ***Shea v. New York City Economic Dev. Corp.*, 2018 N.Y. Slip Op. 03164, Second Dept 5-2-18**

THIRD DEPARTMENT

CIVIL PROCEDURE, CORPORATION LAW, WORKERS' COMPENSATION LAW.

WORKER'S COMPENSATION TRUST DEEMED TO OWE THE WORKERS' COMPENSATION BOARD $220 MILLION, ATTEMPTS TO AMEND THE COMPLAINT TO ADD CAUSES OF ACTION AFTER THE STATUTE OF LIMITATIONS HAD RUN FAILED, CRITERIA EXPLAINED; CRITERIA FOR A GENERAL BUSINESS LAW § 350 CAUSE OF ACTION AND PLEADING AN ALTER EGO THEORY ADDRESSED.

The Third Department determined the relation-back doctrine did not apply to the attempts to amend the complaint in this Worker's Compensation trust action. The trust was formed as self-insurance for Workers' Compensation claims, but was determined to owe the Workers' Compensation Board $220 million. The decision is too complex to fairly summarize here. It comprehensively addresses the criteria for amending complaints, the relation-back doctrine, the General Business Law section 350 cause of action, and the corporate alter ego (piercing the corporate veil) pleading requirements: " '[T]he rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, 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' ... . A claim is palpably insufficient or patently devoid of merit where it would be barred by the applicable statute of limitations. ... Where the issue is whether a claim may be interposed against a defendant who was named as a party before the statute of limitations expired, the query is limited to whether the earlier complaint 'gave notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading' ... . 'The relation back doctrine permits a [plaintiff] to amend a [complaint] to add a [defendant] even though the statute of limitations has expired at the time of amendment so long as the [plaintiff] can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added [defendant] is united in interest with a previously named [defendant], and (3) that the later-added [defendant] knew or should have known that, but for a mistake by [plaintiff] as to the later-added [defendant's] identity, the [action] would have also been brought against him or her' ... . Here, the proposed complaint alleges only that [the two entities] had common owners, officers and directors and that they shared the same office space, addresses and telephone numbers. Such allegations, standing alone, are insufficient to plead the elements required to establish alter ego liability ...". ***Belair Care Ctr., Inc. v. Cool Insuring Agency, Inc.*, 2018 N.Y. Slip Op. 03196, Third Dept 5-3-18**

CRIMINAL LAW.

UNDER THE STIPULATED FACTS, THE DEFENDANT'S TRAGIC ERROR, MISTAKING THE VICTIM FOR A DEER, DID NOT RISE TO THE LEVEL OF CRIMINAL NEGLIGENCE, NEGLIGENT HOMICIDE CONVICTION REVERSED.

The Third Department, reversing defendant's negligent homicide conviction, determined there was no valid line of reasoning that could have led to the verdict in this hunting accident case. The facts were stipulated in this nonjury trial. The victim, who was in the defendant's hunting party, was in an area all had agreed was off limits and there was evidence defendant reasonably mistook the victim for a deer: "Viewing the evidence in the light most favorable to the People ... , there is no valid line of reasoning that could have led County Court to conclude that defendant engaged in any 'blameworthy conduct' that created or contributed to a substantial and unjustifiable risk of death ... . As stipulated to by the parties, ... defendant had 'no reason to believe [that] any of his three companions would be in the area where he was shooting.' Defendant's hunting party was not engaged in the hunting practice of 'driving' the deer ... , and they had instead agreed to hunt from separate, stationary tree stands that had been specifically positioned prior to the hunt 'in such a way that no one would be shooting in the direction of another hunter.' Additionally, ... defendant and the property owner had specifically advised the victim that, should he decide to again leave his designated stand before the hunt was over, he should take a specific route ... that was outside of the hunters' respective lines of fire. Moreover, there was no evidence that defendant had consumed any alcohol or drugs prior to the hunt, and he was unaware that the victim had cocaine and opiates in his system. While defendant made the tragic and deadly error of mistaking the camouflage-dressed victim for a buck, we cannot say — under the stipulated set of facts — that his actions rose to the level of criminal negligence ... ." ***People v. Gerbino*, 2018 N.Y. Slip Op. 03179, Third Dept 5-3-18**

CRIMINAL LAW, MENTAL HYGIENE LAW, ATTORNEYS.

RESPONDENT, WHO PLED NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT, DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THE SUBSEQUENT CRIMINAL PROCEDURE LAW 330.20 COMMITMENT PROCEEDINGS, RESPONDENT'S COUNSEL SIMPLY ACCEPTED THE PSYCHIATRIC EXAMINATION REPORTS.

The Third Department, reversing County Court, determined respondent (defendant) did not receive effect assistance of counsel in the commitment proceedings following his plea of not responsible by reason of mental disease of defect (re: assault charges). "CPL 330.20 requires County Court to conduct an initial hearing within 10 days after receipt of psychiatric examination reports for the purpose of assigning an insanity acquittee to one of three 'tracks' based upon his or her present mental condition ... . 'Track-one [acquittees] are those found by the trial judge to suffer from a dangerous mental disorder; i.e., a mental illness that makes them a physical danger to themselves or others. Track-two [acquittees] are mentally ill, but not dangerous, while track-three [acquittees] are neither dangerous nor mentally ill" ... . County Court's finding in this case placed respondent in track one, a status "significantly more restrictive than track two' ... . 'Track status, as determined by the initial commitment order, governs the acquittee's level of supervision in future proceedings and may be overturned only on appeal from that order, not by means of a rehearing and review' ... . Given the 'vital[] importanc[e]' of track designation ... , the initial commitment hearing was plainly'"a critical stage of the proceedings during which respondent was entitled to the effective assistance of counsel, [requiring us to] consider whether counsel's performance therein viewed in totality amounted to meaningful representation' ... We agree with respondent that counsel's performance fell short of that standard. By affirmatively stating at the initial hearing that she 'was not contesting any findings' contained within the psychiatric reports, respondent's counsel conceded that respondent had a dangerous mental disorder and, thus, implicitly consented to his confinement in a secure facility. Counsel did not call any witnesses or seek to cross-examine the psychiatrists who prepared the reports ... , nor did counsel consult an expert on respondent's behalf who may have offered a contrasting opinion as to his mental status or, at the very least, could have clinically assessed the examination reports and the approaches taken in reaching their ultimate conclusions ...". ***Matter of Matheson Kk.*, 2018 N.Y. Slip Op. 03195, Third Dept 5-3-18**

ENVIRONMENTAL LAW, CIVIL PROCEDURE, LAND USE.

DEPARTMENT OF ENVIRONMENTAL CONSERVATION'S (DEC'S) DETERMINATIONS ON THE USE OF SNOWMOBILES IN NEWLY ADDED PORTIONS OF THE ADIRONDACK PARK UPHELD, TWO CHALLENGES NOT RIPE FOR REVIEW.

The Third Department, in a full-fledged opinion by Justice Rumsey, over a two-justice partial dissent, upheld the Department of Environmental Conservation's (DEC's) determinations regarding snowmobile trails in newly added portions of the Adirondack Park. Because approval of the trails was still subject to permits and variances, two of petitioners' causes of action were deemed not ripe for review. The Third Department determined there was no conflict between the Rivers System Act and the Adirondack Park State Land Master Plan. The Rivers System Act was deemed to control and the act allowed the proposed snowmobile traffic as a continuation of an existing use. And the Third Department held that a 2009 "guidance" document for the siting of snowmobile trails adopted by the DEC did not commit the DEC to a definite course of future action. Concerning the "ripeness" issue, the court wrote: "... [P]ermits and variances must be obtained through further administrative action before the proposed uses may be established. Specifically, permits are required to erect a bridge over a scenic river ... or to construct a trail within a scenic river area ... . Moreover, variances are required for the use of motorized vehicles within scenic river areas ... , and for construction of a Class II snowmobile trail, to the extent that it may exceed the maximum trail width of four feet that is permitted by regulation ... . Permit and variance applications are governed by the Uniform Procedures Act ... , which imposes conditions related to the substantive relief sought and provides the opportunity for further public participation. No permit or variance may be granted unless the proposed use is consistent with the purpose of the Rivers System Act ... , and conditions may be imposed as necessary to preserve and protect affected river resources or to assure compliance with the Rivers System Act ... . Moreover, there is an opportunity for public comment on applications for a permit or a variance ... and the granting of a permit or variance may be challenged through a CPLR article 78 proceeding. Thus, inasmuch as the harms upon which the first and second causes of action are based may be prevented or ameliorated by further administrative action, Supreme Court correctly concluded that the first and second causes of action are not ripe for judicial review." ***Matter of Adirondack Wild: Friends of The Forest Preserve v. New York State Adirondack Park Agency*, 2018 N.Y. Slip Op. 03193, Third Dept 5-3-18**

ENVIRONMENTAL LAW, MUNICIPAL LAW.

VILLAGE BOARD DID NOT TAKE THE 'HARD LOOK' REQUIRED BY THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA), REVIEW WAS UNDERTAKEN TO FACILITATE THE CONDEMNATION OF LAND FOR THE CONSTRUCTION OF A PARKING GARAGE, VILLAGE DID NOT ADEQUATELY CONSIDER ADVERSE TRAFFIC IMPLICATIONS.

The Third Department vacated the village board's State Environmental Quality Review Act (SEQRA) findings that the construction of a parking garage would not result in a substantial increase in traffic. The board conducted a SEQRA review in preparation for a condemnation proceeding to acquire the land: "... [T]he record fails to establish that the Village Board took the requisite hard look at potential traffic implications associated with the construction of a parking garage on the subject property or to set forth a reasoned elaboration of the basis for its determination that the development of the property would not result in any substantial increase in traffic. Upon review of an eminent domain proceeding, courts are required to determine whether the condemnor's findings and determinations comply with ECL article 8, which is incorporated as part of the required procedures under EDPL [Eminent Domain Procedure Law] article 2 ... . In assessing compliance with the substantive mandates of SEQRA, we are tasked with reviewing the record to determine whether the Village Board, as the lead agency, "identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination" ... . 'Literal compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice' ... . An adverse change in traffic levels is ... a potential area of environmental concern ... . During both the public hearing and the written comment period, concerns regarding increased traffic congestion and other potential traffic impacts associated with the proposed condemnation were repeatedly voiced. Yet, the record is bereft of any evidence that the Village Board took the requisite hard look at these potential traffic implications." ***Matter of Adirondack Historical Assn. v. Village of Lake Placid/lake Placid Vil., Inc.*, 2018 N.Y. Slip Op. 03194, Third Dept 5-3-18**

FAMILY LAW, ATTORNEYS.

FAMILY COURT SHOULD HAVE INFORMED WIFE OF HER RIGHT TO ASSIGNED COUNSEL WHEN IT BECAME CLEAR SHE WAS HAVING TROUBLE RETAINING AN ATTORNEY, NEW TRIAL ORDERED.

The Third Department, ordering a new trial in this divorce-custody action, determined Family Court, given the wife's difficulty in raising money to retain new counsel, should have informed her of her right to assigned counsel pursuant to Family Court Act § 262: "... [T]he mother appeared in court, explaining that, although she had retained new counsel, he was unable to attend that day and, therefore, she requested the court to 'extend' or 'hold off' proceeding with the continuation ... . Supreme Court denied the mother's request for an adjournment, indicating that no notice of appearance had been filed by the mother's replacement counsel and that it could not rely solely upon her statement that she may be represented by counsel going forward. Supreme Court then proceeded with the trial, informing the mother that, under the circumstances, she was going to have to proceed pro se. There is nothing in the record to indicate that Supreme Court ever advised the mother of her rights pursuant to Family Ct Act § 262 (a). While we appreciate that the mother initially appeared with retained counsel and Supreme Court granted her a lengthy adjournment to obtain a new attorney, it was incumbent upon the court — particularly in light of the mother's expressed need for several months to obtain the necessary retainer fee — to advise her of the right to assigned counsel in the event that she could not afford same ... . In the absence of the requisite statutory advisement of her right to counsel (see Family Ct Act § 262 [a] [v]) or a valid waiver of such right ..., we find that the mother was deprived of her fundamental right to counsel...". ***DiBella v. DiBella*, 2018 N.Y. Slip Op. 03186, Third Dept 5-3-18**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF, WHO WAS WORKING AT GROUND LEVEL, WAS STRUCK ON THE HEAD BY A TIRE RIM WHICH WAS BLOWN OFF THE ROOF IN HEAVY WINDS, THE TIRE RIM REQUIRED SECURING AND NO SAFETY DEVICE WAS EMPLOYED, PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The Third Department, reversing Supreme Court, determined plaintiff (Wellington) was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff, who was working at ground level, was struck on his head by a 25 to 30 pound tire rim that blew off the roof of the building in strong winds. No one was working on the roof due to the wind. The roofing contractor was defendant Tower. With respect to the applicability of Labor Law § 240(1), the court explained: "The statutory protections arise when 'the falling of an object is related to a significant risk inherent in the relative elevation at which materials or loads must be positioned or secured' ... . The object must have been 'material being hoisted or a load that required securing for the purposes of the undertaking,' and it must have fallen 'because of the absence or inadequacy of a safety device of the kind enumerated in the statute'... . Here, a significant elevation-related risk was inherent in the placement of the tire rim on a roof several stories above an area where others were working, particularly in windy conditions. The tire rim, as part of a safety system mandated by federal regulations, was an integral part of Tower's undertaking in renovating the roof, and, because of the hazard created by the elevation differential, it plainly 'required securing for the

purposes of [that] undertaking' ... . As for the absence or inadequacy of a safety device, several witnesses testified that tire rims were commonly used in the industry as supports for safety warning systems like the one at issue here, and that cinder blocks and sandbags were sometimes used to secure them by adding additional weight. Tower's president testified, however, that it was not Tower's practice to use such securing devices because a tire rim's weight was enough to keep it from falling. In effect, Tower relied upon the tire rim's heaviness as a substitute for a safety device — a method that 'clearly failed in its core objective of preventing the [tire rim] from falling because [it], in fact, fell, injuring [Wellington]' ...". ***Wellington v. Christa Constr. LLC*, 2018 N.Y. Slip Op. 03199, Third Dept 5-3-18**

MUNICIPAL LAW, CIVIL PROCEDURE.

INMATE-PETITIONER'S INITIAL PRO SE ATTEMPT TO FILE A LATE NOTICE OF CLAIM REGARDING AN INCIDENT IN THE COUNTY JAIL BY SENDING THE PAPERS TO THE COURT CLERK, NOT THE COUNTY COURT, WAS A NULLITY, PETITIONER'S SECOND ATTEMPT TO FILE A LATE NOTICE AFTER THE STATUTE OF LIMITATIONS HAD RUN COULD NOT, THEREFORE, RELATE BACK TO THE INITIAL ATTEMPT.

The Third Department determined that the inmate-petitioner's motion for leave to file a late notice of claim, based upon an incident in the county jail, could not relate back to petitioner's first (pro se) attempt to file a late notice of claim. Petitioner's first attempt was sent to the court clerk as opposed to the county clerk. The court clerk returned the papers and instructed the petitioner to send them to the county clerk. Nothing further was done by the petitioner until an attorney was assigned and the statute of limitations had passed. The relation-back doctrine could not be applied because the failure to file the original papers with the county clerk was a jurisdictional defect: "... [W]here an action to enforce a claim has not yet been commenced, a party seeking to make an application for leave to serve a late notice of claim should commence a special proceeding in the Supreme Court or the County Court in a county where the action may be properly brought to trial (see General Municipal Law § 50-e [7] ...). A special proceeding is commenced by the filing of initiatory papers with the County Clerk in the county in which the special proceeding is brought or with any other person designated by the County Clerk to accept filing ... . While the Supreme Court or the County Court may convert an improperly brought motion for leave to serve a late notice of claim into a special proceeding ... , the failure to file the application with the appropriate clerk — the County Clerk — is a fatal defect that may not be overlooked or corrected by the court pursuant to CPLR 2001... . Indeed, the filing of initiatory papers with the Clerk of the Supreme and County Courts, rather than the County Clerk, 'has been equated to a nonfiling and, thus, 'a nonwaivable jurisdictional defect rendering the proceeding a nullity' ...". ***Matter of Dougherty v. County of Greene*, 2018 N.Y. Slip Op. 03192, Third Dept 5-3-18**

RETIREMENT AND SOCIAL SECURITY LAW.

PETITIONER POLICE OFFICER SLIPPED ON WATER FROM A LEAKING WATER COOLER, THE HEARING OFFICER RULED THE INCIDENT WAS NOT A COMPENSABLE ACCIDENT BECAUSE THE WATER WAS READILY OBSERVABLE, THE COURT OF APPEALS RECENTLY HELD A PETITIONER IS NO LONGER REQUIRED TO DEMONSTRATE A CONDITION WAS NOT READILY OBSERVABLE, DETERMINATION ANNULLED.

The Third Department annulled the finding that petitioner police officer, who slipped and fell on water which had leaked from a water cooler, was not entitled to accidental disability retirement benefits. The hearing officer had found that the incident constituted an accident within the meaning of the Retirement and Social Security Law, but the officer was not entitled to benefits because the water was readily observable. The Court of Appeals has recently ruled that a petitioner need not demonstrate a condition was not readily observable in order to demonstrate the incident was an accident: "Respondent [comptroller] adopted the findings and conclusions of the Hearing Officer, who found that slipping on the water 'was a sudden, fortuitous mischance and undoubtably unexpected and out of the ordinary.' The Hearing Officer denied benefits, however, based solely upon petitioner's failure to demonstrate that the water she had slipped on was not readily observable. In its recent decision in Matter of Kelly v. DiNapoli (30 NY3d 674 [2018]), the Court of Appeals stated that 'the requirement that a petitioner demonstrate that a condition was not readily observable in order to demonstrate an 'accident' is inconsistent with our prior case law' ... . Inasmuch as respondent concluded that — but for the lack of proof that the water was readily observable — the incident satisfied the criteria to constitute an accident within the meaning of the Retirement and Social Security Law, substantial evidence does not support the determination that the incident was not an accident and it must be annulled ...". ***Matter of Daquino v. DiNapoli*, 2018 N.Y. Slip Op. 03201, Third Dept 5-3-18**

TRUSTS AND ESTATES, CIVIL PROCEDURE.

MOTION TO SET ASIDE THE VERDICT AS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE AND AS AGAINST THE WEIGHT OF THE EVIDENCE SHOULD HAVE BEEN GRANTED, THE EVIDENCE DID NOT ALLOW THE CONCLUSION THAT THE WILL, WRITTEN BY DECEDENT'S CARETAKER THREE DAYS BEFORE DEATH, WAS DULY EXECUTED.

The Third Department determined the jury verdict finding the will offered by petitioner had been duly executed was not supported by legally sufficient evidence and was against the weight of the evidence. The will was handwritten by petitioner, not decedent, three days before his death. The decedent, who was terminally ill, had moved to petitioner's family-type adult home only three weeks before his death. One attesting witness had worked at the home for 28 years. The other attesting witness had lived at the home for seven years and was petitioner's friend: "A verdict may be set aside as unsupported by legally sufficient evidence where 'there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial' ... . A jury verdict may be found to be against the weight of the evidence 'where the proof so preponderated in favor of the unsuccessful party that the verdict could not have been reached on any fair interpretation of the evidence' ... . * * * Upon this record, we cannot find legally sufficient evidence to support the jury's verdict finding that the will had been duly executed ... . Further, the jury's verdict is against the weight of the evidence, as it could not have been reached on a fair interpretation of the evidence ...". ***Matter of Fraccaro*, 2018 N.Y. Slip Op. 03198, Third Dept 5-3-18**

FOURTH DEPARTMENT

CRIMINAL LAW, ANIMAL LAW, APPEALS.

DEFENDANT CONVICTED OF ASSAULT FIRST DEGREE FOR ALLOWING HIS DOG TO ATTACK THE VICTIM, EVIDENCE OF INTENT TO CAUSE SERIOUS INJURY WAS LEGALLY SUFFICIENT, MOTION FOR TRIAL ORDER OF DISMISSAL AT THE CLOSE OF THE EVIDENCE PRESERVED THE ISSUE BY REFERRING TO THE MOTION MADE AT THE CLOSE OF THE PEOPLE'S CASE.

The Fourth Department determined the evidence was legally sufficient to support the assault first conviction stemming from defendant's allowing his dog to attack the victim. The court noted that the motion for a trial order of dismissal at the close of the People's case was adequate to preserve the challenge to the legal sufficiency of the evidence of intent, even though the renewal of the motion at the close of evidence referred to the earlier motion: "The conviction arises from a dog attack that caused the victim to sustain injuries that included broken bones in his hands and the amputation of a portion of one of his fingers. The victim as well as witnesses to the attack testified that two pit bull terriers that had escaped their owner's property attacked the victim, biting at his arms and legs, as the victim attempted to protect his dog from the pit bulls. Defendant, who was a friend of the owner of the pit bulls, arrived at the scene in a van driven by another man. Defendant exited the van, retrieved the two pit bulls and placed them in the van. After the pit bulls were secured in the van, the victim stood in front of the van and angrily told defendant that the police had been called and 'you're not going anywhere.' Defendant responded by asking the victim, 'you coming at me? Are you going to stop me from leaving?' At that point defendant opened the van door and issued a command to the larger pit bull, who attacked the victim a second time, inflicting the injuries to the victim's hands. Defendant contends that the evidence is legally insufficient to support the conviction inasmuch as the People failed to prove that he intended to cause serious physical injury to the victim ... . Viewing the evidence in the light most favorable to the People ... , we conclude that the evidence is legally sufficient to establish such intent ...". ***People v. Bacon*, 2018 N.Y. Slip Op. 03258, Fourth Dept 5-4-18**

CRIMINAL LAW, APPEALS.

WAIVER OF APPEAL INVALID, MATTER SENT BACK FOR YOUTHFUL OFFENDER DETERMINATION.

The Fourth Department determined the waiver of appeal was invalid and sent the matter back for a determination of youthful offender status: "Supreme Court did not elicit the waiver until after defendant had pleaded guilty and, in any event, 'the record fails to establish that [the court] engaged him in an adequate colloquy to ensure that the waiver was a knowing and voluntary choice' ... . Furthermore, 'neither the written waiver of the right to appeal in the record nor the court's brief mention of that waiver during the plea proceeding distinguished the waiver of the right to appeal from those rights automatically forfeited upon a plea of guilty' ... . We further agree with defendant that the court erred in failing to determine whether he should be afforded youthful offender status ... . As the People correctly concede, defendant is an eligible youth, and the sentencing court must make 'a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it' ...". ***People v. Willis*, 2018 N.Y. Slip Op. 03291, Fourth Dept 5-4-18**

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION BASED UPON INEFFECTIVE ASSISTANCE AND ACTUAL INNOCENCE SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING, DEFENDANT PRESENTED EVIDENCE DEFENSE COUNSEL NEVER SUBPOENAED A WITNESS.

The Fourth Department determined defendant's motion to vacate his conviction based upon ineffective assistance and actual innocence should not have been denied without a hearing: "... [T]he court erred in denying without a hearing that part of his motion based upon ineffective assistance of counsel. Defendant's specific claim is that defense counsel failed to secure the presence of a witness who had potentially exculpatory information, and we agree with defendant that such a failure may serve as the basis for a finding of ineffective assistance of counsel ... . At trial, defense counsel stated on the record that the witness had been subpoenaed to testify on defendant's behalf. The witness did not testify, however, and there is nothing in the trial record indicating why. According to defendant's moving papers, when the witness did not appear to testify, defense counsel merely stated: 'Oh, well.' There is no dispute that defense counsel did not attempt to utilize the procedure for securing the trial testimony of a material witness ... , or to seek a continuance to obtain the witness's voluntary compliance with the subpoena. Notably, the witness avers in her affidavit that she was never subpoenaed. The court denied that part of the motion based on its determination that defendant could have raised his claim on his direct appeal or in his prior CPL 440.10 motions ... . That was error. Because the witness resided in another state and went by a different surname, it was not until 2014—after defendant made his two prior CPL 440.10 motions—that defendant was able to obtain an affidavit from her. The affidavit contains information not contained in the trial record and substantially supports defendant's claim of ineffective assistance. Significantly, it raises an issue of fact whether the witness was ever subpoenaed by defense counsel. That issue of fact is separate and distinct from the witness's information about the murder itself, which was known to defendant through the 2004 police report. Defendant could not have discovered and raised the issue of fact until 2014, when he was able to identify, locate, and obtain an affidavit from the witness." ***People v. Borcyk*, 2018 N.Y. Slip Op. 03256, Fourth Dept 5-4-18**

EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, CIVIL PROCEDURE.

PLAINTIFF'S MOTION TO AMEND HER COMPLAINT BY ADDING A BATTERY CAUSE OF ACTION AGAINST A TEACHER AND A RESPONDEAT SUPERIOR CAUSE OF ACTION AGAINST THE SCHOOL SHOULD HAVE BEEN GRANTED, CRITERIA EXPLAINED, RELATION-BACK DOCTRINE APPLIED TO THE NEW CAUSES OF ACTION.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion to amend her complaint to add a battery cause of action against a teacher and a respondeat superior cause of action against the school should have been granted. Plaintiff alleged the defendant teacher struck her on the back of her head. The complaint alleged a negligence cause of action. Prior to trial plaintiff moved to amend the complaint to add the battery and respondeat superior causes of action. The motion was denied. The case went to trial and the jury rendered a defense verdict. Plaintiff will get a new trial on the two causes of action in the amended complaint: It is well settled that, '[i]n the absence of prejudice or surprise, leave to amend a pleading should be freely granted' ... . Plaintiff established that the relation-back doctrine applied for statute of limitations purposes with respect to the battery cause of action, which was based on the same facts and occurrence as the negligence cause of action and thus related back to the original complaint (see CPLR 203 [f]...). In opposition to the cross motion, defendants failed to establish that they would be prejudiced by plaintiff's delay in seeking leave to amend the complaint ... , inasmuch as the new causes of action were based upon the same facts as the negligence cause of action in the original complaint ... . Defendants argued in opposition to the cross motion that plaintiff failed to proffer any excuse for her delay in seeking leave to amend the complaint, but '[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side' ... . Therefore, although plaintiff provided no excuse for her delay in seeking leave to amend, that is of no moment because, as noted above, defendants have not shown that they were prejudiced by the delay ...". ***Wojtalewski v. Central Sq. Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 03275, Fourth Dept 5-4-18**

FAMILY LAW.

FAMILY COURT DID NOT FOLLOW THE PROCEDURE SET OUT IN THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA) BEFORE DETERMINING IT DID NOT HAVE JURISDICTION OVER FATHER'S CUSTODY PROCEEDING, MOTHER HAD BROUGHT A CUSTODY PROCEEDING IN PENNSYLVANIA, MATTER REMITTED.

The Fourth Department, reversing Family Court, determined Family Court did not follow the procedures required by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) before determining it did not have jurisdiction over the custody proceeding. Family Court had jurisdiction over father's custody proceeding when it was commenced, and Pennsylvania had jurisdiction over the wife's custody proceeding when she commenced it there: "Family Court erred in declining to exercise jurisdiction and dismissing the proceeding without following the procedures required by the UCCJEA

... . The court, after determining that another child custody proceeding had been commenced in Pennsylvania, properly communicated with the Pennsylvania court ... . The court erred, however, in failing either to allow the parties to participate in the communication ... , or to give the parties 'the opportunity to present facts and legal arguments before a decision on jurisdiction [was] made' ... . The court also violated the requirements of the UCCJEA when it failed to create a record of its communication with the Pennsylvania court ... . The summary and explanation of the court's determination following the telephone conference with the Pennsylvania court did not comply with the statutory mandate to make a record of the communication between courts. We also agree with the father that there are insufficient facts in the record to make a determination, based upon the eight factors set forth in the statute ... , regarding which state is the more convenient forum to resolve the issue of custody. 'Because Family Court did not articulate its consideration of each of the factors relevant to the . . . petition . . . and we are unable to glean the necessary information from the record, the court's [implicit] finding that New York was an inconvenient forum to resolve the [custody] petition is not supported by a sound and substantial basis in the record' ...". ***Matter of Beyer v. Hofmann*, 2018 N.Y. Slip Op. 03259, Fourth Dept 5-4-18**

FORECLOSURE.

ALTHOUGH THE MONTHLY MORTGAGE PAYMENTS STOPPED IN 2008, THE DEBT WAS NEVER ACCELERATED UNTIL THE INSTANT FORECLOSURE ACTION WAS BROUGHT IN 2015, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS TIME-BARRED.

The Fourth Department, reversing Supreme Court, determined the foreclosure action was not time barred. The mortgage payments stopped in 2008. But the debt was never accelerated until the foreclosure action was commenced in 2015: "Where, as here, a loan secured by a mortgage is payable in installments, separate causes of action accrue for each unpaid installment, and the statute of limitations begins to run on the date that each installment becomes due ... . Thus, unless the entire debt had been accelerated by the mortgage holder, on the date of a default the statute of limitations begins to run only for the installment payment that became due on that date ... . Here, defendants' own submissions in support of the motion establish that the mortgage is an installment mortgage, the installment payments are due monthly until January 1, 2035, and defendants defaulted on the payment that was due September 1, 2008. Further, defendants failed to establish that plaintiff accelerated the debt by demanding payment of the entire loan or by commencing a prior foreclosure action. Thus, the action was timely commenced inasmuch as the statute of limitations did not begin to run on the entire debt until the instant action was commenced on February 20, 2015." ***Wilmington Sav. Fund Socy., FSB v. Unknown Heirs at Law of Danny Higdon*, 2018 N.Y. Slip Op. 03274, Fourth Dept 5-4-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

WHILE WORKING ON A SIGN AT EYE LEVEL PLAINTIFF SLIPPED OFF A LANDSCAPING ROCK WHICH HE DID NOT NEED TO STAND ON TO DO THE WORK, PLAINTIFF'S LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION PROPERLY DISMISSED.

The Fourth Department determined plaintiff's Labor Law §§ 240(1) and 241(6) causes of action were properly dismissed. Plaintiff slipped off a landscaping rock while working on a business sign. Plaintiff did not need to stand on the rock to do the work, which involved removing letters from the sign. The Labor Law § 241(6) causes of action were not viable because plaintiff did not alleged the rock was slippery or that he tripped over the rock, plaintiff was not engaged in demolition work, and the rock could not be considered debris: "... [T]he court properly denied that part of his motion and granted those parts of defendants' motions with respect to the Labor Law § 240 (1) cause of action. The record establishes that plaintiff was not "obliged to work at an elevation"... , which is a necessary element for recovery under section 240 (1). Indeed, plaintiff's own deposition testimony submitted in support of his motion established that the work he was performing was at eye level and that he could have reached the sign from the ground. Thus, inasmuch as it was not necessary for plaintiff to stand on the rock to perform his work, he was not exposed to an elevation-related hazard of the type contemplated by section 240 (1) ... . Even assuming, arguendo, that a safety device was required to protect plaintiff from such a hazard, we note that plaintiff further testified during his deposition that either of the A-frame ladders that had been provided for his use probably could have straddled the rock, but he thought that a ladder was not necessary ...". ***Maracle v. Autoplace Infiniti, Inc.*, 2018 N.Y. Slip Op. 03252, Fourth Dept 5-4-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INJURY FROM A SAFETY BAR IN A BOBCAT WHICH FELL AFTER PLAINTIFF RAISED IT TO STEP OUT OF THE MACHINE DID NOT RESULT FROM A SIGNIFICANT ELEVATION DIFFERENTIAL WITHIN THE MEANING OF LABOR LAW § 240(1), LABOR LAW § 241(6) CAUSES OF ACTION WERE VIABLE HOWEVER.

The Fourth Department, reversing (modifying) Supreme Court, determined defendant's motion for summary judgment on plaintiff's Labor Law § 240(1) cause of action should have been granted, but the Labor Law § 241(6) causes of action

were viable. Plaintiff was injured when a safety bar in a Bobcat fell and struck him. The safety bar lowers onto the operator's lap when the Bobcat is used. The bar fell after plaintiff raised it to step out of the machine: "... [T]he court properly granted defendants' motion with respect to the Labor Law § 240 (1) claim because plaintiff was not injured as the result of any 'physically significant elevation differential' ... . We further conclude that, contrary to defendants' contention on their appeal, the court properly denied their motion with respect to the section 241 (6) claim insofar as it alleged a violation of 12 NYCRR 23-9.2 (a) because there are triable issues of fact whether plaintiff's employer had actual notice of a structural defect or unsafe condition regarding the safety bar ... . Finally, we agree with plaintiffs on their cross appeal that the court erred in granting defendants' motion with respect to the section 241 (6) claim insofar as it alleges a violation of 12 NYCRR 23-1.5 (c) (3) because that regulation is sufficiently specific to support a claim under section 241 (6) ...". ***Salerno v. Diocese of Buffalo, N.Y.*, 2018 N.Y. Slip Op. 03251, Fourth Dept 5-4-18**

MEDICAL MALPRACTICE, EVIDENCE, PERSONAL INJURY.

MATERIAL PREPARED FOR HOSPITAL QUALITY ASSURANCE REVIEW DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION UNDER AN EXCEPTION TO EDUCATION LAW § 6527.

The Fourth Department determined a power point presentation made by a defendant in a medical malpractice action was discoverable, even though the power point presentation was created for a quality assurance review meeting (usually off limits for discovery pursuant to Executive Law § 6527): "We ... conclude that the disputed materials are discoverable under the exception to the privilege for "statements made by any person in attendance at . . . a [medical or quality assurance review] meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting" (Education Law § 6527 [3]). Disclosure under that exception may be obtained where: (1) the statements were made during a quality assurance review meeting; (2) that review meeting concerned the same subject matter as the malpractice action; and (3) the statements were made by a defendant in the action ... . 'Statements' include written statements, such as letters... , and the PowerPoint slide show at issue here." ***Drum v. Collure*, 2018 N.Y. Slip Op. 03244, Fourth Dept 5-4-18**

MEDICAL MALPRACTICE, EVIDENCE, PERSONAL INJURY.

PLAINTIFF SUFFERED AN EYE INJURY AT SOME POINT IN HIP REPLACEMENT SURGERY OR IN THE RECOVERY ROOM AND SUED SEVERAL DEFENDANTS RELYING ON THE RES IPSA LOQUITUR DOCTRINE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THAT ASPECT OF PLAINTIFF'S CASE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment should have been granted to the extent plaintiff relied on the doctrine of res ipsa loquitur. Plaintiff, who underwent hip replacement surgery, suffered an eye injury either in the operating room or the recovery room: "Plaintiff commenced this medical malpractice action seeking damages for injuries he sustained to his left eye during hip replacement surgery performed at defendant St. Joseph's Hospital (Hospital). Defendants Brett Greenky, M.D. and Syracuse Orthopedic Specialists, P.C. (SOS) were retained by plaintiff to perform the surgery, and defendants Mehtab Singh Bajwa, M.D., Tracie O'Shea, C.R.N.A., and the Anesthesia Group of Onondaga, P.C. (collectively, anesthesia defendants) were responsible for, inter alia, administering the anesthesia to plaintiff prior to the surgery. * * * 'Ordinarily, a plaintiff asserting a medical malpractice claim must demonstrate that the doctor deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury'... . 'Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it' ... .'In a multiple defendant action in which a plaintiff relies on the theory of res ipsa loquitur, a plaintiff is not required to identify the negligent actor . . . That rule is particularly appropriate in a medical malpractice case such as this in which the plaintiff has been anesthetized' ... . Here, plaintiff was under the care and control of Greenky, SOS and the anesthesia defendants during the surgery, and the Hospital immediately after the surgery. During that time, plaintiff was either under anesthesia and/or not fully awake or oriented to his surroundings. While O'Shea testified that there was no indication of an eye injury when she delivered plaintiff to the recovery room, hospital staff testified that plaintiff's eye was noticeably irritated at that time. Consequently, there is an issue of fact whether plaintiff sustained the eye injury in the operating room or in the recovery room. ' Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment . . . [, and] it is manifestly unreasonable for [the defendants] to insist that [he] identify any one of them as the person who did the alleged negligent act' ...". ***White v. Bajwa*, 2018 N.Y. Slip Op. 03246, Fourth Dept 5-4-18**

MEDICAL MALPRACTICE, PERSONAL INJURY.

RESIDENT PHYSICIANS DID NOT EXERCISE INDEPENDENT JUDGMENT AND WERE NOT REQUIRED TO INTERVENE IN THE TREATMENT BY THE ATTENDING PHYSICIAN, THE RESIDENTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing (modifying) Supreme Court, determined the defendant resident physicians' motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's bowel was perforated during an emergency caesarean section. The residents did not exercise any independent judgment during the surgery and were not required to intervene in the treatment by the attending physician (Dr. Balaya): "Dr. Bayala's affidavit also addressed the care provided by the three resident physicians. Dr. Balaya averred that the resident physicians were all under his supervision and direction and, thus, they never exercised independent judgment or made an independent decision with respect to plaintiff's care or treatment ... . In addition, Dr. Balaya averred that none of the resident physicians could be held liable for failure to intervene in plaintiff's care and treatment on the ground that his alleged deviations from normal medical practice were so great that such intervention was warranted ... . Plaintiffs' submissions in opposition to the motion failed to raise an issue of fact whether any of the resident physicians exercised independent medical judgment in plaintiff's care or treatment, or neglected to intervene in plaintiff's care or treatment where the attending physician's directions greatly deviated from normal medical practice ...". ***Groff v. Kaleida Health*, 2018 N.Y. Slip Op. 03249, Fourth Dept 5-4-18**

MUNICIPAL LAW, EMPLOYMENT LAW.

DEFENDANT COUNTY CORONER TOOK PLAINTIFF'S SON'S BRAIN MATTER FOR USE IN TRAINING CADAVER DOGS AND FATHER SUED, QUESTION OF FACT WHETHER COUNTY OBLIGATED UNDER THE PUBLIC OFFICERS LAW TO DEFEND AND INDEMNIFY THE CORONER (I.E., WAS THE CORONER ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT?).

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment on his cross claim against the county (seeking a determination that the county is obligated to defend and indemnify him) should not have been granted. Plaintiff's son was killed in a car accident. Defendant, who was then a county coroner, without permission, took plaintiff's son's brain matter for use in training cadaver dogs. There was a question of fact whether the county was obligated to defend the coroner pursuant to the Public Officers Law, which applies to actions within the scope of employment: "A county's duty to defend an employee 'turns on whether [the employee was] acting within the scope of [his or her] employment,' and whether the obligation to defend the employee 'was formally adopted by a local governing body ... . In order to establish its prima facie entitlement to judgment as a matter of law under Public Officers Law § 18, it was incumbent on defendant to establish the applicability of that section ... . Here, the court erred in granting summary judgment to defendant while still finding that there are issues of fact that bear on the applicability of Public Officers Law § 18 to defendant's claims ...". ***Dunn v. County of Niagara*, 2018 N.Y. Slip Op. 03271, Fourth Dept 5-4-18**

MUNICIPAL LAW, IMMUNITY.

DEFENDANT CITY PAVED A DRIVEWAY CONNECTING A ROAD TO A PAVED PARK PATH, DEFENDANT DRIVER DROVE UP THE DRIVEWAY TO THE PAVED PATH WHERE PLAINTIFFS HAD BEEN WALKING THEIR DOGS, MAINTENANCE OF A PARK IS A PROPRIETARY NOT GOVERNMENTAL FUNCTION, NO GOVERNMENTAL IMMUNITY, CITY'S MOTION FOR SUMMARY JUDGMENT RELIED SOLELY ON GAPS IN PLAINTIFFS' PROOF AND SHOULD HAVE BEEN DENIED.

The Fourth Department, reversing Supreme Court, determined that the defendant city's motion for summary judgment in this car-pedestrian injury case should not have been granted. The city had paved a driveway which connected a road to a pave walking path in a park. Defendant driver, who was intoxicated, drove his car to the park path where plaintiffs had been walking their dogs. There were no barriers or warning signs. The city was not immune because maintenance of a park is a proprietary, not a governmental function: "... [W]e note that, while the City has a duty to maintain its roads in a reasonably safe condition ... , plaintiffs' claims also implicate the City's 'duty to maintain its park and playground facilities in a reasonably safe condition'... . We thus reject the City's contention that it is immune from liability because plaintiffs' claims arise from its performance of a governmental function. 'It is well settled that regardless of whether or not it is a source of income the operation of a public park by a municipality is a quasi-private or corporate and not a governmental function' ... . Furthermore, a 'municipality may not ignore the foreseeable dangers [it created], continue to extend an invitation to the public to use the area and not be held accountable for resultant injuries' ... . Similarly, where, as here, it is undisputed that the City did not consider and render a determination regarding any potential danger prior to paving the driveway, the City's maintenance of the intersection in question is also a proprietary function ... . The City never disputed in its motion papers that it paved the driveway during its development of the park, thereby creating the condition of which plaintiffs now complain, but it instead argued that '[p]laintiffs have offered no evidence' that the City failed to adhere to applicable

design standards or that the driveway created or enhanced a risk to park patrons. It is well established that 'a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof' ... . Similarly, because the City relied exclusively on its argument, unsupported by any evidence, that a defective or dangerous condition did not exist for which a warning was required, it also failed to establish as a matter of law that it had no duty to warn of the foreseeable danger of collision created by this driveway access ...". ***Brady v. City of N. Tonawanda*, 2018 N.Y. Slip Op. 03253, Fourth Dept 5-4-18**

PERSONAL INJURY.

PERSON SENDING TEXT MESSAGES TO A DRIVER DOES NOT OWE A DUTY OF CARE TO A PERSON INJURED BY A DRIVER DISTRACTED BY THE TEXTS.

The Fourth Department, in a full-fledged opinion by Justice Troutman, determined a person who sends text messages to someone who is driving does not owe a duty of care to a person injured by the driver, ostensibly because the driver was distracted by the texts: "... [I]t is the duty of the driver to see what should be seen and to exercise reasonable care in the operation of his or her vehicle to avoid a collision with another vehicle ... If a person were to be held liable for communicating a text message to another person whom he or she knows or reasonably should know is operating a vehicle, such a holding could logically be expanded to encompass all manner of heretofore innocuous activities. A billboard, a sign outside a church, or a child's lemonade stand could all become a potential source of liability in a negligence action. Each of the foregoing examples is a communication directed specifically at passing motorists and intended to divert their attention from the highway. To be sure, cellular telephones and other electronic devices present unique distractions to motorists. For that reason, the legislature passed laws specifically to regulate the use of cellular telephones and other electronic devices by those operating motor vehicles ... . The legislature did not create a duty to refrain from communicating with persons known to be operating a vehicle. To the contrary, those laws place the responsibility of managing or avoiding the distractions caused by electronic devices squarely with the driver. The driver has various means available for managing or avoiding such distractions, such as a hands-free device to handle incoming calls... or a setting for temporarily disabling sounds or alerts. Or, the driver can simply pull over to the side of the highway to engage in any communications deemed too urgent to wait. The remote sender of a text message is not in a good position to know how the driver will or should handle incoming text messages." ***Vega v. Crane*, 2018 N.Y. Slip Op. 03262, Fourth Dept 5-4-18**

PERSONAL INJURY.

EVIDENCE THAT DEFENDANT'S EMPLOYEE SLIPPED ON ICE AND SNOW SEVERAL HOURS BEFORE PLAINTIFF SLIPPED AND FELL IN THE SAME PARKING LOT RAISED A QUESTION OF FACT ABOUT DEFENDANT'S CONSTRUCTIVE KNOWLEDGE OF THE DANGEROUS CONDITION.

The Fourth Department determined defendant's motion for summary judgment in this parking-lot snow-ice slip and fall case was properly denied. Defendant's submissions included evidence one of plaintiff's employee had slipped and fallen on ice in the parking lot several hours before plaintiff fell. That evidence raised a question of fact whether defendant had constructive knowledge of the condition: " 'To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it' ... . Although 'an owner's general awareness' that a dangerous condition may exist is insufficient to support a finding that the owner had constructive notice of the specific condition that caused the plaintiff to slip and fall' ... , evidence that another person had fallen in the 'same general vicinity" a few hours before the plaintiff's fall raises triable issues of fact whether the condition existed for a sufficient length of time to discover and remedy it ... . Inasmuch as defendant submitted evidence that its employee slipped in the same parking lot as plaintiff several hours before plaintiff's fall and thereafter observed the icy condition as he rendered aid to plaintiff, there are triable issues of fact "whether the icy condition was visible and apparent and existed for a sufficient period of time prior to the accident to permit defendant[] to discover it and take corrective action' ...". ***Cosgrove v. River Oaks Rests., LLC*, 2018 N.Y. Slip Op. 03286, Fourth Dept 5-4-18**

PERSONAL INJURY.

RAISED METAL PLATE IN SIDEWALK DEEMED A NONACTIONABLE TRIVIAL DEFECT IN THIS SLIP AND FALL CASE.

The Fourth Department determined the negligence claim against the state in this slip and fall case was properly dismissed after trial. The raised metal plate in the sidewalk was deemed a trivial defect, not a dangerous condition: "The evidence at trial established that the incident occurred on a clear, sunny day, that claimant saw the readily apparent steel plate, and that the height differential between the steel plate and the sidewalk was small." ***Graham v. State of New York*, 2018 N.Y. Slip Op. 03294, Fourth Dept 5-4-18**

PERSONAL INJURY, AGENCY.

RESPONDEAT SUPERIOR DOCTRINE MAY BE APPLIED BASED UPON A PRINCIPAL-AGENT RELATIONSHIP INVOLVING VOLUNTEERS, HERE PLAINTIFF WAS INJURED BY A LADDER WHEN VOLUNTEERS WERE PAINTING THE BUILDING OWNED BY THE DEFENDANT; POINTING TO GAPS IN THE OPPOSING PARTY'S PROOF WILL NOT SUPPORT SUMMARY JUDGMENT.

The Fourth Department, reversing Supreme Court, determined that the fact that the people engaged by defendant to paint the property were volunteers did not preclude the application of the doctrine of respondeat superior based upon a principal-agent relationship. Plaintiff was injured by a ladder when she left the building. Defendants' motion for summary judgment should not have been granted. The court noted that pointing gaps in the opposing party's proof will not support summary judgment: " 'Under the doctrine of respondeat superior, a principal is liable for the negligent acts committed by its agent within the scope of the agency'... , and '[a] principal-agent relationship can include a volunteer when the requisite conditions, including control and acting on another's behalf, are shown' ... . Here, defendants each failed to establish as a matter of law that the volunteers at the residence where plaintiff was injured may not be considered their servants for purposes of respondeat superior liability ... , or that the duty to ensure that the work was performed safely may not fairly be imposed upon them ... . In addition, defendants cannot meet their burden on their respective summary judgment motions and cross motion based upon plaintiff's failure to identify the volunteer(s) who caused the ladder to strike her ... . '[I]n seeking summary judgment, [a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof' ... . Defendants' failure to meet their burden requires denial of the motions and cross motion, 'regardless of the sufficiency of the opposing papers' ...". ***Rozmus v. Wesleyan Church of Hamburg*, 2018 N.Y. Slip Op. 03261, Fourth Dept 5-4-18**

PERSONAL INJURY, ANIMAL LAW.

PLAINTIFF FELL FROM A HORSE DURING A RIDING LESSON, NEITHER THE ASSUMPTION OF THE RISK DOCTRINE NOR THE SIGNED RELEASED WARRANTED SUMMARY JUDGMENT IN FAVOR OF DEFENDANT HORSE FARM, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court, over a dissent, determined that the assumption of the risk doctrine and the signed release did not warrant summary judgment in favor of defendant in this horseback-riding injury case. Plaintiff fell from a horse during a riding lesson: "... [I]t is undisputed that plaintiff was a beginner and had never before attempted to mount or ride a horse, and the deposition testimony relied upon by defendants raises questions of fact whether defendants unreasonably increased the risks associated with mounting the horse by failing to give plaintiff adequate instructions and assistance based on her size, athleticism, and obvious struggles in attempting to mount the horse, and whether there were concealed risks of mounting the horse, i.e., whether the horse was 'tacked' properly ... . For the same reasons, we reject defendants' contention, as an alternative ground for affirmance, that the written release established as a matter of law that, as per the language of the release, plaintiff expressly assumed 'the unavoidable risks inherent in all horse-related activities' ...". **Jones v. Smoke Tree Farm, 2018 N.Y. Slip Op. 03299, Fourth Dept 5-4-18**

PERSONAL INJURY, CRIMINAL LAW.

DEFENDANT WHO ALLOWED 16-YEAR-OLD NEIGHBOR TO WATCH PLAINTIFF'S FIVE-YEAR-OLD DAUGHTER WAS NOT LIABLE FOR THE MURDER OF PLAINTIFF'S DAUGHTER BY THE NEIGHBOR, THE CRIMINAL ACT SEVERED THE LIABILITY OF THE DEFENDANT, NEIGHBOR HAD WATCHED THE CHILD BEFORE WITHOUT INCIDENT, NO RED FLAGS.

The Fourth Department determined defendant great-grandmother's motion for summary judgment in this negligent supervision action was properly granted. Defendant was caring for plaintiff's five-year-old daughter, Isabella. When defendant went to bed she left Isabella with 16-year old Freeman, a neighbor who had watched Isabella more than 10 times in the past without incident. Freeman killed plaintiff's daughter while defendant was asleep: "It is well established that 'an intervening intentional or criminal act will generally sever the liability of the original tort-feasor' ... . 'The test to be applied is whether under all the circumstances the chain of events that followed [an allegedly] negligent act or omission was a normal or foreseeable consequence of the situation created by the [alleged] negligence' ... . Thus, an intervening criminal act by a third party that is 'extraordinary under the circumstances' or ' not foreseeable in the normal course of events' breaks the causal chain and exonerates the original tortfeasor of liability ... . Here, even assuming, arguendo, that defendant was negligent to some extent in supervising Isabella on the night in question, we nevertheless conclude, as a matter of law, that Freeman's intentional murder of Isabella severed the chain of causation and eliminated any liability on defendant's part (see id.). The record contains numerous undisputed facts supporting that conclusion. Freeman had previously watched Isabella on more than 10 occasions, all without incident, and they had even colored together before. Freeman and Isabella got along well for years before the murder, and defendant never observed any 'red flags' or troubling indicia about Freeman generally, or his

interactions with Isabella in particular. Defendant was unaware of any mental problems with Freeman. Indeed, there is no suggestion that Freeman had ever exhibited any questionable behavior or tendencies in the past, whether or not known to defendant." ***Tennant v. Lascelle*, 2018 N.Y. Slip Op. 03279, Fourth Dept 5-4-18**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

RECKLESS DISREGARD STANDARD APPLIED TO DRIVER OF TOWN SNOWPLOW AND THE DRIVER DID NOT ACT WITH RECKLESS DISREGARD FOR THE SAFETY OF OTHERS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined that the town's motion for summary judgment in this snowplow-car accident case should have been granted. Even though the plow was up at the time of the accident, the Vehicle and Traffic Law "reckless disregard" standard applied, and the snowplow driver's (Hanssen's) actions did not amount to "reckless disregard:" "... [D]efendants established as a matter of law that the reckless disregard standard of care, and not negligence, is applicable to this case pursuant to Vehicle and Traffic Law § 1103 (b), and plaintiffs failed to raise a triable issue of fact. Defendants submitted the deposition testimony of Hanssen, who testified that he was plowing snow and salting the roads on his assigned route at the time of the accident, and section 1103 (b) applies where, as here, a snowplow truck is 'actually engaged in work on a highway' ... . Contrary to plaintiffs' contention, although defendants also submitted the deposition testimony of plaintiffs that the plow blade was up at the time of the accident, that is not enough to raise an issue of fact inasmuch as it was uncontroverted that Hanssen was salting the road and was 'working his run' or beat' at the time of the accident' ... . Hanssen testified at his deposition that he slowed down as he approached the stop sign and was moving at a speed of five miles per hour just prior to the intersection. He looked both ways for traffic, but did not see plaintiffs' approaching vehicle. That evidence, which was not controverted by the deposition testimony of plaintiffs, established that Hanssen did not act with reckless disregard for the safety of others ...". ***Harris v. Hanssen*, 2018 N.Y. Slip Op. 03257, Fourth Dept 5-4-18**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

ALTHOUGH THE DRIVER'S MOTHER HAD PURCHASED AND INSURED THE CAR AT THE TIME OF THE ACCIDENT, THE SELLER'S REGISTRATION PLATES WERE STILL ON THE CAR, THE SELLER WAS ESTOPPED FROM DENYING OWNERSHIP.

The Fourth Department determined defendant Buffalo Auto Rental (BAR) was estopped from denying ownership of the vehicle in which plaintiff, a passenger, was injured. Although the driver's (Mayfield's) mother (Julie Robertson) had purchased the car and had insured it, it was still had BAR's registration plates on it at the time of the accident. The court noted that BAR's summary judgment motion papers included Mayfield's deposition testimony in which Mayfield claimed he was driving fast to escape another driver who was acting aggressively. The testimony raised a question of fact about the availability of the emergency defense, precluding summary judgment on the issue of Mayfield's negligence without the need to consider the opposing papers: "... [T]he court properly determined that BAR was estopped from denying ownership of the vehicle as a matter of law. Even assuming, arguendo, that it was the intention of BAR and Robertson that Robertson was to be the legalowner of the vehicle after she executed the bill of sale and took physical possession of the vehicle ... , we conclude that the issue of legal ownership is not determinative. 'Whether or not [BAR] was still the owner of the motor vehicle at the time of the accident need not be determined; [BAR], having left [its] registration plates on the motor vehicle, is estopped to deny [its] ownership' as against plaintiff ... . Contrary to BAR's contention, the fact that Robertson had obtained insurance for the vehicle does not mandate a different result inasmuch as the public policy reasons for the estoppel doctrine are not limited to issues of insurance coverage ...". ***White v. Mayfield*, 2018 N.Y. Slip Op. 03270, Fourth Dept 5-4-18**

TRUSTS AND ESTATES.

WILL THAT CANNOT BE FOUND IS PRESUMED REVOKED, HERE PETITIONER DID NOT REBUT THE PRESUMPTION OF REVOCATION, CRITERIA EXPLAINED.

The Fourth Department determined Surrogate's Court properly determined the presumption the will had been revoked had not been rebutted. Petitioner had attempted to probate a photocopy of the will which could not be found upon the death of the testator: " 'A lost or destroyed will may be admitted to probate only if . . . [i]t is established that the will has not been revoked' (SCPA 1407 [1]). ' When a will previously executed cannot be found after the death of the testator, there is a strong presumption that it was revoked by destruction by the testator' ... . That 'strong presumption of revocation by the testator . . . stands in the place of positive proof when a will previously executed cannot be found after a testator's death'... . Respondent was thus entitled to rely on the presumption to meet his burden on the motion ... . In addition, petitioner's own submissions established that decedent asked to retain the original will in her possession, and the attorney who drafted the will had the original delivered to decedent shortly after its execution ... . In opposition to the motion, petitioner failed

to present evidence sufficient to raise a question of fact whether the presumption of revocation may be overcome ... . The presumption is unaffected by evidence that decedent's attorney retained a copy of the will at his office and that decedent never advised him that she intended to revoke the will ... . Nor may the presumption be overcome with hearsay accounts of decedent's statements concerning her testamentary intentions ... . Finally, while the presumption of revocation may be overcome with circumstantial evidence ... , '[p]etitioner[] cannot succeed on mere speculation and suspicion' ... . Rather, petitioner must present 'facts and circumstances which show that the will was fraudulently destroyed during the testator's lifetime' ...". ***Matter of Scollan*, 2018 N.Y. Slip Op. 03287, Fourth Dept 5-4-18**

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