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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE, APPEALS.

APPELLATE DIVISION APPLIED THE CORRECT CRITERIA IN ITS WEIGHT OF THE EVIDENCE ANALYSIS, DESPITE CITING SEVERAL DECISIONS THAT SHOULD NO LONGER BE FOLLOWED.

The Court of Appeals, over a two-judge dissent, determined that the Appellate Division applied the correct analysis to its weight of the evidence review, despite the Appellate Division's citing of several decisions which should no longer be followed: "The Appellate Division stated the correct standard of review when it concluded that, 'viewing the evidence presented at trial in a neutral light . . . , and weighing the relative probative force of the conflicting testimony and evidence, as well as the relative strength of the conflicting inferences to be drawn therefrom, and according deference to the jury's opportunity to view the witnesses, hear their testimony and observe their demeanor, the jury was justified in finding that the People sustained their burden of disproving defendant's justification defense beyond a reasonable doubt' (157 AD3d 107, 116, 118 [1st Dept 2017]; see People v. Romero, 7 NY3d 633, 643-644 [2006]; People v. Mateo, 2 NY3d 383, 410 [2004], cert denied 542 US 946 [2004]; People v. Bleakley, 69 NY2d 490, 495 [1987]). To the extent the Appellate Division cited to certain prior decisions (see 157 AD3d at 109, citing People v. Castillo, 223 AD2d 481, 481 [1st Dept 1996]; People v. Bartley, 219 AD2d 566, 567 [1st Dept 1995], lv denied 87 NY2d 898 [1st Dept 1995]; People v. Corporan, 169 AD2d 643, 643 [1st Dept 1991], lv denied 77 NY2d 959 [1st Dept 1991]) containing language that is inconsistent with our more recent guidance regarding weight of the evidence (see People v. Delamota, 18 NY3d 107, 116-117 [2011]), those decisions should not be followed. .. . [T]he Appellate Division applied the correct standard from Romero and Bleakley, which involves a 'two-step approach' wherein the court must (1) 'determine whether, based on all the credible evidence, an acquittal would not have been unreasonable[;]' and (2) 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' ...". ***People v. Sanchez*, 2018 N.Y. Slip Op. 06052, CtApp 9-13-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

WHETHER THE POLICE RECEIVED VOLUNTARY CONSENT TO ENTER AN APARTMENT IS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS WILL NOT REVIEW, TWO CONCURRING OPINIONS DEALT WITH AN ISSUE WHICH WAS NOT RAISED, WHETHER THE POLICE WENT TO THE APARTMENT INTENDING TO MAKE A WARRANTLESS ARREST.

The Court of Appeals, over two concurring opinions, determined that it could not review whether the police received voluntary consent to enter an apartment because it is a mixed question of law and fact and there is support in the record for the motion court's ruling. The concurring opinions dealt with an issue which was not raised below or on appeal---whether the police went to the apartment with the intent to make a warrantless arrest: "The determination as to whether police received voluntary consent to enter the apartment is a mixed question of law and fact ... . 'Although the voluntariness of the consent is open to dispute, our power to review affirmed findings of fact is limited. Since the finding of the trial court is supported by the record, we are precluded from upsetting it'... . As our concurring colleagues acknowledge, defendant did not contend below and does not contend on this appeal that his arrest was unlawful because the police went to his home with the intent of making a warrantless arrest." ***People v. Xochimitl*, 2018 N.Y. Slip Op. 06053, CtApp 9-13-18**

FIRST DEPARTMENT

CRIMINAL LAW.

SENTENCING JUDGE MAY HAVE MISTAKENLY BELIEVED THE MINIMUM PERIOD OF POST RELEASE SUPERVISION (PRS) WAS FIVE YEARS WHEN IT ACTUALLY WAS TWO AND A HALF YEARS, MATTER SENT BACK FOR RESENTENCING.

The First Department, over a dissent, sent the case back for resentencing because it appeared the sentencing judge was under the misimpression the minimum period of post release supervision (PRS) was five years, when the minimum was two and a half years: "At the time of defendant's plea, the court, counsel, and the prosecution believed defendant was a predicate felony offender. The plea offer contained the mandatory five-year term of PRS for a second felony offender con-

victed of a first violent felony offense (see Penal Law §§ 70.00[6], 70.45[2][f]). At sentencing, however, when defense counsel stated that defendant was not, in fact, a predicate felon, the sentencing court asked whether defendant's status as a first felony offender 'change[d] our circumstances.' Defense counsel responded, 'I think the minimum is still three and a half.' The court later asked, 'Is there any reason that I should not impose the sentence of three-and- one-half years plus five years of post-release supervision?' Defense counsel replied, 'Even if it was not quote unquote agreed upon, that would have been the best Your Honor could have given.' As indicated, the defense counsel's statement was correct as to the prison term, but not as to the period of PRS." ***People v. Holmes*, 2018 N.Y. Slip Op. 06055, First Dept 9-13-18**

INSURANCE LAW, CONTRACT LAW, SECURITIES, FRAUD.

INSURER OF RESIDENTIAL MORTGAGE-BACKED SECURITIES NOT ENTITLED TO RECOVER ALL CLAIMS PAID OUT AS A RESULT OF 50% OF THE UNDERLYING MORTGAGES GOING INTO DEFAULT UNDER A FRAUD THEORY, ONLY A BREACH OF CONTRACT THEORY WAS AVAILABLE.

The First Department, modifying Supreme Court, in a full-fledged opinion by Justice Manzanet-Daniels, determined plaintiff insurer's (MBAI's) motion for summary judgment should have been denied in its entirety in this action stemming from the insuring of residential mortgage-backed securities. MBAI sought to recover all the payments made after more than 50% of the mortgages underlying the securities went into default: "MBIA seeks 'Claims Payment Damages' and 'Repurchase Damages.' The 'Claims Payment Damages' consist of 'all claims payments that MBIA has made . . . [or] will likely incur,' and are designed to put MBIA in the same position it would have been in had the policy never been issued. As such, they constitute rescissory damages and are not recoverable by plaintiff monoline insurer seeking redress under an irrevocable policy. We have made clear that an insurer is 'not entitled to damages amounting to all claims payments it made or will make under the policies,' inasmuch as such damages are 'rescissory damages to which the insurer is not entitled' ... . 'Repurchase Damages' represent the difference between the claims payments MBIA made or is projected to incur, and those MBIA would have made had [defendant] Credit Suisse repurchased nonconforming lines, i.e., those that breached the representations and warranties. While such repurchase damages are in theory recoverable, the fraud claim was nonetheless correctly dismissed. It has long been the rule that parties may not assert fraud claims seeking damages that are duplicative of those recoverable on a cause of action for breach of contract (see e.g. Manas v. VMS Assoc., LLC, 53 AD3d 451, 454 [1st Dept 2008]). As we noted in Manas, fraud damages are meant to redress a different harm than damages on a cause of action for breach of contract. Contract damages are meant to restore the nonbreaching party to as good a position as it would have been in had the contract been performed; fraud damages are meant to indemnify losses suffered as a result of the fraudulent inducement ... . Where all of the damages are remedied through the contract claim, the fraud claim is duplicative and must be dismissed ...". ***MBIA Ins. Corp. v. Credit Suisse Sec. (USA) LLC*, 2018 N.Y. Slip Op. 06060, First Dept 9-13-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

REMOVING RENTED AIR CONDITIONING EQUIPMENT FROM A HOSPITAL CONSTITUTED A COVERED "ALTERATION" WITHIN THE MEANING OF LABOR LAW 240 (1).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Gesmer, determined that plaintiff's decedent was engaged in an "alteration" within the meaning of Labor Law 240 (1) when he was crushed by an air conditioning unit (a chiller) that was being hoisted. A hospital had rented the chiller as a supplement to the air conditioning system during the warmer months. The chiller was being readied for return to the lessor when the accident happened. The court found that air conditioning is essential to the functioning of the hospital, noting that operating rooms must be kept at 62 degrees: "Here, the work being performed was a significant change to the hospital's air conditioning system, which the hospital must operate in warm weather in order to meet its regulatory requirements. Like the application of 'bomb blast' film to the lobby windows in Belding, the deinstallation and removal of the rented chiller 'altered the configuration or composition of the structure by changing the way the [hospital buildings] react to . . . the elements' (Belding, 14 NY3d at 753). Moreover, like the dismantling and removal of the air handlers in [Panek v. County of Albany, 99 NY2d 452 (2003)], disconnecting and removing the rented chiller and generator was a significant undertaking, was not simple, routine, or cosmetic, and fundamentally altered the function of a significant building system, the hospital's air conditioning system. As in Panek, the project took more than a day to complete. The qualifying work in both Belding and Panek appears to have been performed by one person. In contrast, here, the work was complex enough that it required the labor of employees of the hospital, the contractor and the multiple subcontractors. It required shutting off the valves on the hospital's chilled water supply and return in the mechanical room, unbolting and unscrewing approximately 125 feet of heavy, nonbending hose from the chilled water supply and riser; draining the water from the hoses and standby chiller; dismantling the scaffolding that served as a bridge carrying the hoses from the mechanical room over the sidewalk to the chiller; dismantling the fencing around the chiller and generator; closing the street outside the hospital; using lifting equipment to lower the hoses from the roof; and using a boom, chains, shackles, slings, and hooks to raise the trailer and chiller so that the decedent and his coworker could remove the wood blocks that leveled the trailer and chiller, in order to allow for the trailer to be removed. Under these circumstances, we find that the work decedent was engaged in constituted an alteration under Labor Law § 240." ***Mananghaya v. Bronx-Lebanon Hosp. Ctr.*, 2018 N.Y. Slip Op. 06061. First Dept 9-13-18**

PERSONAL INJURY.

SIDEWALK DEFECT WAS NOT TRIVIAL AS A MATTER OF LAW, TRIVIALITY IS NOT A QUESTION OF DIMENSIONS ALONE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED.
The First Department determined that Supreme Court properly denied the defendants' motion for summary judgment in this sidewalk trip and fall case. There was a question of fact, raised by the plaintiff's expert, whether the defect was trivial as a matter of law: "... [P]laintiff submitted an affidavit from an expert engineer who ... found that the sidewalk flags had a vertical height differential of over one half inch. ... [P]laintiff's expert opined that this differential and the dimension of the opening at the expansion joint created a 'trap-like hazardous condition and [was] a known cause of trip and fall accidents.' The expert further opined that the condition of the sidewalk had been in a noticeable state of disrepair for at least one year prior to plaintiff's fall, and therefore, defendants should have been aware of the unsafe condition. The motion court properly rejected defendants' argument that the sidewalk defect was trivial as a matter of law and denied defendants' motion for summary judgment, finding issues of fact. The Court of Appeals has held 'that there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable' . . . and therefore [] granting summary judgment to a defendant based exclusively on the dimensions[s] of the . . . defect is unacceptable'... . Thus, a finding of triviality, as a matter of law, must 'be based on all the specific facts and circumstances of the case, not size alone' ... . For this reason, the Court of Appeals has noted that 'whether a dangerous or defective condition exists on the property of another so as to create liability . . . is generally a question of fact for the jury' ... . Here, the crux of defendants' triviality argument is that the defect was physically insignificant. However, as already noted, case law prohibits us from basing a finding of triviality on size alone. Indeed, before the burden can shift to the plaintiff, defendants 'must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses' ...". ***Suarez v. Emerald 115 Mosholu LLC*, 2018 N.Y. Slip Op. 06059, First Dept 9-13-18**

SECOND DEPARTMENT

ANIMAL LAW.

NEGLIGENCE, AS OPPOSED TO STRICT LIABILITY, THEORY DID NOT APPLY TO INJURY FROM A HORSE WHICH WAS STARTLED WHEN THREE HORSES ESCAPED FROM A PADDOCK AND GALLOPED TOWARD THE BARN WHERE PLAINTIFF WAS GROOMING THE HORSE WHICH INJURED HER.
The Second Department determined strict liability, not negligence, criteria applied to injury from a horse. Because the defendant demonstrated the escaped horses were domesticated animals and plaintiff did not allege the horses had vicious propensities, the complaint was properly dismissed: "The plaintiff alleges that she was injured while grooming a stallion in the barn at Hidden Brook Farm (hereinafter the farm), when three horses, who had escaped from their paddocks, galloped unaccompanied toward the barn. The stallion was startled and suddenly side-stepped, pinning the plaintiff against the wall. * * * Contrary to the plaintiff's contention, this case does not fall within the limited exception set forth in Hastings v. Suave (21 NY3d 122, 125-126), regarding a farm animal that strays from the place where it is kept onto a public road or other property ... . In carving out this exception, the Court of Appeals recognized 'the unique peril that arises from allowing farm animals to wander off a farm unsupervised and unconfined' and the 'common expectation among people in general that a 1,500-pound cow, a 400-pound pig or an unruly goat will not be permitted to wander freely into traffic or onto a neighbor's yard, mangling people and property alike' ... . Here, the plaintiff was in the barn grooming a horse, and the presence of horses was not unexpected." ***Brinkman v. Marshall Field VI*, 2018 N.Y. Slip Op. 05996, Second Dept 9-12-18**

CIVIL PROCEDURE.

MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 AND 5015 PROPERLY DENIED, CRITERIA EXPLAINED.
The Second Department determined the motion to vacate a default judgment pursuant to CPLR 317 and 5015(a) was properly denied because the defendant did not demonstrate it was not personally served with the summons and complaint. The court explained the criteria under each statute: "CPLR 317 provides that a person served with a summons, other than by personal delivery to him or her, who does not appear, may be allowed to defend the action within one year after he or she obtains knowledge of entry of the judgment upon a finding of the court that he or she did not personally receive notice of the summons in time to defend and has a potentially meritorious defense ... . However, the 'mere denial of receipt of the summons and complaint is not sufficient to establish lack of actual notice of the action in time to defend for the purpose of CPLR 317' ... . Here, the defendant failed to establish that it did not personally receive notice of the summons in time to defend the action. The affidavit of the defendant's 'representative,' who appears to be its attorney, stated that the complaint was not delivered 'personally' to the defendant, but rather, 'to an inaccurate address through the Secretary of State,' which address had not been valid 'for several years.' This representative's affidavit does not appear to be based on personal knowledge. Furthermore, there is no allegation contained in this affidavit that the defendant, in fact, never received the

summons and complaint, nor is there any detail as to where the defendant moved to and when, nor whether the defendant made any efforts to update its address on file with the Secretary of State. Under these circumstances, the defendant did not demonstrate lack of actual notice of the action ... . In contrast to a motion pursuant to CPLR 317, on a motion pursuant to CPLR 5015(a)(1), the movant is required to establish a reasonable excuse for his or her default. In general, a defendant's failure to keep a current address on file with the Secretary of State does not constitute a reasonable excuse ... . However, there is no per se rule that a corporation served through the Secretary of State, and which failed to update its address on file there, cannot demonstrate an 'excusable default.' Rather, a court should consider, among other factors, the length of time for which the address had not been kept current ... . Here, no evidence was presented as to how long the address was not updated. Accordingly, the defendant failed to establish a reasonable excuse for its default." ***Dwyer Agency of Mahopac, LLC v. Dring Holding Corp.*, 2018 N.Y. Slip Op. 06001, Second Dept 9-12-18**

CIVIL PROCEDURE.

MOTION TO COMPEL PLAINTIFF TO ACCEPT A LATE ANSWER, IN RESPONSE TO PLAINTIFF'S MOTION FOR A DEFAULT JUDGMENT, PROPERLY GRANTED.

The Second Department determined defendant's cross-motion to compel plaintiff to accept a late answer, in response to plaintiff's motion for a default judgment, was properly granted: "The plaintiff allegedly slipped and fell on snow and ice on an exterior walkway located on property owned and operated by the defendants. She subsequently commenced this action and served the defendants with process via the Secretary of State on October 11, 2016, pursuant to Limited Liability Company Law § 303. On November 25, 2016, the plaintiff moved pursuant to CPLR 3215 for leave to enter a default judgment. On December 22, 2016, 42 days after the defendants' time to answer had expired, the defendants cross-moved pursuant to CPLR 2004 and 3012(d) to compel the plaintiff to accept their late answer. Annexed to the defendants' cross motion was their proposed answer. The Supreme Court denied the plaintiff's motion and granted the defendants' cross motion. The plaintiff appeals. In light of the lack of prejudice to the plaintiff resulting from the defendants' short delay in answering the complaint, the lack of willfulness on the part of the defendants, the existence of a potentially meritorious defense, and the public policy favoring the resolution of cases on the merits, the Supreme Court providently exercised its discretion in denying the plaintiff's motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendants and in granting the defendants' cross motion to compel the plaintiff to accept their late answer ...". ***Marcelli v. Lorraine Arms Apts., LLC*, 2018 N.Y. Slip Op. 06006, Second Dept 9-12-18**

CIVIL PROCEDURE, FORECLOSURE.

FAILURE TO SUBMIT AN ORDER FOR SIGNATURE WITHIN 60 DAYS CONSTITUTED ABANDONMENT.

The Second Department determined the failure to submit an order for signature within 60 days constituted abandonment of the action: "The Supreme Court declined to sign the plaintiff's proposed order granting it summary judgment and, in the order appealed from, the court vacated the decision entered September 16, 2009, in effect, granted that branch of the motion ... which was pursuant to CPLR 3215 to dismiss the complaint insofar ... as abandoned, and, thereupon, directed dismissal of the complaint in its entirety pursuant to CPLR 1003. 'Proposed orders . . . , with proof of service on all parties where the order is directed to be settled or submitted on notice, must be submitted for signature, unless otherwise directed by the court, within 60 days after the signing and filing of the decision directing that the order be settled or submitted' (22 NYCRR 202.48[a]). 'Failure to submit the order . . . timely shall be deemed an abandonment of the motion or action, unless for good cause shown' (22 NYCRR 202.48[b]). These provisions are not applicable where the decision does not explicitly direct that the proposed judgment or order be settled or submitted for signature (see Funk v. Barry, 89 NY2d 364). However, the direction to 'settle order' 'ordinarily entails more complicated relief,' and therefore 'contemplates notice to the opponent so that both parties may either agree on a draft or prepare counter proposals to be settled before the court' (Funk v. Barry, 89 NY2d at 367). Here, the decision entered September 16, 2009, directed the plaintiff to 'settle order.' " ***Lasalle Bank N.A. v. Benjamin*, 2018 N.Y. Slip Op. 06005, Second Dept 9-12-18**

CIVIL PROCEDURE, FORECLOSURE, ATTORNEYS.

LAW OFFICE FAILURE WAS AN INADEQUATE EXCUSE FOR PLAINTIFF'S FAILURE TO APPEAR AT A SCHEDULED COURT CONFERENCE IN A FORECLOSURE ACTION.

The Second Department determined plaintiff's motion to vacate the dismissal of a foreclosure action was properly denied. Plaintiff failed to appear at a scheduled court conference and the law-office-failure excuse was deemed inadequate: "In order to vacate a default in appearing at a scheduled court conference, a plaintiff must demonstrate both a reasonable excuse and a potentially meritorious cause of action (see CPLR 5015[a][1]...). The determination of whether an excuse is reasonable lies within the sound discretion of the Supreme Court ... . The court has discretion to accept law office failure as a reasonable excuse (see CPLR 2005) where the claim is supported by a detailed and credible explanation of the default... . Here, the plaintiff's bare allegation of law office failure was insufficient to demonstrate a reasonable excuse for its default ... .

Moreover, the plaintiff failed to provide a reasonable excuse for its lengthy delay in moving to vacate the order of dismissal ...". ***Option One Mtge. Corp. v. Rose*, 2018 N.Y. Slip Op. 06023, Second Dept 9-12-18**

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

MOTION TO VACATE A DEFAULT JUDGMENT PURSUANT TO CPLR 317 PROPERLY GRANTED, DEFENDANT DEMONSTRATED IT WAS NOT PERSONALLY SERVED AND THE FAILURE TO PROVIDE THE CORRECT ADDRESS TO THE SECRETARY OF STATE WAS NOT A DELIBERATE ATTEMPT TO EVADE NOTICE.

The Second Department determined that defendant's motion to vacate a default judgment pursuant to CPLR 317 was properly granted: "CPLR 317 provides that a defendant who is not served by personal delivery in an action may vacate its default as long as it demonstrates that it did not personally receive notice of the lawsuit in time to defend against the action and shows that it possesses a potentially meritorious defense ... . The determination of a motion pursuant to CPLR 317 is addressed to the sound discretion of the trial court, 'the exercise of which will generally not be disturbed if there is support in the record therefor'... . Contrary to the plaintiff's contention, the Supreme Court did not improvidently exercise its discretion in granting that branch of 510's motion which was pursuant to CPLR 317 to vacate the judgment of foreclosure and sale on the condition that it pay all amounts owed within 30 days of the date of the order. Service of the summons and complaint in the foreclosure action was made upon 510 by delivering the pleadings to the Secretary of State (see Limited Liability Company Law § 303), which did not constitute personal delivery ... , and 510's submissions in support of the motion established that it did not receive actual notice of the foreclosure action in time to defend... . Moreover, under the circumstances of this case, 510 succeeded in setting forth a potentially meritorious defense to the foreclosure action. Finally, the evidence does not suggest that 510's failure to update its service address with the Secretary of State while its principal offices were undergoing renovations constituted a deliberate attempt to evade notice; hence, that failure did not preclude the granting of relief to it under CPLR 317 ...". ***Acqua Capital, LLC v. 510 W. Boston Post Rd, LLC*, 2018 N.Y. Slip Op. 05991, Second Dept 9-12-18**

CRIMINAL LAW.

DENIAL OF A LATE PEREMPTORY CHALLENGE TO A JUROR WAS AN ABUSE OF DISCRETION, NEW TRIAL ORDERED.

The Second Department determined Supreme Court abused its discretion in denying a late peremptory challenge to a juror and ordered a new trial: "... [C]ounsel for codefendant Rodger Freeman stated, 'There was one we missed, number eight.' The court responded, 'We have eight.' In response, counsel for codefendant Rodger Freeman stated, 'We don't want eight.' The court replied, 'You already—you told me what the perempts are and who the selected jurors are,' and denied the request to challenge prospective juror eight. * * * Under CPL 270.15, 'the decision to entertain a belated peremptory challenge is left to the discretion of the trial court, in recognition that the voir dire process can often be time-consuming and requires practical limitations' ... . Here, the delay in challenging prospective juror eight was de minimis. There was no discernable interference or undue delay caused by the defense's momentary oversight and the voir dire of the second subgroup of prospective jurors was still to be conducted. Under these circumstances, the Supreme Court improperly denied the request to challenge prospective juror eight ... . Since a trial court's improper denial of a peremptory challenge mandates reversal, we reverse the judgment and order a new trial ...". ***People v. Viera*, 2018 N.Y. Slip Op. 06043, Second Dept 9-12-18**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE DNA EVIDENCE PRESENTED BY A CRIMINALIST WAS IN PART TESTIMONIAL, THE DEFENDANT'S RIGHT TO CONFRONTATION WAS NOT VIOLATED AND THE EVIDENCE WAS PROPERLY ADMITTED.

The Second Department determined that, although the DNA evidence presented by a criminalist was in part testimonial, it was properly admitted: "At trial, the Supreme Court admitted DNA profiles and reports, as well as the testimony of an expert in DNA analysis, pertaining to the five victims and the defendant. The expert, Craig O'Connor, testified that he had a Ph.D. in genetics and laboratory sciences, and he was a criminalist level III at the Office of the Chief Medical Examiner. O'Connor testified that he was not the original criminalist on all of the individual cases. The other two analysts who worked on the cases 'resigned in previous years to pursue other endeavors.' With regard to the case files that he took over from the analysts who resigned, O'Connor testified that he became the custodian of the case files and, in doing so, he 'was required to review them all and look at all the paperwork and the reports and everything.' Moreover, O'Connor testified that he would 'take all of the results and do the analysis and interpretations,' and he 'review[ed] all the facts and all the data contained in all of the files.' When the prosecutor asked O'Connor if he had 'review[ed] th[e] data and draw[n] [his] own independent conclusions,' O'Connor responded, 'Yes, I reviewed the results that were obtained and also the reports, yes.' * * * Here, the DNA evidence is, at least in part, testimonial ... . However, O'Connor's testimony regarding his review and analysis of all of the case files indicated that he independently analyzed the raw data, as opposed to functioning as 'a conduit for the conclusions of others' ... . Moreover, unlike in other cases, the record here demonstrates that, to the extent that O'Connor was

not the original criminalist assigned to any of the individual cases, the original criminalists had resigned and, thus, were unavailable ... . Accordingly, the Supreme Court properly admitted the DNA profiles and reports and O'Connor's testimony." ***People v. Pascall*, 2018 N.Y. Slip Op. 06037, Second Dept 9-12-18**

CRIMINAL LAW, EVIDENCE.

MOTION TO VACATE DEFENDANT'S CONVICTION SHOULD NOT HAVE BEEN GRANTED, EVIDENCE ALLEGEDLY WITHHELD FROM THE DEFENSE WAS NOT *BRADY* MATERIAL.

The Second Department reversed the vacation of defendant's conviction by the motion court, finding that the evidence which defendant alleged had not been turned over to the defense was not *Brady* material: "The defendant was charged with murder in the second degree, among other crimes, in connection with the shooting death of Tracey Thomas on October 22, 1993. Thomas was shot and killed as he sat in his car outside a game room operated by the defendant, who was known as 'Pike.' The evidence at trial, which was conducted in 1998, included the testimony of two eyewitnesses who identified the defendant as the shooter. One eyewitness to the shooting, Marilyn Connor, testified that she heard a gunshot and saw a spark coming from the defendant, who was standing in front of Thomas. Connor stated that she had seen the defendant '[o]nce or twice' before. The other eyewitness, Shawn Newton, testified that the defendant exited the game room, approached Thomas's car, and shot Thomas in the chest. Newton stated that he had known the defendant 'all [his] life.' * * * The nondisclosure of the DOCCS record reflecting Newton's apparent suicide attempt did not constitute a Brady violation, inasmuch as the information contained in that record was not favorable to the defense. As set forth in the DOCCS record, Newton, who was observed in the process of tying a bed sheet around a radiator pipe, reported that he was 'stressed and [did] not want to go to court in fear of [the] safety of himself and family,' and that he 'fears [the defendant].' The DOCCS record further indicated that Newton was '[a]ssured that this [would] be noted and that there should be no contact between him and enemy as well as enemy's family.' Thus, the DOCCS record attributed the apparent suicide attempt to Newton's fear of the defendant and was therefore not favorable to the defense. ... Furthermore, that the prosecutor had obtained a material witness order to secure Connor's testimony did not constitute Brady material because that information was not exculpatory ... . To the contrary, the record indicates that Connor's absence was due to her fear of testifying against the defendant. ... We next turn to the nondisclosure of the Damiani orders, which are orders of the Supreme Court, Kings County, pursuant to which custody of an inmate, with the inmate's consent, is delivered to the police department to be interviewed by the District Attorney's Office … [C]ontrary to the Supreme Court's determination, the orders did not satisfy the materiality standard." ***People v. Spruill*, 2018 N.Y. Slip Op. 06041, Second Dept 9-12-18**

CRIMINAL LAW, JUDGES.

JUDGE CONDUCTED EXCESSIVE QUESTIONING OF WITNESSES, NEW TRIAL WITH A DIFFERENT JUDGE ORDERED.

The Second Department ordered a new trial because the judge conducted excessive questioning of trial witnesses: "... [T]here must be a new trial, before a different justice, because the Supreme Court conducted excessive and prejudicial questioning of trial witnesses. Although defense counsel did not object to most instances of judicial interference, we reach this contention in the exercise of our interest of justice jurisdiction (see CPL 470.15[6][a]...). 'While neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process,' the court's discretion in this area is not unfettered' ... . The principle restraining the court's discretion is that a trial judge's 'function is to protect the record, not to make it' ... . Indeed, when the trial judge interjects often and indulges in an extended questioning of witnesses, even where those questions would be proper if they came from trial counsel, the trial judge's participation presents significant risks of prejudicial unfairness ... . Accordingly, while a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on 'the function or appearance of an advocate' ... . Here, the Supreme Court interjected itself into the questioning of multiple witnesses, elicited step-by-step details about how the defendant was identified by witnesses as a suspect, and generally created the impression that it was an advocate for the People. Under the circumstances, the court's improper interference deprived the defendant of a fair trial, and a new trial before a different justice is warranted ...". ***People v. Sookdeo*, 2018 N.Y. Slip Op. 06040, Second Dept 9-12-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT'S LEVEL THREE SEX OFFENDER ADJUDICATION SHOULD NOT HAVE BEEN VACATED, HIS SENTENCE ON A SEX OFFENSE WAS INTERRUPTED WHEN THE PAROLE BOARD DECLARED HIM DELINQUENT, WHEN DEFENDANT RETURNED TO STATE CUSTODY AFTER A SUBSEQUENT MURDER CONVICTION, HIS SEX OFFENSE SENTENCE RESUMED MAKING HIM SUBJECT TO SORA.

The Second Department determined the defendant's level three sex offender adjudication should not have been vacated on the ground that defendant had completed his sex offense sentence in 1980, well before SORA went into effect in 1996. The Second Department held that defendant's sentence had been interrupted in 1979 when the Parole Board declared him delinquent. Defendant was subsequently prosecuted for murder and when defendant returned to state custody after

his murder conviction in 1982, his sex offense sentence resumed: "Contrary to the defendant's contention, his rape and attempted robbery sentences were 'automatically interrupted when the Parole Board declared him delinquent' on June 4, 1979 ... . The defendant was not entitled to credit against those interrupted sentences for his time spent in local custody while his murder case was pending, as none of the provisions providing for such credit in Penal Law former § 70.40(3)(c) apply in this case (see Penal Law former § 70.40[3][c]...). The interruption of the defendant's rape and attempted robbery sentences that began on June 4, 1979, continued until the defendant returned 'to an institution under the jurisdiction of the state department of correction,' which in this case occurred when the defendant was returned to the custody of DOCCS on January 19, 1982 (Penal Law former § 70.40[3][a]...). Upon his return to the custody of DOCCS in 1982, the defendant both commenced serving his murder sentence and resumed serving his interrupted rape and attempted robbery sentences (see Penal Law § 70.30[1]; Penal Law former § 70.40[3][a]...). For the purposes of SORA, the defendant was subject to all of these sentences during his incarceration after January 19, 1982 .... Thus, the defendant was serving his rape, attempted robbery, and murder sentences on SORA's effective date in 1996, and he is subject to SORA ...". ***People v. Johnson*, 2018 N.Y. Slip Op. 06045, Second Dept 9-12-18**

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, NEGLIGENCE.

STUDENT WALKING HOME FROM SCHOOL STRUCK BY A CAR, SUIT AGAINST SCHOOL BOARD AND MUNICIPALITY PROPERLY DISMISSED, NO SPECIAL RELATIONSHIP WITH MUNICIPALITY, NO DUTY TO SUPERVISE AFTER DISMISSAL FROM SCHOOL.

The Second Department determined plaintiff-student's action against the school board and municipality stemming from the student's being struck by a car crossing a street after school was properly dismissed. No crossing guard was provided for the street where the student crossed, but a crossing guard was routinely provided for a street a block away and that guard was out sick on the day of the accident. No special relationship with the municipality was demonstrated. Because the student had been dismissed from the school, the negligent supervision cause of action was not viable: "A municipal defendant is immune from negligence claims arising from the performance of its governmental functions unless the injured person can establish a special relationship with the municipal defendant ... . The elements of a special relationship based on a voluntary assumption of a duty are '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the injured party's justifiable reliance on the municipality's affirmative undertaking' ... . The municipal defendants' duty was limited to providing a crossing guard at the intersection of 101st Street and Seaview Avenue, and did not extend to the intersection of 100th Street and Seaview Avenue, where no crossing guard was assigned ... . Further, the municipal defendants established, prima facie, that the failure of having a crossing guard at the intersection of 101st Street and Seaview Avenue was not a proximate cause of the injuries allegedly sustained by the infant plaintiff in this case ... . The municipal defendants also established their prima facie entitlement to judgment as a matter of law dismissing the negligent supervision cause of action. Their submissions demonstrated that the accident occurred after the infant plaintiff was dismissed from school ... , and that they did not release the infant plaintiff into a foreseeably hazardous setting that they had a hand in creating ...". ***Ade v. City of New York*, 2018 N.Y. Slip Op. 05993, Second Dept 8-12-18**

FAMILY LAW.

MOTHER'S MENTAL ILLNESS SUPPORTED NEGLECT FINDING.

The Second Department determined that mother's mental illness supported the neglect finding and an order requiring mother to cooperate with medication management by her mental health service providers: "Mental illness means 'an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in or returned to the custody of the parent, the child would be in danger of becoming a neglected child as defined in the family court act' (Social Services Law § 384-b[6][a]). 'While parental neglect may be based on mental illness, proof of a parent's mental illness alone will not support a finding of neglect'... . Rather, the petitioner must adduce evidence sufficient to 'establish a causal connection between the parent's condition, and actual or potential harm to the [child]' ... . .. [T]the mother's contention that the Family Court acted in excess of its jurisdiction or violated her constitutional right to direct her own medical treatment when it directed that she comply with medication management recommended by her mental health service providers is without merit, since the court did not order the forcible administration of medication ...". ***Matter of Nialani T. (Elizabeth B.)*, 2018 N.Y. Slip Op. 06019, Second Dept 9-12-18**

INSURANCE LAW, CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE SEARCHED THE RECORD TO AWARD SUMMARY JUDGMENT ON A GROUND NOT RAISED BY THE PARTIES, HOWEVER, FAILURE TO TIMELY NOTIFY UMBRELLA INSURER OF THE CLAIM WARRANTED SUMMARY JUDGMENT.

The Second Department determined Supreme Court should not have searched the record to award summary judgment on a ground not raised by the parties in this car accident case. However, the Second Department determined summary judgment was properly granted to the umbrella insurer (RLI) on the ground that the owner of the leased car (CFC) did not timely notify RLI of the claim: "The Supreme Court erred in essentially searching the record and granting relief based upon arguments that were not raised ... . 'A motion for summary judgment on one claim or defense does not provide a basis for searching the record and granting summary judgment on an unrelated claim or defense' ... . RLI established, prima facie, its entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it based upon CFC's failure to provide timely notice of the occurrence and suit. 'The insured's failure to satisfy the notice requirement constitutes a failure to comply with a condition precedent which, as a matter of law, vitiates the contract' ... . This rule applies to excess carriers as well as primary carriers ... . '[A] justifiable lack of knowledge of insurance coverage may excuse a delay in reporting an occurrence'... . To establish a valid excuse due to the insured's alleged ignorance of insurance coverage, the insured has the burden of proving 'a justifiable lack of knowledge of insurance coverage' and 'reasonably diligent efforts to ascertain whether coverage existed' upon receiving information 'which would have prompted any person of ordinary prudence to consult either an attorney or an insurance broker' ... . Here, in support of its motion, RLI submitted evidence that counsel for ... CFC in the underlying action performed an investigation and learned the detailed information regarding the umbrella policy in March 2005. Such knowledge is imputed to CFC ... . As such, RLI established that RLI was given no notice of the accident or lawsuit until August 2006, and CFC did not provide notice until ... June 2010." ***Daimler Chrysler Ins. Co. v. Keller*, 2018 N.Y. Slip Op. 05999, Second Dept 9-12-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INJURY FROM STEPPING INTO AN OPENING THAT IS NOT BIG ENOUGH FOR A PERSON TO FALL THROUGH IS NOT COVERED BY LABOR LAW §§ 240(1) OR 241(6).

The Second Department determined the defendants were entitled to summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action because injury caused by stepping in an opening that is not big enough for a person to fall through is not covered: "The defendants established, prima facie, their entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action. The defendants submitted evidence that, although the plaintiff's foot slipped through openings in the rebar grid, the openings were too small for a person's body to fall through. The plaintiff testified at his deposition that his foot could fit through the openings, but not his entire body. The defendants, therefore, established that the openings of the grid did 'not present an elevation-related hazard to which the protective devices enumerated [in Labor Law § 240(1)] are designed to apply' ... . In opposition, the plaintiff failed to raise a triable issue of fact ... . The defendants also established, prima facie, their entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) cause of action, which was premised upon alleged violations of 12 NYCRR 23-1.7(b)(1) and (d), (e), and (f). The provision pertaining to 'hazardous openings' (12 NYCRR 23-1.7[b][1]) does not apply to openings that are too small for a worker to completely fall through ...". ***Johnson v. Lend Lease Constr. LMB, Inc.*, 2018 N.Y. Slip Op. 06004, Second Dept 9-12-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

IN THIS LABOR LAW §§ 240(1), 241(6) AND 200 ACTION, THERE WAS A QUESTION OF FACT WHETHER DEFENDANT WAS AN OWNER OF THE PROPERTY WHERE PLAINTIFF WAS INJURED BY A FALLING OBJECT, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined there were questions of fact whether defendant 101 Norfolk was an owner within the meaning of Labor Law §§ 240(1), 241(6) and 200. Plaintiff was injured by a falling object: "Contrary to the defendant 101 Norfolk's contention, it cannot be said, as a matter of law, that the defendant 101 Norfolk was not an 'owner' for purposes of liability under the Labor Law. Rather, the evidence demonstrated that the defendant 101 Norfolk owned the property on which the plaintiff allegedly was injured and there was evidence that the plaintiff was injured in the course of a construction project encompassing both 103-105 Norfolk Street and the defendant 101 Norfolk's property, 101 Norfolk Street. Under the circumstances of this case, triable issues of fact exist as to whether the defendant 101 Norfolk contracted to have the injury-causing work performed, or had a sufficient nexus to that work, so as to support liability under Labor Law §§ 240 and 241 ... . There are also triable issues of fact as to whether the defendant 101 Norfolk had a duty to provide the plaintiff with a safe place to work ...". ***Powell v. Norfolk Hudson, LLC*, 2018 N.Y. Slip Op. 06047, Second Dept 9-12-18**

LANDLORD-TENANT, CIVIL PROCEDURE.

YELLOWSTONE INJUNCTION NOT WARRANTED IN THIS LEASE-TERMINATION CASE, PLAINTIFF NIGHTCLUB DID NOT DEMONSTRATE ITS WILLINGNESS TO CURE AN ALLEGED NOISE-LEVEL VIOLATION OF THE LEASE.

The Second Department, reversing Supreme Court, determined that a *Yellowstone* injunction should not have issued to plaintiff nightclub. The defendant landlord started proceedings to terminate the lease based upon an alleged violation of the noise-level provision in the lease: " ' A Yellowstone injunction maintains the status quo so that a commercial tenant, when confronted by a threat of termination of its lease, may protect its investment in the leasehold by obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture' of the lease'... . 'To obtain a Yellowstone injunction, the tenant must demonstrate that (1) it holds a commercial lease, (2) it received from the landlord either a notice of default, a notice to cure, or a threat of termination of the lease, (3) it requested injunctive relief prior to both the termination of the lease and the expiration of the cure period set forth in the lease and the landlord's notice to cure, and (4) it is prepared and maintains the ability to cure the alleged default by any means short of vacating the premises' ... . A plaintiff demonstrates that it has the desire and ability to cure its alleged default by indicating in its motion papers that it is willing to repair any defective condition found by the court and by providing proof of the substantial effort it has already made in addressing the default listed on the notice to cure ... . In this case, the plaintiff failed to satisfy its burden of adducing evidence that it is willing and able to cure its default." ***146 Broadway Assoc., LLC v. Bridgeview at Broadway, LLC*, 2018 N.Y. Slip Op. 05990, Second Dept 9-12-18**

MEDICAL MALPRACTICE, PERSONAL INJURY, EMPLOYMENT LAW.

HOSPITAL DID NOT DEMONSTRATE PHYSICIANS ALLEGED TO HAVE COMMITTED MALPRACTICE WERE NOT EMPLOYEES AND WERE NOT NEGLIGENT, MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the hospital's motion for summary judgment in this medical malpractice action was properly denied. The hospital did not demonstrate that the two physicians alleged to have committed malpractice were not employees of the hospital and did not demonstrate the two physicians did not deviate from the acceptable standards of medical care: " 'In general, a hospital may not be held vicariously liable for the malpractice of a private attending physician who is not an employee' ... . Therefore, when hospital employees, such as resident physicians and nurses, have participated in the treatment of a patient, the hospital may not be held vicariously liable for resulting injuries where the hospital employees have merely carried out the private attending physician's orders ... . These rules shielding a hospital from liability do not apply when: (1) 'the staff follows orders despite knowing that the doctor's orders are so clearly contraindicated by normal practice that ordinary prudence requires inquiry into the correctness of the orders'... ; (2) the hospital's employees have committed independent acts of negligence ... ; or (3) the words or conduct of the hospital give rise to the appearance and belief that the physician possesses the authority to act on behalf of the hospital ... . 'Thus, in order to establish its entitlement to judgment as a matter of law defeating a claim of vicarious liability, a hospital must demonstrate that the physician alleged to have committed the malpractice was an independent contractor and not a hospital employee' ... . The hospital defendants failed to establish, prima facie, that both physicians alleged to have committed malpractice, the two attending nephrologists, were independent contractors [not emplyees]." ***Dupree v. Westchester County Health Care Corp.*, 2018 N.Y. Slip Op. 06000, Second Dept 9-12-18**

MUNICIPAL LAW, REAL PROPERTY LAW, IMMUNITY.

LAND HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY IS NOT IMMUNE FROM ADVERSE POSSESSION.

The Second Department, reversing Supreme Court, determined the complaint seeking a declaration that plaintiff is the owner, by adverse possession, of land adjacent to municipal railway tracks states a cause of action. The court explained that land held by a municipality in a proprietary capacity, as opposed to a governmental capacity, is not immune from adverse possession: "Although a municipality cannot lose title through adverse possession to property which it owns in its governmental capacity, or which has been made inalienable by statute... , when a municipality holds real property in its proprietary capacity, there is no immunity against adverse possession ... . Here, the [municipality] did not conclusively establish that the property is not subject to adverse possession on the basis of governmental immunity." ***Mazzei v. Metropolitan Transp. Auth.*, 2018 N.Y. Slip Op. 06007, Second Dept 9-12-18**

PERSONAL INJURY.

EVIDENCE NOT SUFFICIENT TO DEMONSTRATE SIDEWALK DEFECT WAS TRIVIAL, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY DENIED.

The Second Department determined the owners of property abutting the sidewalk where plaintiff fell did not present sufficient evidence to warrant summary judgment in this slip and fall case. The defendant-owners (Millers) argued the defect was trivial: " 'A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses' ... . In determining whether a defect is trivial, the court

must examine all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place, and circumstance of the injury' ... . The Millers failed to establish their prima facie entitlement to judgment as a matter of law on the ground that the alleged defective condition was trivial as a matter of law ... . In support of their motion, the Millers submitted conflicting evidence as to the dimensions of the alleged defective condition, including the plaintiff's testimony at a hearing pursuant to General Municipal Law § 50-h and measurements taken by the Millers' investigator. Further, 'it is impossible to ascertain from the photographs submitted in support of the motion whether the alleged defective condition was trivial as a matter of law' ...". ***Coriat v. Miller*, 2018 N.Y. Slip Op. 05998, Second Dept 9-12-18**

PERSONAL INJURY.

PLAINTIFF INJURED WHEN, AFTER CONSUMING ALCOHOL, HE DOVE INTO A SHALLOW PART OF DEFENDANT'S POOL, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Second Department determined defendant property owner's motion for summary judgment was properly granted in this swimming pool injury case: "After consuming alcohol, the plaintiff ran out of the defendant's house and dove headfirst into the defendants' pool, striking his forehead on the bottom of the pool. The plaintiff commenced this action against the defendants to recover damages for personal injuries, alleging that the defendants were negligent in, among other things, the ownership, operation, and maintenance of their pool. The defendants moved for summary judgment dismissing the complaint, and the plaintiff opposed the motion. The Supreme Court granted the defendants' motion and dismissed the complaint. The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff's act of diving headfirst into the defendants' shallow pool was the sole proximate cause of his injuries ... . In support of their motion, the defendants submitted, inter alia, the plaintiff's deposition transcript, in which he testified that he swam in the subject pool once or twice prior to the accident, and that he was aware of the depth of the pool ...". ***Carroll v. Montalvo*, 2018 N.Y. Slip Op. 05997, Second Dept 9-12-18**

PERSONAL INJURY, LANDLORD-TENANT, EVIDENCE.

IN THIS SLIP AND FALL CASE, THERE WAS A QUESTION OF FACT WHETHER THE OUT-OF-POSSESSION LANDLORD WAS LIABLE FOR AN ALLEGEDLY DEFECTIVE DRAINAGE SYSTEM WHICH RESULTED IN ICE ACCUMULATION. PLAINTIFF'S AFFIDAVITS SHOULD HAVE BEEN CONSIDERED.

The Second Department, reversing Supreme Court, determined that plaintiff lessee's complaint in this slip and fall case against the landlord should not have been dismissed. Although defendant, an out-of-possession landlord, demonstrated it was solely plaintiff lessee's responsibility to remove ice and snow, plaintiff raised a question of fact about whether defendant was responsible for an inadequate drainage system which caused ice and snow to accumulate. The Second Department noted that Supreme Court should have considered the expert affidavit and plaintiff's and his ex-wife's affidavits stating that the ice and snow condition could not be dealt with by normal methods (due to the drainage issue): "Here, there was no statute imposing a duty on the defendants to maintain the premises in a reasonably safe condition. The defendants also demonstrated that the parties agreed that the plaintiff would be responsible for snow and ice removal and that the plaintiff actually undertook to conduct snow and ice removal. ... Even in the absence of a duty to repair an allegedly defective condition, liability may attach to an out-of-possession landlord who has affirmatively created a dangerous condition or defect ... . The defendants did not dispute that they installed the drainage system. Moreover, the defendants failed to establish that they did not have a duty to repair a defective condition in the drainage system. ... [P]laintiff raised triable issues of fact as to whether the drainage system was defective and, if so, whether such defect contributed to his accident ... . The court should have considered the affidavits of the plaintiff and his former wife, in which they averred that the icy condition on the driveway could not be ameliorated by snowplowing and their daily efforts at salting, sanding, and ashing the driveway, as those averments were consistent with the plaintiff's deposition testimony... . The court also should have considered the affidavit of the plaintiff's expert, in which he stated that defective conditions in the property's drainage system made the driveway area near the entrance prone to the pooling and freezing of water from the roof and surrounding lawn areas. Contrary to the court's determination, there is no requirement that a plaintiff establish the violation of a specific statutory provision where the duty to repair a defective condition is assumed by the landlord by contract or course of conduct ...". ***Bartels v. Eack*, 2018 N.Y. Slip Op. 05995, Second Dept 9-12-18**

PRODUCTS LIABILITY, NEGLIGENCE.

FAILURE TO WARN WAS NOT A SUBSTANTIAL CAUSE OF THE INJURIES AND DEATHS IN THIS PRODUCTS LIABILITY ACTION, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the manufacturer of a transformer base was entitled to summary judgment in this failure to warn action. Plaintiff decedent fell asleep at the wheel, "drove up an embankment, struck a tree, rolled back down the embankment, and ran over a transformer base, which ruptured the gas tank of his vehicle, causing a fire. The decedent was unable to extricate himself and his two infant children from the vehicle, and they all died.": "The plaintiff alleged that when a pole is attached to the transformer base, the transformer base is designed so

that it will break away from its concrete base when it is struck by a vehicle in order to minimize damage to the vehicle. The plaintiff alleged that when the pole was removed from the subject transformer base prior to the accident, the transformer base lost this 'breakaway' feature. The plaintiff alleged that the manufacturer of the transformer base and all other entities in the supply chain had a duty to warn the DOT that the transformer base would lose its breakaway capability if it was not attached to a pole. * * * To recover on a strict products liability cause of action based on inadequate warnings, a plaintiff must prove causation, i.e., that if adequate warnings had been provided, the product would not have been misused... . In other words, '[f]or there to be recovery for damages stemming from a product defective because of the inadequacy or absence of warnings, the failure to warn must have been a substantial cause of the events which produced the injury' ... . 'Generally, it is for the trier of fact to determine the issue of proximate cause'... . 'However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts' ... . The transformer base at issue in this case was located beyond the clear zone, which is defined as 'an area without fixed objects that is adjacent to a highway and intended to provide safe passage and a recovery area for vehicles that veer off the roadway' ... . [Defendants] demonstrated that, as per DOT policy, light poles located beyond the clear zone were not required to have breakaway transformer bases and that the loss of the breakaway feature would not have affected the DOT's decision to remove the light pole from the subject transformer base prior to the accident. Accordingly, [defendants] established, prima facie, that the failure to warn of the loss of the breakaway feature was not a substantial cause of the events which produced the injuries alleged here ...". ***Reece v. J.D. Posillico, Inc.*, 2018 N.Y. Slip Op. 06048, Second Dept 9-12-18**

REAL PROPERTY LAW, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW.

CRITERIA FOR ADVERSE POSSESSION AND OUSTER AGAINST A COTENANT NOT MET.

The Second Department determined defendant failed to meet the proof requirements for adverse possession and ouster against a cotenant: "In order to establish his counterclaim for adverse possession, the defendant was required to prove, by clear and convincing evidence, that his possession of the property was (1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required statutory period... . The defendant could not establish that his possession of Lot 176 was under a claim of right, as he did not have a reasonable basis for the belief that the property belonged to him alone (see RPAPL 501[3]). Even assuming that the defendant had exclusive possession of Lot 176 and that he paid maintenance expenses on that property, these actions are insufficient to establish a claim of right for purposes of adverse possession as against a cotenant ... . RPAPL 541 creates a statutory presumption that a tenant in common in possession holds the property for the benefit of the cotenant ... . The presumption ceases only after the expiration of 10 years of exclusive occupancy of such tenant or upon ouster (see RPAPL 541...). Actual ouster usually requires a possessing cotenant to expressly communicate an intention to exclude or to deny the rights of cotenants. Ouster may be implied in cases where the acts of the possessing cotenant are so openly hostile that the nonpossessing cotenants can be presumed to know that the property is being adversely possessed against them ... . Here, the defendant did not commit acts constituting either an actual or implied ouster. Absent ouster, the period required by RPAPL 541 is 20 years of continuous exclusive possession before a cotenant may acquire full title by adverse possession ... . Even assuming that the defendant had exclusive possession of the property after the plaintiff went on disability in 1994, the required 20-year statutory period had not elapsed when the defendant asserted his counterclaim for adverse possession in his answer ...". ***Fini v. Marini*, 2018 N.Y. Slip Op. 06003, Second Dept 9-12-18**

THIRD DEPARTMENT

TRUSTS AND ESTATES, EVIDENCE.

SUMMARY JUDGMENT DISMISSING THE OBJECTION THAT THE DECEDENT LACKED TESTAMENTARY CAPACITY WAS PROPERLY GRANTED, THE INQUIRY IS CONFINED TO THE TIME AT WHICH THE WILL IS SIGNED, TWO DISSENTERS.

The Third Department, over a two-justice partial dissent, determined that Surrogate's Court properly granted summary judgment dismissing the objection that the decedent lacked testamentary capacity. "... [E]vidence of decedent's diagnosis of dementia and declining cognitive abilities 'does not, without more, create a question of fact on the issue of testamentary capacity, as the appropriate inquiry is whether the decedent was lucid and rational at the time the will was signed' ... . **From the dissent:** ... '[S]ummary judgment is rare in a contested probate proceeding and where, as here, there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed evidence, summary judgment is inappropriate' ... . Although a diagnosis of dementia, standing alone, is insufficient to create a triable issue of fact regarding mental capacity ... , where, as here, there is proof of a progressively worsening mental condition, evidence of specific facts that occur close in time to execution is probative of testamentary capacity at the relevant time and is sufficient to establish a triable issue of fact ...". ***Matter of Giaquinto*, 2018 N.Y. Slip Op. 06065, Third Dept 9-12-18**

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