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CasePrepPlus

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COURT OF APPEALS

ADMINISTRATIVE LAW, EVIDENCE.

REVOCATION OF RACEHORSE TRAINER'S LICENSE BY THE NYS RACING AND WAGERING BOARD SHOULD HAVE BEEN CONFIRMED, SUBSTANTIAL EVIDENCE STANDARD WAS MET.

The Court of Appeals, reversing the Appellate Division, determined the revocation of petitioner's racehorse trainer's license by the NYS Racing and Wagering Board should have been confirmed. The Court of Appeals did not write a decision and adopted the reasoning of the dissenting justice on the Appellate Division: **From the Dissent in the Appellate Division's Decision at 144 AD3d 1244, 1247-1252:** "I agree with the majority that if the dates found on veterinary records ... regarding specified forms of veterinary care represent the dates upon which such treatment was administered, those records, along with other evidence, chronicle 1,717 violations by petitioner of rules prohibiting the administration of specified substances to a horse within specified windows prior to a race. The majority, however, finds that a reasonable mind cannot reach the conclusion that those dates convey when treatment occurred. As a result, the majority annuls the entirety of respondent's determination. In contrast, I find that the inference that respondent made that the dates listed next to specified veterinary care represent the dates that such care was administered to be reasonable and plausible. That conclusion requires confirmance and, accordingly, I respectfully dissent. * * * Substantial evidence 'demands only that a given inference is reasonable and plausible, not necessarily the most probable' ... . Where 'room for choice' exists in the inferences to be drawn from evidence, this Court has no power to preference its own interpretation over that of the administrative agency tasked with the determination ... . This great deference accorded to such an agency determination derives from the Legislature's decision to task an agency with expertise in the relevant law and regulations—rather than a court of general jurisdiction that lacks such expertise—with the authority to initially resolve legal disputes ...". ***Matter of Pena v. New York State Gaming Commn.*, 2018 N.Y. Slip Op. 08060, CtApp 11-27-18**

CRIMINAL LAW, CONSTITUTIONAL LAW, IMMIGRATION LAW.

EVEN THOUGH DEFENDANT WAS NOT ENTITLED TO A JURY TRIAL BECAUSE THE CHARGES WERE B MISDEMEANORS, THE FACT THAT DEPORTATION WAS A POTENTIAL PENALTY ENTITLED DEFENDANT TO A JURY TRIAL PURSUANT TO THE SIXTH AMENDMENT.

The Court of Appeals, reversing the appellate division, in a full-fledged opinion by Judge Stein, over two separate dissenting opinions, determined that the potential penalty of deportation entitles a defendant to a jury trial, even if, as here, the charges are B misdemeanors which are triable without a jury pursuant to Criminal Procedure Law § 340.40: "The Sixth Amendment of the United States Constitution guarantees that a defendant will be judged by a jury of peers if charged with a serious crime. Today, as a matter of first impression, we hold that a noncitizen defendant who demonstrates that a charged crime carries the potential penalty of deportation—i.e. removal from the country—is entitled to a jury trial under the Sixth Amendment. * * * Defendant argues that, although the Sixth Amendment right to a jury trial did not automatically attach to the crimes with which he was charged because they are punishable by less than a six-month term of incarceration, he met his burden of establishing that the crimes carry an additional penalty beyond incarceration—namely, deportation—which he contends is a sufficiently severe penalty to rebut the presumption that the crimes are petty for Sixth Amendment purposes. We agree." ***People v. Suazo*, 2018 N.Y. Slip Op. 08056, CtApp 11-27-18**

CRIMINAL LAW, CORRECTION LAW.

THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION MET ITS STATUTORY BURDEN TO ASSIST PETITIONER, A SEX OFFENDER, IN FINDING SUITABLE HOUSING UPON RELEASE, APPELLATE DIVISION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a partial dissent and an extensive dissenting opinion, determined that the Department of Corrections and Community Supervision (DOCCS) had met its burden of providing assistance to sex offenders in finding suitable housing upon release. Here the petitioner was transferred to a residential treatment facility (RTF) when his sentence was complete because he was unable to find suitable housing as required by the Sexual Assault Reform Act (SARA): "Correction Law § 201 (5) requires DOCCS to assist inmates prior to release and

under supervision to secure housing. DOCCS has interpreted its obligation under the statute as satisfied when it actively investigates and approves residences that have been identified by inmates and when it provides the inmates with adequate resources to allow them to propose residences for investigation and approval. This interpretation is consistent with the plain language of the statute as well as the larger statutory framework. While the agency is free, in its discretion, to provide additional assistance to inmates in locating SARA-compliant housing — particularly where an inmate is nearing the maximum expiration date or is residing in an RTF with the associated restrictions on the ability to conduct a comprehensive search — there is no statutory basis in Correction Law § 201 (5) for imposing such an obligation. As to whether DOCCS met its obligation in this particular case, the record demonstrates that petitioner met biweekly with an ORC regarding SARA-compliant housing and also met several times with his parole officer. Petitioner was able to propose 58 residences which DOCCS investigated for SARA-compliance. The agency also affirmatively identified at least two housing options for petitioner in New York City — one was rejected by petitioner on the basis that he could not afford it and the other was the shelter in Manhattan where he was ultimately housed. Certainly, the record reflects that DOCCS provided more than passive assistance, given that it affirmatively contacted other agencies and providers on petitioner's behalf because of his financial needs. Indeed, petitioner was successfully placed with New York City's DHS through DOCCS' efforts, which were adequate to meet its statutory obligation to provide assistance. Finally, we agree with the Appellate Division that there was insufficient record evidence to establish that DOCCS' determination to place petitioner at the Woodbourne RTF was irrational or that the conditions of his placement at that facility were in violation of the agency's statutory or regulatory obligations ... ". ***Matter of Gonzalez v. Annucci*, 2018 N.Y. Slip Op. 08057, CtApp 11-27-18**

CRIMINAL LAW, EVIDENCE.

ENTERPRISE CORRUPTION CONVICTION NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE OF DEFENDANT'S KNOWLEDGE OF THE EXISTENCE OF THE ENTERPRISE AND HIS INTENT TO PARTICIPATE IN AFFAIRS OF THE ENTERPRISE.

The Court of Appeals, in a memorandum decision supplemented with an extensive concurring opinion, determined that the defendant's conviction of enterprise corruption (Penal Law § 460.20) was not supported by legally sufficient evidence: "... [T]he proof elicited at trial was not legally sufficient to establish the elements of defendant's knowledge of the existence of the subject criminal enterprise and the nature of its affairs or his intent to participate in such affairs ... . On the mens rea element, the People were required to prove, beyond a reasonable doubt, that defendant, 'having knowledge of the existence of a criminal enterprise and the nature of its activities,' and, 'being employed by or associated with such enterprise . . . intentionally conduct[ed] or participate[d] in the affairs of an enterprise' ... . Consistent with this statutory mens rea requirement, the trial court additionally instructed the jury, without objection, that the People were required to show that defendant had 'chosen to be part of the group and to have worked as a member of it or in affiliation with it to achieve its criminal purposes.' Here, the evidence of defendant's knowledge of the existence of the criminal enterprise and his intention to participate in its affairs fell short as a matter of law. The evidence of defendant's participation in the three requisite criminal acts included in the pattern activity alone does not establish defendant's knowledge of the existence of the criminal enterprise and the nature of its activities. In addition, the critical trial testimony of the People's cooperating witness demonstrated that defendant was isolated from — rather than employed by or associated with — the enterprise, and that defendant acted independently on his own behalf, with the singular purpose of serving his own interests." ***People v. Jones*, 2018 N.Y. Slip Op. 08058, CtApp 11-27-18**

PRODUCTS LIABILITY, TOXIC TORTS, NEGLIGENCE, EMPLOYMENT LAW.

THE GRANT OF FORD'S MOTION TO SET ASIDE THE VERDICT IN THIS ASBESTOS CASE AFFIRMED, EVIDENCE OF A CAUSAL CONNECTION BETWEEN ASBESTOS IN BRAKE LININGS AND PLAINTIFF'S DECEDENT'S MESOTHELIOMA NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE.

The Court of Appeals, affirming the grant of defendant-Ford's motion to set aside the verdict in this asbestos case, over two concurring opinions and a dissenting opinion, determined the evidence of a causal connection between the asbestos in brake linings on Ford vehicles and plaintiff's decedent's mesothelioma was legally insufficient. Plaintiff's decedent worked in a garage and was exposed to asbestos-laden dust from new and used brakes, clutches and manifold and engine gaskets: "Viewing the evidence in the light most favorable to plaintiffs, the evidence was insufficient as a matter of law to establish that respondent Ford Motor Company's conduct was a proximate cause of the decedent's injuries pursuant to the standards set forth in Parker v. Mobil Oil Corp. (7 NY3d 434 [2006]) and Cornell v. 360 W. 51st St. Realty, LLC(22 NY3d 762 [2014]). Accordingly, on this particular record, defendant was entitled to judgment as a matter of law under CPLR 4404 (a) ...". ***Matter of New York City Asbestos Litig.*, 2018 N.Y. Slip Op. 08059, CtApp 11-27-18**

FIRST DEPARTMENT

ADMINISTRATIVE LAW, CIVIL PROCEDURE, EMPLOYMENT LAW, APPEALS, MUNICIPAL LAW.

BECAUSE THE PETITIONERS CHOSE TO APPEAL THEIR TERMINATION FROM EMPLOYMENT AS CORRECTION OFFICERS TO THE NYC CIVIL SERVICE COMMISSION INSTEAD OF BRINGING AN ARTICLE 78, THE COURT'S REVIEW POWERS ARE EXTREMELY LIMITED, THE TERMINATION WAS UPHELD.

The First Department determined the NYC Civil Service Commission (CSC) properly upheld the termination of the petitioner correction officers for using excessive force against an inmate. The court noted that, because the petitioners chose to appeal the determination of the administrative law judge to the CSC, instead of bringing an Article 78, the court's review powers are extremely limited: "Civil Service Law § 76(1) permits a person whose civil service employment has been terminated to 'appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with [article 78].' If the former option is chosen, '[t]he decision of such civil service commission shall be final and conclusive, and not subject to further review in any court' ... . The Court of Appeals has clarified that, despite the plain language in the statute, judicial review is not completely foreclosed ... . Rather, the article 78 court, instead of being guided by the substantial evidence or arbitrary and capricious standards of review, is limited to reviewing whether 'the agency has acted illegally, unconstitutionally, or in excess of its jurisdiction' ... . Petitioners argue that CSC acted unconstitutionally because it relied on the statements of the inmates, who never testified, thus depriving petitioners of any chance to cross-examine them. However, this point is unpreserved. Petitioners fail to point to anything in the record showing that they ever sought to cross-examine or call the inmates and were denied that opportunity. More importantly, they never protested that their constitutional rights were being violated. This Court has 'no discretionary authority' to 'reach[] an unpreserved issue in the interest of justice' in an article 78 proceeding challenging an administrative determination ... , including issues touching on due process ... and evidentiary challenges ...". ***Matter of Almanzar v. City of New York City Civ. Serv. Commn.*, 2018 N.Y. Slip Op. 08062, First Dept 11-27-18**

ADMINISTRATIVE LAW, CONTRACT LAW, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

ALTHOUGH CPLR 2104 DOES NOT APPLY TO STIPULATIONS IN ADMINISTRATIVE PROCEEDINGS, THE STIPULATION SIGNED BY PLAINTIFF, IN WHICH HE AGREED TO RETIRE IN RETURN FOR THE CESSATION OF DISCIPLINARY PROCEEDINGS, WAS ENFORCEABLE UNDER CONTRACT PRINCIPLES DESPITE PLAINTIFF'S SUBSEQUENT CHANGE OF HEART.

The First Department determined the stipulation signed by plaintiff teacher, who agreed to resign in return for discontinuing the disciplinary hearing, was binding under contract principles, despite the inapplicability of CPLR 2104 to administrative proceedings. After signing the stipulation, plaintiff changed his mind: "In the stipulation, DOE (Department of Education] agreed to discontinue the disciplinary hearing on the pending misconduct charges and to take no further disciplinary action against plaintiff, in exchange for which plaintiff agreed 'to irrevocably retire from his employment with [DOE] ... .' The agreement was signed by plaintiff, his counsel, and DOE's counsel ... . Annexed to the stipulation was a letter signed by plaintiff and addressed to District Superintendent Karen Watts stating, 'I hereby irrevocably retire from [DOE] ... .' The stipulation contained a signature line for Superintendent Watts, who signed it several days later. Before Superintendent Watts signed the stipulation, plaintiff notified DOE that he had changed his mind and wanted to rescind the stipulation. He argues that the stipulation was unenforceable when he changed his mind because not all the parties had signed it. ... Although CPLR 2104 is not applicable to agreements entered into in administrative proceedings, the stipulation signed by plaintiff and counsel acting on behalf of DOE is binding under general contract principles ... . Plaintiff failed to show the existence of fraud, collusion, mistake or accident, or that counsel lacked DOE's consent to enter into the stipulation ... . Plaintiff's agreement to retire was irrevocable, and plaintiff understood its consequences. His change of mind is not a cause sufficient to set aside his agreement ... . Nor is his parol evidence, offered to show that the parties did not intend to be bound by the stipulation until Superintendent Watts had signed it, admissible to add to or vary the terms of the writing ...". ***Matter of Nobile v. Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 2018 N.Y. Slip Op. 08065, First Dept 11-27-1**

CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE.

MOTION TO AMEND COMPLAINT AND BILL OF PARTICULARS TO CHANGE THE DATE OF THE ALLEGED SLIP AND FALL PROPERLY DENIED.

The First Department determined the motion to amend the complaint and bill of particulars in this slip and fall case was properly denied. Plaintiff sought to change the dare of the accident from October 12, 2012, to August 15, 2012: "Plaintiff alleges that she slipped and fell on rainwater that came in through negligently maintained windows in the hallway of defendants' building. In support of her motion to amend, plaintiff stated that she originally alleged that the accident occurred on October 13, 2012, but that after reviewing her medical records she realized that she was mistaken and that the accident actually occurred on August 15, 2012, the day before she sought treatment at the hospital. The motion court providently

exercised its discretion in denying plaintiff's motion, as defendants demonstrated that the delay in notifying them that plaintiff had incorrectly identified the date of the accident prejudiced their ability to investigate the incident and to defend the action using surveillance videotapes of the hallway ... . Defendants showed that, after learning of plaintiff's claim, they retrieved surveillance tapes of the alleged accident date of October 13th, which showed that no accident occurred on that date, but that they were no longer able to retrieve videotapes from August 2012 by the time plaintiff informed them of the claimed error in the pleadings. Furthermore, the August 2012 hospital record plaintiff relies upon reflects that she sought treatment from a podiatrist for an unrelated foot condition, and does not reference any fall the previous day ...". ***Otero v. Walton Ave. Assoc. LLC*, 2018 N.Y. Slip Op. 08083, First Dept 11-27-18**

CONTRACT LAW, FRAUD, CONSUMER LAW, REAL ESTATE, COOPERATIVES.

THE ACTUAL DIMENSIONS OF THE COOPERATIVE APARTMENT WERE SMALLER THAN THE DIMENSIONS DESCRIBED IN THE LISTING, THE LISTING COULD NOT BE DEEMED INCORPORATED BY REFERENCE INTO THE PURCHASE AGREEMENT, THE COMPLAINT ALLEGING BREACH OF CONTRACT, FRAUD AND DECEPTIVE BUSINESS PRACTICES PROPERLY DISMISSED.

The First Department determined the misrepresentation of the dimensions of the cooperative apartment in the listing could not be deemed incorporated by reference into the purchase agreement. The complaint was therefore properly dismissed: "... [P]laintiffs allege that defendants prepared a floor plan, which accompanied the listing for the unit at issue, that stated that the unit was '~1,966' square feet, when it was, in fact, approximately 1,495 square feet. Plaintiffs contend that the floor plan was incorporated into the offering plan by reference, and the offering plan, in turn, was incorporated into the purchase agreement. ... The doctrine of incorporation by reference 'is appropriate only where the document to be incorporated is referred to and described in the instrument as issued so as to identify the referenced document beyond all reasonable doubt'... . Here, the listing is not identified in any of the relevant purchase documents ... . Moreover, any purported representation or warranty is refuted by the clear terms of the purchase agreement, which contains a merger clause, states that no representations are being made by the sponsor, that the unit was being purchased 'as is' and that the onus was on the buyer to inspect 'to determine the actual dimensions' prior to purchasing ... . Reasonable reliance is an element of claims for fraud, aiding and abetting fraud and negligent misrepresentation... . Plaintiffs cannot as a matter of law establish reasonable reliance on a representation concerning the condition of the apartment since they had the means to ascertain the truth of the condition ... . [P]laintiffs' allegations based on purported representations made in the listing fail to set forth a viable claim under General Business Law §§ 349 or 350, as they do not fall within the type of deceptive acts, that, if permitted to continue, would have a broad impact on consumers at large ... ". ***Von Ancken v. 7 E. 14 L.L.C.*, 2018 N.Y. Slip Op. 08097, First Dept 11-27-18**

CRIMINAL LAW.

NEW JERSEY FORGED INSTRUMENT CONVICTION WAS NOT THE EQUIVALENT OF A NEW YORK FELONY AND SHOULD NOT HAVE BEEN THE BASIS OF SECOND FELONY OFFENDER STATUS.

The First Department, in a full-fledged opinion by Justice Renwick, ordering the resentencing of defendant, determined the defendant's prior New Jersey forged instrument conviction was not the equivalent of a New York felony and therefore could not be the basis of second felony offender status: "The first mens rea element of both New York and New Jersey's crime of uttering a forged instrument are the same: that the defendant had knowledge that the subject instrument was forged. However, the second mens rea element of the New Jersey crime of uttering a forged instrument is broader than the second mens rea element of the New York crime of uttering a forged instrument. Because the New Jersey statute uses the disjunctive 'or,' the second mens rea element of the NJ crime of uttering a forged instrument can be satisfied in two different ways: that one who utters a forged instrument must act either with the intent to defraud (purpose to defraud or injure anyone) or with the knowledge that one is facilitating a fraud. By contrast, the second mens rea element of the New York crime of uttering a forged instrument can be satisfied only one way: that the person who utters a forged instrument acted with the 'intent to defraud.' Since the New Jersey statute punishes a broader range of mental states than its New York counterpart, it fails New York's strict equivalency test ...". ***People v. Allison*, 2018 N.Y. Slip Op. 08194, First Dept 11-29-18**

CRIMINAL LAW, EVIDENCE.

ADMITTING INTO EVIDENCE A PISTOL ALLEGED TO BE THE SAME TYPE OF WEAPON USED IN THE CRIME WAS NOT ERROR.

The First Department determined the introduction of a handgun alleged to be the same type used in the crime and recovered three months after the crime was not error: "The court providently exercised its discretion in admitting a black nine millimeter pistol, the same type of weapon that, according to other evidence, was used in the crime. The pistol was recovered, pursuant to a search warrant, from defendant's girlfriend's apartment three months after the commission of the crime, and the evidence showed that defendant resided in that apartment. This evidence was relevant to show that defendant had access to that type of weapon, and it thus tended to establish his involvement in the charged crimes ... . The jury could have drawn a reasonable inference that the weapon was in defendant's possession at the time of the crime, and the availability

of other inferences went to weight rather than admissibility. Furthermore, the probative value of this evidence, which the court carefully limited, outweighed any prejudicial effect." ***People v. Birkett*, 2018 N.Y. Slip Op. 08072, First Dept 11-27-18**

CRIMINAL LAW, EVIDENCE.

JURY SHOULD HAVE BEEN INSTRUCTED TO CONSIDER A LESSER INCLUDED OFFENSE AND AN ADVERSE INFERENCE INSTRUCTION SHOULD HAVE BEEN GIVEN CONCERNING SURVEILLANCE PHOTOS DESTROYED BY THE POLICE, CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined the jury should have been instructed to consider a lesser included offense and an adverse inference instruction should have been given concerning photographs destroyed by the police: "The court's first-degree robbery charge, consistent with the indictment, required the People to prove that defendant used or threatened to use a knife; it is undisputed that a finding that defendant wielded some weapon or object other than a knife would not support first-degree robbery in this case. There was a reasonable view of the evidence, viewed in the light most favorable to defendant, that he forcibly stole property from the victim, but did not use or threaten to use a knife in the course of doing so... . On the facts presented, the jury could have reasonably reached these findings by generally crediting the victim's account, but finding that her testimony about seeing defendant using a knife was mistaken. Moreover, while this circumstance is not controlling, we note that the People joined in defendant's request for submission of third-degree robbery. .. [T]the court should also have granted defendant's request for an adverse inference charge as to surveillance photos taken in the victim's livery cab after other photos, introduced at trial, were taken. The photos in evidence showed defendant in the back seat before he left and allegedly returned to rob the driver. The Police Department collected the photos but destroyed all but a few of them, which were introduced at trial through a detective who alleged that other members of his team selected them as the most relevant. Defendant established that the missing photos were 'reasonably likely to be material' ... , since they might have shown what type of weapon or object was used by the perpetrator. The record fails to support the People's assertion that the camera could not have recorded the incident ...". ***People v. Holmes*, 2018 N.Y. Slip Op. 08178, First Dept 11-29-18**

EMPLOYMENT LAW, LABOR LAW, CONTRACT LAW.

EMPLOYEES OF SUBCONTRACTOR CAN SUE FOR THE PREVAILING WAGE REQUIRED BY LABOR LAW § 220 AS THIRD PARTY BENEFICIARIES OF THE PRIME CONTRACT.

The First Department affirmed the denial of defendant employer's (SLSCO's) motion to dismiss the plaintiff employees' breach of contract complaint. The complaint alleged that SLSCO and the subcontractor, PMJ, which employed plaintiffs, breached the prime employment contract by failing to pay the prevailing wage for work done for the Department of Environmental Protection (DEP). The court noted the employees were third party beneficiaries of the contract and the clause in the contract which purported to prohibit third-party actions seeking the prevailing wage would be void as against public policy: "Plaintiffs are employees of PMJ. They commenced this action for breach of contract against PMJ and SLSCO, predicated upon a third-party contract beneficiary theory, alleging that PMJ failed to pay them prevailing wages as required by the terms of the prime contract ... . Labor Law § 220(3) provides, in pertinent part, that wages paid to laborers, workers, or mechanics on a public works project shall be the prevailing rate of wages in that locality, and that the public works contracts, including subcontracts thereunder 'shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work shall be paid the wages herein'. This statute 'has as its entire aim the protection of workingmen against being induced, or obliged, to accept wages below the prevailing rate' and 'must be construed with the liberality needed to carry out its beneficent purposes'... . In keeping with this liberal reading of the statute, the courts of this state have consistently held that, in public works contracts, a subcontractor's employees have both an administrative remedy under the statute as well as a third-party right to make a breach of contract claim for underpayment against the general contractor ... ". ***Wroble v. Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C.*, 2018 N.Y. Slip Op. 08061, First Dept 11-27-18**

MUNICIPAL LAW, NEGLIGENCE, LABOR LAW-CONSTRUCTION LAW.

MOTION TO DEEM NOTICE OF CLAIM FILED ONE DAY LATE TIMELY SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined petitioner's motion to deem the notice of claim timely filed should have been granted even if the excuse for the delay was not reasonable. The notice of claim was one day late: "CUCF [defendant City University Construction Fund] acquired actual notice of the essential facts constituting the claim within a reasonable time after the expiration of the 90-day statute of limitations period due to the fact that petitioner filed his notice of claim only one day late, on the 91st day after the accident occurred. Moreover, the notice of claim provides the essential facts constituting the claim and further describes CUCF's alleged negligence and alleged violations of Labor Law §§ 240(1), 241(6) and 200, and certain Industrial Code provisions. Additionally, petitioner has demonstrated that his one-day delay in serving the notice of claim on CUCF did not substantially prejudice CUCF's defense on the merits. CUCF had actual knowledge of the facts constituting petitioner's claim only one day after the expiration of the 90-day statutory period and thus,

had ample opportunity to conduct a thorough investigation. ... Even if petitioner's excuse for the delay in filing the notice of claim, specifically, that such delay was due to a clerical error made by the process server, was unreasonable, 'the absence of a reasonable excuse is not, standing alone, fatal to the application,' especially in a case such as this one where respondent had actual notice of the essential facts constituting petitioner's claim and where respondent was not prejudiced by the delay ...". ***Matter of Dominguez v. City Univ. of N.Y.*, 2018 N.Y. Slip Op. 08084, First Dept 11-27-18**

PERSONAL INJURY, EVIDENCE, PRIVILEGE.

PLAINTIFF DID NOT PLACE HER PRIOR KNEE INJURIES IN CONTROVERSY BY ALLEGING A LOSS OF ENJOYMENT OF LIFE, THEREFORE PLAINTIFF DID NOT WAIVE HER PATIENT-PHYSICIAN PRIVILEGE RE: THE KNEE-INJURY MEDICAL RECORDS, THE FIRST DEPARTMENT DECIDED NOT TO FOLLOW THE SECOND DEPARTMENT'S CONTRARY RULING, EXTENSIVE TWO-JUSTICE DISSENT.

The First Department, in a full-fledged opinion by Justice Singh, over an extensive two-justice dissenting opinion, determined that the plaintiff in this traffic accident case did not place her prior knee injuries in controversy and the defendants' demand for the related medical authorizations should not have been granted. The First Department held plaintiff had not waived her patient-physician privilege regarding the knee injuries. Plaintiff had alleged injury to her back, neck and shoulder, but had also alleged a loss of enjoyment of life, including her inability to wear heels. Defendants argued that her prior knee injury and surgery were relevant to those same issues. The First Department decided not to follow the Second Department's contrary holding: "Contrary to defendants' argument, neither plaintiff's bill of particulars nor her deposition testimony places her prior knee injuries in controversy. In paragraph 10 of her bill of particulars, plaintiff limits the injuries she sustained in the 2014 accident to her cervical spine, lumbar spine, and left shoulder. Accordingly, the specified bodily injuries that are affirmatively placed in controversy are the spinal and shoulder injuries. The claims for lost earnings and loss of enjoyment of life alleged in the bill of particulars are limited to these specified injuries. Plaintiff does not mention her prior knee treatments. Nor does she claim that the injuries to her knees were exacerbated or aggravated as a result of the 2014 automobile accident. * * * Defendants cite to Second Department precedent in support of their argument that the condition of plaintiff's knees is material and necessary to their defense. The Second Department has held that a party places his or her entire medical condition in controversy through 'broad allegations of physical injuries and claimed loss of enjoyment of life due to those injuries' ... . We are not persuaded by the reasoning of the Second Department. In our view, the Second Department's precedent cannot be reconciled with the Court of Appeals' rulings that the physician-patient privilege is waived only for injuries affirmatively placed in controversy." ***Brito v. Gomez*, 2018 N.Y. Slip Op. 08105, First Dept 11-27-18**

SECOND DEPARTMENT

CIVIL PROCEDURE, ADMINISTRATIVE LAW, APPEALS.

EXCEPTION TO THE MOOTNESS DOCTRINE DID NOT APPLY AFTER THE UNDERLYING ACTION WAS SETTLED, CRITERIA EXPLAINED.

The Second Department determined the exception to the mootness doctrine did not apply and the Department of Health's (DOH's) motion to dismiss causes of action pursuant to the Americans with Disabilities Act and the Rehabilitation Act should have been granted. The underlying action was brought by disabled residents of an adult-care facility which was being closed. The matter settled and the facility closed rendering further proceedings academic. Supreme Court had held that the state claims were moot, but the federal claims were viable under an exception to the mootness doctrine: "The exception to the mootness doctrine does not apply here. That exception permits a court to pass on moot issues when there exists: '(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues' ... . If one or more of these elements is missing, the exception does not apply... . Here, there is no likelihood of repetition because the issues are fact-specific ... . Furthermore, because the issues are fact-specific, they are not substantial and novel ... . The plaintiffs contend that their federal law causes of action are not fact-specific, in that they challenge the validity of the regulations pursuant to which the DOH approves of any closure plan for an assisted living residence ... . The plaintiffs contend that the regulations themselves violate the mandate in the ADA and Rehabilitation Act that services be administered in the most integrated setting appropriate to the needs of the resident ... . However, this facial challenge to the DOH's closure regulations is time-barred ... . The issues presented here also do not typically evade review... . An injunction maintaining the status quo was an effective procedure here and would be in a future case raising similar issues. The issues here only became moot when the plaintiffs voluntarily opted to settle their claims against the LLC ...". ***Berger v. Prospect Park Residence, LLC*, 2018 N.Y. Slip Op. 08110, Second Dept 11-28-18**

CIVIL PROCEDURE, ADMINISTRATIVE LAW, HUMAN RIGHTS LAW, EMPLOYMENT LAW.

COMPLAINANT'S ACTUAL EMPLOYER WAS ADDED TO THE EMPLOYMENT DISCRIMINATION PROCEEDING MORE THAN ONE YEAR AFTER TERMINATION, THE RELATION-BACK DOCTRINE DID NOT APPLY, DISCRIMINATION FINDING ANNULLED.

The Second Department, annulling the employment discrimination determination, held that the action against the employer, Food Corp., was untimely and the relation-back doctrine did not apply. Complainant had originally named Trade Fair as her employer and then added Food Corp. more than a year after her termination: "Food Corp. does not dispute that the first prong of the relation-back test was satisfied, because the claims against Food Corp. arose out of the same transactions or occurrences as those asserted against Trade Fair. The complainant also established the third prong of the test by presenting evidence suggesting that Food Corp. had notice of the proceeding before the statute of limitations expired, and that Food Corp. should have known that, but for the complainant's mistake in omitting it as a respondent in her complaint, the proceeding would have been timely commenced against it as well. However, the complainant failed to satisfy the second prong of the relation-back test, because Food Corp. and Trade Fair were not united in interest. Respondents are 'united in interest only when their interest in the subject-matter [of the proceeding] is such that [the respondents] stand or fall together and that judgment against one will similarly affect the other' ... . '[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the [complainant]' ... . Respondents are not united in interest if there is a possibility that the new party could have a defense different from that of the original party ... . Here, the Commissioner dismissed the second amended complaint insofar as asserted against Trade Fair on the grounds that the complainant never interacted with or took direction from Trade Fair's employees, and that Trade Fair was not the complainant's employer. In contrast, the Commissioner determined that Food Corp. was the complainant's employer because Food Corp.'s personnel hired and fired the complainant and controlled the complainant's daily workplace activities. Thus, the record makes clear that Food Corp.'s and Trade Fair's interests in the administrative proceeding did not stand or fall together ...". ***Matter of 130-10 Food Corp. v. New York State Div. of Human Rights*, 2018 N.Y. Slip Op. 08123, Second Dept 11-28-18**

CIVIL PROCEDURE, CORPORATION LAW.

CORPORATE OFFICER WHO SIGNED THE CONTRACT AT ISSUE WAS NOT UNITED IN INTEREST WITH THE CORPORATION, THEREFORE THE ATTEMPT TO ADD AN UNTIMELY FRAUD CAUSE OF ACTION AGAINST THE OFFICER WAS NOT POSSIBLE UNDER THE RELATION BACK DOCTRINE.

The Second Department, reversing Supreme Court, determined the relation back doctrine did not apply to an attempt to amend the answer to add a fraud cause of action against Tam, an officer of plaintiff corporation, because Tam and the corporation were not united in interest. Tam had signed the contract at issue as an officer, not in his individual capacity: " 'The relation-back doctrine allows a party to be added to an action after the expiration of the statute of limitations, and the claim is deemed timely interposed, if (1) the claim arises out of the same conduct, transaction, or occurrence, (2) the additional party is united in interest with the original party, and (3) the additional party knew or should have known that but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against the additional party as well' ... . The original counterclaim asserted against the plaintiff alleged that plaintiff breached contractual obligations for which Tam—an officer of the corporation—was not individually liable ... . 'There is no legal theory of vicarious liability for breach of contract' by 'an agent of a disclosed principal' … . Tam, when signing the contract in issue, did so as president of the plaintiff, and not individually. Therefore, the cross movants are not united in interest. Further, since Tam signed the contract, [defendant] was aware of Tam's identity at the time the original answer was served. Therefore, failure to join Tam cannot be attributable to a mistake as to the identity of the proper parties ... . Thus, the addition of Tam as a party to this action was improper." ***Roco G.C. Corp. v. Bridge View Tower, LLC*, 2018 N.Y. Slip Op. 08164, Second Dept 11-28-18**

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW.

CONVICTION AFFIRMED BUT STRONG DISSENT ARGUED DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL AND WAS DENIED A FAIR TRIAL BECAUSE HE WORE THE SAME PRISON-ISSUE CLOTHES FOR EIGHT DAYS.

The Second Department, over a detailed and comprehensive dissent (worth reading), affirmed defendant's attempted murder conviction. The dissent made it clear there was a strong right to counsel issue that, because it involved facts that are not on the record, must be brought in a motion to vacate the conviction. The dissent also argued defendant was deprived of a fair trial because he appeared in the same prison-issue clothes for eight days: **From the Dissent:** "Since the Supreme Court was informed at the time of arraignment in Queens County that the defendant had established an attorney-client relationship with Eaddy in both the Kings County and Queens County cases, it was incumbent upon the court to assign her as counsel unless she was not ready, willing, or able to accept the assignment... . At the time of arraignment, there was no risk that Eaddy's participation would have delayed or disrupted the proceedings, created any conflict of interest, or resulted in prejudice to the prosecution or the defense. To the contrary, Eaddy's familiarity with the defendant and the case, as well

as the defendant's preference for her as his assigned counsel, would most likely have expedited matters. Indeed, the attorney who was assigned to represent the defendant at the arraignment, Siff, was eventually discharged in March 2011 and replaced with Coppin, with whom the defendant expressed dissatisfaction and requested further substitution. Instead of inquiring as to Eaddy's availability at the time of arraignment, the Supreme Court summarily denied the defendant's request for the constitutionally impermissible reason that the defendant was too indigent to pay for her services ... . * * * Here, there is no question that the clothing worn by the defendant was prison-issued clothing. The defendant wore the same green top and bottom for three days of jury selection and more than five days of trial testimony. Even the Supreme Court described the defendant's clothing as 'that thing.' Based upon the description of the clothes and the fact that the defendant wore the same clothes for at least eight days, a reasonable juror could only conclude that the clothing was prison garb. Given the defendant's objection to wearing dirty prison clothes, I conclude that he preserved his contention for appellate review, and that, as a matter of law, he was deprived of a fair trial ...". ***People v. Ellis*, 2018 N.Y. Slip Op. 08143, Second Dept 11-28-18**

FAMILY LAW, ATTORNEYS.

FATHER WAS NEVER PROPERLY INFORMED OF HIS RIGHT TO COUNSEL IN THIS MAINTENANCE AND CHILD SUPPORT ENFORCEMENT PROCEEDING AND NEVER WAIVED THAT RIGHT, ORDER OF COMMITMENT REVERSED.

The Second Department, reversing Family Court in this child support and maintenance arrears proceeding, determined that father was never properly advised of his right to counsel by the support magistrate. It was not sufficient that father was told the matter could be adjourned to allow him to speak to an attorney or that father could get in touch with legal aid: "... [W]hen the father first appeared in the Family Court, the Support Magistrate informed him that he had the right to request an adjournment to hire or speak with an attorney, or he could proceed to represent himself. The father elected to proceed representing himself, and no further advisement or inquiry was made by the court. At the next appearance, the Support Magistrate indicated that she would give the father contact information for the Legal Aid Society of Orange County, but she did not advise the father of his right to have counsel assigned by the court if he was financially unable to retain counsel. Several months later, when the parties appeared for the fact-finding hearing, both pro se, the Support Magistrate again advised the father that he had the right to request an adjournment to hire or speak with an attorney, or he could waive that right and represent himself. The father stated that he would represent himself, no further advisement or inquiry was made, and the fact-finding hearing was held, with both parties proceeding pro se. By representing himself, the father was necessarily forgoing the benefits associated with the right to counsel ... . Although a party may waive the right to counsel and opt for self-representation, prior to permitting a party to proceed pro se, the court must conduct a 'searching inquiry' to ensure that the party's waiver is knowing, intelligent, and voluntary ... . A waiver is valid where the party was aware of the dangers and disadvantages of proceeding without counsel ... . Here, the record demonstrates that the father was not advised of his right to assigned counsel, as required. Further, there is no indication that he validly waived his right to counsel. Under these circumstances, the father was deprived of his right to counsel and reversal is required, without regard to the merits of his position in the enforcement proceeding ...". ***Matter of Gallousis v. Gallousis*, 2018 N.Y. Slip Op. 08129. Second Dept 11-28-18**

FORECLOSURE, CONTRACT LAW, EVIDENCE.

PLAINTIFF DID NOT DEMONSTRATE THE CONDITIONS PRECEDENT TO THE ACCELERATION OF THE MORTGAGE DEBT HAD BEEN SATISFIED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiff's motion for summary judgment in this foreclosure action should not have been granted. The mortgage included conditions precedent to the acceleration of the debt and plaintiff's papers did not demonstrate satisfaction of the conditions precedent: "The mortgage required that the lender give notice of a date by which the borrower must correct a default in order to avoid acceleration. It further required that the date specified in the notice 'be at least 30 days from the date on which the notice is given.' The mortgage also provided that notice by first-class mail 'is considered given' on the date mailed. In support of its motion for summary judgment, the plaintiff failed to establish, prima facie, that it complied with this condition precedent to accelerating the mortgage. Specifically, in support of its motion for summary judgment, the plaintiff presented conflicting evidence as to whether it mailed the notice at least 30 days before the date specified in that notice. Inasmuch as the plaintiff's own evidence submitted in support of the motion demonstrated the existence of a triable issue of fact as to whether the plaintiff complied with the 30-day notice provision, the plaintiff's motion should have been denied without regard to the sufficiency of the defendant's opposition papers ...". ***Wilmington Sav. Fund Socy. FSB v. Yisroel*, 2018 N.Y. Slip Op. 08174, Second Dept 11-28-18**

FORECLOSURE, JUDGES, CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, FOUND THAT A DEFENDANT WHO HAD NOT BEEN SERVED WAS A NECESSARY PARTY AND SHOULD NOT HAVE DISMISSED THE FORECLOSURE ACTION AGAINST OTHER DEFENDANTS ON THAT GROUND.

The Second Department, in this foreclosure action, determined Supreme Court should not have, sua sponte, held that a party (Moreno) was a necessary party and should not have dismissed the complaint against the other defendants on that ground: "Bromley [plaintiff] argues, in effect, that it was denied due process as a result of being unable to contest whether Dual Properties is the fee owner and whether Moreno is a necessary party. 'The lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process' ... . Here, the record does not support the Supreme Court's conclusion that Moreno's ownership of the property was 'uncontested.' In any event, the court's determination that Moreno was a necessary party prejudiced Bromley in that 'it was never afforded the opportunity to present evidence refuting the court's sua sponte determination' ... . Accordingly, we disagree with the Supreme Court's determination to, sua sponte, direct the dismissal of the complaint insofar as asserted against the remaining defendants for failure to join a necessary party." ***Aurora Loan Servs., LLC v. Moreno*, 2018 N.Y. Slip Op. 08107, Second Dept 11-28-18**

MUNICIPAL LAW, CIVIL RIGHTS LAW, CIVIL PROCEDURE, FALSE ARREST, FALSE IMPRISONMENT, ASSAULT, BATTERY. MALICIOUS PROSECUTION.

NO NOTICE OF CLAIM REQUIRED FOR ALLEGED VIOLATIONS OF 42 U.S.C. § 1983, STATUTE OF LIMITATIONS EXPIRED ON ASSAULT AND BATTERY, PERMISSION TO FILE LATE NOTICE OF CLAIM ON THE REMAINING STATE CHARGES SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined petitioner's application for permission to file a late notice of claim should not have been granted. After criminal charges were dismissed, eight months after the deadline for filing a notice of claim, petitioner sought to bring an action alleging violations of 42 U.S.C. § 1983, false arrest, false imprisonment, assault, battery, and malicious prosecution. The Second Department found that a notice of claim is not required for the 42 U.S.C. § 1983 action, the statute of limitations had expired on the assault and battery actions, reports documenting an investigation did not provide the city with timely notice of the essential facts of the claim, the excuse for the delay was not reasonable, and petitioner did not show the city was not prejudiced by the delay: "The branch of the petition which sought leave to serve a late notice of claim to assert, pursuant to 42 USC § 1983, violations of the petitioner's federal civil and constitutional rights, should have been denied as unnecessary... . Such a claim is not subject to the State statutory notice of claim requirement ... . We disagree with the Supreme Court's conclusion that the City acquired actual knowledge of the essential facts constituting the relevant state law claims within 90 days after they arose or a reasonable time thereafter. Actual knowledge could not be readily inferred from two reports dated June 18, 2015, documenting an internal investigation conducted by the police department to determine how a firearm was allegedly carried into, and concealed within, the station house, that 'a potentially actionable wrong had been committed by the [City]' against the plaintiff ... . Moreover, the mere alleged existence of other police reports and records, without evidence of their content, and the involvement of the City's police officers in the alleged incident, without more, were insufficient to impute actual knowledge to the City ... . We also disagree with the Supreme Court's conclusion that the petitioner presented a reasonable excuse for his failure to serve a timely notice of claim. The petitioner's incarceration did not constitute such an excuse, since the relevant state law claims did not accrue, and the petitioner's time to serve a notice of claim did not begin to run, until he was released from custody ...". ***Matter of Nicholson v. City of New York*, 2018 N.Y. Slip Op. 08134, Second Dept 11-28-18**

PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

DEFENDANT HAD PLED GUILTY TO SCALDING A DISABLED CHILD BY BATHING HER IN WATER THAT WAS TOO HOT, AT THE SUBSEQUENT CIVIL TRIAL DEFENDANT WAS ALLOWED TO CROSS-EXAMINE PLAINTIFF'S EXPERTS ABOUT THE EVIDENCE THAT THE CHILD SUFFERED AN ALLERGIC REACTION AND HAD NOT BEEN SCALDED, THE DEFENSE VERDICT WAS AFFIRMED, PLAINTIFF'S MOTION IN LIMINE REQUESTING THAT THE GUILTY PLEA BE GIVEN COLLATERAL ESTOPPEL EFFECT AND THAT THE PLAINTIFF BE PRECLUDED FROM PRESENTING EVIDENCE OF THE ALLERGIC REACTION WAS ACTUALLY AN UNTIMELY SUMMARY JUDGMENT MOTION, DESPITE SUPREME COURT'S GRANTING OF THE MOTION, THE DEFENSE VERDICT MAKES ANY FURTHER CONSIDERATION OF THE ERROR UNNECESSARY.

The Second Department affirmed the defense jury verdict in a case preceded by defendant's guilty plea to endangering the welfare of an incompetent or physically disabled person. It was alleged that defendant (Tiger), a nurse, scalded a 10-year-old severely disabled child (Alejandra) by bathing the child in hot water. After defendant pled guilty she moved set aside her conviction and submitted evidence the child suffered an allergic reaction which was misinterpreted as skin burns. The Appellate Division granted the motion to set aside the conviction. The Court of Appeals reversed, ruling that the "actual innocence" defense is not available after a guilty plea. In the subsequent civil trial, plaintiff had brought a motion in limine requesting that the guilty plea be given collateral estoppel effect and that the defendant be prohibited from presenting evidence of the allergic reaction. Supreme Court essentially granted the motion but allowed cross-examination of the plain-

tiff's experts about the allergic reaction. The Second Department determined the motion in limine was actually an untimely motion for summary judgment. But in light of the defense verdict, no further action by the appellate court was necessary. ***Farias-Alvarez v. Interim Healthcare of Greater N.Y.*, 2018 N.Y. Slip Op. 08115, Second Dept 11-28-18**

PERSONAL INJURY, CIVIL PROCEDURE, JUDGES.

THE REAR-END CHAIN-REACTION ACCIDENT OCCURRED IN PENNSYLVANIA BUT ALL PARTIES RESIDED IN NEW YORK, SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, DETERMINED THAT PENNSYLVANIA LAW APPLIED, BECAUSE THE PARTIES DID NOT RAISE THE CHOICE OF LAW ISSUE THEY ARE DEEMED TO HAVE CONSENTED TO THE APPLICABILITY OF NEW YORK LAW.

The Second Department, reversing Supreme Court, determined that the Ibrahims, the driver and owner of the second car in a four-car chain-reaction rear-end accident, were entitled to summary judgment. The accident occurred in Pennsylvania but all parties were residents of New York. Supreme Court, sua sponte, held that Pennsylvania law applied and the Ibrahims summary judgment motion must be denied under Pennsylvania law. The Second Department noted that none of the parties raised the choice of law issue and therefore the parties must be deemed to have consented to the applicability of New York law: "The Supreme Court should not have raised the issue of Pennsylvania law of its own accord, and should not have based its determination of the motion on a ground that was neither raised nor briefed by the parties ... . 'Parties to a civil litigation, in the absence of a strong countervailing public policy, may consent, formally or by their conduct, to the law to be applied' ... . By failing to raise a choice of law issue in opposition to Ibrahim's motion for summary judgment, the codefendants are deemed to have consented to the application of New York law... . In this case, Ibrahim established his prima facie entitlement to judgment as a matter of law by submitting evidence that he brought his vehicle safely to a stop behind the lead vehicle before being struck in the rear by the Goldman vehicle ...". ***Abdou v. Malone*, 2018 N.Y. Slip Op. 08106, Second Dept 11-28-18**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

INFANT PLAINTIFF WAS INJURED DURING RECESS WHEN, PLAYING FOOTBALL OUTSIDE THE DESIGNATED FOOTBALL AREA, HE DOVE FOR THE BALL AND STRUCK A PIECE OF PLAYGROUND EQUIPMENT, THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the school district's motion for summary judgment in this negligent supervision, student injury case should not have been granted. Infant plaintiff was playing touch football during recess in a designated area near the playground. The student was injured when, outside the designated area, he dove to catch the ball and struck a piece of playground equipment: "… [T]he defendants failed to meet their prima facie burden of demonstrating that the risk of colliding into the playground equipment located near the edge of the field was inherent in the activity of playing touch football on the field. Although the risks inherent in a sport include those 'associated with the construction of the playing surface and any open and obvious condition on it' ... , the playground equipment was not a part of the football field or related to the game... . Accordingly, the defendants failed to establish, prima facie, that their alleged negligent supervision in permitting the students to play football near the playground did not 'create[ ] a dangerous condition over and above the usual dangers that are inherent in the sport' ... . In addition, while the infant plaintiff was a willing participant in the game, in light of his age, it cannot presently be determined as a matter of law that he was aware of and appreciated the risks involved in the activity in which he was engaged ... . Further, the defendants failed to establish, prima facie, that the infant plaintiff's accident occurred in so short a span of time that even the most intense supervision could not have prevented it, thereby negating any alleged lack of supervision as the proximate cause of the infant plaintiff's injuries ... . Rather, there is a triable issue of fact as to whether the infant plaintiff 'was participating in a prohibited activity for an extended period of time and more intense supervision may have prevented the accident' ...". ***M.P. v. Mineola Union Free Sch. Dist.*, 2018 N.Y. Slip Op. 08119, Second Dept 11-28-18**

PRODUCTS LIABILITY, PERSONAL INJURY, CIVIL PROCEDURE, EVIDENCE.

VEHICLE SOFT CLOSE AUTOMATIC DOOR CLOSING MECHANISM WAS REPLACED AND DESTROYED AFTER PLAINTIFF'S FINGER WAS ALLEGEDLY CRUSHED WHEN THE DOOR ON THE VAN CLOSED, PROPER SANCTION FOR SPOLIATION IS AN ADVERSE INFERENCE JURY INSTRUCTION.

The Second Department, reversing (modifying) Supreme Court, determined defendant's motion for sanctions for spoliation of evidence should not have been denied and an adverse inference jury instruction was appropriate. Plaintiff alleged a "soft-close" mechanism on a van malfunctioned causing her finger to be crushed. After the "soft-close" mechanism was replaced it was destroyed: "... [W]e disagree with the Supreme Court's determination to deny that branch of the defendant's motion which was to impose sanctions for spoliation of evidence. The defendant sustained its burden of establishing that the plaintiff was obligated to preserve the soft-close automatic door mechanism on the driver's side door at the time of its destruction in September 2015, when the plaintiff had the mechanism replaced, that the evidence was negligently destroyed before the defendant had an opportunity to inspect it, and that the destroyed evidence was relevant to the litigation ... . Nevertheless,

since the defendant's ability to prove its defense was not fatally compromised by the destruction of the evidence... , the appropriate sanction for the spoliation herein is not to strike the complaint, but rather to direct that an adverse inference charge be given against the plaintiff at trial with respect to the unavailable evidence ...". ***Richter v. BMW of N. Am., LLC*, 2018 N.Y. Slip Op. 08163, Second Dept 11-28-18**

REAL PROPERTY LAW, ATTORNEYS.

CRITERIA FOR INTERPRETING AN EXPRESS EASEMENT AND A PRESCRIPTIVE EASEMENT EXPLAINED, PARTY PROPERLY SANCTIONED FOR COUNSEL'S FILING AN AMENDED COMPLAINT DIFFERENT FROM THE COMPLAINT APPROVED BY THE COURT.

The Second Department determined that neither plaintiff nor defendants were entitled to summary judgment in this dispute over an plaintiff's ingress and egress easement over defendants' land. The court explained the criteria for interpretation of an express easement and a prescriptive easement. The court noted that plaintiff was properly sanctioned for her counsel's conduct in filing an amended complaint which differed from the complaint approved by the court: "[T]he plaintiff moved for summary judgment on the amended complaint, arguing, in effect, that the language of the express easement should be amended to include certain curves in the right of way that were necessary to permit utility and delivery trucks to access the plaintiff's property. The plaintiff argued that she had obtained a prescriptive easement over the portions of the defendants' property which underlaid the proposed curves. The defendants cross-moved for summary judgment declaring that the plaintiff was not entitled to an expansion of the easement, by prescription or otherwise. ... 'Easements by express grant are construed to give effect to the parties' intent, as manifested by the language of the grant' ... . 'The extent of an easement claimed under a grant is generally limited by the language of the grant, as a grantor may create an extensive or a limited easement'... . 'Where, as here, an easement provides for the ingress and egress of motor vehicles, it is granted in general terms and the extent of its use includes any reasonable use necessary and convenient for the purpose for which it is created' ... . 'An easement by prescription may be demonstrated by clear and convincing proof of the adverse, open and notorious, continuous, and uninterrupted use of the subject property for the prescriptive period' ...". ***DiDonato v. Dyckman*, 2018 N.Y. Slip Op. 08113, Second Dept 11-28-18**

RELIGION, CONSTITUTIONAL LAW, CIVIL PROCEDURE.

DISPUTE BETWEEN THE CHURCH AND THE NUN WHO WAS DEFROCKED AND EJECTED FROM THE CONVENT IS NOT JUSTICIABLE IN NEW YORK COURTS UNDER THE FIRST AMENDMENT.

The Second Department, reversing Supreme Court, over a two-justice dissent, determined the action stemming from plaintiff church's defrocking and ejecting defendant nun from a convent was not justiciable in the New York courts because inquiry into religious doctrine or practice was required. Defendant nun had complained about sexual harassment by a priest and alleged she was retaliated against by the plaintiff church: " 'The First Amendment forbids civil courts from interfering in or determining religious disputes, because there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs' ... . A court may, however, properly preside over a dispute involving a religious body only when the dispute may be resolved utilizing neutral principles of law ... . Here, the summary proceedings for eviction and the action, inter alia, for ejectment are inextricably intertwined with the determinations of the ecclesiastical court, particularly its 2008 determination defrocking the defendant and ordering her to vacate the convent. Therefore, this consolidated action involves review of an ecclesiastical determination that may not be resolved by resort to neutral principles of law ... . Moreover, this matter does not involve a purely religious determination requiring this Court to accept the actions of the ecclesiastical court as final and binding ...". ***Russian Orthodox Convent Novo-Diveevo, Inc. v. Sukharevskaya*, 2018 N.Y. Slip Op. 08167, Second Dept 11-28-18**

ZONING, LAND USE, ADMINISTRATIVE LAW, EVIDENCE.

DENIAL OF SPECIAL USE PERMIT FOR A GAS STATION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Second Department determined the denial of a special use permit for the construction of a gas station was not supported by substantial evidence: "The subject two-acre parcel of land, upon which is located a used auto sales dealership, an automotive repair shop, and an area for the storage of cars and boats, is located in a business district in which gasoline service stations are a permitted use with a special permit. * * * Unlike a variance, a special permit does not entail a use of the property forbidden by the zoning ordinance but, instead, constitutes a recognition of a use which the ordinance permits under stated conditions ... . Thus, the burden of proof on an applicant seeking a special permit is lighter than that required for a hardship variance... . In reviewing a town board's determination on special permit applications, we are 'limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion,' and we 'consider substantial evidence only to determine whether the record contains sufficient evidence to support the rationality of the [b]oard's determination' ... . 'A denial of a special . . . permit must be supported by evidence in the record and may not be based solely upon community objection'... . Here, the material findings of the Town Board were not supported by substantial evidence. With regard to the alleged increased volume of traffic, there was no showing that the proposed use of a gasoline service station would have a greater impact on traffic than would other uses unconditionally permitted ... . While there was evidence that

traffic would be increased by 3%, there was no evidence indicating that the proposed use would have any greater impact than would other permitted uses. Thus, the alleged increase in traffic volume was an improper ground for the denial of the special permit." ***Matter of QuickChek Corp. v. Town of Islip*, 2018 N.Y. Slip Op. 08136, Second Dept 11-28-18**

THIRD DEPARTMENT

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL APOLOGIZED TO COUNTY COURT AND INDICATED DEFENSE COUNSEL'S BEHAVIOR MAY HAVE CAUSED THE PEOPLE TO HAVE WITHDRAWN A MORE FAVORABLE PLEA OFFER, COUNTY COURT SHOULD HAVE ASSIGNED SUBSTITUTE COUNSEL AND SHOULD HAVE CONDUCTED AN INQUIRY TO DETERMINE WHETHER THE PEOPLE SHOULD BE COMPELLED TO REOFFER THE PRIOR PLEA DEAL.

The Third Department, reversing County Court, determined County Court should have inquired into defense counsel's apology for his behavior which may have caused the People to withdraw a more favorable plea offer: "County Court failed to take appropriate action in response to defense counsel's disclosures. Initially, County Court failed to recognize that defense counsel's statements disqualified him from continuing to represent defendant, particularly if defense counsel were required to provide testimony regarding the events that allegedly took place on the preceding Friday... . Accordingly, when presented with defense counsel's statements, County Court should have immediately explained the situation to defendant and adjourned the matter to allow for the substitution of counsel. Following substitution of counsel, County Court should have conducted a hearing to determine whether defendant received the ineffective assistance of counsel during the plea negotiation process and, thus, was entitled to an order directing the People to reoffer the more favorable plea offer that was allegedly available on the preceding Friday... . County Court, however, failed to appreciate that, if defendant made the requisite showing at that hearing, it could in its discretion direct the People to reoffer the prior, more favorable plea, if it was in fact made... . Indeed, a court may direct the People to reoffer a prior, more favorable plea offer on ineffective assistance of counsel grounds only if a defendant demonstrates (1) the existence of a prior, more favorable plea offer, (2) a reasonable probability that, but for defense counsel's conduct, he or she would have accepted the prior plea offer, (3) a reasonable probability that the agreement would have been presented to and accepted by the court and (4) that the conviction and/or sentence under the terms of the plea offer would have been less severe than the conviction and sentence ultimately imposed ... . County Court did not afford defendant the opportunity to make this showing here. Rather, it repeatedly misinformed defendant that it could not direct the People to reoffer the prior plea offer and that defendant could either take a new plea offer or go to trial. It is under these circumstances that defendant accepted the later plea offer and entered the underlying guilty plea. Therefore, we reverse the judgment of conviction and remit the matter for substitution of defense counsel and further proceedings." ***People v. McGee*, 2018 N.Y. Slip Op. 08203, Third Dept 11-29-18**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW.

AFTER REVERSAL BY THE COURT OF APPEALS, THE EXPULSION OF PETITIONER STUDENT FOR SEXUAL MISCONDUCT IN VIOLATION OF THE COLLEGE'S STUDENT CODE CONFIRMED, COLLEGE APPEALS BOARD HAD THE POWER TO IMPOSE ANY AVAILABLE REMEDY INCLUDING EXPULSION.

The Third Department, after a reversal by the Court of Appeals, confirmed the college's determination to expel petitioner, a student accused of sexual misconduct in violation of the student code: "... [T]he Court of Appeals agreed with us 'that petitioner's due process arguments were not preserved at the administrative level' … . To the extent that petitioner's procedural claims go beyond those arguments, they are also unpreserved due to him either failing to raise them at the administrative hearing when they could have been corrected or failing to raise them altogether ... . We accordingly focus upon the penalty of expulsion recommended by SUNY's Appellate Board and imposed by respondent Kristen Esterberg, SUNY's president. Petitioner may not have been aware of the fact when he took an administrative appeal from a decision of the Hearing Board that suspended him for a semester, but the Appellate Board was empowered by article IX (C) of the student code of conduct to 'alter the sanctions imposed' and punish him with 'any of the [available] sanctions,' including more severe ones. Article IX misstates the student code of conduct sections dealing with the jurisdiction of the Appellate Board and the permissible sanctions, but a review of the pertinent provisions leaves no doubt that those misstatements were drafting errors that may be disregarded ... . The Appellate Board chose one of the available remedies by recommending expulsion and, while no explanation was offered as to why it did so, the student code of conduct did not require one. Esterberg adopted the recommendation." ***Matter of Haug v. State Univ. of N.Y. At Potsdam*, 2018 N.Y. Slip Op. 08208, Third Dept 11-29-18**

FAMILY LAW, ATTORNEYS, CRIMINAL LAW.

RESPONDENT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL IN THIS FAMILY OFFENSE PROCEEDING, DEFENSE COUNSEL DID ALMOST NOTHING TO ASSIST HIS CLIENT, FINDINGS AND ORDER OF PROTECTION REVERSED.

The Third Department, reversing Family Court, determined that respondent did not receive effective assistance of counsel in this family offense proceeding: "Petitioner filed a family offense petition alleging that respondent harassed and stalked her. ... Viewing the record in its entirety, we agree with respondent's argument that he was denied meaningful representation ... . Before the hearing, counsel did not engage in any discovery. At the hearing, counsel did not present an opening or closing statement. Nor did counsel object when Family Court questioned petitioner — who appeared pro se — and admittedly assisted her in establishing a foundation for two of her three photographic exhibits. Counsel asked questions of petitioner regarding those exhibits on voir dire, but objected to admission of only one of them, did not request that the court disregard petitioner's handwritten notes on the exhibits, and did not object to the many hearsay statements made by petitioner. Counsel declined to cross-examine petitioner, at which point the court stated that she had established a prima facie case and did not need to call any further witnesses. Even though respondent had stated — while not under oath — that one of the photographs was taken when the parties were out together, rather than while petitioner was unaware of his presence, counsel did not call respondent or any other witnesses to testify. In short, counsel did almost nothing to assist his client." ***Matter of Wood v. Rebich*, 2018 N.Y. Slip Op. 08213, Third Dept 11-29-18**

FAMILY LAW, EVIDENCE.

TERMINATION OF FATHER'S VISITATION RIGHTS WAS NOT SUPPORTED BY A SOUND AND SUBSTANTIAL BASIS IN THE RECORD, WHICH INCLUDED HEARSAY.

The Third Department, reversing Family Court, determined termination of father's visitation was not supported by a sound and substantial basis in the record: "It is undisputed that the father engaged in physical violence and verbal abuse directed at the mother. Although the record demonstrates strong support for a change in circumstances and supervised visitation, the record lacks direct evidence that visitation is detrimental to the child; as such, it is presumed that it is in the child's best interests to continue visitation ... . Further, although the mother and maternal grandmother testified regarding concerns about the father's sexual behavior, these concerns were based on hearsay and speculation from vulgar and inappropriate comments made by the father. Concern regarding abuse or potential abuse must have a basis in the record to justify denial of visitation; uncorroborated hearsay alone is not enough ... . Notably, both the mother and the attorney for the child supported continued supervised visitation ... . Thus, Family Court's determination to terminate visitation lacks a sound and substantial basis in the record ...". ***Matter of Boisvenue v. Gamboa*, 2018 N.Y. Slip Op. 08211, Third Dept 11-29-18**

FAMILY LAW, EVIDENCE.

FAMILY COURT'S CONCLUSIONS IN THIS CUSTODY MATTER WERE NOT SUPPORTED BY THE RECORD, MATTER REMITTED FOR PROCEEDINGS BEFORE A DIFFERENT JUDGE.

The Third Department, reversing Family Court, determined that the custody determinations were not supported by the record and remitted the matter for further proceedings before a different judge. The decision is too fact-specific to fairly summarize here: "We agree with the mother that Family Court's decision and order mischaracterizes and, at times, inaccurately reflects the record evidence and that, therefore, its determination lacks a sound and substantial basis in the record. ... [T]he record evidence does not support Family Court's depiction of the mother as 'a hands-off parent who appears to pay little attention to the child's needs when he is in her care' or its converse depiction of the father as a 'devote[d]' parent with few, if any, flaws. Our review of the evidence reveals a more complicated picture than that portrayed by Family Court. ... [T]he record evidence, including the father's own admissions, completely contradicts Family Court's conclusion that there was no support for the mother's claim of substance abuse and domestic violence by the father. ... Family Court's conclusion that there 'was no credible evidence of domestic violence' by the father against the mother was also contradicted by the record. ... Family Court misconstrued, mischaracterized and otherwise amplified the evidence to portray the mother in the light least favorable. ... Moreover, even if Family Court's determination to award the father primary physical custody were supported by a sound and substantial basis, there was no basis for the severe reduction of the mother's overall time with the child, particularly since the parties had previously shared 50/50 custody of the child ...". ***Matter of Shirreece AA. v. Matthew BB.*, 2018 N.Y. Slip Op. 08215, Third Dept 11-29-18**

LIEN LAW.

THE LIEN LAW DOES NOT PROVIDE THAT A TOWING COMPANY STORING A CAR PURSUANT TO A POLICE IMPOUND HAS THE RIGHT TO DEMAND A RELEASE FROM THE POLICE DEPARTMENT AND A HOLD HARMLESS AGREEMENT BEFORE RELEASING THE CAR, THE CAR SHOULD HAVE BEEN RELEASED WHEN PETITIONER FIRST REQUESTED IT, IN ADDITION, THE $50 A DAY STORAGE FEE IS EXCESSIVE.

The Third Department determined respondent towing company, which was storing petitioner's car pursuant to a police impound, did not have the authority to demand police approval for release of the car or a hold harmless agreement, and the $50 a day storage fee was excessive. The car should have been released when petitioner first requested it: "On October 29, 2016, respondent All County Towing and Recovery (hereinafter respondent) towed a vehicle to its facility at the direction of a local police department. On November 2, 2016, respondent mailed a notice to the registered owner of the vehicle and petitioner, a lienholder, advising that the vehicle was in its possession as a result of a police impound, that a lien was being asserted pursuant to Lien Law § 184, that storage fees were accruing in the amount of $50 per day and that, once the vehicle was released from police impound, it could be retrieved 'upon full payment of all charges accrued' as of the date of release. That same day, petitioner offered to pay the fees then due in order to take possession of the vehicle, but respondent refused to surrender the vehicle unless petitioner obtained a release authorization from the local police department. Petitioner's agent again attempted to recover the vehicle on November 7, 2016, and reported that respondent now demanded, in addition to a police release, the execution of a hold-harmless agreement in its favor. ... [W]e conclude that nothing in Lien Law § 184 authorized respondent to condition the release of a vehicle upon the provision of a release authorization from law enforcement officials or the execution of a hold-harmless agreement in its favor ... . [W]e agree with Supreme Court that respondent's $50 daily storage fee is unreasonable ...". ***Matter of Ally Fin., Inc v. All County Towing & Recovery*, 2018 N.Y. Slip Op. 08223, Third Dept 11-29-18**

MUNICIPAL LAW, ENVIRONMENTAL LAW, EMPLOYMENT LAW.

BUILDING INSPECTOR WAS PROPERLY TERMINATED FOR FAILURE TO REQUIRE ASBESTOS ABATEMENT FOR A DEMOLISHED BUILDING, BECAUSE THE ACTIONS OF THE INSPECTOR CONSTITUTED CRIMES UNDER THE ENVIRONMENTAL CONSERVATION LAW AND PENAL LAW, THE EMPLOYMENT-RELATED CHARGES WERE TIMELY.

The Third Department determined that petitioner, formerly a village building inspector, was properly terminated for failing to require asbestos abatement for a demolished building. Because the allegations constituted crimes pursuant to the Environmental Conservation Law (ECL) the charges were not time-barred. The evidence was deemed sufficient to support the charges: "Petitioner's primary contention on appeal is that the charge should have been dismissed as untimely. Indeed, 'no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges' (Civil Service Law § 75 [4... . However, this limitations period does not apply 'where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime' ... . Upon our review, we find substantial evidence in the record to sustain the charge that petitioner 'committ[ed] acts constituting crimes' — namely, endangering public health, safety or the environment in the fourth degree, official misconduct and criminal nuisance in the second degree — and, thus, to support the determination terminating petitioner's employment ...". ***Matter of Snowden v. Village of Monticello*, 2018 N.Y. Slip Op. 08226, Third Dept 11-29-18**

WORKERS' COMPENSATION, ATTORNEYS, EVIDENCE.

THE COMMUNICATION BETWEEN CLAIMANT'S ATTORNEY AND THE INDEPENDENT MEDICAL EXAMINER DID NOT CREATE THE APPEARANCE OF IMPROPRIETY, THE INDEPENDENT MEDICAL EXAMINER'S REPORT AND TESTIMONY SHOULD NOT HAVE BEEN PRECLUDED.

The Third Department, reversing the Workers' Compensation Board, determined that the communication between claimant's counsel and the independent medical examiner (Saunders) who assessed claimant's loss of use of his left foot, did not create the appearance of impropriety and did not warrant the preclude Sauders' report and testimony: "... [A]t the conclusion of Saunders' deposition, the employer's attorney inquired whether claimant's attorney had communicated with him regarding the claim. Saunders responded that he had received a text message from the attorney the day before the deposition indicating that the deposition would address claimant's schedule loss of use, but that there was no discussion with counsel. The employer's attorney asked no further questions and made no request for claimant to produce a copy of the text message, a copy of which is not in the record. We are left then with what appears to be a limited communication between claimant's counsel and Saunders confirming the subject of the deposition. Significantly, there is no dispute that Saunders' ensuing deposition testimony fully comported with the report that he had previously filed with the Board — an outcome illustrating that claimant's counsel in no way influenced Saunders' testimony through the text message. In our view, ver-

ifying the subject of the deposition was simply ministerial in nature and does not reflect an effort to influence the witness testimony." ***Matter of Knapp v. Bette & Cring LLC*, 2018 N.Y. Slip Op. 08218, Third Dept 11-20-18**

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