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CasePrepPlus

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COURT OF APPEALS

CIVIL PROCEDURE. CHOICE OF LAW. RESTRICTIVE COVENANTS. NON-SOLICITATION OF CUSTOMERS. CONTRACT LAW. EMPLOYMENT LAW.

The Florida law on restrictive covenants re: non-solicitation of customers by a former employee violated the public policy of New York State. Therefore the choice-of-law provision in the employee agreement was unenforceable. Questions of fact precluded a determination whether the non-solicitation agreement at issue should be enforced under New York Law. With respect to the public policy violation, the court explained: "... Florida law requires a party seeking to enforce a restrictive covenant only to make a prima facie showing that the restraint is necessary to protect a legitimate business interest, at which point the burden shifts to the other party to show that the restraint is overbroad or unnecessary (see Fla Stat § 542.335 [1] [c]). If the latter showing is made, the court is required to "modify the restraint and grant only the relief reasonably necessary to protect" the employer's legitimate business interests (Fla Stat § 542.335 [1] [c]). In contrast to this focus solely on the employer's business interests, under New York's three-prong test, "[a] restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." **Brown & Brown, Inc. v Johnson, 2015 NY Slip Op 04876, Ct App 6-11-15**

CONTRACT LAW. BREACH OF REPRESENTATIONS AND WARRANTIES. ACCRUAL OF BREACH OF CONTRACT CAUSE OF ACTION. STATUTE OF LIMITATIONS.

In an action involving residential mortgage-backed securities, the court determined that a cause of action based upon breach of representations and warranties accrued on the date the contract was executed. A few years after the parties executed a mortgage loan purchase agreement (MLPA) and a pooling and servicing agreement (PSA) borrowers began to default, resulting in hundreds of millions in losses. Upon investigation it was determined that the underlying mortgage loans failed to comply with the defendant's representations and warranties about the borrowers' incomes, occupancy status and existing debts. The Court of Appeals held that the breach of the representations and warranties occurred when the MLPA was executed on March 28, 2006. The action was commenced on the last day of the limitations period (on March 28, 2012), but was untimely because the contractual conditions precedent to suit had not been complied with as of that date. Plaintiff argued that the defendant's refusal to cure or repurchase after notification in January 2012 breached a second contract and started the six-year statute running from that point. The Court of Appeals held that the defendant's repurchase obligation was not a valid agreement "to undertake a separate obligation, the breach of which does not arise until some future date...". "[Defendant's] cure or repurchase obligation could not reasonably be viewed as a distinct promise of future performance. It was dependent on, and indeed derivative of, [defendant's] representations and warranties, which did not survive the closing and were breached, if at all, on that date...". **ACE Sec. Corp. v DB Structured Prods., Inc., 2015 NY Slip Op 04873, CtApp 6-11-15**

CONTRACT LAW. "ABSOLUTE AND UNCONDITIONAL" GUARANTY OF PAYMENT. FRAUD.

An unconditional guaranty (re: payment of corporate debts) was a proper basis for summary judgment in lieu of a complaint, notwithstanding defendant's (unsupported) allegation the underlying judgment was the result of collusion and fraud. An unconditional guaranty is enforceable in New York, even where it is alleged the guaranty itself was the product of fraud: "Guarantees that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guarantees that are "absolute and unconditional," have been consistently upheld by New York courts * * *. This Court has acknowledged the application of these absolute guarantees even to claims of fraudulent inducement in the execution of the guaranty ... ." **Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A. v Navarro, 2015 NY Slip Op 04753, CtApp 6-9-15**

CRIMINAL LAW. ACCOMPLICE LIABILITY. JURY INSTRUCTION OUTSIDE PRESENCE OF DEFENDANT.

Noting that it was a close case, the Court of Appeals determined the evidence supported defendant's conviction for manslaughter under an accomplice theory. Defendant struck the victim with a beer bottle and then chased after another man. There was conflicting testimony about whether defendant was present when another man who was with the defendant

struck the victim with a baseball bat. Viewing the evidence in the light most favorable to the People, the evidence of a "community of purpose" among accomplice and principal was sufficient. Further, the court determined the judge's correcting an error in the jury instructions by informing the jury of the correct dates of the offenses outside the presence of the parties, but with the parties' consent, was not a mode of proceedings error requiring reversal. **People v Scott, 2015 NY Slip Op 04874, CtApp 6-11-15**

CRIMINAL LAW. DOUBLE JEOPARDY.

Defendant was not entitled to the dismissal of charges on double jeopardy grounds. Defendant had used his son's identification information to procure a non-driver ID card in Suffolk County. Several months later defendant was stopped by police in Westchester County, presented the fake non-driver ID card, and was subsequently charged with possession of a forged instrument in the second degree. Defendant pled guilty to possession of a forged instrument third degree. When defendant's son returned to New York State (after a four-year absence) and applied for a driver's license in Westchester County, authorities became aware of defendant's submission (in Westchester County) of a fake application (MV-44 form) for the non-driver ID. Defendant was then charged in Westchester County with possession of a forged instrument (the ID application form) as well as forgery. The Court of Appeals held that the two offenses were not "integrated, interdependent acts as seen in conspiracy cases or complex frauds...". Therefore, unlike individual acts within such conspiracies or complex frauds, the two acts did not constitute a "single criminal venture." The court noted: "A closer case might be presented had defendant applied for a driver's license in Suffolk County with his son's papers and showed the temporary driver's license later that same day when his car was stopped by police. In such circumstances, the timing and criminal purpose of the two acts would be more interrelated than the circumstances presented here.". **People v Lynch, 2015 NY Slip Op 04754, CtApp 6-9-15**

CRIMINAL LAW. EVIDENCE. IMPROPER "EXPERT" TESTIMONY. "SUMMATION WITNESSES."

Although deemed harmless, it was error to allow a detective, who was involved in the underlying murder investigation, to testify as an "expert." The detective was asked to explain the meaning of so-called "code words" used in recorded conversations admitted into evidence. But it was clear that the trial court allowed the detective to testify as an "expert" on matters that had nothing to do with translating code words (acting as a so-called "summation witness"). As a result, the detective's testimony was imbued with an aura of expertise which could have improperly added weight to his testimony in the eyes of the jury. Because this issue has not been addressed by New York courts, the Court of Appeals turned to two Second Circuit cases which held the improper "expert" testimony, on topics not beyond the "ken of the jurors," usurped the jury's role. **People v Inoa, 2015 NY Slip Op 04790, CtApp 6-10-15**

CRIMINAL LAW. SEX OFFENDER REGISTRATION ACT (SORA). DUE PROCESS. MODIFICATION HEARING.

Defendant was entitled access to all the documents reviewed by the New York State Board of Examiners of Sex Offenders (Board) in connection with the Board's recommendation that defendant's classification remain at risk level 3. However, County Court's refusal to grant an adjournment to allow defendant to gain access to missing documents (two emails) was not an abuse of discretion. The record evidence in support of the denial of the modification was overwhelming. **People v Lashway, 2015 NY Slip Op 04877, CtApp 6-11-15**

CRIMINAL LAW. WAIVER OF APPEAL.

Defendant's waiver of appeal was valid, although the nature of the right to appeal could have been defined more fully: "Regarding the waiver of the right to appeal, the following exchange ... took place between the prosecutor and defendant: 'Q Do you understand that as a condition of this plea you are waiving the right to appeal your conviction and sentence to the Appellate Division Second Department? A Yes. Q Have you discussed this waiver of the right to appeal with your attorney? A Yes. Q In consideration of this negotiated plea[,] do you now voluntarily waive your right to appeal your conviction and sentence under this indictment? A Yes.' … County Court adequately described the right to appeal without lumping it into the panoply of rights normally forfeited upon a guilty plea." [The dissent pointed out that the responsibility for the colloquy re: the waiver of appeal was delegated to the prosecutor here.] **People v Sanders, 2015 NY Slip Op 04755, CtApp 6-9-15**

CRIMINAL LAW. YOUTHFUL OFFENDER STATUS. ARMED FELONY. ENUMERATED SEX OFFENSE. MITIGATING FACTORS.

"[W]hen a defendant has been convicted of an armed felony or an enumerated sex offense pursuant to CPL 720.10 (2) (a) (ii) or (iii), and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the [mitigating] factors set forth in CPL 720.10 (3). The court must make such a determination on the record 'even where [the] defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request' pursuant to a

plea bargain ... . If the court determines, in its discretion, that neither of the CPL 720.10 (3) factors exist and states the reasons for that determination on the record, no further determination by the court is required. If, however, the court determines that one or more of the CPL 720.10 (3) factors are present, and the defendant is therefore an eligible youth, the court then 'must determine whether or not the eligible youth is a youthful offender' (CPL 720.20 [1])." **People v Middlebrooks, 2015 NY Slip Op 04875, CtApp 6-11-15**

FORECLOSURE. MORTGAGES. STANDING.

Possession of the note, not the mortgage, when the foreclosure proceedings are commenced is sufficient to confer standing upon the note-holder. " '[A]ny disparity between the holder of the note and the mortgagee of record does not stand as a bar to a foreclosure action because the mortgage is not the dispositive document of title as to the mortgage loan; the holder of the note is deemed the owner of the underlying mortgage loan with standing to foreclose'... . . Accordingly, the [defendants'] argument that [plaintiff] lacked standing because it did not possess a valid and enforceable mortgage as of the commencement of this action is simply incorrect. The validity of the ... assignment of the mortgage is irrelevant to [plaintiff's] standing." **Aurora Loan Servs., LLC v Taylor, 2015 NY Slip Op 04872, CtApp 6-11-15**

INSURANCE LAW. NO-FAULT INSURANCE BENEFITS. SUMMARY JUDGMENT ON OVERDUE CLAIMS. EVIDENCE.

Once a no-fault claim is overdue (because the insurance company has not denied the claim, asked for verification of the claim, or paid the claim, within the statutory time-period), the plaintiff-medical-provider is entitled to summary judgment on the overdue claims after submitting proof the statutory claim forms were mailed to and received by the insurer. There is no requirement that the plaintiff submit proof of the validity of the underlying medical services. **Viviane Etienne Med. Care v Country-Wide Ins. Co., 2015 NY Slip Op 04787, CtApp 6-10-15**

MENTAL HYGIENE LAW. GUARDIANS OF INCAPACITATED PERSONS. DEBTS OF INCAPACITATED PERSIONS. TRUSTS AND ESTATES. STATUTORY INTERPRETATION.

Mental Hygiene Law 81.44 does not permit "a guardian to retain property of an incapacitated person after the incapacitated person has died for the purpose of paying a claim against the incapacitated person that arose before such person's death." "... [T]he issue [here was] whether property held by ... [the] guardian at the time of [the incapacitated person's] death automatically became the property of her estate or could be withheld by [the guardian] for the purpose of paying the claim, out of the guardianship account, that [the nursing home] had noticed before [the incapacitated person] died." Based upon the legislative history of Mental Hygiene Law 81.44, the court determined, after an incapacitated person's death, the guardian may use guardianship funds only to pay claims related to the administration of the guardianship, and may not use them to pay debts incurred by the incapacitated person]. **Matter of Shannon, 2015 NY Slip Op 04789, CtApp 6-10-15**

NEGLIGENCE. PERSONAL INJURY. COMMUNITY COLLEGES. COUNTY LAW. EDUCATION LAW. MUNICIPAL LAW.

Plaintiff's decedent died of cardiac arrest in a Sullivan County Community College (SCCC) dormitory. Plaintiff sued the county, alleging the dormitory should have been equipped with a defibrillator and/or should have had an emergency medical response plan in effect. The Court of Appeals determined the complaint against the county was properly dismissed. Although the county was the "sponsor" of the community college, it did not own the dormitory and did not manage the day-to-day operation of the community college, which was handled by the board of trustees (Education Law 6306). **Branch v County of Sullivan, 2015 NY Slip Op 04756, CtApp 6-9-15**

NEGLIGENCE. PERSONAL INJURY. MEDICAL MALPRACTICE. "FOREIGN OBJECT." STATUTE OF LIMITATIONS. CPLR 214-a.

A catheter left in plaintiff's heart after surgery in 1986 (when plaintiff was three years old) was a "foreign object." Therefore the statute of limitations did not start to run until the presence of the catheter was "discovered" in 2008. Plaintiff's complaint, brought within one year of discovery, was therefore timely. The issue was whether the catheter could be considered a "fixation device" because it was intentionally inserted. If so, the one-year-from-discovery "foreign object" statute of limitations (see CPLR 214-a) would not have applied and the complaint would have been untimely. The Court of Appeals held that the catheter (which was to temporarily monitor heart function after surgery) was not a "fixation device" because, although it was intentionally inserted, it was not inserted to serve a "postsurgery healing function" and it was to be removed a few days after insertion. Thus the catheter was different in kind from a "fixation device," such as a "stent" or a "suture," deliberately inserted to serve a "healing function." **Walton v Strong Mem. Hosp., 2015 NY Slip Op 04786, CtApp 6-10-15**

NEGLIGENCE. PERSONAL INJURY. MUNICIPAL LAW (NEW YORK CITY). VEHICLE AND TRAFFIC LAW. RULES OF THE CITY OF NEW YORK (RCNY).

The "reckless disregard" standard in Vehicle and Traffic Law 1103, not the ordinary negligence standard, applied to the operator of a New York City street sweeper who was in the process of cleaning the street when the sweeper struck plaintiff's car. A question of fact had been raised whether the applicable standard of care was violated. **Deleon v New York City Sanitation Dept., 2015 NY Slip Op 04788, CtApp 6-9-15**

NEGLIGENCE. PERSONAL INJURY. STRICT LIABILITY. ANIMAL LAW. DOGS.

The Court of Appeals kept New York law as it was with respect to the available causes of action for injuries caused by dogs. Negligence theories are not available, and a strict liability theory requires proof the dog owners were aware of the dog's propensity to cause injury. In one case (*Doerr v. Goldsmith*) the dog was called by one of its owners and ran across a bike path where plaintiff, a bicyclist, struck the dog and was injured. In the other case (*Dobinski v. Lockhart*), dogs were let out of the owners' house and ran into the road where plaintiff-bicyclist struck one of the dogs and was injured. The court kept the existing distinction between domestic pets and farm animals. The owner of a farm animal which wanders off the farm and causes injury may be liable for negligently allowing the farm animal to escape. The same theory of owner-negligence was not extended to domestic animals (dogs here). The dog owners who allowed their dog to run across a bike path in response to a command could not be held liable for negligence in handling the dog. And the dog owners whose dogs ran into the road after being let outside could not be liable for negligently handling the dogs and could not held strictly liable in the absence of proof they were aware of the dogs' relevant propensity. **Doerr v Goldsmith, 2015 NY Slip Op 04752, CtApp 6-9-15**

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS. RIGHT OF SEPULCHER. PUBLIC HEALTH LAW. MUNICIPAL LAW.

The medical examiner, who conducted an autopsy of plaintiffs' 17-year-old son after his death in a car accident, was under no statutory or ministerial duty to inform plaintiffs he had removed plaintiffs' son's brain for further examination and testing, nor was he under a duty to return the brain to the plaintiffs. Therefore plaintiffs did not have a "negligent infliction of emotional distress" or "violation of the right of sepulcher" cause of action against the city. (Plaintiffs had been awarded significant damages at trial.) **Shipley v City of New York, 2015 NY Slip Op 04791, CtApp 6-10-15**

FIRST DEPARTMENT

ADMINISTRATIVE LAW. EDUCATION-SCHOOL LAW. TEACHERS. TERMINATION OF PROBATIONARY EMPLOYMENT AND TEACHING LICENSES.

The school district's termination of petitioner's probationary employment as a teacher and termination of her teaching licenses was "arbitrary and capricious" because it was based in part on an issue, absenteeism, of which the teacher had not been given notice. **Matter of Brower v New York City Dept. of Educ., 2015 NY Slip Op 04764, 1st Dept 6-9-15**

ATTORNEYS. DISQUALIFICATION. APPEARANCE OF A CONFLICT OF INTEREST. MENTAL HYGIENE LAW. GUARDIANSHIP. INCAPACITATED PERSONS.

A single attorney representing co-guardians of an incapacitated person created the appearance of representing conflicting interests. The court held there was a potential conflict of interest because the co-guardians were dependent upon the incapacitated person and had competing financial interests in the terms of a trust and as beneficiaries of the incapacitated person's will. **Matter of Strasser v Asher, 2015 NY Slip Op 04763, 1st Dept 6-9-15**

CRIMINAL LAW. EVIDENCE. HEARSAY. DECLARATION AGAINST PENAL INTEREST.

Defendant's friend's alleged hearsay statement that he, not defendant, assaulted the victim was properly precluded. The statement did not meet the "reliability" requirement for admissibility as a statement against penal interest (an exception to the hearsay rule). The First Department explained: "This hearsay evidence did not satisfy the reliability requirement for admissibility under the exception for declarations against penal interest ..., or under a due process theory ... . Defendant's friend told defense counsel that he neither committed the assault nor made the alleged statements, the statements were contradicted by trial witnesses who testified that the friend was nearby but did not participate in the assault, the statements were allegedly made to persons closely aligned with defendant, and recorded phone calls raised suspicion that defendant had made efforts to manufacture exculpatory evidence. All these factors undermined any reliability this hearsay evidence may have had ..." . **People v Jones, 2015 NY Slip Op 04781, 1st Dept 6-9-15**

CRIMINAL LAW. GROSSLY UNQUALIFIED JUROR. DISHCHARGE OF JUROR FOR CAUSE BASED UPON A NEWLY DISCOVERED GROUND.

A sworn juror was properly discharged as "grossly unqualified," as well as "for cause." The juror lived in the neighborhood where the crime occurred and where defendant and his accomplices lived. The juror told the court that his fear of drug dealers in his neighborhood would prevent him from reaching an impartial verdict. The juror had not mentioned his fear before he was sworn. The First Department wrote: "The juror's fear provided grounds for the court to dismiss him as 'grossly unqualified to serve' pursuant to CPL 270.35(1), even if the court did not cite the statutory phrasing, because it was clear that the juror could not remain impartial. Additionally, since the juror had not mentioned that he feared for his safety when questioned by the court and the parties before being sworn, he was properly discharged for cause, on a newly discovered ground, pursuant to CPL 270.15(4)." **People v Ward, 2015 NY Slip Op 04928, 1st Dept 6-11-15**

EDUCATION-SCHOOL LAW. EDUCATION LAW. ADMINISTRATIVE LAW. STATUTE OF LIMITATIONS.

The third set of charges brought against petitioner-teacher, alleging the teacher improperly obtained his daughter's admission to NYC Department of Education (DOE) schools for which she was not zoned, was time-barred. Although the three-year statute of limitations in the Education Law would not apply had the allegations constituted a crime, the hearing officer did not find the teacher's conduct to be criminal. The First Department determined that the first two set of charges against the teacher did not justify termination (the penalty imposed) and remitted the matter for a lesser punishment. The court noted that the statute of limitations in the Education Law need not be raised as a defense. **Matter of Suker v New York City Board/ Dept. of Educ., 2015 NY Slip Op 04940, 1st Dept 6-11-15**

LABOR LAW. PERSONAL INJURY. CIVIL PROCEDURE. NECESSARY PAPERS PROVIDED BY ANOTHER PARTY.

Plaintiff was properly awarded summary judgment on his Labor Law 240 (1) claim. A rope attached to a heavy tank being lowered down some stairs by plaintiff severed one finger and a portion of another ("grave injury"). The court found that the incident was gravity-related, plaintiff was not provided with adequate safety devices, and plaintiff's actions were not the sole proximate cause of his injury. The court noted that another party's cross-motion for summary judgment should not have been denied on the ground the pleadings were not attached to the motion papers. The pleadings had been provided to the court by other parties. **Serowik v Leardon Boiler Works Inc., 2015 NY Slip Op 04773, 1st Dept 6-9-15**

MUNICIPAL LAW. NOTICE OF CLAIM. MOLD CLAIMS. ACCRUAL OF CLAIMS/NEW YORK CITY HOUSING AUTHORITY (NYCHA).

Supreme Court should not have, sua sponte (in the absence of a motion by the plaintiff), deemed plaintiff's late notice of claim timely filed nunc pro tunc. The claim alleged mold resulting from a leak in plaintiff's New York City Housing Authority (NYCHA) apartment exacerbated plaintiff's asthma. The First Department found that the cause of action accrued when plaintiff's symptoms worsened, no later than February, 2011, not when a connection between the mold and plaintiff's symptoms was suggested by a doctor in March 2011." **Vincent v New York City Hous. Auth., 2015 NY Slip Op 04767, 1st Dept 6-9-15**

NEGLIGENCE. PERSONAL INJURY. REAR-END COLLISIONS.

Questions of fact about the sequence of rear-end collisions precluded summary judgment. DiPaoli, the driver of the front vehicle, was at a complete stop at a red light. The middle vehicle was driven by Passos, the plaintiff. The last vehicle was an MTA bus. From the deposition testimony, it was unclear whether the plaintiff's vehicle struck the first vehicle before the bus struck plaintiff's vehicle. The First Department explained the applicable law: "When approaching another vehicle from behind, drivers are required to maintain a reasonably safe rate of speed, maintain control over the vehicle, and use reasonable care to avoid a collision, by, among other things, including maintaining a safe distance (Vehicle and Traffic Law § 1129[a]). Under the law applicable to rear end collisions, a presumption of negligence is established by proof that a stopped car was struck in the rear ... . However, that presumption can be rebutted if the operator of the rear vehicle comes forward with an adequate non-negligent explanation for the accident ..." . **Passos v MTA Bus Co., 2015 NY Slip Op 04916, 1st Dept 6-11-15**

NEGLIGENCE. PERSONAL INJURY. STRICT PRODUCTS LIABILITY. ASBESTOS. FORESEEABILITY. DISMANTLING, SALVAGING, DEMOLISHING THE PRODUCT.

The dismantling, salvaging and demolishing of valves containing asbestos did not constitute a foreseeable use of the valves. The complaint against the manufacturer of the valves, sounding in strict products liability and negligence, was dismissed. The First Department explained: "A manufacturer who sells a product in a defective condition is liable for injury which results to another when the product is used for its intended purpose or for an unintended but reasonably foreseeable purpose" … . The issue, which has not been squarely addressed by the courts of this State, is whether dismantling constitutes a

reasonably foreseeable use of a product. * * * To recover for injuries caused by a defective product, the defect must have been a substantial factor in causing the injury, and the product must have been used for the purpose and in the manner normally intended or in a manner reasonably foreseeable... . As plaintiff did not use [defendant's] manufactured product in a reasonably foreseeable manner and his salvage work was not an intended use of the product, the complaint should have been dismissed." [internal quotation marks omitted] **Hockler v William Powell Co., 2015 NY Slip Op 04765, 1st Dept 6-9-15**

PUBLIC AUTHORITIES LAW. NEW YORK CITY TRANSIT AUTHORITY. INTEREST ON JUDGMENT.

The First Department noted that, although plaintiff procured a judgment (after trial) for past lost earnings against the city, the judgment will ultimately be paid by non-party New York City Transit Authority. Therefore, pursuant to Public Authorities Law 1212(6), the interest on the judgment cannot exceed 3 %. **Soltero v City of New York, 2015 NY Slip Op 04770, 1st Dept 6-9-15**

SECOND DEPARTMENT

ADMINISTRATIVE LAW. DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD. VEHICLE AND TRAFFIC LAW. DRIVING WHILE INTOXICATED. REFUSAL OF CHEMICAL TEST. DRIVER'S LICENSE REVOCATION HEARING. CRIMINAL LAW. "REASONABLE SUSPICION" FOR VEHICLE STOP.

Petitioner was arrested for driving while intoxicated and refused the chemical test. As a result petitioner's license was revoked by an administrative law judge. The Second Department annulled the determination of the Department of Motor Vehicles Appeals Board (which upheld the revocation). The court determined the arresting officer did not have "reasonable suspicion" justifying the initial stop. Petitioner was in a parked car with the engine running. The officer parked behind petitioner's car, blocking any exit, and then approached the car. Only then did the officer notice signs of intoxication. **Matter of Stewart v Fiala, 2015 NY Slip Op 04857, 2nd Dept 6-10-15**

APPEALS. INTERLOCUTORY APPEAL. EVIDENCE.

Defendant was intoxicated when her vehicle collided with plaintiff's decedent's vehicle. Plaintiff, the administrator of decedent's estate, sought to introduce expert testimony demonstrating that, based upon defendant's blood-alcohol content six hours after the accident, she would have been visibly intoxicated and had a higher blood-alcohol content when she was served at defendant tavern. The tavern moved to preclude the expert testimony and, after a Frye hearing, the court granted the motion. The Third Department determined the court's ruling on the evidentiary issue did not limit the scope of the issues or theories of liability to be tried and was not, therefore, appealable as of right or by permission. Appeal would have to wait until the trial is concluded. **Hurtado v Williams, 2015 NY Slip Op 04912, 3rd Dept 6-11-15**

ATTORNEYS. CONFLICT OF INTEREST. REPRESENTING BOTH DRIVER AND PASSENGER IN A REAR-END COLLISION. NEGLIGENCE. PERSONAL INJURY.

The Second Department determined, once a counterclaim was made against the driver of the car which was stopped and rear-ended, a conflict of interest arose prohibiting an attorney from representing both the driver and the passenger. **Shelby v Blakes, 2015 NY Slip Op 04839, 2nd Dept 6-10-15**

CIVIL PROCEDURE. TRUSTS AND ESTATES.

The estate's administrator's more than five-year delay in seeking to be substituted for the decedent as plaintiff in a lawsuit (CPLR 1021), together with the administrator's failure to provide an excuse for the delay and demonstrate the action had merit, warranted the dismissal of the complaint with prejudice. **Alejandro v North Tarrytown Realty Assoc., 2015 NY Slip Op 04792, 2nd Dept 6-10-15**

CONTRACT LAW. UNSIGNED CONTRACT. INDEMNFICATION.

In a case stemming from plaintiff's fall from an allegedly improperly installed scaffold, a question of fact had been raised whether a tag on the scaffolding, which included an indemnification clause, evidenced an enforceable indemnification agreement: "[A] contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute—such as the statute of frauds (General Obligations Law § 5-701)—that imposes such a requirement" ... . "[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" ... . "[I]n many instances the issue of whether or when an indemnification agreement came into being in the absence of a signed document will present a question of fact to be resolved by the trier of fact." .**Murphy v Eagle Scaffolding, Inc., 2015 NY Slip Op 04823, 2nd Dept 6-10-15**

CRIMINAL LAW. BATSON (REVERSE-BATSON) CHALLENGE. RESPONSE TO JURY NOTE.

The trial judge properly sustained the prosecutor's "reverse-Batson" challenge to a peremptory challenge to a white woman by defense counsel. Defense counsel's proffered reason, that the juror had her head down and would be a "wall flower" following others on the jury, was deemed pretextual. The proffered reason was entirely subjective and was not based upon the voir dire. Reversal of the conviction was warranted, however, because the trial judge did not inform and seek the input of the parties in response to a jury note. Preservation of the error was not required because the record did not reflect that defense counsel was made aware of the contents of the note prior to the judge's answering it in the jury's presence. **People v Brown, 2015 NY Slip Op 04860, 2nd Dept 6-10-15**

CRIMINAL LAW/. INEVITABLE DISCOVERY DOCTRINE. APPEALS.

Defendant's motion to suppress jewelry taken from his pocket after pat-down search on the street should have been granted. At the suppression hearing, the People did not argue that the officer who stopped the defendant had probable cause to arrest the defendant at the time of the pat-down search. Therefore, the Second Department noted, that argument could not be raised by the People on appeal. At the suppression hearing, the People argued that the jewelry was admissible under the "inevitable discovery" exception to the warrant requirement. However, the "inevitable discovery" exception does not apply to "the very evidence obtained in the illegal search." **People v Henagin, 2015 NY Slip Op 04864, 2nd Dept 6-10-15**

DRIVER'S LICENSE REVOCATION HEARING. REFUSAL OF CHEMICAL TEST. DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD. VEHICLE AND TRAFFIC LAW. DRIVING WHILE INTOXICATED. CRIMINAL LAW. "REASONABLE SUSPICION" FOR VEHICLE STOP.

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LABOR LAW. PERSONAL INJURY.

Plaintiff, Casasola, was entitled to summary judgment on his Labor Law 240 (1) cause of action. Casasola was standing on an unsecured A-frame ladder when it swayed and tipped over. The incident occurred when Casasola was working on property owned by the State of New York. The court noted that, to be liable, the property owner need not have exercised any control over the work. All the plaintiff must show is the violation of a statute proximately caused his injury. **Casasola v State of New York, 2015 NY Slip Op 04798, 2nd Dept 6-10-15**

LABOR LAW. PERSONAL INJURY.

Plaintiff was entitled to summary judgment on his Labor Law 240 (1) cause of action based upon his fall from scaffolding which did not have safety rails. The Second Department succinctly explained the relevant law: "Labor Law § 240(1) imposes a nondelegable duty upon owners, lessees that control the work performed, and general contractors to provide safety devices necessary to protect workers from risks inherent in elevated work sites ... . To recover on a cause of action pursuant to Labor Law § 240(1), a plaintiff must demonstrate that there was a violation of the statute, and that the violation was a proximate cause of the accident ... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law by demonstrating that he was injured when he fell from a scaffold which lacked safety rails on the sides and that he was not provided with a safety device to prevent him from falling ..." . [internal quotation marks omitted] **Vasquez-Roldan v Two Little Red Hens, Ltd., 2015 NY Slip Op 04842, 2nd Dept 6-10-15**

MORTGAGES. FORECLOSURE. STANDING. WAIVER OF DEFENSE.

Plaintiff was entitled to summary judgment on its foreclosure action, noting that any defense based upon plaintiff's alleged lack of standing was waived because it was not raised in the answer or in a pre-answer motion to dismiss the complaint: "A party's alleged lack of standing to commence [an] action is a defense that is waived if not raised in an answer or in a pre-answer motion to dismiss the complaint ... . Where, as here, the defendants in a mortgage foreclosure action waive the issue of standing by failing to assert the defense in an answer or pre-answer motion to dismiss the complaint (see CPLR 3211[e]), the plaintiff need not establish its standing in order to demonstrate its prima facie entitlement to judgment as a matter of law ... . In this case, the plaintiff established, prima facie, its entitlement to judgment as a matter of law for the unpaid principal balance of the note ... . In this regard, the plaintiff presented the subject mortgage, the unpaid note, evidence of [defendant's] default, and evidence demonstrating that the unpaid principal balance remaining on the note totaled $434,382.89 ... . In opposition, [defendant] failed to raise a triable issue of fact ...". **JP Morgan Chase Bank, N.A. v Butler, 2015 NY Slip Op 04812, 2nd Dept 6-10-15**

MUNICIPAL LAW. POLICE POWERS. DEMOLITION OF BUILDING.

Summary judgment dismissing the complaint against the city, based upon the city's demolishing a building without notice or the opportunity to be heard, was properly granted: "In the exercise of its police powers [a] municipality may demolish a building without providing notice and an opportunity to be heard if there are exigent circumstances which require immediate demolition of the building to protect the public from imminent danger ... . [W]here there is competent evidence allowing the official to reasonably believe that an emergency does in fact exist, or that affording pre-deprivation process would be otherwise impractical, the discretionary invocation of an emergency procedure results in a constitutional violation only where such invocation is arbitrary or amounts to an abuse of discretion ... . Here, the defendant City of New York made a prima facie showing that its decision to cause the demolition of the subject building was not arbitrary or an abuse of discretion ... . In opposition, the plaintiffs failed to raise a triable issue of fact." [internal quotation marks omitted] **Iavarone v City of New York, 2015 NY Slip Op 04811, 2nd Dept 6-10-15**

NEGLIGENCE. PERSONAL INJURY. BUILDING MANAGER. INHERENTLY DANGEROUS CONDITION. LIABILITY IN TORT ARISING FROM CONTRACT. CONTRACT LAW.

There was a question of fact whether a building manager (Milford) who hired a window washing service (Red Cap) could be liable for injury to a pedestrian (plaintiff) struck by a piece of window-washing equipment which fell. Although Red Cap was an independent contractor, plaintiff raised a question of fact about whether Milford owed a nondelegable duty to plaintiff because the work it hired Red Cap to do was inherently dangerous (in the absence of warning signs and pedestrian barriers) and whether the building management services contract between Milford and the building-owner (S & P) was sufficiently comprehensive and exclusive to create a duty running to plaintiff. The court noted that the property owners were not liable because ownership and control of the building (on the property) had been transferred (to the building-owner). **Baek v Red Cap Servs., Ltd., 2015 NY Slip Op 04794, 2nd Dept 6-10-15**

NEGLIGENCE. PERSONAL INJURY. LIABILITY IN TORT ARISING FROM CONTRACT. CONTRACT LAW.

In determining the management agreement with a hospital did not give rise to tort liability for a slip and fall on the hospital premises, the Second Department explained the relevant law: "Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party... . However, there are three exceptions to this general rule: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm or creates or exacerbates a hazardous condition; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely ... . As part of its prima facie showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars ...". **Sperling v Wyckoff Hgts. Hosp., 2015 NY Slip Op 04840, 2nd Dept 6-10-15**

NEGLIGENCE. PERSONAL INJURY. MUNICIPAL LAW. TOWN LAW. WRITTEN NOTICE OF SIDEWALK DEFECT.

Summary judgment was properly awarded to the town (re: an allegedly defective sidewalk where plaintiff fell) because the "written notice manually transcribed by the complainant" requirement was not met. The fact that there existed writings and email generated by the town concerning the defect, and the fact that the town may have had constructive or actual notice of the defect, did not obviate the written notice requirement. **Wolin v Town of N. Hempstead, 2015 NY Slip Op 04846,, 2nd Dept 6-9-15**

NEGLIGENCE. PERSONAL INJURY. VEHICLE AND TRAFFIC LAW. PRESUMPTION OWNER CONSENTED TO USE OF THE VEHICLE.

In the context of a summary judgment motion in an automobile accident case, the testimony of the vehicle owner, Varela, and her daughter, an interested witness, was not sufficient to rebut the presumption that another was driving the vehicle with Verela's consent (Vehicle and Traffic Law 388). **Blassberger v Varela, 2015 NY Slip Op 04796, 2nd Dept 6-10-15**

REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL). MORTGAGES. FORECLOSURE.

Real Property Actions and Proceedings Law (RPAPL) 1301(3) did not require dismissal of plaintiff's foreclosure action. Although the statute prohibits more than one action to recover a mortgage debt at a time, the pending action had been abandoned (although not formally discontinued). Therefore plaintiff's action was viable. **Old Republic Natl. Tit. Ins. Co. v Conlin, 2015 NY Slip Op 04826, 2nd Dept 6-10-15**

ZONING/AREA VARIANCE. ARBITRARY AND CAPRICIOUS STANDARD. GENERAL CITY LAW.

The Second Department reversed Supreme Court, finding the Zoning Boa d of Appeals' (ZBA's) denial of an area variance (re: a parking lot for residents of a cooperative),based solely upon the subjective objections of town residents, was arbitrary

and capricious. The ZBA's decision did not address the statutory factors applied to area variances: "Here, while it was rational for the ZBA to conclude that the requested variance was substantial, its determination to deny the variance was otherwise conclusory and lacked an objective factual basis. In particular, no evidence was adduced which demonstrated that the health, safety, and welfare of the neighborhood or community would be detrimentally affected by the granting of the requested variance ... . Rather, the ZBA was merely presented with the subjective objections and general community opposition of neighboring property owners, most of whom expressed their subjective opinions as to the negative aesthetics of a parking lot. Further, the ZBA did not provide an objective basis upon which to conclude that the petitioner had a feasible alternative to the requested variance, and there was no evidence that the situation was self-created. In light of the current condition of the property, the legality of using the lot as a small parking lot, and the fact that the lot is fenced so as to block ground-level water views, the ZBA failed to explain how the expansion of the number of spaces in the lot would change the character of the neighborhood. Accordingly, the record does not contain sufficient evidence to support the rationality of the ZBA's determination denying the proposed area variance ... . Since the ZBA's determination was irrational and arbitrary and capricious, the Supreme Court should have granted the petition, annulled the ZBA's determination, and remitted the matter to the ZBA for the issuance of the requested area variance." **Matter of Marina's Edge Owner's Corp. v City of New Rochelle Zoning Bd. of Appeals, 2015 NY Slip Op 04851, 2nd Dept 6-10-15**

THIRD DEPARTMENT

ADMINISTRATIVE LAW. COURT'S REVIEW POWERS. RESIGNATION IN THE FACE OF IMMEDIATE TERMINATION CONSTITUTES A FINAL AGENCY ACTION (REVIEWABLE BY A COURT).

The Third Department upheld the determination of the Division of State Police Hearing Board and the termination of the petitioner (a State Trooper). The fact that petitioner had resigned did not deprive the court of its review power, despite the resulting absence of a "final agency determination." The petitioner had been shown the superintendent's termination determination and was told he would be terminated if he did not immediately resign. Petitioner resigned. The Third Department held that resignation under such a circumstance is effectively a termination by a final agency action and is therefore reviewable by a court. **Matter of Lyons v Superintendent of State Police, Joseph D'Amico, 2015 NY Slip Op 04892, 3rd Dept 6-11-15**

ARBITRATION. MODIFICATION OF AWARD. AUTHORITY OF ARBITRATOR.

The Third Department determined the arbitrator did not have the authority to modify an award by including an additional amount for interest. Even if the interest should have been awarded initially as a matter of law, modification by adding interest exceeded the powers enumerated in CPLR 7511. (The modification was more than a matter of form here, it significantly increased the award.) The court explained the arbitrator's authority in this context: "[I]t has been recognized that an arbitrator's power to modify an award is extremely limited and that, absent compliance with the statutory requirements, an arbitrator is without authority to modify an award ... . The statutory requirements for modification are set forth in CPLR 7509, which allows an arbitrator to modify his or her award upon the grounds set forth in CPLR 7511 (c) if a timely application for modification is made. Because a timely request was made by petitioner, modification was permissible if: '1. there was a miscalculation of figu es or a mistake in the description of any person, thing or property referred to in the award; or 2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or 3. the award is imperfect in a matter of form, not affecting the merits of the controversy." **Matter of David Frueh Contr., LLC (BCI Constr., Inc.), 2015 NY Slip Op 04913, 3rd Dept 6-11-15**

BANKING LAW. JOINT BANK ACCOUNTS. RIGHT OF SURVIVORSHIP. CONVENIENCE ACCOUNTS. TRUSTS AND ESTATES.

Petitioner, whose name was on a joint bank account with decedent and another, was not entitled to one-half of the proceeds in the account upon decedent's death. The presumption (Banking Law 675) that a joint bank account creates a joint tenancy with right of survivorship is triggered only when the signature card for the account indicates the parties intended the right of survivorship to apply. Here the signature card made no mention of the right of survivorship. **Matter of Farrar, 2015 NY Slip Op 04902, 3rd Dept 6-11-15**

CONTRACT LAW. IMPLIED CONTRACT FOR COMMUNITY HOMEOWNERS' ASSOCIATIONS. BUSINESS JUDGMENT RULE.

Defendants (townhouse residents) had entered an implied contract to pay a proportionate share of the full cost of maintaining the facilities. The defendants had refused to pay membership fees after a dispute with other residents arose. The Third Department, applying the "business judgment rule," determined the fees assessed by the plaintiffs were for authorized and necessary services provided by the plaintiff: "[T]he Court of Appeals has made clear that an implied contract for a community homeowners' association 'includes the obligation to pay a proportionate share of the full cost of maintaining

. . . facilities and services, not merely the reasonable value of those actually used by any particular resident' ... . We review plaintiff's action in undertaking such expenditures under the business judgment rule, which, in the absence of 'claims of fraud, self-dealing, unconscionability, or other misconduct,' is limited to an inquiry of 'whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the corporation.'" **Bluff Point Townhouse Owners Assn., Inc. v Kapsokefalos, 2015 NY Slip Op 04905, 3rd Dept 6-11-15**

CONTRACT LAW. RELEASES. INCAPACITY. MENTAL DISABILTY SUFFICIENT TO TOLL STATUTE OF LIMITATIONS. NEGLIGENCE.

The release signed by the plaintiff was not enforceable, because the plaintiff was not competent at the time it was signed. The statute of limitations was tolled by plaintiff's mental disability. Plaintiff suffered a brain injury when he was struck by a car in 1991. A few months later plaintiff signed a release provided by an insurance adjuster in return for $5,000. The case languished for years and Supreme Court denied defendant's motion for summary judgment dismissing the case in 2014. The Third Department explained the relevant law: "With respect to the release signed by plaintiff, the burden of proving incompetence rests upon the party asserting incapacity to enter into an agreement [and], to prevail, plaintiff was required to establish that [his] mind was so affected as to render [him] wholly and absolutely incompetent to comprehend and understand the nature of the transaction ... . The incapacity must be shown to exist at the time the pertinent document was executed ... . Regarding the statute of limitations issue, the toll for insanity provided by CPLR 208 is narrowly interpreted, the concept of insanity is equated with unsoundness of mind ... and encompasses only those individuals who are unable to protect their legal rights because of an over-all inability to function in society ... . The mental incapacity must exist at or be caused by the accident and continue during the relevant time ...". [internal quotation marks omitted] . **Lynch v Carlozzi, 2015 NY Slip Op 04893, 3rd Dept 6-11-15**

DEFAMATION. DAMAGES. OSTRACISM AND REJECTION. EDUCATION-SCHOOL LAW. NAME-CLEARING HEARING.

In a lawsuit stemming from allegedly slanderous remarks made by defendants in connection with plaintiff's termination from employment by the defendant school district, the Third Department determined plaintiff's petition for a name-clearing hearing should have been dismissed, because there was no evidence defendants disclosed the relevant letters to anyone, and the jury should not have been allowed to consider rumor-related "ostracism and rejection" damages, because there was no evidence defendants were responsible for the alleged repetition of the slander by third persons. A new trial on damages was ordered. **Wilcox v Newark Val. Cent. School Dist., 2015 NY Slip Op 04890, 3rd Dept 6-11-15**

ENVIRONMENTAL LAW. NAVIGATION LAW. "PERC" CLEANUP.

The Navigation Law did not confer upon plaintiff a private right of action to sue for clean-up of PERC, a chemical used in dry cleaning. Plaintiff is the owner of a shopping plaza and sued the estate of the owner of a dry cleaning business that was located in the plaza after PERC was found in the soil. The Navigation Law provides a private right of action to sue for the clean-up of "petroleum." Although PERC is derived from petroleum, the court held PERC does not constitute petroleum within the meaning of the Navigation Law. **Fairview Plaza, Inc. v Estate of Peter J. Rigos, 2015 NY Slip Op 04901, 3rd Dept 6-11-15**

FAMILY LAW. NEGLECT. ABUSE. EVIDENCE. WEIGHT OF THE EVIDENCE. EXPERT TESTIMONY.

The Third Department reversed Family Court's finding that father abused and neglected his infant daughter (Nora). The trial was essentially a "battle of experts" [Patno was the Department of Social Service's expert; Scheller was father's expert]. The Third Department determined the Department of Social Services had made out a prima facie case of abuse and neglect (expert testimony that Nora's physical condition was caused by shaking) but, under a weight of the evidence analysis, father's expert provided the best explanation for Nora's injuries — an explanation which did not implicate father. The court noted that father did not exhibit any characteristics associated with an abusive parent and father's expert's "testimony, which was consistent with conclusions of Nora's treating physicians and her medical records in crucial respects, offered a reasonable and persuasive account of how Nora's symptoms — and lack thereof — better supported his ... diagnosis." **Matter of Natalie AA. (Kyle AA.), 2015 NY Slip Op 04889, 3rd Dept 6-11-15**

LABOR LAW. PERSONAL INJURY.

Plaintiff was directed to remove snow from the work site and slipped and fell in the process. The Third Department affirmed the dismissal of plaintiff's Labor Law 241(6) cause of action because the cited industrial code provision (12 N.Y.C.R.R. 23-1.7(d)) did not apply to the work plaintiff was assigned. The industrial code prohibited allowing an employee to use an "elevated working surface which is in a slippery condition." However, where the injury is caused by "an integral part of the work" being performed (here, removal of the slippery condition) that industrial code provision does not apply. **Barros v Bette & Cring, LLC, 2015 NY Slip Op 04910, 3rd Dept 6-11-15**

MEDICAID. STANDING TO SEEK REIMBURSEMENT OF MEDICAID EXPENSES.

Petitioner, the former owner of a nursing home, did not have standing to seek payments from Medicaid for the period before petitioner sold the nursing home. Only the current operator of the nursing home has standing to seek Medicaid payments. The court noted that petitioner had protected his interest in the payments by contract with the new owner of the nursing home. **Matter of Park Manor Rehabilitation & Health Care Ctr., LLC v Shah, 2015 NY Slip Op 04909, 3rd Dept 6-11-15**

NEGLIGENCE. PERSONAL INJURY. NEGLIGENCE PER SE. VEHICLE AND TRAFFIC LAW. MUNICIPAL LAW. COUNTY LAW. EXECUTIVE LAW. EMERGENCY RESPONSE. GOVERNMENTAL IMMUNITY.

Plaintiff was injured when a piece of lumber fell off an open truck owned by the county. Plaintiff was driving her vehicle when the debris came off the county truck and struck her in the head. The county truck was being used to transport debris in the aftermath of Hurricane Irene. The Third Department determined that, by transporting unsecured debris in an open truck, the county had violated Vehicle and Traffic Law 380-a(1) and, therefore, the county was negligent per se. The court interpreted Vehicle and Traffic Law 380-a to mean that a prima facie case of a violation of the statute is made out by proof a load in an open truck was not covered. Once that showing is made, the owner of the truck will not be deemed to have violated the statute, despite the lack of a cover, if the owner can show the load was secure such that no cover was required. No such showing was possible here. The court rejected the county's argument that the emergency-related immunity conferred by the Executive Law applied here. The court noted the purpose of the Executive-Law immunity is to allow the government to make decisions during an emergency — which roads to clear first, for instance — without fear of liability, but the "emergency" immunity did not insulate the county from liability for its negligence in every context. **Pierce v Hickey, 2015 NY Slip Op 04914, 3rd Dept 6-11-15**

REAL PROPERTY TAX LAW (RPTL). VOLUNTARY TAX PAYMENTS. CIVIL PROCEDURE. *SUA SPONTE* RAISING OF THE STATUTE OF LIMITATIONS DEFENSE. WAIVER OF DEFENSE. MUNICIPAL LAW. COUNTY LAW.

Supreme Court properly denied petitioner's request for a refund of real estate taxes paid re: optic cable installations located on private rights-of-way because petitioner had not protested the tax payments and had made them voluntarily. In addition, the court noted that the court should not have raised the statute of limitations defense sua sponte because the defense did not implicate subject matter jurisdiction. The Third Department explained: [re: sua sponte raising of a defense] "[U]nless subject matter jurisdiction is implicated, a court should not raise an issue sua sponte when a party is prejudiced by its inability to respond ... . Here, because respondent Essex County failed to raise the statute of limitations as an affirmative defense in a pre-answer motion to dismiss or in its answer (see CPLR 3211 [a] [5]; [e]; 7804 [f]), it was improper for Supreme Court to raise it sua sponte ... . [re: voluntary payment of taxes without protest] ... [W]e find no reason to disturb Supreme Court's partial denial of the petition on the ground that petitioner failed to demonstrate that it paid the taxes involuntarily. To recover payments made under a mistake of law, as in the present case ... , a taxpayer is required to show that the payments were made involuntarily ... . This requirement ensures that governmental entities have notice that they may need to provide for tax refunds ... . Here, petitioner fully paid all of the relevant taxes and offered no proof that it did so under protest or that such payments were otherwise involuntary ... . Indeed, petitioner did nothing to indicate that its payments were involuntary until nearly 18 months after the final contested tax bill was paid, when petitioner submitted its RPTL 556-b correction applications ...". **Matter of Level 3 Communications, LLC v Essex County, 2015 NY Slip Op 04899, 3rd Dept 6-11-15**

WORKERS' COMPENSATION LAW.

The Third Department determined the fact that an MRI had been approved demonstrated that the claimant's case had not been closed for the requisite seven years. Liability therefore was not shifted to the Special Fund for closed cases: "Pursuant to Workers' Compensation Law § 25-a, the Special Fund becomes liable for claims that are reopened more than seven years from the date of the injury and three years after the last payment of compensation ... . There is no dispute that this case was initially closed as of June 20, 2005. In its amended decision, the Board determined that the case was first reopened in April 2012 when the MRI was requested, but closed once that application was approved. Finding that the case was again reopened when surgery was requested on June 26, 2012, the Board determined that the requisite seven-year time period had passed, shifting liability to the Special Fund. This sequence calls into question whether the case was "truly closed" when the MRI request was approved. We have previously recognized that a 'decision authorizing [an] MRI [does] not constitute a true closing of the case as [the] claimant's future treatment depended upon the results of the MRI and, thus, further action was contemplated although not planned at that time' ... . The same holds true here. As such, we conclude that the Board erred in concluding that the case was closed when the MRI was authorized. Correspondingly, since the case was reopened when the MRI was requested in April 2012, within the statutory seven-year period, liability does not shift to the Special Fund." **Matter of Bank v Village of Tuckahoe, 2015 NY Slip Op 04894, 3rd Dept 6-11-15**

WORKERS' COMPENSATION LAW. PERSONAL INJURY. STATUTORY LIEN.

The Third Department noted that, even though the worker who had received workers' compensation benefits successfully sued his employer (as opposed to a third party) for his injuries, the workers' compensation carrier still had a lien against the recovery (Workers' Compensation Law 29(1)). **Ronkese v Tilcon N.Y., Inc., 2015 NY Slip Op 04908, 3rd Dept 6-11-15**

FOURTH DEPARTMENT

CIVIL PROCEDURE. PUBLIC BENEFIT CORPORATION. PUBLIC AUTHORITIES LAW. CPLR 205(a). CONDITION PRECEDENT VS. STATUTE OF LIMITATIONS.

The underlying medical malpractice action is against Erie County Medical Center Corporation, a public benefit corporation. Pursuant to Public Authorities Law 3641, a notice of claim must be filed prior to the commencement of the lawsuit. Plaintiff had not filed a notice of claim. The action was dismissed without prejudice, subject to the terms of CPLR 205(a), which allows six months to recommence an action that has not been dismissed on the merits. When the suit was recommenced, the defendant argued that the one-year-and-ninety-day time limit for bringing suit under the Public Authorities Law was not a statute of limitations subject to the CPLR 205(a) six-month extension, rather it was a condition precedent to suit, and the (second) complaint must therefore be dismissed as untimely. The Fourth Department determined the one-year-and-ninety-day time limit for suit under the Public Authorities Law was a statute of limitations, not a condition precedent, and the six-month extension provided by CPLR 205(a) applied. **Benedetti v Erie County Med. Ctr. Corp., 2015 NY Slip Op 04964, 4th Dept 6-12-15**

CIVIL PROCEDURE. STATUTE OF LIMITATIONS. CPLR 214-c. TOXIC TORTS. NEGLIGENCE. MUNICIPAL LAW. TOWN LAW.

Plaintiffs sought replacement-cost damages for a defective septic system, alleging the town negligently approved the system prior to plaintiffs' purchase of the property. Although the three-year statute of limitations for negligence had passed, the plaintiffs argued that CPLR 214-c applied. CPLR 214-c applies to latent defects and the statute starts running upon discovery of the injury. The Fourth Department determined CPLR 214-c did not apply, noting that the Court of Appeals has held the statute applies only to injury from "toxic torts." **Clendenin v Town of Milo, 2015 NY Slip Op 04976, 4th Dept 6-12-15**

CRIMINAL LAW. CONCURRENT INCLUSORY COUNTS DISMISSED.

The lesser inclusory counts of vehicular manslaughter in the first degree were dismissed by the Fourth Department, despite lack of preservation. The court explained: "[C]ounts four, five and seven must be dismissed as lesser inclusory counts of count three, vehicular manslaughter in the first degree. Initially, we note that defendant's failure to preserve the issue for our review is of no moment because preservation is not required ... . With respect to the merits, concurrent counts are inclusory when the offense charged in one is greater than that charged in the other and when the latter is a lesser offense included within the greater ... . Thus, where, as here, it is impossible to commit a particular crime without concomitantly committing, by the same conduct, []other offense[s] of lesser grade or degree, the latter [are], with respect to the former, . . . lesser included offense[s] ... . Because it is impossible to commit the crime of vehicular manslaughter in the first degree under Penal Law § 125.13 (4), without concomitantly committing the crime of vehicular manslaughter in the second degree under Penal Law § 125.12, or without concomitantly committing the crime of, inter alia, driving while ability impaired by drugs under Vehicle and Traffic Law § 1192 (4), the latter two crimes are inclusory concurrent counts of the former crime. We therefore modify the judgment by dismissing the three counts of the indictment charging the latter two crimes." [internal quotation marks omitted] **People v Bank, 2015 NY Slip Op 04954, 4th Dept 6-12-15**

CRIMINAL LAW. MOTION TO VACATE CONVICTION. INEFFECTIVE ASSISTANCE OF COUNSEL. FAILURE TO INVESTIGATE POTENTIAL DEFENSE.

Defendant's motion to vacate his conviction should have been granted. Defendant suffered from mental illness and had been hospitalized for psychiatric disorders. The trial court had granted defense counsel permission to access defendant's psychiatric records and had granted authorization for the appointment of an independent psychiatrist to evaluate defendant. Defense counsel did not seek the psychiatric records, nor the evaluation by the independent psychiatrist. The Second Department, after an in-depth explanation of the criteria, held that defendant was deprived of effective assistance of counsel. The court noted that the ground at issue here, defense counsel's failure to pursue minimal investigation, required reversal without a showing that the result of the trial would have been different had the investigation been conducted. **People v Graham, 2015 NY Slip Op 04862, 2nd Dept 6-10-15**

CRIMINAL LAW. MOTION TO VACATE CONVICTION. BRADY VIOLATION. UNQUALIFIED JUROR.

Defendant made sufficient evidentiary showings that (1) the People may have failed to inform the defense of a plea bargain made with the codefendant in return for testimony against the defendant, and (2) a juror may have been unqualified due to a mental disability. Therefore defendant's motion to vacate his conviction should not have been denied without a hearing. **People v Bailey, 2015 NY Slip Op 04987, 4th Dept 6-12-15**

CRIMINAL LAW. MOTION TO VACATE CONVICTION. NEWLY DISCOVERED EVIDENCE. STATEMENTS AGAINST PENAL INTEREST. SPOUSAL PRIVILEGE.

The Fourth Department affirmed County Court's vacation of defendant's murder convictions, after a hearing, based upon newly discovered evidence. Although the "declarant" did not testify, witnesses testified declarant admitted killing the two persons defendant had been convicted of murdering. There was considerable evidence supporting the reliability of the declarant's statements. The court noted that the declarant's statements were admissible under an exception to the hearsay rule as "statements against penal interest" and it was reasonable to assume the declarant was "unavailable" (a requirement for admissibility) because he would assert his right to remain silent if called as a witness. The court further noted that the testimony of declarant's ex-wife was not protected by spousal privilege. Declarant's threat to kill his wife if she reported the murders to the police removed the "communications from the protection of privilege." **People v Pierre, 2015 NY Slip Op 04985, 4th Dept 6-12-15**

CRIMINAL LAW. SENTENCING. MATERIALLY UNTRUE ASSUMPTIONS OR MISINFORMATION RELIED UPON IN SENTENCING.

Although the error was not preserved, the Fourth Department, in the interest of justice, determined defendant's sentence should be vacated. At sentencing, the judge made statements alleging past criminal acts by the defendant which were unsupported by the record: "[W]e conclude that the court erred in sentencing defendant on the basis of 'materially untrue assumptions or misinformation' ... . Here, the court characterized defendant as having been involved in 'more than 40 residential burglaries' and 'all the tens of burglaries,' but those statements are unsupported by the record and therefore constitute improper speculation..." . **People v Mcknight, 2015 NY Slip Op 04961, 4th Dept 6-12-15**

DEFAMATION. STATEMENTS REPORTED IN A NEWSPAPER ARTICLE.

The Fourth Department determined the complaint made out a prima facie case of defamation. The statements were included in a newspaper article and were attributed to defendant. The court succinctly explained the applicable law: "The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se..., and we conclude that the complaint sufficiently alleges those elements and, thus, states a viable cause of action. We further conclude, contrary to defendant's contention, that the particular words complained of were sufficiently set forth in the complaint as required by CPLR 3016 (a) and, in any event, plaintiff attached to the complaint the full Niagara Falls Reporter article containing the alleged defamatory statements ... . Defendant contends that, because he did not participate in the drafting of the Niagara Falls Reporter article, he cannot be held liable for defamation and, thus, the court properly granted his cross motion. That contention is without merit. It is well established that [a]nyone giving a statement to a representative of a newspaper authorizing or intending its publication is responsible for any damage caused by the publication ...". [internal quotation marks omitted] **Accadia Site Contr., Inc. v Skurka, 2015 NY Slip Op 04958, 4th Dept 6-12-15**

FAMILY LAW. REVIVAL OF UNEMANCIPATED STATUS.

The Fourth Department determined the child's moving in with father after becoming emancipated by leaving mother's residence revived his unemancipated status, thereby entitling father to child support. The child left mother to avoid her rules, including rules prohibiting the use of drugs. After living with friends for a while, the child sought treatment for drug addiction. It was thereafter the child moved in with father. **Baker v Baker, 2015 NY Slip Op 05045, 4th Dept 6-12-15**

FRAUD. AGENCY. APPARENT AUTHORITY. JUSTIFIABLE RELIANCE. EMPLOYMENT LAW.

Plaintiff was entitled to summary judgment on its fraud cause of action against defendant insurance agency. An employee of the insurance agency issued a fake workers' compensation policy to the plaintiff. The Fourth Department found that

the actions of the insurance agency provided the employee with "apparent authority" to issue the policy and the plaintiff justifiably relied on that apparent authority. The court explained: "It is axiomatic that [t]he mere creation of an agency for some purpose does not automatically invest the agent with apparent authority to bind the principle without limitation . . . An agent's power to bind his [or her] principal is coextensive with the principal's grant of authority ... . Essential to the creation of apparent authority are words or conduct of the principal, communicated to the third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his [or her] own acts imbue himself [or herself] with apparent authority. Rather, the existence of apparent authority depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal — not the agent . . . More[o]ver, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable ... . Here, plaintiff contacted defendant seeking workers' compensation coverage, and defendant assigned its employee who specialized in plaintiff's type of business to assist plaintiff. We therefore conclude that plaintiff established that it reasonably relied upon the authority of defendant's employee to act for defendant." **Regency Oaks Corp. v Norman-Spencer McKernan, Inc., 2015 NY Slip Op 04959, 4th Dept 6-12-15**

MORTGAGES. FORECLOSURE. EQUITABLE POWER TO SET ASIDE A FORECLOSURE SALE AS AN "INSTRUMENT OF INJUSTICE."

The Fourth Department exercised its equitable power to set aside a foreclosure sale which, it determined, had been made an "instrument of injustice." The facts of the case, which include an extensive appellate history, defy adequate summarization here. The court explained its equitable power to set aside the foreclosure sale: "It is well settled that, even after a judicial sale to a good faith purchaser, [a] court may exercise its inherent equitable power over a sale made pursuant to its judgment or decree to ensure that it is not made the instrument of injustice . . . Although this power should be exercised sparingly and with great caution, a court of equity may set aside its own judicial sale upon grounds otherwise insufficient to confer an absolute legal right to a resale in order to relieve [a party] of oppressive or unfair conduct ... . Generally, such discretion, which is separate and distinct from any statutory authority ..., is exercised where fraud, mistake, exploitive overreaching, misconduct, irregularity or collusion casts suspicion on the fairness of the sale ... . It may also be exercised where the price is so inadequate as to shock the court's conscience ... or where the judicial sale has been made the instrument of injustice ...". [internal quotation marks omitted] **Altshuler Shaham Provident Funds, Ltd. v GML Tower LLC, 2015 NY Slip Op 04952, 4th Dept 6-12-15**

PUBLIC HEALTH LAW. GROUP HOMES FOR THE DEVELOPMENTALLY DISABLED. RESIDENTIAL HEALTH CARE FACILITIES. PRIVATE RIGHT OF ACTION PURSUANT TO PUBLIC HEALTH LAW 2801-d.

Plaintiff's brother, Brian, is developmentally disabled and resided in a group home operated by the defendant. Plaintiff alleged her brother was injured as a result of the negligence of defendant's employees and brought suit under Public Health Law 2801-d, which allows a private right of action by patients against "residential health care facilities." The Fourth Department determined the group home was not a "residential health care facility" within the meaning of Public Health Law 2801-d and, therefore, the causes of action based on that statute should have been dismissed. **Burkhart v People, Inc., 2015 NY Slip Op 04974, 4th Dept 6-12-15**

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