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FIRST DEPARTMENT

BUSINESS LAW, MISAPPROPRIATION OF TRADE SECRETS, ETC.

CAUSES OF ACTION FOR (1) MISAPPROPRIATION OF (a) TRADE SECRETS, (b) BUSINESS IDEAS, AND (c) LABOR, SKILLS AND EXPENDITURES, (2) BREACH OF FIDUCIARY DUTY (DELAWARE LAW), (3) AIDING AND ABETTING BREACH OF FIDUCIARY DUTY (DELAWARE LAW), (4) UNJUST ENRICHMENT AND (5) PROMISSORY ESTOPPEL DESCRIBED IN DETAIL.

The First Department, in a full-fledged opinion by Justice Richter, determined the complaint stated causes of action against the Cohen defendants for essentially stealing plaintiffs' ideas for a website. Defendant Cohen, an investor, eventually served as chairman and CEO of a company formed by plaintiffs to develop the website. The complaint alleged that Cohen caused a strain among the partners which stalled the project. Cohen circulated a liquidation agreement which was never addressed by the other partners. Then, the complaint alleged, Cohen took the plaintiffs' ideas and website-development work to the founders of Pinterest, which, the complaint alleged, was formed based upon the ideas Cohen misappropriated from plaintiffs. The plaintiffs sued the Cohen defendants and Pinterest. All the causes of action against Pinterest were dismissed by Supreme Court. The First Department held the complaint stated causes of action against the Cohen defendants for (1) breach of fiduciary duty (under Delaware Law), (2) misappropriation of trade secrets, (3) misappropriation of ideas, (4) and misappropriation of labor, skill and expenditures. (Apparently the unjust enrichment cause of action, which Supreme Court dismissed only re: Pinterest, was not a subject of the appeal.) The First Department found that all the causes of action against Pinterest were properly dismissed. The opinion includes detailed descriptions of the elements of breach of fiduciary duty (Delaware law), aiding and abetting breach of fiduciary duty, unjust enrichment, misappropriation of trade secrets, misappropriation of ideas, misappropriation of labor, skills and expenditures, and promissory estoppel. The discussions are too extensive to be fairly summarized here. **Schroeder v Pinterest Inc., 2015 NY Slip Op 07232, 1st Dept 10-6-15**

CRIMINAL LAW.

EXCLUSION OF DEFENDANT'S BROTHER FROM THE COURTROOM BASED UPON THE FEAR OF A TESTIFYNG WITNESS WAS PROPER, DESPITE LACK OF EXPRESS FINDINGS BY TRIAL JUDGE.

The exclusion of a single spectator (defendant's brother) during the testimony of a witness was proper, despite the absence of express findings by the trial judge. The witness expressed her fear of defendant's brother. The court explained the analytical criteria: "The People established an overriding interest that warranted a courtroom closure that was limited to the exclusion of a single spectator during the testimony of a single witness ... . Contrary to defendant's arguments, the witness articulated a specific fear of testifying in the presence of defendant's brother, and we find that this fear justified the limited closure ... . The trial court was in the best position to determine whether the witness' expression of fear rose to a level justifying the closure. We note that the court was aware of the brother's approach to a different witness. Although a timely objection . . . would have permitted the court to rectify the situation instantly by making express findings ..., defendant made no such objection, and thus did not preserve his complaint that the court failed to set forth express findings of fact to justify the exclusion of defendant's brother. Accordingly, we decline to review this claim in the interest of justice. As an alternative holding, we find that the court's ruling implicitly adopted the People's particularized showing and was specific enough that a reviewing court can determine whether the closure order was properly entered ...". [internal quotation marks omitted] **People v Williams, 2015 NY Slip Op 07335, 1st Dept 10-8-15**

CORPORATION LAW, ATTORNEY-CLIENT PRIVILEGE.

CRITERIA FOR THE "FIDUCIARY EXCEPTION" TO THE ATTORNEY-CLIENT PRIVILEGE IN THE CONTEXT OF A DERIVATIVE ACTION EXPLAINED.

The First Department, in a full-fledged opinion by Justice Acosta, in a matter of first impression, developed analytical criteria for determining whether documents sought by the plaintiff major investor (NAMA) in defendant limited liability company (Alliance) (formed for a major real estate development project) were protected by the attorney-client privilege. The documents at issue are communications between the managers of defendant Alliance and their attorneys, defendant Greenberg. Supreme Court held that the 3,000 communications were not protected by attorney-client privilege pursuant to

the "fiduciary exception" to the privilege (re: derivative actions) because the interests of the plaintiff were not "adverse" to Alliance. However, that finding was not based upon a review of the communications. The First Department determined each individual communication must be reviewed to find whether it evinces an adversarial relationship. If so, such "adversity" would be only one factor to weigh in concluding whether "good cause" exists to invoke the "fiduciary exception" to the privilege. The First Department adopted the reasoning of a Fifth Circuit case, *Garner v. Wolfinbarger*, 430 Fed 1093, which sets out a list of factors to be applied in finding good cause to apply the fiduciary exception to the privilege. "Adversity" is but one of those factors: **NAMA Holdings, LLC v Greenberg Traurig LLP, 2015 NY Slip Op 07346, 1st Dept 10-8-15**

PERSONAL INJURY, MUNICIPAL LAW.

CRITERIA FOR AMENDMENT OF A NOTICE OF CLAIM EXPLAINED.
Supreme Court should have granted plaintiff's motion to amend the notice of claim to include mention of a defective handrail, despite plaintiff's failure to invoke the proper statutory authority (General Municipal Law 50-e(5)). The court explained the criteria for an amendment: "Under GML § 50-e(5), a notice of claim may be amended within one year and ninety days of an accident to include new theories of liability … . Plaintiff's cross motion was made eleven months after the accident, well within the one-year-and-ninety-day limitation period. In determining whether an application for leave to serve a late notice of claim should be granted, a court shall consider whether the public corporation . . . acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one . . . or within a reasonable time thereafter (GML § 50-e[5]). The court shall also consider all other relevant facts and circumstances, including whether the delay substantially prejudiced the public corporation in maintaining its defense on the merits … . In determining whether the city was prejudiced by any mistake, omission, irregularity or defect in the notice [of claim], the court may look to evidence adduced at a section 50-h hearing, and to such other evidence as is properly before the court ... . * * * We have previously held that prejudice will not be presumed ... . Moreover, [i]t may not be shown without evidence of an attempt to investigate the accident ...". [internal quotation marks omitted] **Thomas v New York City Hous. Auth., 2015 NY Slip Op 07328, 1st Dept 10-8-15**

SECOND DEPARTMENT

CIVIL PROCEDURE.

IN OPPOSING A MOTION TO DISMISS FOR FAILURE TO TIMELY FILE A NOTE OF ISSUE, NO NEED TO SHOW POTENTIALLY MERITORIOUS CAUSE OF ACTION WHERE DEFENDANT CONTRIBUTED TO THE DELAY.
Defendants' motion to dismiss for failure to prosecute should not have been granted. The court noted that one of the defendants contributed to the delay in filing the note of issue by not showing up for a deposition. Because of the defendant's contribution to the delay, the plaintiff did not have to demonstrate a potentially meritorious cause of action: "CPLR 3216 is 'extremely forgiving' in that it 'never requires, but merely authorizes, the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed' ... . When served with a 90-day demand pursuant to CPLR 3216, it is incumbent upon a plaintiff to comply with the demand by filing a note of issue or by moving, before the default date, either to vacate the demand or extend the 90-day period ... . In general, if a plaintiff fails to comply with the demand, to avoid the sanction of dismissal, the plaintiff is required to demonstrate a justifiable excuse for the delay and the existence of a potentially meritorious cause of action (see CPLR 3216[e]...). Here, although the plaintiff did not file a note of issue within the 90-day demand period, her conduct negated any inference that she intended to abandon the action ... . In opposition to the defendants' separate motions, the plaintiff promptly cross-moved to strike the answer of ... defendant ... Sarab for his willful failure to appear for a court-ordered deposition. The plaintiff established that, due to an unresolved discovery dispute, she was unable to timely file a note of issue ... . Furthermore, since Sarab contributed to the plaintiff's inability to file a timely note of issue in the proper form, the plaintiff was not required to demonstrate a potentially meritorious cause of action ...". **Lee v Rad, 2015 NY Slip Op 07248, 2nd Dept 10-7-15**

CIVIL PROCEDURE.

BUSINESS CONNECTIONS TO NEW YORK INSUFFICIENT TO CONFER JURISDICTION UNDER CPLR 301 OR 302, CRITERIA EXPLAINED.
The defendants-respondents were properly granted summary judgment dismissing the complaint based upon the court's lack of jurisdiction over a foreign corporation and individual non-domiciliary (insufficient business connection with New York). The court explained the business-related jurisdiction requirements under CPLR 301 and 302: "Jurisdiction under CPLR 301 may be acquired over a foreign corporation only if that corporation does business here not occasionally or casually, but with a fair measure of permanence and continuity so as to warrant a finding of its presence in this jurisdiction ... . Furthermore, [a]n individual cannot be subject to jurisdiction under CPLR 301 unless he [or she] is doing business in New York as an individual rather than on behalf of a corporation ... . Here, the respondents were not doing business in this State ... . Pursuant to CPLR 302(a)(1), a court may exercise personal jurisdiction over any non-domiciliary . . . who in person or

through an agent . . . transacts any business within the state or contracts anywhere to supply goods or services in the state (CPLR 302[a][1]). Whether a defendant has transacted business within New York is determined under the totality of the circumstances, and rests on whether the defendant, by some act or acts, has purposefully avail[ed] itself of the privilege of conducting activities within [New York] ... . Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws ... . CPLR 302(a)(1) jurisdiction is proper even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted ... . Here, the respondents established, prima facie, that they did not conduct any purposeful activities in New York which bore a substantial relationship to the subject matter of this action, so as to avail themselves of the benefits and protections of this State's laws." [internal quotation marks omitted] **Okeke v Momah, 2015 NY Slip Op 07252, 2nd Dept 10-7-15**

CIVIL PROCEDURE.

FORUM SELECTION CLAUSE IN NURSING HOME ADMISSION AGREEMENT ENFORCEABLE.

Defendant nursing home's motion to change venue based upon a forum selection clause in the admission agreement should have been granted. After her mother (a resident of defendant nursing home) died, plaintiff brought this action for medical malpractice in a county other than that designated in the admission agreement: "A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court ... . Here, the plaintiff failed to show that enforcement of the forum selection clause would be unreasonable, unjust, or in contravention of public policy, or that the inclusion of the forum selection clause in the agreement was the result of fraud or overreaching ... . Moreover, the plaintiff failed to demonstrate that a trial in Suffolk County would be so gravely difficult that, for all practical purposes, she would be deprived of her day in court ...". [internal quotation marks omitted] **Puleo v Shore View Ctr. for Rehabilitation & Health Care, 2015 NY Slip Op 07255, 10-7-15**

EMPLOYMENT LAW, UNIONS.

PETITIONER-EMPLOYEE DID NOT DEMONSTRATE THE UNION BREACHED ITS DUTY OF FAIR REPRESENTATION, THEREFORE PETITIONER DID NOT DEMONSTRATE AN EXCEPTION TO THE "EXHAUSTION OF REMEDIES" PREREQUISITE FOR AN ARTICLE 78 PROCEEDING.

Petitioner's Article 78 action should have been dismissed because petitioner did not demonstrate an exception to the requirement that she exhaust all the grievance remedies provided by the collective bargaining agreement. Petitioner was terminated from her employment at a county community college: "Generally, an employee covered by a collective bargaining agreement which provides for a grievance procedure must exhaust administrative remedies prior to seeking judicial remedies ... . However, the failure to exhaust administrative remedies may be excused where the employee can prove that the union breached its duty of fair representation in the handling of the employee's grievance ... . Breach of the duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith ... . Here, the petitioner did not allege that the union's conduct was arbitrary, discriminatory, or made in bad faith, and the record does not support such a conclusion ... . Accordingly, as the petitioner failed to establish that an exception to the exhaustion doctrine was applicable, the Supreme Court should have denied the petition and dismissed the proceeding on the merits." **Matter of McLaughlin v Hankin, 2015 NY Slip Op 07272, 2nd Dept 10-7-15**

FAMILY LAW.

FAMILY COURT HAS THE STATUTORY AUTHORITY TO IMPOSE A JAIL TERM FOR WILLFUL VIOLATION OF CHILD SUPPORT OBLIGATIONS.

Reversing the support magistrate, the Second Department determined Family Court does have the authority to impose a jail term for willful violation of child support obligations: "The Family Court is a court of limited jurisdiction and cannot exercise powers beyond those which are granted to it by statute ... . However, Family Court Act § 451(1) specifically provides the Family Court with continuing plenary and supervisory jurisdiction over a support proceeding until its judgment is completely satisfied ... . Family Court Act § 460(1)(e) provides that, where a party has defaulted in paying any sum of money due as required by an order directing such payment, the court shall make an order directing the entry of a judgment for the amount of child support arrears, unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. However, Family Court Act § 460(3) also makes clear that the entry of a money judgment is a form of relief mandated in addition to any and every other remedy which may be provided under the law including, but not limited to, the remedies provided under the provisions of section four hundred fifty-four of this act (Family Ct Act § 460[3]). The remedies provided by Family Court Act § 454 include a provision authorizing the court to commit a respondent to jail for a term not exceeding six months upon a finding that the respondent has willfully failed to obey any lawful order of support (see Family Ct Act § 454[3][a])." [internal quotation marks omitted] **Matter of Damadeo v Keller, 2015 NY Slip Op 07267, 2nd Dept 10-7-15**

PERSONAL INJURY, MUNICIPAL LAW.

NO "SPECIAL RELATIONSHIP" BETWEEN PLAINTIFF AND CITY, CITY NOT LIABLE FOR SHOOTING OF THE PLAINTIFF BY A CIVILIAN AS POLICE WERE LEAVING THE SCENE OF A DISTURBANCE.

The city was properly granted summary judgment in an action by the victim of a (civilian) shooting. Plaintiff was involved in some sort of altercation. The police arrived and ordered the group to disperse. As the police were leaving, plaintiff was shot in the back. The court explained that the city could not be held liable for performance of a governmental function (police protection) unless there was a "special duty" owed plaintiff. No "special duty" was demonstrated here: "Liability for a claim that a municipality negligently exercised a governmental function turns upon the existence of a special duty to the injured person, in contrast to a general duty owed to the public ... . The provision of police protection is a classic governmental function, and a municipality's general duty to furnish police protection does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created ... . A special duty—a duty to exercise reasonable care toward the plaintiff—is born of a special relationship between the plaintiff and the governmental entity ... . As relevant here, a special relationship can be formed when the following elements are present: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking ... . Here, the City defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that no special relationship was created through the voluntary assumption of a duty to the injured plaintiff, either individually or as a member of a specific class ... . Even if there had been a duty here, the evidence submitted by the City defendants established that the injured plaintiff did not justifiably rely upon an affirmative undertaking by the City defendants ...". [internal quotations marks omitted] **Moore v City of New York, 2015 NY Slip Op 07249, 2nd Dept 10-7-15**

REAL PROPERTY.

QUESTION OF FACT WHETHER ABUTTING LANDOWNERS OWNED TO THE CENTERLINE OF THE ROADWAY BED, RELEVANT LAW EXPLAINED.

Reversing Supreme Court, the Second Department determined there was a question of fact whether abutting landowners owned to the centerline of a roadway bed, or whether defendants had acquired title to the roadway bed. The court explained the relevant analytical criteria: "[W]hen an owner of property sells a lot with reference to a map, and the map shows that the lot abuts upon a street, the conveyance presumptively conveys fee ownership to the center of the street on which the lot abuts, subject to the rights of other lot owners and their invitees to use the entire area of the street for highway purposes ... . The presumption is not, however, inflexible and will yield to a showing in the deed of a contrary intent to exclude from the grant the bed of the street ... . Indeed, the presumption can be rebutted by determining the intent of the parties gathered from the description of the premises [conveyed] read in connection with the other parts of the deed, and by reference to the situation of the lands and the condition and relation of the parties to those lands and other lands in the vicinity ... . Thus, the presumption can be rebutted by a showing in the deed of a contrary intent to exclude from the grant the bed of the street ...". [internal quotation marks omitted] **Stanley Acker Family L.P. v DePaulis Enters. V, Ltd., 2015 NY Slip Op 07259, 2nd Dept 10-7-15**

THIRD DEPARTMENT

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

SLIP AND FALL ON ICE NOT AN "ACCIDENT" WITHIN MEANING OF RETIREMENT AND SOCIAL SECURITY LAW.

The Third Department confirmed the comptroller's finding that petitioner, who worked for a town public safety department, was not entitled to enhanced disability benefits based upon a slip and fall on ice. The incident did not constitute an "accident" within the meaning of the Retirement and Social Security Law: "As defined for purposes of the Retirement and Social Security Law, an unexpected and unfortunate incident does not constitute an accident, so as to support an award of benefits, 'where the injury results from an expected or foreseeable event arising during the performance of routine employment duties' ... . Significantly, the burden is on the party seeking benefits to establish that the incident causing his or her injury was an accident ... .Here, petitioner testified that the night before the incident there was an ice storm, and he left for work early the following morning to allow him time to navigate the icy road conditions. He stated that he spoke to his supervisor while en route and arrived in the parking lot about 10 minutes prior to his regularly scheduled shift. As he exited his vehicle, he took a few steps and then slipped and fell in the parking lot. While he was on the ground, he saw that he was lying on ice, and water was running down the middle. Based upon petitioner's testimony describing the occurrence and his awareness of the hazardous conditions created by the ice storm, he should have reasonably anticipated that the parking lot would be slippery when he exited his vehicle. Accordingly, as the precipitating event was entirely foreseeable, substan-

tial evidence supports the Comptroller's finding that the incident did not constitute an accident within the meaning of the Retirement and Social Security Law and, thus, that petitioner was not entitled to enhanced benefits...". **Matter of Begley v DiNapoli, 2015 NY Slip Op 07323, 3rd Dept 10-8-15**

RETIREMENT AND SOCIAL SECURITY LAW, PERSONAL INJURY.

CORRECTIONS OFFICER NOT ENTITLED TO PERFORMANCE OF DUTY DISABILITY BENEFITS BASED UPON INJURY STEMMING FROM AIDING AN INMATE WHO WAS HAVING A SEIZURE.

A corrections officer was not entitled to "performance of duty" disability benefits based upon an injury sustained while aiding an inmate who had a seizure. The court found that the "performance of duty" disability provision pertained only to injury caused by a violent inmate: "Retirement and Social Security Law § 507-b (a) provides for performance of duty disability retirement benefits to correction officers employed by the Department of Corrections and Community Supervision who are unable to perform their job duties as the natural and proximate result of an injury, sustained in the performance or discharge of [their] duties by, or as a natural and proximate result of, an act of an inmate. The statute does not specifically define an act of an inmate. The legislative history, however, reveals that the statute was clearly intended to compensate correction officers who, because of the risks created by their daily contact with certain persons who are dangerous [and] profoundly antisocial . . . become permanently disabled ... . In accordance with this intent, courts have construed the language to require that the injuries be caused by direct interaction with an inmate in order to qualify for benefits under the statute ... . Petitioner contends that she had direct interaction with the inmate while she was lowering him to the floor during his seizure. However, in analogous circumstances where a correction officer was injured while assisting an incapacitated inmate during a medical emergency, we held that the inmate was not engaged in any act that was a proximate cause of petitioner's . . . injury (*Matter of Esposito v Hevesi*, 30 AD3d 667, 668 [2006]). Given the absence of any affirmative act on the part of the inmate here, we perceive no meaningful distinction to be drawn between this case and *Matter of Esposito v Hevesi* (supra) ...". [internal quotation marks omitted] **Matter of Laurino v DiNapoli, 2015 NY Slip Op 07327, 3rd Dept 10-8-15**

UNEMPLOYMENT INSURANCE.

SALES REP WHO WORKED FROM HOME WAS AN EMPLOYEE.

The Third Department upheld the board's determination that claimant, who worked from home as a sales representative for DaVinci, was an employee entitled to benefits: "Here, claimant knew DaVinci's principal through prior business dealings and obtained the job after submitting a resume, but did not go through a formal hiring procedure. Through negotiation, the principal agreed to pay her $4,000 per month, plus health insurance, and to reimburse her for business-related expenses. Her compensation was initially supposed to be a draw on commission, but turned out to be a salary that she was paid every other week regardless of sales. Although claimant worked from home, she provided the principal with weekly activity reports, maintained regular contact by phone and email, and received specific instructions on products, pricing, delivery and clients. In addition, claimant contacted clients who she had dealings with in the past, but also claimant followed up on leads directed to her by the principal and met with him at conventions and product demonstrations. Notably, the principal provided claimant with a three dimensional television and other equipment needed to conduct her sales activities, as well as training on how to operate the equipment. In view of the foregoing, and notwithstanding the evidence that would support a contrary conclusion, substantial evidence supports the Board's finding that an employment relationship existed between claimant and DaVinci...". **Matter of Gluck (Davinci 3D Corp.--Commissioner of Labor), 2015 NY Slip Op 07320, 3rd Dept 10-8-15**

WORKERS' COMPENSATION.

WHERE THERE IS PERMANENT PARTIAL DISABILITY, THE BENEFITS ARE CALCULATED BASED UPON THE DIFFERENCE BETWEEN THE PRE-DISABILITY EARNINGS AND THE ACTUAL EARNINGS DURING THE PERIOD OF DISABILITY.

The Board correctly calculated the benefits for a nurse who could no longer work as a nurse due to an allergic reaction to hand sanitizer (permanent partial disability). She found work as a part-time cashier at $8 an hour. She had earned over $2,000 per week as a nurse. The Board awarded her benefits of $600 per week for 500 weeks. The Third Department held the Board correctly used the difference between her nursing salary and her earnings as a cashier during the period of disability as the basis for the award. The court explained the analytical criteria: "Workers' Compensation Law § 15 (3) (w) provides that the compensation rate for injured employees who have permanent partial disabilities that are not subject to schedule awards is based upon the difference between the injured employee's average weekly wages and his or her wage-earning capacity thereafter in the same employment or otherwise ... . Workers' Compensation Law § 15 (5-a) further provides that the wage-earning capacity of an injured employee with a partial disability shall be determined by his [or her] actual earnings while disabled ... . Notably, the Court of Appeals has recognized that where actual earnings during the period of the disability are established, wage[-]earning capacity must be determined exclusively by the actual earnings of the injured employee without evidence of capacity to earn more or less during such disability period ... . Vocational and functional

considerations, such as a claimant's age, education, training, experience, restrictions and related factors, are appropriately taken into account with respect to loss of wage-earning capacity only as they are relevant to the duration of a claimant's permanent partial disability benefits ...". [internal quotation marks omitted] **Matter of Baczuk v Good Samaritan Hosp., 2015 NY Slip Op 07313, 3rd Dept 10-8-15**

FOURTH DEPARTMENT

CIVIL PROCEDURE.

CRITERIA FOR CLASS CERTIFICATION EXPLAINED (NOT MET HERE).
An action by about 1,900 patients who received insulin injections at defendant hospital was properly denied class certification. The patients were notified they may have been administered insulin by insulin pens shared by more than one patient and all were offered free testing for possible blood borne disease. No one tested positive for disease. The court concluded that whether a particular patient was actually exposed and whether exposure resulted in damages would have to be determined on a case by case basis. Therefore issues common to the class did not predominate: "[A] class action may be maintained in New York only after the five prerequisites set forth in CPLR 901 (a) have been met, i.e., the class is so numerous that joinder of all members is impracticable, common questions of law or fact predominate over questions affecting only individual members, the claims or defenses of the representative parties are typical of the class as a whole, the representative parties will fairly and adequately protect the interests of the class, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy ... . The class representative bears the burden of establishing compliance with the requirements of both CPLR 901 and 902 ... . Where, as here, no plaintiff has tested positive for the blood-borne disease to which he or she allegedly was exposed as a result of defendant's negligence, a prerequisite to recovery is proof of actual exposure to the blood-borne disease ... . The issue of actual exposure will require individualized determinations with respect to each plaintiff. Further, even if members of the proposed class could establish such actual exposure, the extent of the damages resulting therefrom [is a] question[] requiring individual investigation and separate proof as to each individual claim ... . Thus, we conclude that, even if there are common issues in this case, those issues do not predominate ..., and [t]he predominance of individualized factual questions . . . renders this case unsuitable for class treatment ...". [internal quotation marks omitted] **Westfall v Olean Gen. Hosp., 2015 NY Slip Op 07396, 4th Dept 10-9-15**

CIVIL PROCEDURE.

CRITERIA FOR "INTEREST OF JUSTICE" EXTENSION OF TIME TO EFFECT SERVICE EXPLAINED.
Supreme Court properly allowed plaintiff an extension of time to effect service on defendant in the interest of justice. An "interest of justice" analysis in this context does not require a showing of good cause for the extension: "Pursuant to CPLR 306-b, if service is not timely made, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service. Even assuming, arguendo, that plaintiff failed to establish good cause for an extension, we conclude that the court properly granted plaintiff's cross motion in the interest of justice. That standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the [s]tatute of [l]imitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant ...". [internal quotation marks omitted] **Swaggard v Dagonese, 2015 NY Slip Op 07398, 4th Dept 10-9-15**

CONTRACT LAW, DAMAGES.

LAW RE: LIQUIDATED DAMAGES EXPLAINED.
The Fourth Department concluded that defendant's papers were not sufficient to warrant summary judgment invalidating a liquidated damages provision of an agreement, but noted that plaintiff may not be able to prove the validity of the provision at trial. Liquidated damages are valid only if they bear a reasonable relationship to the loss; otherwise they constitute an unenforceable penalty. Here, plaintiff sold defendant a car with the condition that the car not be re-sold for one year. Defendant sold the car two weeks after purchase and plaintiff sued to enforce the $20,000 liquidated damages provision of the "agreement not to export." The court explained the relevant law: "Liquidated damages are enforceable only to the extent that they comprise an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement ... . As a general rule, a liquidated damages clause is enforceable only if the stipulated amount of damages bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation ... . If, however, the clause provides for damages that are plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced ...". [internal quotation marks omitted] **Great Lakes Motor Corp. v Johnson, 2015 NY Slip Op 07394, 4th Dept 10-9-15**

CRIMINAL LAW.

GUILTY PLEA TO POSSESSION OF A WEAPON IN ONE COUNTY PRECLUDED PROSECUTION FOR THE SAME OFFENSE IN ANOTHER COUNTY (DOUBLE JEOPARDY).

Charges stemming from the possession of a weapon in two counties triggered the protection against double jeopardy: "Defendant was convicted, following a jury trial, of reckless endangerment in the first degree (Penal Law § 120.25) and criminal possession of a weapon in the second degree (§ 265.03 [3]). The charges arose from an incident in which defendant discharged a firearm into the bedroom window of an occupied, residential home in Oswego County during the early morning hours of March 5, 2012. Defendant was apprehended by the police later that day at a motel in Onondaga County, where a handgun was found in his vehicle. Prior to his trial in Oswego County Court, defendant was charged with and pleaded guilty to, in Onondaga County Court, criminal possession of a weapon in the second degree for the handgun recovered from his vehicle. * * * It is well settled that a defendant has the right not to be punished more than once for the same crime ... . When successive prosecutions are involved, the guarantee serves a constitutional policy of finality for the defendant's benefit . . . and protects the accused from attempts to secure additional punishment after a prior conviction and sentence ... . This case presents a prototypical instance of a constitutional double jeopardy violation inasmuch as defendant was prosecuted and convicted of a crime in Oswego County to which he had pleaded guilty in Onondaga County. In both instances, the charge was the same: criminal possession of a weapon in the second degree pursuant to Penal Law § 265.03 (3). We reject the People's contention that double jeopardy did not attach because defendant was convicted in Oswego County before he was sentenced on his guilty plea in Onondaga County. [T]ermination of a criminal action by entry of a guilty plea constitutes a previous prosecution for double jeopardy purposes...". [internal quotation marks omitted] **People v Gardner, 2015 NY Slip Op 07363, 4th Dept 10-9-15**

CRIMINAL LAW.

FAILURE TO ADVISE NON-CITIZEN DEFENDANT OF DEPORTATION CONSEQUENCES OF PLEA REQUIRED REMITTAL.

The court's failure to advise defendant of the deportation consequences of his guilty plea required that the case be remitted to afford the defendant the opportunity to move to vacate his plea: "We agree with defendant, a noncitizen, that County Court failed to advise him of the deportation consequences of his felony plea, as required by *People v Peque* (22 NY3d 168). We therefore hold the case, reserve decision and remit the matter to County Court to afford defendant the opportunity to move to vacate his plea based upon a showing that there is a "reasonable probability" that he would not have pleaded guilty had he known that he faced the risk of being deported as a result of the plea (id. at 176...)." **People v Traverso, 2015 NY Slip Op 07376, 4th Dept 10-9-15**

CRIMINAL LAW.

MOTION PAPERS SUFFICIENT TO WARRANT A PROBABLE CAUSE HEARING, CRITERIA EXPLAINED.

The Fourth Department, reversing Supreme Court, determined defendant's motion papers were sufficient to warrant a probable cause hearing. No affidavit from the defendant is required. The Fourth Department explained the analytical criteria: "As the People correctly concede, the court erred in determining that defendant was not entitled to a hearing because his motion papers did not include an affidavit from defendant (*see* CPL 710.60 [1]...). The court also erred in determining that the factual assertions contained in defendant's moving papers were insufficient to warrant a hearing. In determining whether a hearing is required pursuant to CPL 710.60, the sufficiency of defendant's factual allegations should be evaluated by (1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information ... . Here, considering defendant's limited access to information regarding the basis for the actions of the arresting officers, he could do little more than dispute the circumstances surrounding his arrest . . . [D]efendant's lack of access to information precluded more specific factual allegations and created factual disputes, the resolution of which required a hearing ...". [internal quotation marks omitted] **People v Jones, 2015 NY Slip Op 07392, 4th Dept 10-9-15**

CRIMINAL LAW.

FAILURE TO WARN DEFENDANT THAT FAILURE TO APPEAR WOULD RESULT IN A HARSHER SENTENCE REQUIRED VACATION OF THE HARSHER SENTENCE.

The Fourth Department vacated defendant's enhanced sentence because defendant was not warned that his failure to appear at sentencing would result in a harsher sentence. The matter was remitted for imposition of the bargained-for sentence or the opportunity to withdraw the plea: "Although defendant failed to preserve his contention for our review by objecting to the enhanced sentence or by moving to withdraw his plea or to vacate the judgment of conviction ..., we nevertheless exercise our power to review defendant's contention as a matter of discretion in the interest of justice ... . We agree with defendant that the court erred in imposing an enhanced sentence inasmuch as it did not advise defendant at the time of his plea that a harsher sentence than he bargained for could be imposed if [he] failed to appear at sentencing ... . We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court to impose the promised sentence

or to afford defendant the opportunity to withdraw his plea ...". [internal quotation marks omitted] **People v Donald, 2015 NY Slip Op 07399, 4th Dept 10-9-15**

CRIMINAL LAW.

ALLEGATIONS IN MOTION TO SUPPRESS INSUFFICIENT TO WARRANT HEARING.

In concluding a suppression hearing (re: statements by the defendant) was properly denied, the Fourth Department explained the relevant analytical criteria: "It is well settled that [h]earings are not automatic or generally available for the asking by boilerplate allegations ... . Here, [t]he allegations in defendant's moving papers, when considered in the context of the detailed information provided to defendant, were insufficient to create a factual dispute requiring such a hearing . . . Defendant . . . did not address the specific allegations set forth in the felony complaint and the other discovery materials provided to him ..., which included the relevant grand jury testimony of the witness. Thus, the court properly denied the motion without conducting a hearing based on the insufficiency of the allegations and, under the circumstances of this case ...". [internal quotation marks omitted] **People v Mitchell, 2015 NY Slip Op 07411, 4th Dept 10-9-15**

EMPLOYMENT LAW, MUNICIPAL LAW.

TERMINATION FOR INSUBORDINATION PROPER.

Petitioner, the former chief operator of a city water treatment plant, was properly terminated for insubordination. Petitioner complained directly to the NYS Department of Health about a supervisor's decision, thereby allegedly violating directives concerning the chain of command. **Matter of Gaffney v Addison, 2015 NY Slip Op 07372, 4th Dept 10-9-15**

LABOR LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF'S CONDUCT, PLACING LADDER ON ICE, WAS SOLE PROXIMATE CAUSE OF INJURY.

There was a question of fact whether the plaintiff's conduct constituted the sole proximate cause of his injury (re: the Labor Law 240(1) cause of action). Plaintiff placed his ladder on ice and was injured when the ladder slipped on the ice. The court explained the analytical criteria: "Liability under section 240 (1) is contingent on a statutory violation and proximate cause ... . If both elements are established, contributory negligence cannot defeat the plaintiff's claim … . There can be no liability under Labor Law § 240 (1), however, when there is no violation and the worker's actions . . . are the sole proximate cause of the accident ... . It is therefore conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff's injury) to occupy the same ground as a plaintiff's sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it. Conversely, if the plaintiff is solely to blame for the injury, it necessarily means that there has been no statutory violation ...". [internal quotation marks omitted] **Fazekas v Time Warner Cable, Inc., 2015 NY Slip Op 07403, 4th Dept 10-9-15**

PERSONAL INJURY, LANDLORD-TENANT.

CRITERIA FOR LEAD-PAINT-EXPOSURE CAUSE OF ACTION DESCRIBED.

In finding plaintiff had raised a question of fact whether one of the defendant landlords was aware of peeling lead paint in the apartment (because of alleged complaints about it), the Fourth Department explained the elements of a lead-paint-exposure cause of action: "To establish that a landlord is liable for a lead-paint condition, a plaintiff must demonstrate that the landlord had actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition, and failed to do so ... . Thus, to meet their burden on their motions for summary judgment with respect to the premises liability causes of action, defendants were required to establish that they had no actual or constructive notice of the hazardous lead paint condition prior to an inspection conducted by the [Oswego] County Department of Health (... *see generally Chapman v Silber*, 97 NY2d 9, 15). ... [T]he factors set forth in *Chapman* . . . remain the bases for determining whether a landlord knew or should have known of the existence of a hazardous lead paint condition and thus may be held liable in a lead paint case...". [internal quotation marks omitted] **Kimball v Normandeau, 2015 NY Slip Op 07357, 4th Dept 10-8-15**

PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF ASSUMED THE RISK OF INJURY FROM COLLIDING WITH AND BREAKING A WINDOW NEAR THE BASKETBALL COURT.

Plaintiff raised a question of fact whether he assumed the risk of injury from colliding with and breaking a window near the basketball court on which he was playing. Plaintiff submitted an expert affidavit alleging that the window should have been covered with a screen or otherwise made safe. Therefore, there was a question of fact whether the window represented a risk over and above the dangers inherent in the sport: "It is well settled that, by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks [that] are inherent in and arise out of the nature of the sport generally and flow from such participation ... . A plaintiff, however, will not be deemed to have consented to concealed or unreasonably increased risks ... . Here, even assuming, arguendo, that defendant met its initial burden on the motion, we conclude that plaintiff raised a triable issue of fact by submitting the affidavit of a licensed architect who opined that the

window involved in the accident did not meet industry standards for use in a gymnasium because the glass was not covered by a protective screen, nor was it laminated or tempered to withstand impact by a person ... . Thus, there is a triable issue of fact whether defendant created a dangerous condition over and above the usual dangers that are inherent in the sport of basketball...". [internal quotation marks omitted] **Barends v Town of Cheektowaga, 2015 NY Slip Op 07377, 4th Dept 10-9-15**

PERSONAL INJURY.

COMPLAINT DID NOT STATE A CAUSE OF ACTION AGAINST MECHANIC WHO INSPECTED DEFENDANT'S CAR.

The Fourth Department, reversing Supreme Court, determined plaintiff did not state a cause of action against the mechanic who inspected the defendant's (Golley's) car, with which plaintiff's motorcycle collided. Plaintiff alleged the mechanic negligently allowed Golley's car to pass inspection. However, the complaint did not allege the mechanic owed a duty of care to plaintiff by creating or exacerbating any dangerous condition in Golley's car. The court explained the relevant law: "Here, plaintiff alleged with respect to defendant that he knowingly passed a vehicle for inspection that should not have passed, but he did not allege, either in the complaint or in opposition to the motion, that defendant created or exacerbated any dangerous condition relating to Golley's vehicle by inspecting it. Thus, even assuming, arguendo, that defendant did not conduct a proper inspection of Golley's vehicle, we conclude that plaintiff has failed to allege that defendant assumed a duty to plaintiff by launch[ing] an instrument of harm since there is no reason to believe that the inspection made [Golley's] vehicle less safe than it was beforehand ...". [internal quotation marks omitted] **Murray v Golley, 2015 NY Slip Op 07395, 4th Dept 10-9-15**

PERSONAL INJURY, MUNICIPAL LAW.

QUESTION OF FACT WHETHER THE MUNICIPALITY CREATED THE ROAD DEFECT THEREBY NEGATING THE NOTICE REQUIREMENT, QUESTION OF FACT WHETHER PLAINTIFF SUFFICIENTLY IDENTIFIED CAUSE OF THE FALL.

The requirement that the municipality be notified of a road defect before liability can attach did not preclude suit because there was a question of fact whether the municipality created the defect. Plaintiff's identification of the cause of the fall from his bicycle was sufficient to allow a jury to identify the cause without resort to speculation: "Contrary to defendant's contention, the court properly denied that part of its motion seeking dismissal of the complaint on the ground that it did not receive prior written notice of any defective or dangerous condition. Defendant asserted on its motion, and plaintiff conceded, that defendant did not have any such notice (... *see generally* Village Law § 6-628). Therefore, this case turns on whether defendant created the allegedly defective or dangerous condition with an affirmative act of negligence ... . Here, plaintiff's expert opined that the dangerous condition was caused by the intentional removal of paving material from the area adjacent to the water valve box cover at the time the roadway was resurfaced, and we therefore conclude that plaintiff raised an issue of fact whether defendant created a dangerous condition that caused the accident ... . * * * Although a defendant may establish its prima facie entitlement to judgment as a matter of law by submitting evidence that the plaintiff cannot identify the cause of his or her fall without engaging in speculation ..., we conclude that defendant failed to meet that burden here ... . In support of its motion, defendant submitted plaintiff's deposition testimony and plaintiff's testimony from a hearing pursuant to General Municipal Law § 50-h, in which plaintiff testified that the accident occurred after the front wheel of the bicycle hit something on the roadway. Although plaintiff could not remember seeing the object with which he collided, he testified that the accident occurred in the immediate vicinity of a gap in the pavement adjacent to a water valve box cover, thereby rendering any other potential cause of [his] fall sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence ...". [internal quotation marks omitted] **Swietlikowski v Village of Herkimer, 2015 NY Slip Op 07405, 4th Dept 10-9-15**

REAL ESTATE, CONTRACT LAW.

THE ABSENCE OF PLAINTIFF'S (BUYER'S) ATTORNEY'S EXPLICIT UNCONDITIONAL APPROVAL OF THE PURCHASE CONTRACT INVALIDATED THE CONTRACT, DESPITE PLAINTIFF'S DESIRE TO GO THROUGH WITH THE PURCHASE.

The Fourth Department, reversing Supreme Court, determined that an explicit (not implied) unconditional attorney approval of a real estate contract is a necessary prerequisite for a valid contract. Here, plaintiff's attorney had approved the contract on the condition that an environmental warranty be provided by the sellers, a condition which was never met or explicitly waived. Despite plaintiff's desire to go through with the purchase, defendant-sellers' attorney correctly determined there was no valid contract of sale because plaintiff's attorney never explicitly unconditionally approved it: "As the Court of Appeals has stated, [c]larity and predictability are particularly important in the area of law dealing with attorney approval of real estate contracts ... . Here, we conclude that, although plaintiff could have unilaterally waived the environmental conditions that [his attorney] placed on his approval of the contract inasmuch as those conditions benefitted only him ..., neither [of plaintiff's attorneys] clearly and unequivocally did so. Thus, the contract was never unconditionally approved by plaintiff's attorneys. * * * [C]onsiderations of clarity, predictability, and professional responsibility weigh against reading

an implied limitation into the attorney approval contingency ... . If [plaintiff's attorney] intended to waive the conditions placed ... on ... approval of the contract, he should have done so expressly and not left anything for inference, or he should have stated that he, as plaintiff's counsel, unconditionally approved the contract as proposed by defendants. Because he failed to do so, we conclude that there was not a valid contract between the parties and that the court erred in directing defendants to sell the property to plaintiffs." [internal quotation marks omitted] **Pohlman v Madia, 2015 NY Slip Op 07379, 4th Dept 10-9-15**

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