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COURT OF APPEALS

ARBITRATION.

DISPUTES INVOLVING COMMERCIAL REAL ESTATE WERE SUFFICIENTLY RELATED TO INTERSTATE COMMERCE TO FALL UNDER THE JURISDICTION OF THE FEDERAL ARBITRATION ACT; PLAINTIFFS' RESORT TO LITIGATION AND THE RESULTING PREJUDICE TO DEFENDANTS CONSTITUTED A WAIVER OF ARBITRATION.

The Court of Appeals, in a full-fledged opinion by Judge Lippman, determined that the intrafamilial contractual disputes involving commercial real estate fell under the jurisdiction of the Federal Arbitration Act (FAA), but that the plaintiffs, by litigating the disputes in the courts and thereby prejudicing the rights of the defendants, had waived arbitration: "Generally, when addressing waiver, courts should consider the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established ... . The majority of federal courts have taken the position that waiver cannot be established in the absence of prejudice ... . * * * "Here, ... prejudice ... [has] been established. After vigorously pursuing their litigation strategy for approximately one year, plaintiffs moved to compel arbitration. Even more telling, the desire for arbitration only arose after Supreme Court made plain its view that plaintiffs' claims were vexatious and largely time-barred. Indeed, plaintiffs had expressly represented to Supreme Court that they did not want to go to arbitration. Plaintiffs' behavior is indicative of blatant forum-shopping and, under these circumstances, prejudice has clearly been established. Therefore, plaintiffs have waived the right to arbitration and the issue of timeliness should be determined by the court ...". **Cusimano v Schnurr, 2015 NY Slip Op 09232, CtApp 12-16-15**

CIVIL PROCEDURE, CONTRACT LAW.

A CONTRACTUAL NEW YORK CHOICE OF LAW PROVISION OVERRIDES AN OTHERWISE APPLICABLE NEW YORK STATUTORY CHOICE OF LAW PROVISION WHICH WOULD REQUIRE THE APPLICATION OF ANOTHER STATE'S LAW.

In a full-fledged opinion by Judge Stein, over an extensive dissenting opinion by Judge Abdus-Salaam (in which Judge Rivera concurred), the Court of Appeals determined the New York choice of law provision in decedent's retirement and death benefit plans required the application of New York law, even though, under the facts, an otherwise applicable New York statutory choice of law provision required the application of Colorado law. Decedent was enrolled in both retirement and death benefit plans. He made his wife the beneficiary of the plans and his wife's father the contingent beneficiary. Decedent and his wife divorced and decedent died in Colorado. If the otherwise applicable New York statutory choice of law provision applied, the effect of the divorce would be determined by Colorado law (where decedent died). Under Colorado law, the divorce removed both decedent's wife and her father as beneficiaries of the plans. Under New York law only the wife was removed and her father remained. The choice of law provision in the retirement and death benefit plans was deemed to supersede the otherwise applicable New York statutory choice of law provision (which would have required analysis under Colorado law): "... [W]e should apply the most reasonable interpretation of the contract language that effectuates the parties' intended and expressed choice of law ... . To do otherwise — by applying New York's statutory conflict-of-laws principles, even if doing so results in the application of the substantive law of another state — would contravene the primary purpose of including a choice-of-law provision in a contract — namely, to avoid a conflict-of-laws analysis and its associated time and expense. Such an interpretation would also interfere with, and ignore, the parties' intent, contrary to the basic tenets of contract interpretation." **Ministers & Missionaries Benefit Bd. v Snow, 2015 NY Slip Op 09186, CtApp 12-15-15**

CIVIL PROCEDURE, EVIDENCE.

SANCTIONS FOR NEGLIGENT SPOLIATION OF EVIDENCE REQUIRE A SHOWING OF THE RELEVANCE OF THE LOST EVIDENCE; AN ADVERSE INFERENCE JURY INSTRUCTION MAY BE APPROPRIATE FOR NEGLIGENT SPOLIATION.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over an extensive dissenting opinion by Judge Stein (in which Judge Rivera concurred), determined the record supported a finding that defendant was negligent in failing to preserve electronic evidence and remitted the matter to Supreme Court for a determination of the relevance of the lost evidence and a sanction, if deemed appropriate. The court noted that, even where spoliation is the result of simple negligence, an

adverse inference jury instruction may be appropriate. The court explained the applicable law as follows: "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense' ... . Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed ... . On the other hand, if the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense ...". **Pegasus Aviation I, Inc. v Varig Logistica S.A., 2015 NY Slip Op 09187, CtApp 12-15-15**

CRIMINAL LAW.

INFORMATION ADEQUATELY ALLEGED CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE; THE APPEARANCE OF BURNT RESIDUE IN A GLASS PIPE, TOGETHER WITH ALLEGATIONS THE OFFICER HAD THE REQUISITE TRAINING AND EXPERIENCE SUFFICIENT.

The Court of Appeals determined the heightened requirements for a misdemeanor information were met by the information charging defendant with criminal possession of a controlled substance seventh degree: "Here, ... the information was facially sufficient because it contained adequate allegations that the officer had the requisite training and experience to recognize the substance in defendant's possession as a controlled substance and that the officer reached his conclusion about the nature of the substance based on its appearance and placement within a favored apparatus of drug users, a glass pipe. That the substance at issue here was a burnt residue does not dictate a different result. ... [A]n information's description of the characteristics of a substance combined with its account of an officer's training in identifying such substances, the packaging of such substance and the presence of drug paraphernalia, can support the inference that the officer properly recognized the substance as a controlled substance." **People v Smalls, 2015 NY Slip Op 09188, CtApp 12-15-15**

CRIMINAL LAW.

RE: FAILURE TO TIMELY FILE A NOTICE OF APPEAL; A PREREQUISITE FOR CORAM NOBIS RELIEF IS INEFFECTIVE ASSISTANCE OF COUNSEL.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, over a partial dissent, determined that the applications for a writ of coram nobis in the two cases before the court were properly denied. The court found that the defendants were aware of their right to appeal but had not requested that their attorneys file a notice of appeal. The cases, therefore, were factually distinct from cases where the defendants requested that their attorneys file a notice of appeal but the attorneys failed to do so: "… [C]oram nobis relief is not just another stop on a continuum of opportunities for a defendant to seek appellate relief. Rather, it is extraordinary relief only to be provided in "rare cases" "when a right to appeal was extinguished 'due solely to the unconstitutionally deficient performance of counsel'" ... . * * *... [N]either defendant claims that he requested that his attorney file a notice of appeal and that his attorney failed to comply with that request. … The records as a whole reveal that defendants knew about their right to appeal. Thus, to grant defendants relief here would be to broaden the … rule to apply to any case where a notice of appeal had not been filed within one year and 30 days of conviction. Such a rule would abrogate CPL 460.30. Simply put, defendants here failed to show that their attorneys were unconstitutionally ineffective and therefore they are not entitled to the relief they seek." **People v Rosario, 2015 NY Slip Op 09230, CtApp 12-16-15**

CRIMINAL LAW.

WHERE NO NOTICE OF APPEAL IS FILED, A CONVICTION AND SENTENCE BECOMES FINAL WHEN THE 30-DAY PERIOD FOR FILING A NOTICE OF APPEAL EXPIRES.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a dissenting opinion by Judge Rivera, determined a judgment of conviction and sentence becomes final when the 30-day period for filing a notice of appeal expires (where no notice is filed). Here the issue was whether the defendant could move to vacate his conviction by guilty plea because he was not informed of the deportation consequences of the plea. Because the motion to vacate would not be available if defendant's conviction and sentence became final before Padilla v Kentucky (559 US 356) was decided (requiring that a defendant be informed of deportation consequence of a plea), the date of finality was determinative. If the finality date is 30 days after conviction and sentence, defendant's conviction and sentence would have been final before Padilla was decided. If, as defendant argued, the conviction and sentence became final one year and 30 days after the conviction and sentence, when the time for moving to file a late notice of appeal expired, defendant's conviction and sentence would not have been final before Padilla was decided. Because the Court of Appeals decided the conviction and sentence became final when no notice of appeal was filed within 30 days, defendant could not move to vacate his conviction. **People v Varenga, 2015 NY Slip Op 09312, CtApp 12-17-15**

CRIMINAL LAW.

"TRIAL PREPARATION" EXCEPTION TO A DETERMINATION WHETHER A PHOTOGRAPHIC DISPLAY IS UNDULY SUGGESTIVE, IN THE FORM OF A *HERNER* HEARING, SHOULD NO LONGER BE EMPLOYED.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissenting opinion by Judge Lippman, held that the "trial preparation" exception to a determination whether a photographic display is unduly suggestive, in the form of a *Herner* hearing, should no longer be employed. The complainant was shown a photograph of the defendant shortly before trial, ostensibly as part of "trial preparation." Defense counsel asked for a full-fledged *Wade* hearing to determine whether the single-photograph-showing was unduly suggestive. Instead only a *Herner* hearing was held to determine if a judicial determination of suggestiveness was needed. The trial court determined no judicial determination of suggestiveness was necessary. Although the Court of Appeals found the trial court erred in not conducting a full *Wade* hearing, it further found the complainant's identification of defendant was otherwise validated by an "independent source." The dissent disagreed and argued the conviction should be reversed. **People v Marshall, 2015 NY Slip Op 09313, CtApp 12-17-15**

CRIMINAL LAW.

FAILURE TO PRESERVE PHOTO ARRAY GIVES RISE TO A REBUTTABLE PRESUMPTION THE PHOTO ARRAY WAS SUGGESTIVE; THE PRESUMPTION CAN BE REBUTTED BY DETAILING THE PROCEDURES USED TO SAFEGUARD AGAINST SUGGESTIVENESS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, with a concurring opinion by Judge Abdus-Salaam, adopted an analytical framework for determining whether a photo array which has not been preserved is unduly suggestive. When a photo array is not preserved, a presumption arises that the array was suggestive. That presumption can be rebutted. If the presumption is rebutted, the burden of demonstrating undue suggestiveness passes to the defendant. Here, the victim was shown over 100 computer generated images after the police entered criteria based upon eyewitness-descriptions of the perpetrator. Because those images were not preserved, a presumption of suggestiveness arose. Evidence that the victim picked out the defendant, and only the defendant, from the 100 images rebutted that presumption. Defendant thereafter did not meet his burden of showing undue suggestiveness: "Under Appellate Division case law, the failure of the police to preserve a photographic array [shown to an identifying witness] gives rise to a rebuttable presumption that the array was suggestive ... . The rebuttable presumption fits within the burden-shifting mechanism in the following manner. Failure to preserve a photo array creates a rebuttable presumption that the People have failed to meet their burden of going forward to establish the lack of suggestiveness ... . To the extent the People are silent about the nature of the photo array, they have not met their burden of production. On the other hand, the People may rebut the presumption by means of testimony detailing the procedures used to safeguard against suggestiveness ..., in which case they have met their burden, and the burden shifts to the defendant. Although we have not expressly adopted this presumption of suggestiveness before, we endorse it now." [internal quotation marks omitted] **People v Holley, 2015 NY Slip Op 09314, CtApp 12-17-15**

CRIMINAL LAW, APPEALS.

THE COURT OF APPEALS CAN HEAR THE APPEAL OF AN UNPRESERVED SENTENCING ISSUE RAISED FOR THE FIRST TIME IN A MOTION TO VACATE THE SENTENCE; A FOREIGN STATUTE WHICH CAN BE VIOLATED BY AN ACT WHICH IS NOT A FELONY IN NEW YORK CANNOT SERVE AS A PREDICATE FELONY, IRRESPECTIVE OF THE ACTUAL FACTS UNDERLYING THE FOREIGN CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over a full-fledged dissenting opinion by Judge Pigott, determined the Court of Appeals could hear the appeal of an unpreserved sentencing issue first raised in a motion to vacate the sentence (Criminal Procedure Law 440.20) and further determined that a Washington, DC robbery conviction should not have been deemed a predicate felony. Because the DC statute could be violated by "snatching" property from someone, an act which would not be felony robbery in New York, the Court of Appeals held it could not be the basis for defendant's conviction as a second felony offender, irrespective of whether the actual facts underlying the DC conviction would constitute a felony in New York: "... [U]nder the D.C. statute the taking can occur (1) by force or violence, or (2) by putting in fear. The force or violence element can be accomplished (1) against resistance, or (2) by sudden or stealthy seizure, or (3) by snatching ... . Stated another way, the statute must be interpreted to include stealthy seizure as a form of force or violence ... . The statutory language means that the crime can be committed in different ways, and the phrase sudden or stealthy seizure or snatching does not describe separate criminal acts required by the statute in addition to the use of force or violence ... . Consequently, we do not look at the underlying accusatory instrument to determine if the crime is equivalent to a New York felony ... . Because the statute, itself, indicates that a person can be convicted of the D.C. crime without committing an act that would qualify as a felony in New York (i.e., by pickpocketing), defendant's D.C. conviction for attempt to commit robbery was not a proper basis for a predicate felony offender adjudication ...". [internal quotation marks omitted] **People v Jurgins, 2015 NY Slip Op 09311, CtApp 12-17-15**

CRIMINAL LAW, ATTORNEYS.

COLLATERAL ESTOPPEL DOCTRINE DID NOT PRECLUDE TESTIMONY ABOUT DEFENDANT'S USE OF A RAZOR BLADE, DESPITE DEFENDANT'S ACQUITTAL ON THE RELATED "DANGEROUS INSTRUMENT" CHARGES IN THE FIRST TRIAL; ADVOCATE-WITNESS RULE REQUIRED THAT DEFENSE COUNSEL'S MOTION TO WITHDRAW OR HER MOTION FOR A MISTRIAL BE GRANTED.

The Court of Appeals, in a full-fledged opinion by Judge Pigott, determined the doctrine of collateral estoppel did not prohibit testimony in defendant's second trial that the defendant threatened to cut a victim's throat with a razor blade, despite the fact defendant was acquitted of charges involving the use of a dangerous instrument in the first trial. The court concluded that the witness-victims could not give truthful testimony about the defendant's actions without reference to the razor blade. Therefore, the collateral estoppel doctrine, under the facts of this case, was properly not applied. The court went on to find that defense counsel's request to withdraw or her motion for a mistrial should have been granted. Defense counsel's statements at arraignment were used to impeach the defendant's version of events. After defense counsel reviewed her notes, she informed the court that her statements at arraignment were incorrect and that defendant's testimony at trial matched what he had told her before arraignment. Under these circumstances, the witness-advocate rule required that defense counsel be required to withdraw or that a mistrial be declared. Defendant's conviction was therefore reversed: "... [T]he rigid application of collateral estoppel sometimes gives way to society's interest in ensuring the correctness of criminal prosecutions ... . Thus, ... if it becomes apparent ... that collateral estoppel 'cannot practicably be followed if a necessary witness is to give truthful testimony, then [the doctrine] should not be applied' .... . * * * [Re: the use of defense counsel's erroneous statement to impeach defendant:] The situation went from bad to worse when it became clear that the only way for defense counsel to rehabilitate her client's credibility was to impugn her own, moments before she would argue for her client's innocence in summation. Any way you look at it, defense counsel had no choice but to withdraw. In these unusual circumstances, we hold that the trial court should have granted counsel's request to withdraw or declared a mistrial." **People v Ortiz, 2015 NY Slip Op 09233, CtApp 12-16-15**

CRIMINAL LAW, EVIDENCE.

PROSECUTION'S USE OF EVIDENCE OF DEFENDANT'S POST-ARREST SILENCE VIOLATED DEFENDANT'S DUE PROCESS RIGHTS UNDER THE STATE CONSTITUTION; THE ERROR WAS DEEMED HARMLESS HOWEVER.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissenting opinion by Judge Pigott (who adopted the dissent by Justice Garry in the Appellate Division), determined that the prosecution's proof of defendant's post-Miranda silence as he was being transported by the police violated defendant's due process rights under the state constitution. The error, however, was deemed harmless because the court found there was no reasonable possibility the error contributed to defendant's conviction. The defendant's conviction was therefore upheld. The defendant acknowledged commission of the crimes (two murders) but raised the extreme emotional disturbance (EED) defense. The Court of Appeals held that evidence of defendant's silence upon arrest, which apparently was aimed at disproving or calling into question the EED defense, did not contribute to the jury's rejection of the EED defense. The opinion includes extensive discussions of the use of evidence of a defendant's silence and the related violation of state constitutional rights, the EED proof requirements, and ineffective assistance of counsel. **People v Pavone, 2015 NY Slip Op 09315, CtApp 12-17-15**

CRIMINAL LAW, EVIDENCE.

HEARSAY STATEMENT BY AN UNAVAILABLE WITNESS SHOULD HAVE BEEN ADMITTED AS A STATEMENT AGAINST PENAL INTEREST.

The Court of Appeals, in a full-fledged opinion by Judge Lippman, over a dissenting opinion by Judge Pigott, determined that a statement made by an unavailable witness should have been admitted as a statement against penal interest. The defendant was convicted of driving while intoxicated. The out-of-court statement made by the unavailable witness indicated that she, not the defendant, was driving. The Court of Appeals affirmed the Appellate Division, reversed defendant's conviction and ordered a new trial. The court held that all of the following elements of the declaration-against-penal-interest exception to the hearsay rule were supported by sufficient evidence at trial: "The declaration-against-interest exception to the hearsay rule 'flows from the fact that a person ordinarily does not reveal facts that are contrary to his own interest' unless those facts are true ... . A statement qualifies as a declaration against interest if four elements are met: (1) the declarant is unavailable to testify as a witness; (2) when the statement was made, the declarant was aware that it was adverse to his or her penal interest; (3) the declarant has competent knowledge of the facts underlying the statement; and (4) supporting circumstances independent of the statement itself attest to its trustworthiness and reliability ...". **People v Soto, 2015 NY Slip Op 09316, CtApp 12-17-15**

FAMILY LAW.

GRANDPARENTS, WITH WHOM THE CHILD HAD RESIDED FOR TEN YEARS, HAD STANDING TO SEEK CUSTODY OF THE CHILD; THERE IS NO REQUIREMENT THAT THE 24-MONTH SEPARATION OF PARENT AND CHILD REQUIRED BY THE "GRANDPARENT STANDING" STATUTE BE CHARACTERIZED BY A COMPLETE LACK OF CONTACT BETWEEN PARENT AND CHILD.

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined the grandparents had demonstrated standing to seek custody of the child, who had lived with the grandparents from infancy for ten years. Mother argued that, in order to meet the standing requirement of a 24-month separation of parent and child, the child

must have had no contact with her during at least a 24-month period. The Court of Appeals disagreed, finding no "absence of parental contact" requirement. The case was remanded to the Appellate Division for an application of the "best interests of the child" analysis in the custody proceedings: "Domestic Relations Law § 72 (2) sets forth three 'elements' required to demonstrate the extraordinary circumstance of an 'extended disruption of custody,' specifically: (1) a 24-month separation of the parent and child, which is identified as 'prolonged,' (2) the parent's voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents' household. * * * "Contrary to the mother's contention, a lack of contact is not a separate element under the statute. Indeed, there is no explicit statutory reference to contact or the lack thereof. Rather, the quality and quantity of contact between the parent and child are simply factors to be considered in the context of the totality of the circumstances when determining whether the parent voluntarily relinquished care and control of the child, and whether the child actually resided with the grandparents for the required 'prolonged' period of time." **Matter of Suarez v Williams, 2015 NY Slip Op 09231, CtApp 12-16-15**

PERSONAL INJURY, MEDICAL MALPRACTICE, DUTY OF CARE.

DOCTORS, WHO ALLEGEDLY FAILED TO WARN PATIENT OF DISORIENTING EFFECTS OF DRUGS, OWED A DUTY OF CARE TO PLAINTIFF, WHO WAS STRUCK BY A VEHICLE DRIVEN BY THE PATIENT.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over an extensive dissenting opinion by Judge Stein (in which Judge Abdus-Salaam concurred), determined a medical malpractice complaint alleging defendant hospital and doctors owed a duty of care to plaintiff, who was injured by a patient, should not have been dismissed. The patient was treated with drugs which could impair her ability to drive but allegedly was not warned of that effect by the treating doctors. Shortly after leaving the hospital, the patient crossed a double yellow line and struck plaintiff's vehicle. The Court of Appeals held that the injured plaintiff's complaint, which alleged the negligent failure to warn the patient of the impairment of the ability to drive, stated a cause of action, sounding in medical malpractice, against the defendant hospital and doctors: "Here, put simply, to take the affirmative step of administering the medication at issue without warning [the patient] about the disorienting effect of those drugs was to create a peril affecting every motorist in [the patient's] vicinity. Defendants are the only ones who could have provided a proper warning of the effects of that medication. Consequently, on the facts alleged, we conclude that defendants had a duty to plaintiffs to warn [the patient] that the drugs administered to her impaired her ability to safely operate an automobile ...". **Davis v South Nassau Communities Hosp., 2015 NY Slip Op 09229, CtApp 12-16-15**

FIRST DEPARTMENT

CIVIL PROCEDURE.

PLAINTIFF IN PERSONAL INJURY ACTION NOT REQUIRED TO DISCLOSE (1) FACEBOOK PHOTOGRAPHS SHE DID NOT INTEND TO INTRODUCE AT TRIAL AND (2) INFORMATION ABOUT POST-ACCIDENT MESSAGES.

The First Department, over an extensive dissenting memorandum by Justice Saxe, reversing Supreme Court, determined plaintiff in a personal injury action was not required to turn over to the defendant post-accident photographs of herself posted on Facebook which she does not intend to introduce at trial, and, further, plaintiff was not required to provide defendant with authorizations allowing Facebook to disclose when private messages were posted by the plaintiff after the accident and how long those messages were: "CPLR 3101(a) provides that [t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action. In determining whether the information sought is subject to discovery, [t]he test is one of usefulness and reason ... . It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims ... . Discovery demands are improper if they are based upon hypothetical speculations calculated to justify a fishing expedition... . This Court has consistently applied these settled principles in the context of discovery requests seeking a party's social media information." [internal quotation marks omitted] **Forman v Henkin, 2015 NY Slip Op 09350, 1st Dept 12-17-15**

EVIDENCE.

MISSING WITNESS CHARGE SHOULD NOT HAVE BEEN GIVEN, NO SHOWING REQUEST FOR THE CHARGE WAS TIMELY; ADVERSE INFERENCE CHARGE RE: EXPERT WHO DID NOT BRING SUBPOENAED NOTES SHOULD HAVE BEEN GIVEN.

The First Department, in ordering a new trial, determined the trial judge should not have given a missing witness charge with respect to one of plaintiff's doctors and should have given an adverse inference charge based upon a defense expert's failure to bring her notes, which were subpoenaed: "Here, the record does not reflect when defendants asked for a missing witness charge for Dr. Rose. This presents the possibility that they did not do so until after plaintiff presented her case. Had that been so, plaintiff would have lost any opportunity to account for Dr. Rose's absence, argue that plaintiff did not have

the requisite control over him, or attempt to procure his appearance. Accordingly, since there is no indication that defendants met their burden, we find that the missing witness charge was improperly given. * * * ... [W]hile Dr. Elkin [a defense expert] did not, as plaintiff suggests, testify that she "destroyed" her notes, she did concede that she did not comply with the subpoena, which required her to bring with her to court the notes that she used in generating her report on behalf of defendants. The failure to produce those notes affected plaintiff's ability to cross-examine defendants' expert and was fundamentally unfair to plaintiff. At the least, it would have been appropriate for the court to issue an adverse inference charge ... . That Dr. Elkin testified that the notes were subsumed in the report is of no moment. Plaintiff was entitled to independently investigate that claim without having to rely on Dr. Elkin's own assurances that the notes were themselves of no probative value." **Herman v Moore, 2015 NY Slip Op 09352, 1st Dept 12-17-15**

PERSONAL INJURY.

DEFENDANT UNABLE TO DEMONSTRATE PLAINTIFF DID NOT KNOW THE CAUSE OF HIS FALL; DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The First Department, over a dissent, determined defendant did not demonstrate, as a matter of law, that plaintiff did not know the cause of his slip and fall. Therefore, defendant's motion for summary judgment should not have been granted: "... [P]laintiff, who testified at his depositions through a Spanish interpreter, testified at his first deposition that upon exiting the convenience store he 'stepped like on a hole,' and that he 'stepped on something' on the defective ramp which caused his ankle to twist and him to fall to the ground. He further testified at that deposition that '[w]hen [he] stepped, it was that [he] felt like something — that something was not right underneath,' '[l]ike [he] stepped on something not solid.' That plaintiff could not initially identify the location of his accident, based upon photographs he was shown at his first deposition that depicted only the bottom portion of a door with no other identifying features, is hardly surprising and not dispositive. Upon being shown, at his second deposition, additional photographs depicting the full entrance area and front of the convenience store, plaintiff was able to definitively identify and mark with an 'X' the area on the ramp which was 'not leveled and caused him to fall ...". **Taveras v 1149 Webster Realty Corp., 2015 NY Slip Op 09192, 1st Dept 12-15-15**

PERSONAL INJURY, MEDICAL MALPRACTICE.

WRONGFUL BIRTH CAUSE OF ACTION ACCRUES UPON BIRTH OF THE CHILD, NOT UPON THE TERMINATION OF TREATMENT CULMINATING IN THE IMPLANTATION OF A FERTILIZED DONOR EGG.

The First Department, in a full-fledged opinion by Justice Friedman, over a partial dissent, determined that plaintiff's action for wrongful birth accrued upon the birth of the child, not when the procedure implanting a fertilized donated egg was complete. The plaintiff's alleged that a donor egg was not adequately screened for genetic defects and that, in fact, a genetic defect in the egg was passed on to plaintiff's child: "This is a medical malpractice action for 'wrongful birth' ... , in which it is alleged that defendants' failure to perform adequate genetic screening of an egg donor for an in vitro fertilization resulted in the conception and birth of plaintiffs' impaired child. The primary question raised on this appeal is whether plaintiffs' wrongful birth cause of action accrued upon the termination of defendants' treatment of the plaintiff mother, less than two months after the implantation of the embryo, or upon the birth of the infant several months later. We hold that the wrongful birth claim accrued upon the birth of the infant and, therefore, was not barred by the applicable statute of limitations (CPLR 214-a) when this action was commenced within 2-1/2 years after the birth. * * * In the case of a claim for wrongful birth, 'the parents' legally cognizable injury is the increased financial obligation' of raising an impaired child … , … . Whether this legally cognizable injury will befall potential parents as the result of the gestation of an impaired fetus cannot be known until the pregnancy ends. Only if there is a live birth will the injury be suffered. Thus, until there is a live birth, the existence of a cognizable legal injury that will support a wrongful birth cause of action cannot even be alleged . Without legally cognizable damages, there is no legal right to relief, and 'the Statute of Limitations cannot run until there is a legal right to relief' ... . Accordingly, the statute of limitations begins to run on a wrongful birth claim upon the live birth of an impaired child, whose care and support will occasion the pecuniary damages the parents may seek to recover.' **B.F. v Reproductive Medicine Assoc. of N.Y., LLP, 2015 NY Slip Op 09370, 1st Dept 12-17-15**

SECOND DEPARTMENT

ANIMAL LAW.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED IN DOG-BITE CASE.

The Second Department determined defendants motion for summary judgment in a dog bite case was properly granted. The court explained the relevant law: "Aside from a limited exception for straying farm animals ..., which has no application here, 'New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal' ... . To recover in strict liability for damages caused by a dog, the plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities ... . 'Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl, snap, or bare its teeth, the

manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by showing that they were not aware, and should not have been aware, of any vicious propensity ... . The defendants' submissions * * * established that, prior to the encounter with the plaintiff and her dog, there had never been any reported incident of aggression or viciousness ...". **Cosgrove v Trump Natl. Golf Club, 2015 NY Slip Op 09246, 2nd Dept 12-16-15**

ATTORNEYS.

DEFENDANTS' MOTION TO DISQUALIFY PLAINTFF'S ATTORNEY ON CONFLICT OF INTEREST GROUNDS SHOULD HAVE BEEN GRANTED.

The Second Department determined defendants' motion to disqualify plaintiff's attorney on conflict of interest grounds should have been granted. Plaintiff's attorney had previously represented the defendant involving issues substantially related to those in the current action: "The disqualification of an attorney is a matter that rests within the sound discretion of the court ... . A party seeking disqualification of its adversary's counsel based on counsel's purported prior representation of that party must establish (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse ... . A party's entitlement to be represented in ongoing litigation by counsel of [his or her] own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted ... . However, the right to be represented by counsel of one's own choosing will not supercede a clear showing that disqualification is warranted ... . Any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification so as to avoid even the appearance of impropriety ... . Due to the significant competing interests in attorney disqualification cases, however, the Court of Appeals has advised against mechanical application of blanket rules, in favor of a careful appraisal of the interests involved ...". [internal quotation marks omitted] **Gjoni v Swan Club, Inc., 2015 NY Slip Op 09252, 2nd Dept 12-16-15**

ATTORNEYS, FAMILY LAW.

NO EQUITABLE DISTRIBUTION FUND TO WHICH ATTORNEY'S CHARGING LIEN COULD ATTACH.

The Second Department explained when an attorney's charging lien can be imposed in divorce proceedings: "A charging lien is a security interest in the favorable result of litigation, giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client (... see Judiciary Law § 475). In a matrimonial action, a charging lien will be available to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already held by the client ... . However, [w]here the attorney's services do not create any proceeds, but consist solely of defending a title or interest already held by the client, there is no lien on that title or interest ... . In this case, the plaintiff and the defendant already owned the marital residence jointly as tenants by the entirety. Thus, the parties' settlement agreement merely permitted the plaintiff to retain her existing interest in the marital residence. Although the nature of the property was converted from realty into dollars, her interest remained the same. Thus, no equitable distribution fund to which a charging lien can attach was created by the efforts of the [plaintiff's] attorney ...". [internal quotation marks omitted] **Charnow v Charnow, 2015 NY Slip Op 09241, 2nd Dept 12-16-15**

CIVIL PROCEDURE.

EVIDENCE SUBMITTED FOR THE FIRST TIME IN REPLY PAPERS PROPERLY CONSIDERED.

The Second Department determined Supreme Court had properly considered an affidavit submitted with the bank's reply papers in a mortgage foreclosure action. In the answering papers, appellant claimed that the bank did not properly serve notices of default. In the reply papers, the bank submitted an affidavit demonstrating proper service. The court explained when evidence submitted in reply papers can be considered: "Although a party moving for summary judgement cannot meet its prima facie burden by submitting evidence for the first time in reply ... , and generally, evidence submitted for the first time in reply papers should be disregarded by the court ... , exceptions to the rule arise when the evidence submitted is in response to allegations raised for the first time in the opposition papers ...". **Citimortgage, Inc. v Espinal, 2015 NY Slip Op 09242, 2nd Dept 12-16-15**

CRIMINAL LAW.

DEFENDANT'S UNEQUIVOCAL REQUEST FOR COUNSEL NOT HONORED; CONVICTION REVERSED.

The Second Department determined defendant's statements, made after an unequivocal request for counsel, should have been suppressed. Defendant's conviction was reversed and a new trial ordered: "The issue is whether a reasonable police officer in the circumstances would understand the statement to be a request for an attorney ... . Any indication by a police officer that he understood a defendant's statement to be a request for counsel is a factor to be considered in evaluating whether there was an unequivocal request for counsel ... . Once a suspect in police custody unequivocally requests the assistance of counsel, the suspect may not be asked any more questions in the absence of counsel ... . A defendant's unequivocal invo-

cation of counsel while in custody results in the attachment of the right to counsel, indelibly so, meaning that, as a matter of state constitutional law, a defendant cannot subsequently waive the right to counsel unless the defendant is in the presence of an attorney representing that defendant ... . * * * ... [T]he defendant's second statement, made approximately 25 minutes after his first mention of an attorney, stating that he need[ed] to see private counsel and that he need[ed] an attorney, was an unequivocal invocation of his right to counsel ... . Shortly thereafter, the investigator evidenced his understanding that the defendant had requested counsel by querying the defendant about the attorney thing." [internal quotation marks omitted] **People v Carrino, 2015 NY Slip Op 09295, 2nd Dept 12-16-15**

CRIMINAL LAW, EVIDENCE.

DEFENSE COUNSEL'S OBLIGATIONS RE: HAVING A PERJURIOUS DEFENDANT TESTIFY IN NARRATIVE FORM.

The Second Department explained the rules associated with defense counsel's decision to have a perjurious defendant testify in narrative form: "... [W]here defense counsel indicates an intention to present the defendant's testimony in narrative form, due process does not require that a record be made of either defense counsel's reasons for believing the defendant will commit perjury or of defense counsel's advice to the defendant regarding the intention to commit perjury or the consequences of that course of action. 'A lawyer with a perjurious client must contend with competing considerations — duties of zealous advocacy, confidentiality and loyalty to the client on the one hand, and a responsibility to the courts and our truth-seeking system of justice on the other' ... . Requiring counsel to put on the record his or her reasons for anticipating perjured testimony and the advice proffered to the defendant related to his or her testimony would not strike the appropriate balance between these competing considerations but rather, would present too great a risk that defense counsel would be forced to reveal client confidences ... . A defendant who seeks to challenge counsel's judgment to elicit testimony in narrative form or counsel's advice in that regard may raise those issues in a motion pursuant to CPL 440.10." **People v Wesley, 2015 NY Slip Op 09310, 2nd Dept 12-16-15**

FAMILY LAW.

NEW YORK WOULD REMAIN "HOME STATE" FOR A CUSTODY MATTER IF FATHER WRONGFULLY PREVENTED CHILDREN FROM RETURNING TO NEW YORK FROM BANGLADESH IN THE SIX MONTHS BEFORE THE FILING OF THE PETITION.

The Second Department determined Family Court should not have concluded it did not have subject matter jurisdiction over a custody matter without conducting a hearing. It was alleged father was wrongfully preventing the children from returning to New York from Bangladesh. If father prevented the children from returning to New York in the six month period before the petition was filed, New York, pursuant to the controlling statutes, would be the "home state:" "Under the Domestic Relations Law, a state may have jurisdiction over a child custody proceeding if the state is the home state of the child (Domestic Relations Law § 76[1][a] ...). A [h]ome [s]tate is defined as the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding (Domestic Relations Law § 75-a[7]). The definition of a [h]ome [s]tate also permits a period of temporary absence during the six-month time frame necessary to establish home-state residency (Domestic Relations Law § 75-a[7] ...). In addition, it is established that a parent may not wrongfully remove or withhold a child from the other parent for the purpose of establishing a home state for that child ... . Here, there are disputed allegations as to the circumstances of the continued presence of the children in Bangladesh. Thus, under the circumstances of this case, the Family Court erred in dismissing the petition based on lack of subject matter jurisdiction without conducting a hearing as to whether the children were wrongfully prevented from returning to New York during the six-month period preceding the petition. If that is the case, New York remained the "home state" of the children in light of such wrongdoing ...". [internal quotation marks omitted] **Matter of Padmo v Kayef, 2015 NY Slip Op 09289, 2nd Dept 12-16-15**

PERSONAL INJURY.

FAILURE TO DEMONSTRATE WHEN AREA WAS LAST CLEANED OR INSPECTED REQUIRED DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined summary judgment should not have been granted to defendants in a slip and fall case. The plaintiff alleged she slipped on a patch of oil in a parking lot. The defendants failed to demonstrate when the area had last been inspected or cleaned: "To meet its burden on the issue of lack of constructive notice, a defendant is required to offer some evidence as to when the accident site was last cleaned or inspected prior to the accident ... . 'Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice' ... . In support of their motion, the defendants failed to demonstrate, prima facie, a lack of constructive notice of the allegedly hazardous condition that caused the subject accident, as they failed to submit any evidence as to when, prior to the accident, the area of the parking lot where the alleged slip and fall occurred, was last inspected or cleaned relative to the accident ...". **Bruni v Macy's Corporate Servs., Inc., 2015 NY Slip Op 09238, 2nd Dept 12-16-15**

PERSONAL INJURY.

DEFENDANTS' FAILURE TO DEMONSTRATE THE NORMAL RISKS ASSOCIATED WITH HORSEBACK RIDING WERE NOT UNREASONABLY INCREASED BY THE RIDING INSTRUCTOR REQUIRED DENIAL OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

The Second Department determined defendants' motion for summary judgment should not have been granted. Plaintiff was injured when she fell off a horse during riding instruction. The instructor had plaintiff execute a maneuver with her feet outside the stirrups. The plaintiff had told the instructor she could not do the maneuver and she fell when attempting it: "The primary assumption of risk doctrine does not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased ... . '[A]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff' ... . Furthermore, 'in assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport' ... . Here, the defendants failed to establish [their] prima facie entitlement to judgment as a matter of law. The defendants failed to establish, prima facie, that the conduct of [the instructor] did not unreasonably increase [plaintiff's] exposure to the risk of falling." **Georgiades v Nassau Equestrian Ctr. at Old Mill, Inc., 2015 NY Slip Op 09249, 2nd Dept 12-16-15**

PERSONAL INJURY, EVIDENCE.

FAILURE TO INSTRUCT JURY ON EFFECT OF STATUTORY AND REGULATORY VIOLATIONS REQUIRED REVERSAL AND A NEW TRIAL IN THIS SLIP AND FALL CASE.

The Second Department determined the trial judge's failure to instruct the jury on the effect of the defendant's violation of a statute and/or a regulation required reversal of the defense verdict in this slip and fall case. The New York State Building Code and the Americans with Disabilities Act require eight-foot wide aisles for access to handicapped parking spots. Plaintiff, who had a handicapped parking permit, slipped on a grassy slope after getting out of his car. The plaintiff's expert testified the parking spot where plaintiff fell did not comply with the statutory/regulatory requirements for handicapped parking. The plaintiff requested the jury be instructed on the effect of a statutory violation (negligence per se) and the defendant requested the jury be instructed on the effect of a regulatory violation (some evidence of negligence). The judge denied both requests. The Second Department ordered a new trial: "The general rule is that the violation of a statute that establishes a specific safety duty constitutes negligence per se ... . When evidence is presented that a defendant violated such a statute, the jury's role is to determine whether the violation of that statute proximately caused the plaintiff's injury (... PJI 2:25). Moreover, if proven, a violation of the Building Code of New York State can be considered by a jury as some evidence of negligence (... PJI 2:29 ...). * * * Based on the evidence, the trial court should have charged the jury as to the language of the applicable sections of the Americans with Disabilities Act along with PJI 2:25 and the applicable sections of the Building Code of New York State and the Property Maintenance Code of New York State, in conjunction with PJI 2:29. The failure to do so cannot be considered harmless error since these provisions are applicable to the subject parking lot ...". [internal quotation marks omitted] **DiLallo v Katsan LP, 2015 NY Slip Op 09248, 2nd Dept 12-16-15**

PERSONAL INJURY, LABOR LAW.

INJURY WHILE DOING ROUTINE MAINTENANCE DID NOT GIVE RISE TO LABOR LAW CAUSES OF ACTION.

The Second Department determined plaintiff was doing routine maintenance (checking light fixtures) when he was injured by a loose electric cable and his Labor Law causes of action were properly dismissed: "The defendants established their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 240(1) by offering proof that the plaintiff was involved in routine maintenance rather than repair and, therefore, the plaintiff's activity did not fall within the protection of that provision of the Labor Law ... . The defendants also demonstrated their prima facie entitlement to judgment as a matter of law dismissing the cause of action alleging a violation of Labor Law § 241(6). The plaintiff was not involved in the activity of construction, excavation, or demolition, and the statute does not protect workers involved in maintenance or replacement of parts ... . The defendants also demonstrated their prima facie entitlement to judgment as a matter of law dismissing the causes of action alleging a violation of Labor Law § 200 and common-law negligence. The defendants demonstrated, prima facie, that they neither created nor had notice of the loose cable that allegedly caused the plaintiff's electric shock ...". **Guevera v Simon Prop. Group, Inc., 2015 NY Slip Op 09254, 2nd Dept 12-16-15**

PERSONAL INJURY, MUNICIPAL LAW.

NO SPECIAL RELATIONSHIP BETWEEN CITY AND PLAINTIFF; CITY WAS THEREFORE IMMUNE FROM SUIT.

The Second Department determined no special relationship existed between plaintiff, a city sanitation worker, and the city (NYC). Therefore, the city was protected from plaintiff's suit by the doctrine of governmental immunity. Plaintiff was attacked by a participant in a community service program with whom plaintiff was working. The gravaman of plaintiff's

complaint was the city's failure to provide security. The provision of security is a governmental, not proprietary, function. Therefore, absent a special relationship between the plaintiff and the city, the city was immune from suit. **Giordanella v City of New York, 2015 NY Slip Op 09251, 2nd Dept 12-16-15**

PERSONAL INJURY, MUNICIPAL LAW.

QUESTION OF FACT WHETHER CITY LIABLE FOR FAILURE TO INSTALL A STOP SIGN AT AN ACCIDENT-PRONE INTERSECTION.

The Second Department determined there was a question of fact whether the municipality should have installed an all-way stop at an intersection where plaintiff was injured. A study of the intersection by the municipality, prompted by the number of accidents, was deemed inadequate: "A municipality owes a nondelegable duty to keep its streets in a reasonably safe condition ... . However, it is accorded a qualified immunity from liability arising out of a highway safety planning decision ... . A municipality may be held liable only 'when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan' ... . * * * 'Once [a municipality] is made aware of a dangerous traffic condition it must undertake reasonable study thereof with an eye toward alleviating the danger' ... . 'Moreover, after the [municipality] implements a traffic plan it is under a continuing duty to review its plan in the light of its actual operation' ... . Under these circumstances, the City's submissions revealed triable issues of fact regarding the adequacy of the ... 2008 re-evaluation of its prior study which it undertook to complete, and the reasonableness of the City's failure to install a stop sign ... at the intersection under all of the attendant circumstances ...". **Langer v Xenias, 2015 NY Slip Op 09258. 2nd Dept 12-16-15**

THIRD DEPARTMENT

MUNICIPAL LAW.

AGREEMENT ALLOWING CASINO GAMBLING ON ONEIDA NATION LAND DID NOT VIOLATE TOWNS' "HOME RULE" RIGHTS.

The Third Department, in a full-fledged opinion by Justice Garry, determined the petitioners, the Town of Vernon and the Town of Verona, did not have standing to attack an agreement (ratified by the New York Gaming Economic Development Act of 2013 [UNYGEDA]) allowing the Oneida Nation to implement legalized casino gambling. The towns argued that the agreement violated the towns' "home rule" rights by removing land from their zoning and environmental authority, as well as preventing the collection of property taxes. The Third Department held that it was the placing of Oneida Nation land in trust (by the federal Department of the Interior) which caused these negative consequences and the trust was created before the agreement at issue: "These negative consequences ... did not result from the agreement or from the UNYGEDA, but, instead, from the decision by the Department to place the lands in trust. That decision had already been made when the agreement was executed, and it was unaffected by any State action other than the agreement's provision that the State and the Counties would discontinue then-pending federal litigation that challenged the Department's decision. In 2014, the State and Counties did so ... . The State has no constitutional obligation to pursue litigation, nor have petitioners established that the litigation would have resulted in the reversal of the Department's decision to place the lands in trust if it had not been settled. Further, the discontinuance of the State's claims did not foreclose the Towns from pursuing separate federal litigation that challenged the Department's action, which they did until the action was dismissed on the merits in 2015 ... . Thus, the State's actions did not cause the harm that forms the basis of the Towns' claims. Accordingly, the Towns failed to establish that the agreement and the UNYGEDA impinged upon their home rule powers, and Supreme Court properly ruled that they lacked the capacity to bring this action/proceeding." **Matter of Town of Verona v Cuomo, 2015 NY Slip Op 09338, 3rd Dept 12-17-15**

PERSONAL INJURY.

SUPERMARKET EMPLOYEES HAD NO LEGAL DUTY TO AID AN UNCONSCIOUS PERSON IN A CAR IN THE SUPERMARKET PARKING LOT.

The Third Department determined employees of Tops supermarket did not have a duty to come to the aid of decedent, who died in his parked car in the Tops parking lot. Decedent and companions were drinking and doing drugs. When decedent was unconscious, his companions placed him in his own car and allegedly told Tops employees decedent was in need of emergency aid. The court held that the Tops employees did not have a legal duty to aid decedent: "In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff ... . This is frequently a difficult task [and,] [d]espite often sympathetic facts in a particular case before them, courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree ... . Consonant with the premise that a moral duty does not equate with a legal duty ... , it is the general rule that one does not owe a duty to come to the aid of a person in peril ... . Exceptions to the general rule exist, such as, for example, a common carrier's duty to take reasonable action to protect a passenger who is being assaulted ... . Here, although Tops

was open to shoppers, this did not necessarily create an affirmative duty to come to the aid of anyone who was anywhere on its property no matter how unrelated such person's presence was to Tops' function as a grocery store. Decedent was not a customer of Tops, neither he nor his companions were on the premises for any activity related in any manner to Tops' business, Tops' employees did not participate in any fashion in the conduct of decedent's companions, it is not alleged that Tops' employees saw or had any contact with decedent on the premises, and Tops' employees did not take any actions that put decedent in a worse position than the one in which his companions left him." [internal quotation marks omitted] **Daily v Tops Mkts., LLC, 2015 NY Slip Op 09336, 3rd Dept 12-17-15**

UNEMPLOYMENT INSURANCE.

INTERPRETERS ARE EMPLOYEES.

The Third Department determined interpreters were employees of CP Language Institute, Inc (CPLI): "The record establishes that CPLI advertises for language service interpreters, like claimant, to provide translation services for its clients. An interpreter is required to submit a resume and, after being interviewed by CPLI and receiving a sufficient score on a written language proficiency test, CPLI adds the interpreter to its roster. CPLI maintains a file of each interpreter's qualifications that includes a resume, reference letters, proficiency exam and availability. CPLI notifies an interpreter of assignments, which can be accepted or declined by the interpreter. Once an assignment is accepted, however, the interpreter is required to notify CPLI if he or she becomes unavailable and CPLI, not the interpreter, provides a substitute if needed. Furthermore, claimant signed an agreement with CPLI that included guidelines regarding punctuality, attire, performance and conduct when providing services to CPLI clients. Although claimant could work for other agencies that provided translation services, she was subject to a 12-month noncompete clause following termination of her relationship with CPLI. In addition, claimant was provided with a picture identification badge with CPLI's name. Claimant was paid by CPLI following the submission of time sheets, regardless of whether CPLI was paid by the client. Any complaints from a client were handled by CPLI." **Matter of Karapetyan (Commissioner of Labor), 2015 NY Slip Op 09324, 3rd Dept 12-17-15**

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