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CasePrepPlus

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FIRST DEPARTMENT

CIVIL PROCEDURE, BREACH OF FIDUCIARY DUTY, FRAUD.

SIX-YEAR STATUTE OF LIMITATIONS APPLIES TO BREACH OF FIDUCIARY DUTY CLAIMS WHICH SOUND IN FRAUD.

The First Department, in a case remitted by the Court of Appeals, determined the six-year statute of limitations applied to "breach of fiduciary duty" causes of action because fraud allegations were at the heart of the claims. Where, as here, a "breach of fiduciary duty" cause of action seeks monetary damages and not equitable relief, the three-year statute of limitations usually applies. However, where, as here, allegations of fraud are central to the fiduciary duty cause of action, the six-year statute of limitations applies: " '[A] cause of action for breach of fiduciary duty based on allegations of actual fraud is subject to a six-year limitations period' ... . An exception to this rule exists 'if the fraud allegation is only incidental to the claim asserted' ... . Thus, 'where an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name' ... . Here, although the fiduciary duty claims seek monetary relief, the six-year limitations period applies because the claims sound in fraud." **Cusimano v Schnurr, 2016 NY Slip Op 01758, 1st Dept 3-15-16**

CONTRACT LAW, UCC.

COMPLAINTS ALLEGING THE DELIVERY OF FUEL OIL MIXED WITH WASTE OIL SHOULD NOT HAVE BEEN DISMISSED, THE COMPLAINTS STATED BREACH OF CONTRACT AND BREACH OF WARRANTY CAUSES OF ACTION.

The First Department, in a full-fledged opinion by Justice Saxe, determined two class action complaints alleging defendants supplied heating oil of lesser quality than that called for by the contracts should not have been dismissed. The complaints alleged waste oil had been mixed with the No. 4 and No. 6 fuel oil which was ordered. Certain detrimental effects of burning the mixed fuel were alleged. The First Department held that the "no injury" products liability cases relied upon by the motion court did not apply. Rather the case presented breach of contract/warranty issues: "Under UCC 2-714(2), the measure of damages for breach of warranty is the difference between the value of the goods delivered and the value of the goods warranted ... . Since we must infer from the complaint that plaintiffs received nonconforming oil deliveries of lesser value than those they contracted and paid for, causes of action for breach of contract and breach of warranty — including plaintiffs' damages — are stated in each action." **BMW Group, LLC v Castle Oil Corp., 2016 NY Slip Op 01790, 1st Dept 3-15-16**

CRIMINAL LAW.

UNDER THE FACTS, PRE-TRIAL REQUEST TO PROCEED PRO SE PROPERLY DENIED.

The First Department determined defendant's pre-trial request to represent himself was properly denied because the request raised a significant potential for obstruction and diversion. The request was made after the People rested in a suppression hearing: "[T]he court properly denied defendant's request to represent himself. Although a request to proceed pro se at trial is generally deemed timely if asserted before trial (*see People v McIntyre*, 36 NY2d 10, 17 [1974]), defendant here waited until after the People had rested in the suppression hearing before requesting to proceed pro se within that hearing, raising a significant 'potential for obstruction and diversion' (*id*.). Accordingly, the court properly denied defendant's request in the absence of 'compelling circumstances' (*id*.). We note that, over the course of the proceedings, defendant was represented by a total of seven retained or assigned attorneys, and repeatedly changed his mind about whether to represent himself." **People v Franklin, 2016 NY Slip Op 01781, 1st Dept 3-15-16**

EDUCATION-SCHOOL LAW, CONTRACT LAW.

TACIT MISREPRESENTATION BY STUDENT DURING ADMISSIONS PROCESS ENTITLED LAW SCHOOL TO REFUSE TO AWARD LLM DEGREE AFTER STUDENT HAD COMPLETED COURSE REQUIREMENTS.

The First Department, in a full-fledged opinion by Justice Saxe, determined respondent law school had the authority to refuse an LLM degree to a student who had completed the course requirements because of the student's (tacit) misrepresentation at the time of admission to the program. The LLM program was open to students with a law degree from a foreign

school. However, the student's law degree was from an online law school — information the student should have provided when he realized the school representative was under the impression his degree was from a foreign school. The student's law school transcript was not provided until after he had begun courses in the LLM program: "Although petitioner here did not affirmatively or explicitly misrepresent facts on his application, he omitted the critical fact that the school from which he had received his J.D. degree was not a foreign law school, which fact disqualified him from eligibility for entry into the LL.M. program. By submitting the application, petitioner was implicitly stating that he satisfied the program's prerequisites for attendance, in particular, the requirement that he had attended a foreign law school. Indeed, he did more than omit that information; he allowed respondents to proceed with his admission knowing that they harbored a misconception regarding the nature of the institution that had awarded him a J.D. degree." **Matter of Salvador v Touro Coll., 2016 NY Slip Op 01924, 1st Dept 3-17-16**

FAMILY LAW, DEBTOR-CREDITOR, CIVIL PROCEDURE.

WIFE SHOULD HAVE BEEN ALLOWED TO INTERVENE IN AN ACTION SEEKING THE TURNOVER OF PERSONAL PROPERTY TO ENFORCE A JUDGMENT AGAINST HUSBAND; HER SEPARATE PROPERTY, AS OPPOSED TO MARITAL PROPERTY, COULD NOT BE REACHED BY A JUDGMENT CREDITOR.

The First Department determined the wife in a divorce proceeding, Wendy, should have been allowed to intervene in an action against her husband, Hugh, by plaintiff, Pensmore, seeking the turnover and sale of personal property to enforce a money judgment. Wendy submitted proof supporting her claim that the personal property in her possession was her separate property, not marital property, and therefore could not be reached by the creditor: "While . . . an inchoate right to equitably share in marital property cannot be protected against third party creditors of a debtor spouse . . . , the same rule does not hold true for separate property of the non-debtor spouse. Domestic Relations Law § 236[B] provides that 'all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held' is marital property (Domestic Relations Law § 236 [B][1][c]...). There is an exception, however, for 'property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;' such property is the separate property of that spouse (DRL § 236 [B][1][d]...). Separate property, is not 'marital property' and it is not equitably distributed in a divorce action ... . Although neither spouse has a vested interest in any property that is otherwise marital until it is distributed in a divorce action, separate property, unless transmuted or commingled, retains its character as the property of the spouse who owns it both during and after the marriage ...". **Pensmore Invs., LLC v Gruppo, Levey & Co., 2016 NY Slip Op 01789, 1st Dept 3-15-16**

FAMILY LAW, JUVENILE DELINQUENCY, EVIDENCE, APPEALS.

JUVENILE DELINQUENCY ADJUDICATION AGAINST THE WEIGHT OF THE EVIDENCE; ANALYTICAL CRITERIA EXPLAINED.

The Second Department, over a dissent, determined the juvenile delinquency finding was against the weight of the evidence. The juvenile was accused of throwing a kitten under the wheels of a moving vehicle. The single-witness case relied upon weak identification evidence. The court explained the "weight of the evidence" analytical criteria in this context: "We must 'weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions' ... . In weighing the conflicting testimony in a single-witness identification case, as here, we must independently consider, among other things, the truthfulness and reliability of the identification testimony ... . * * * ... [T]he reliability of the witness's identification of the appellant was called into doubt by several factors. An examination of her testimony reveals that the witness had only a limited opportunity and ability to observe the perpetrator because the incident occurred over a relatively short period of time, and there was a distance of a minimum of 10 feet between the witness and the perpetrator during their interaction. The witness was also admittedly excited and upset during the incident. In addition, the witness's description of the perpetrator lacked specificity, and did not include body shape, height, weight, facial features, skin tone, accent, or any distinctive characteristics. We further note that the incident occurred in the late afternoon near the time that students were being released from several neighborhood schools, that the perpetrator was dressed in a school uniform similar in type to the uniforms worn by students at those schools, and that the witness's description of the school uniform worn by the perpetrator did not match the appellant's school uniform. Under these circumstances, the witness's identification of the appellant was not convincing when balanced against the substantial evidence submitted by the appellant in her own defense." **Matter of Shannel P., 2016 NY Slip Op 01853, 2nd Dept 3-16-16**

INSURANCE LAW, CONTRACT LAW, UCC.

BAILEE CANNOT, PURSUANT TO THE UCC, CONTRACT AWAY LIABILITY FOR LACK OF CARE IN STORING GOODS, PURPORTED WAIVER OF SUBROGATION UNENFORCEABLE.

The First Department determined the relationship between the fine art dealer (Chowalski) and the defendant warehouse was that of bailor/bailee with respect to stored artworks. Under the UCC the bailee (warehouse) cannot contract away liability for damage caused by lack of due care. Therefore, the waiver of subrogation in the bailment agreement was not

enforceable. There was a question of fact whether the failure to move the stored artworks as Hurricane Sandy approached constituted a failure to exercise the level of care mandated by the UCC: "UCC 7-204(a) provides that a 'warehouse is liable for damages for loss of or injury to the goods caused by its failure to exercise care with regard to the goods that a reasonably careful person would exercise under similar circumstances' and 'is not liable for damages that could not have been avoided by the exercise of that care.' UCC 7-204(b) provides that '[d]amages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage beyond which the warehouse is not liable.' However, such limitations on liability are limited by UCC 7-202(c), which provides that such terms must not 'impair its . . . duty of care under Section 7-204. Any contrary provision is ineffective.' " **XL Specialty Ins. Co. v Christie's Fine Art Stor. Servs., Inc., 2016 NY Slip Op 01901, 1st Dept 3-17-16**

LABOR LAW.

PLAINTIFF NEED NOT SHOW LADDER WHICH FELL WAS DEFECTIVE TO BE ENTITLED TO SUMMARY JUDGMENT ON LABOR LAW § 240(1) CAUSE OF ACTION.

The First Department determined plaintiff need not show the ladder which fell was defective to be entitled to summary judgment on his Labor Law § 240(1) cause of action: "Plaintiff made a prima facie showing of his entitlement to summary judgment as to liability on his Labor Law § 240(1) cause of action, by submitting his own testimony that the ladder upon which he was standing to perform his work wobbled, and that both he and the ladder fell to the ground as he descended it to figure out why it had wobbled ... . Plaintiff was not required to offer proof that the ladder was defective ... . In opposition, defendant failed to show that plaintiff's conduct was the sole proximate cause of the accident . . . and that it had provided plaintiff with adequate safety devices to prevent his fall ...". **Ocana v Quasar Realty Partners L.P., 2016 NY Slip Op 01902, 1st Dept 3-17-16**

LABOR LAW.

THE INDUSTRIAL CODE REQUIRED A GUARD ON THE SAW WHICH INJURED PLAINTIFF; DEFENDANT WAS NOT ENTITLED TO SUMMARY JUDGMENT BASED ON THE ALLEGATION THERE WAS NO PLACE TO INSTALL A GUARD ON THE SAW.

The plaintiff was injured when he was struck by part of a saw blade which broke off from the hand-held reciprocating saw he was using. A provision of the Industrial Code, with a couple of exceptions not relevant to this case, requires guards on hand-held saws. The saw used by plaintiff did not have any guards. Defendant alleged there was no place to attach such a guard on the saw and the plaintiff testified he had never seen a reciprocating saw with a guard. The First Department upheld the motion court's finding that the Industrial Code applied to the saw in question as a matter of law. Therefore defendant's motion for summary judgment was properly denied: "Industrial Code § 23-1.12(c)(1) is sufficiently specific to support a Labor Law § 241(6) claim and is applicable because plaintiff was using a 'power-driven, hand-operated saw' at the time of his accident. Defendant sought to use plaintiff's deposition testimony that he had never seen a blade cover or guard on that type of saw as expert testimony to establish that the reciprocating saw plaintiff was given was not covered by the Industrial Code provision in question ... . Defendant, however, cannot avoid its duty to comply with section 23-1.12(c)(1) by asserting that the saw used by plaintiff had no base plate and could not accommodate a self adjusting guard. Section 23-1.12(c)(1) obligated defendant to ensure that the 'power-driven, hand-operated saw' provided to plaintiff to perform his job was secured with guard plates to cover the saw blade. As the motion court observed, '[T]o interpret the regulation in any other manner [] would be to ineffectualize the regulation because employers, owners and contractors would only use tools that would minimize their liability.' Accordingly, we find that Industrial Code (12 NYCRR) § 23-1.12(c)(1)) is applicable to this case as a matter of law." **Kelmendi v 157 Hudson St., LLC, 2016 NY Slip Op 01903, 1st Dept 3-17-16**

MENTAL HYGIENE LAW.

ANTISOCIAL PERSONALITY DISORDER WITH PSYCHOPATHY SUFFICIENT TO DEMONSTRATE PROBABLE CAUSE, SEX OFFENDER CIVIL MANAGEMENT PETITION SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined the state's petition for sex offender civil management should not have been dismissed after the article 10 probable cause hearing. Expert evidence was presented which alleged respondent suffered from antisocial personality disorder (ASPD) with psychopathy. That was sufficient to demonstrate probable cause: " '[I]n article 10 proceedings, issues concerning the viability and reliability of the respondent's diagnosis are properly reserved for resolution by the jury' ... . Here, the State expert opined that respondent suffers from a mental abnormality within the meaning of the MHL [Mental Hygiene Law] based on a diagnosis of antisocial personality disorder (ASPD) with psychopathy. Although the factfinder at trial may or may not accept the expert's opinion, the expert's testimony at the hearing was not so deficient as to warrant dismissal of the petition at this early juncture, especially since the expert offered extensive testimony regarding the distinctions between ASPD and psychopathy, and since the Court of Appeals in *Donald DD*. did not state that a diagnosis of ASPD with psychopathy is insufficient to support a finding of mental abnormality ...". **Matter of State of New York v Jerome A., 2016 NY Slip Op 01788, 1st Dept 3-15-16**

PERSONAL INJURY.

DEFENDANT'S FAILURE TO DEMONSTRATE WHEN AREA WHERE PLAINTIFF FELL WAS LAST INSPECTED OR CLEANED REQUIRED DENIAL OF DEFENSE SUMMARY JUDGMENT MOTION.

The First Department, reversing (modifying) Supreme Court, determined the defendant YMCA's failure to demonstrate when the area where plaintiff fell had last been inspected or cleaned required denial of the YMCA's motion for summary judgment: "Plaintiff alleges that she slipped and fell on a puddle of water that was on the floor of a YMCA owned and maintained by defendants. The YMCA made a prima facie showing that it did not cause or create the alleged condition, because plaintiff testified that she did not see the YMCA's employees working at the accident location prior to the incident and did not know where the water came from ... . The YMCA also made a prima facie showing that it lacked actual notice of the alleged condition, because the building engineer for the premises averred that he oversaw the maintenance of the premises and did not receive complaints about water on the floor prior to the accident ... . However, the YMCA failed to make a prima facie showing that it lacked constructive notice of the alleged defect. The building engineer failed to aver as to when the YMCA's employees last cleaned or inspected the accident location before the incident occurred ...". **Graham v YMCA of Greater N.Y., 2016 NY Slip Op 01777, 1st Dept 3-15-16**

PERSONAL INJURY.

VERDICT FINDING PLAINTIFF WAS NEGLIGENT BUT HER NEGLIGENCE WAS NOT THE PROXIMATE CAUSE OF HER INJURY WAS INCONSISTENT AND AGAINST THE WEIGHT OF THE EVIDENCE.

The First Department determined a new trial on liability was required. The plaintiff fractured her ankle walking over cobblestones to board a bus which had parked five feet from the curb. The jury found plaintiff was negligent but her negligence was not the proximate cause of her injury. The First Department concluded the verdict was inconsistent and against the weight of the evidence: "The jury's finding that plaintiff was negligent, but that such negligence was not the proximate cause of her injuries, is inconsistent and against the weight of the evidence. The issues 'are so inextricably interwoven as to make it logically impossible to find negligence without also finding proximate cause' ...". **McKenzie v New York City Tr. Auth., 2016 NY Slip Op 01918, 1st Dept 3-17-16**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

EXPERT EVIDENCE IMPROPERLY PRECLUDED, NEW TRIAL BEFORE A DIFFERENT JUDGE ORDERED.

The First Department concluded the trial judge improperly precluded the plaintiff in a medical malpractice action from presenting expert evidence alleging defendant doctor departed from the standard of care by failing to tie off plaintiff's decedent's femoral artery. The First Department determined the relevant theory had been raised in the bills of particular and notice of the expert's testimony had been timely provided (eight months before trial). A new trial was ordered before a different judge because the record demonstrated the trial judge's bias in favor of the defendants: "The trial court improvidently exercised its discretion in granting the motion and in dismissing the complaint based on the preclusion of evidence. Defendants' argument that they had no notice of plaintiffs' theory and were unfairly surprised is unavailing. The theory concerning vascularization of decedent's left leg was adequately disclosed in plaintiff's original and supplemental bills of particulars. Further, while CPLR 3101(d)(1)(i) does not require a party to retain an expert at any particular time . . . , here plaintiff served the CPLR 3101(d) expert disclosure notice about eight months before trial, which was sufficient notice ... . Furthermore, during that period, defense counsel were present at several pretrial conferences and raised no objections to the expert disclosure, nor did they reject the notice ... . Given the improper preclusion of evidence, plaintiffs are entitled to a new trial ... . Further, the matter should be remitted for trial before a different Justice, as the record shows that the trial court was biased in favor of defendants ...". **Dedona v DiRaimo, 2016 NY Slip Op 01779, 1st Dept 3-15-16**

SECOND DEPARTMENT

ATTORNEYS, DEFAMATION.

STATEMENTS MADE BY ATTORNEY IN AFFIDAVIT SUBMITTED TO THE COURT WERE ABSOLUTELY PRIVILEGED, DEFAMATION ACTION PROPERLY DISMISSED.

The Second Department determined the defendant-attorney's motion to dismiss the defamation complaint was properly dismissed for failure to state a cause of action. The allegedly defamatory statements were made in an affidavit submitted to the court and concerned the will at the center of the proceedings. The statements, therefore, were absolutely privileged: "An otherwise defamatory statement may be 'privileged' and thus not actionable ... . Insofar as is relevant herein, an absolute privilege is accorded statements made at all stages of a judicial proceeding in communications among the parties, witnesses, counsel, and the court, provided that the statements may be considered in some way 'pertinent' to the issue in the proceeding ... . 'The test of pertinency [to the litigation] is extremely liberal so as to embrace [ ] anything that may possibly

or plausibly be relevant or pertinent' ... . This privilege applies to all statements made in or out of court and regardless of the motive for which they were made ...". **Brady v Gaudelli, 2016 NY Slip Op 01793, 2nd Dept 3-16-16**

CIVIL PROCEDURE.

WAIVED DEFENSE CAN BE INTERPOSED IN AN ANSWER AMENDED BY LEAVE OF COURT.

The Second Department determined defendant doctor in this medical malpractice action should have been allowed to amend his answer to add the defense of discharge in bankruptcy. The court noted that even where a defense is waived pursuant to CPLR 3211(e) it can be interposed in an answer amended by leave of court pursuant to CPLR 3025(b): "Even when a defense is waived under CPLR 3211(e), 'it can nevertheless be interposed in an answer amended by leave of court pursuant to CPLR 3025(b), as long as the amendment does not cause the other party prejudice or surprise resulting directly from the delay, and is not palpably insufficient or patently devoid of merit' ... . Under the circumstances of this case, we find that [defendant's] affirmative defense of discharge in bankruptcy is neither patently insufficient nor palpably devoid of merit, and there would be little or no prejudice resulting from any delay in granting leave to amend his answer to add this affirmative defense ...". **Dixon v Chang, 2016 NY Slip Op 01797, 2nd Dept 3-16-16**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

DEPORTATION OF DEFENDANT DID NOT RENDER APPEAL OF SORA RISK ASSESSMENT ACADEMIC; UPWARD DEPARTURE BASED UPON THE EXTREME VIOLENCE OF THE CRIME PROPER.

The Second Department, in a full-fledged opinion by Justice Leventhal, determined the fact defendant had been deported did not render his appeal of a Sex Offender Registration Act (SORA) level 2 risk assessment academic (a matter of first impression in the department). The court further determined the SORA court properly increased defendant's risk level based on the extreme violence of the crime, even though the guidelines took violence into account: "[T]he People have failed to demonstrate that the defendant's involuntary absence from New York renders review of the order designating him a level two offender academic. As a result of his level two designation, the defendant's name, photograph, the details of his crime, and other information can be accessed online at the Division website, notwithstanding the fact that he has been deported ... . The outcome of an appeal such as this, which concerns a defendant's risk level designation, will have certain practical consequences with respect to SORA registration requirements, such as the duration of the posting of this information, which is already on the website (*see* Correction Law § 168-h). * * * While the SORA Guidelines do take into account the use of violence under risk factor 1, the People's proof demonstrated, by clear and convincing evidence, that the SORA Guidelines did not adequately take into account the true nature of the defendant's actions, and that the defendant's conduct tended to show a higher likelihood of reoffense or danger to the community. **People v Shim, 2016 NY Slip Op 01818, 2nd Dept 3-16-16**

FORECLOSURE, CIVIL PROCEDURE.

SUA SPONTE DISMISSAL FOR LACK OF STANDING REVERSED, LACK OF STANDING DEFENSE WAS WAIVED AND IS NOT A JURISDICTIONAL DEFECT.

The Second Department reversed Supreme Court's sua sponte dismissal of a foreclosure complaint for lack of standing. Because the defendants did not answer the complaint or make a pre-answer motion to dismiss, the defense of lack of standing was waived. The matter was sent back to be heard by a different judge: "The Supreme Court erred in, sua sponte, directing the dismissal of the plaintiff's complaint and discharge of the notice of pendency against the subject property for lack of standing. 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' ... . Here, the Supreme Court was not presented with any extraordinary circumstances warranting sua sponte dismissal of the complaint and discharge of the notice of pendency. Since the defendants did not answer the complaint and did not make pre-answer motions to dismiss the complaint, they waived the defense of lack of standing ... . Furthermore, a party's lack of standing does not constitute a jurisdictional defect and does not warrant sua sponte dismissal of a complaint by the court ...". **Consumer Solutions, LLC v Charles, 2016 NY Slip Op 01794, 2nd Dept 3-16-16**

FORECLOSURE, CIVIL PROCEDURE.

ONCE PLAINTIFF RELEASED THE MORTGAGE UPON PAYMENT OF LESS THAN THE VALUE OF THE NOTE, PLAINTIFF COULD PROCEED AGAINST THE NOTE AND GUARANTY BY AMENDING THE FORECLOSURE COMPLAINT.

The Second Department, reversing Supreme Court, determined, once plaintiff agreed to release a mortgage in return for sale proceeds which were less than the value of the note, plaintiff could then commence a proceeding on the note and the guaranty. The court further held that the action on the note and guaranty could be accomplished by amending the original foreclosure complaint: " "RPAPL 1301(3) . . . prohibits a party from commencing an action at law to recover any part of the mortgage debt while the foreclosure proceeding is pending or has not reached final judgment, without leave of the court in which the foreclosure action was brought' ... . Conversely, 'where a foreclosure action is no longer pending and did not re-

sult in a judgment in the plaintiff's favor, the plaintiff is not precluded from commencing a separate action' without leave of the court' ... . Here, since, pursuant to the parties' stipulation, the plaintiff agreed to accept the net proceeds of the sale in exchange for releasing the property from the mortgage and there was no judgment in the plaintiff's favor, the plaintiff was not precluded from seeking to recover on the note and guaranty by RPAPL 1301(3), 'a statute which must be strictly construed' ... . Furthermore, there is no reason the plaintiff could not seek such relief by seeking leave to amend its complaint, rather than by commencing a new action ...". **TD Bank, N.A. v 250 Jackson Ave., LLC, 2016 NY Slip Op 01828, 2nd Dept 3-16-16**

INSURANCE LAW, CONTRACT LAW, ATTORNEY FEES.

ATTORNEY FEES NOT AVAILABLE TO INSURED WHO BRINGS AFFIRMATIVE ACTION TO SETTLE RIGHTS UNDER A POLICY; CAUSE OF ACTION FOR BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING NOT DUPLICATIVE OF CAUSE OF ACTION FOR BREACH OF CONTRACT.

The Second Department, reversing Supreme Court, determined the insured's motion for summary judgment dismissing the demand for an attorney fee should have been granted. When an insured brings an affirmative action to settle rights under an insurance policy, the insured cannot recover attorney fees. The court further held the action for breach of the covenant of good faith and fair dealing was not duplicative of the breach of contract cause of action and the insurer's motion for summary judgment on that ground was properly denied: "Implicit in every contract is a covenant of good faith and fair dealing which encompasses any promise that a reasonable promisee would understand to be included ... . In the context of an insurance contract, 'a reasonable insured would understand that the insurer promises to investigate in good faith and pay covered claims' ... . Here, the defendant failed to eliminate all triable issues as to whether it investigated the loss in good faith and timely paid covered claims ... . Further, contrary to the defendant's contention, the cause of action alleging breach of the covenant of good faith and fair dealing is not wholly duplicative of the cause of action alleging breach of contract…". **Doody v Liberty Mut. Group, Inc., 2016 NY Slip Op 01798, 2nd Dept 3-16-16**

PERSONAL INJURY.

DEFENDANT DRIVER ENTITLED TO SUMMARY JUDGMENT UNDER THE EMERGENCY DOCTRINE.

The Second Department determined summary judgment was properly granted to defendant taxi driver in a car-accident case. Plaintiff was in an accident caused by black ice and was standing in the roadway near the cars involved. Defendant taxi driver (Favors) applied his brakes when he saw the cars stopped in the roadway ahead but slid on the black ice and struck one of the vehicles, pinning plaintiff. The court held the emergency doctrine entitled the taxi driver to summary judgment: "Here, the evidence submitted by the taxi defendants in support of their motion demonstrated, prima facie, that Favors faced an emergency situation. Favors' encounter with three cars that had recently crashed on the Van Wyck and which blocked two lanes of traffic was sudden and unexpected ... . He applied the brakes as soon as he saw these cars, but black ice on the highway caused his car to slide. Favors had no reason to suspect that ice would be present on the highway and, therefore, the presence of black ice was also sudden and unexpected ... . In light of these facts and the evidence establishing that Favors was not speeding, that the events leading to Favors' collision with Alma's vehicle transpired over a matter of seconds, and that he tried to steer his taxi to avoid the other vehicles, the taxi defendants established, prima facie, that Favors was presented with an emergency situation and that he reacted as a reasonable person would under the circumstances ...". **Kandel v FN; Taxi; Inc., 2016 NY Slip Op 01809, 2nd Dept 3-16-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

QUESTION OF FACT WHETHER DEFENDANT DOCTOR CONDUCTED AN ADEQUATE SUICIDE ASSESSMENT.

The Second Department determined plaintiff raised a triable question of fact whether defendant neurologist (Lombard) conducted an adequate suicide assessment of plaintiff's decedent. Plaintiff's decedent committed suicide one week after the assessment: "The plaintiff raised a triable issue of fact as to whether Lombard departed from good and accepted medical practice by failing to obtain the decedent's records from his prior mental health care providers, including the records from the . . . emergency room where the decedent had been seen earlier on the day he met with Lombard, and by conducting an inadequate suicide assessment . . . , such that Lombard's treatment decision was 'something less than a professional medical determination' ... . 'A decision that is without proper medical foundation, that is, one which is not the product of a careful examination, is not to be legally insulated as a professional medical judgment' ...". **Gallen v County of Rockland, 2016 NY Slip Op 01803, 2nd Dept 3-16-16**

PERSONAL INJURY, MEDICAL MALPRACTICE.

HOSPITAL NOT LIABLE FOR INJURIES CAUSED BY MENTALLY ILL PATIENT FOUR DAYS AFTER DISCHARGE.

The Second Department determined defendant hospital (HHC) was entitled to summary judgment in an action stemming from injuries caused by a mentally ill patient after discharge from defendant hospital. The patient, four days after discharge, attacked and stabbed employees of the residential facility where the patient resided. The hospital medical records supported the conclusion the patient did not qualify for involuntary psychiatric observation at the time of his release. The plaintiff's expert's opposing affidavit was conclusory and speculative: " '[D]octors or a governmental subdivision of the State that em-

ploys them cannot be held responsible for damages resulting from the actions of a psychiatric patient who has been released when the patient's release is a matter of professional judgment' ... . For liability to attach, it must be shown that the decision to release the patient was 'something less than a professional medical determination' founded upon careful examination of the patient ... . 'Evidence of a difference of opinion among experts does not provide an adequate basis for a prima facie case of malpractice' ... . * * * ... [T]he plaintiffs submitted an expert affirmation opining that HHC deviated from accepted standards of medical practice and failed to make a careful examination by failing to contact [the patient's] psychiatric providers . . . and his . . . caseworker to inquire as to his condition and history of violence before making the determination whether to discharge him, and that those deviations proximately caused the plaintiffs' injuries. However, the expert failed to explain what, if any, information HHC did not already have which those parties could have provided, and which would have been necessary for a careful examination of whether [the patient] continued to meet the legal criteria for involuntary psychiatric observation, care, and treatment. The expert also failed to address the evidence that [the patient] did not meet the criteria for involuntary psychiatric observation, care, and treatment at the time of his discharge ...". **Stephen v City of New York, 2016 NY Slip Op 01827, 2nd Dept 3-16-16**

PRODUCTS LIABILITY.

QUESTIONS OF FACT WHETHER AUTOMOBILE LIFT WAS INTENDED TO BE USED WITHOUT A PROTECTIVE DEVICE AND WHETHER WARNINGS WERE ADEQUATE.

The Second Department determined plaintiff had raised questions of fact whether the automobile lift was defectively designed and whether there were inadequate warnings about its use. When the lift was originally shipped, there was a plastic cover over an opening which exposed the mechanism. The plastic cover was inexplicably missing. Two of plaintiff's fingers were partially amputated when plaintiff put his hand inside the hole. Although the manufacturer demonstrated the product was safe with the cover in place, plaintiff raised questions of fact in opposition, including a question whether the lift was intended to be used without the cover. **Singh v Gemini Auto Lifts, Inc., 2016 NY Slip Op 01826, 2nd Dept 3-16-16**

REAL PROPERTY.

RIGHT TO PARTITION IS NOT ABSOLUTE AND IS SUBJECT TO THE EQUITIES BETWEEN THE PARTIES.

The Second Department determined Supreme Court should not have granted plaintiff summary judgment in a partition action without holding a hearing. The right to partition is not absolute and the remedy is subject to the equities between the parties: " 'A person holding and in possession of real property as joint tenant or tenant in common, in which he [or she] has an estate of inheritance, or for life, or for years, may maintain an action for the partition of the property, and for a sale if it appears that a partition cannot be made without great prejudice to the owners (RPAPL 901[1]). The right to partition is not absolute, however, and while a tenant in common has the right to maintain an action for partition pursuant to RPAPL 901, the remedy is always subject to the equities between the parties' … . Here, the Supreme Court implicitly acknowledged the above when it stated in its . . . order that the parties were directed to appear for a conference 'for purposes of finding a date for a trial of the issue of existence of equitable defenses to plaintiff's request for partition.' " **Guo v Guo, 2016 NY Slip Op 01806, 2nd Dept 3-16-16**

REAL PROPERTY TAX LAW.

PURCHASE PRICE OF GOLF COURSE NOT PROPER VALUATION FOR TAX PURPOSES, PURCHASE PRICE REFLECTED POTENTIAL VALUE OF THE LAND AS DEVELOPED.

The Second Department, reversing (modifying) Supreme Court, determined the recent sales price of a golf course was not the proper benchmark for valuing the property for tax purposes. The $12 million purchase price reflected the potential value of the land as developed: " '[T]he purchase price set in the course of an arm's length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the highest rank' to determine the true value of the property at that time' ... . However, improved property must be assessed based on its current condition and use (*see* RPTL 302[1]...). 'Property is assessed for tax purposes according to its condition on the taxable status date, without regard to future potentialities or possibilities and may not be assessed on the basis of some use contemplated in the future'... . Accordingly, in the context of a tax certiorari proceeding involving improved land, a recent sales price that was based upon speculation for future development, rather than continuation of the property's current use, is not a proper indicator of value (*see* RPTL 302[1]...). Here, the evidence at trial established that the subject property was purchased for future residential development that had not yet occurred, and the sales price was based upon this residential development potential. Accordingly, the Supreme Court's adoption of the recent sales price as the valuation of the property for assessment purposes was in error ...". **Matter of Hampshire Recreation, LLC v Board of Assessors, 2016 NY Slip Op 01847, 2nd Dept 3-16-16**

TRUSTS AND ESTATES.

LETTERS TESTAMENTARY PROPERLY REVOKED WITHOUT A HEARING.

The Second Department determined Surrogate's Court properly revoked letters testamentary without a hearing based upon undisputed proof the administrators were in conflict with each other, improvidently managed the property and failed to

abide by the terms of a so-ordered stipulation: "The removal of a fiduciary pursuant to SCPA 711 and 719 is equivalent to a judicial nullification of the testator's choice and may only be decreed when the grounds set forth in the relevant statutes have been clearly established ... . The Surrogate may remove a fiduciary without a hearing only where the misconduct is established by undisputed facts or concessions, where the fiduciary's in-court conduct causes such facts to be within the court's knowledge, or where facts warranting an amendment of letters are presented to the court during a related evidentiary proceeding ... . Thus, revoking a fiduciary's letters without a hearing pursuant to SCPA 719 will constitute an abuse of discretion where the facts are disputed, where conflicting inferences may be drawn therefrom, or where there are claimed mitigating facts that, if established, would render summary removal an inappropriate remedy ...". **Matter of Kaufman, 2016 NY Slip Op 01849, 2nd Dept 3-16-16**

THIRD DEPARTMENT

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF PRIOR UNCHARGED BAD ACTS SHOULD NOT HAVE BEEN ADMITTED, ERROR HARMLESS HOWEVER.

The Third Department determined evidence of uncharged sexual contact with young girls should not have been admitted in evidence in this rape/sexual-abuse/endangering-the-welfare-of-a-child trial. The error was deemed harmless, however. The limited probative value of the proof was outweighed by its prejudicial effect: "Here, the People moved before trial for permission to offer, among other things, the testimony of four adult female witnesses that defendant had sexual contact with them during the 1970s when he was employed as their music teacher and they were between 12 and 14 years old. * * * The court found that the testimony was not relevant to the charges of rape in the second degree or sexual abuse in the second degree, as defendant's intent to commit these crimes could be inferred from commission of the acts themselves, but that it was relevant to the mens rea element of the charge of endangering the welfare of a child. * * * ... [T]he probative value of the testimony for the limited purpose of showing defendant's mental state in doing kindnesses for the victim was highly limited. The alleged prior bad acts were extremely remote in time, taking place decades previously. Further, there were significant factual differences between the actions that defendant allegedly took to gain the trust of his earlier alleged victims and those he used with the victim. By contrast, the prejudicial impact of the testimony — consisting of descriptions of multiple reprehensible acts allegedly committed by defendant against vulnerable children — was significant." **People v Scaringe, 2016 NY Slip Op 01871, 3rd Dept 3-16-16**

UNEMPLOYMENT INSURANCE.

CLAIMANT DID NOT PROVOKE HER DISCHARGE AND IS THEREFORE ENTITLED TO BENEFITS.

The Third Department determined claimant was entitled to unemployment insurance benefits because she attempted in good faith to comply with the residency requirement for her position with the city and therefore did not provoke her discharge: " 'Provoked discharge . . . is a narrowly drawn legal fiction designed to apply where an employee voluntarily engages in conduct which transgresses a legitimate known obligation and leaves the employer no choice but to discharge him [or her]' ... . 'Whether [a] claimant's actions constituted a voluntary leaving of employment without good cause by provoking his [or her] discharge is a factual determination for the [B]oard' ... . Here, claimant's testimony established that she began living with her cousin in an apartment in New York City in an attempt to comply with the employer's residency requirements, as well as to accommodate her school schedule. Although claimant also spent time with her husband in an apartment outside New York City, the employer acknowledged that an individual could maintain more than one residence, even if one was outside New York City, and still be in compliance with the residency requirement. Claimant pays her cousin money to live in the apartment and to help offset expenses, and she receives mail at that address, including bank account and credit card statements. Claimant also pays New York City income taxes. Moreover, claimant testified that, because she did not fully understand the residency requirement, she inquired to both her supervisor and the employer's personnel department as to whether she was considered to be in compliance with the necessary requirement; however, those inquiries went unanswered. Under these circumstances, substantial evidence supports the Board's finding that claimant did not voluntarily engage in conduct that transgressed the employer's mandate so as to find that she provoked her discharge ...". **Matter of Rosseychuk (City of New York—Commissioner of Labor), 2016 NY Slip Op 01885, 3rd Dept 3-17-16**

UNEMPLOYMENT INSURANCE.

NEWSPAPER CARRIER WAS AN EMPLOYEE ENTITLED TO BENEFITS.

The Third Department determined claimant, who delivered newspapers for CFHI using her own car, was an employee entitled to unemployment benefits. Claimant ended her contract because of problems with her car: "Here, claimant responded to a newspaper advertisement soliciting motor route carriers and was retained by CFHI after meeting with its district manager. Claimant signed an independent contractor distributor agreement that (1) assigned her specific routes, (2) required her to furnish her own vehicle with proof of insurance, (3) set forth specific rates governing her compensation, (4) required her to deliver newspapers in a dry condition by specified times, (5) imposed a penalty upon her if CFHI had to make a delivery

due to a subscriber complaint, and (6) provided for termination of the contract by CFHI in the event that claimant received more than 10 subscriber complaints. Although no formal training was provided by CFHI, its district manager reviewed a checklist with claimant containing detailed information that she needed to know to perform her duties. In addition, CFHI provided claimant with optional property damage and personal injury insurance for purchase through an independent carrier, made available supplies, such as rain bags and rubber bands, for claimant to purchase, prohibited claimant from placing any inserts or other materials in the newspapers to be delivered and fielded customer complaints before referring them to claimant. As in many of the other newspaper delivery carrier cases, the record as a whole contains substantial evidence to support the conclusion that CFHI retained a sufficient indicia of control over the performance of claimant's duties to establish the existence of an employment relationship ...". **Matter of Rosenfelder (Community First Holdings, Inc.—Commissioner of Labor), 2016 NY Slip Op 01888, 3rd Dept 3-17-16**

WORKERS' COMPENSATION LAW.

CARRIER'S INABILITY TO CONDUCT AN INDEPENDENT MEDICAL EXAMINATION OF CLAIMANT WARRANTED SUSPENSION OF COMPENSATION PAYMENTS.

The Third Department determined the carrier's inability to conduct an independent medical examination (IME) of claimant, ostensibly due to claimant's medical restrictions, warranted suspending claimant's compensation payments: "[W]e note that 'refusal by the claimant to submit to [an IME] at such time or times as may reasonably be necessary in the opinion of the [B]oard, shall bar the claimant from recovering compensation for any period during which he or she has refused to submit to such examination' (Workers' Compensation Law § 13-a [4] [b]). Whether suspending compensation payments on account of a claimant's attempt to frustrate a carrier's right to engage in an IME is a question of fact for the Board to resolve ... . Here, there are opposing views as to why claimant did not submit to an IME. It was within the Board's purview to credit the carrier's assertion that it has engaged in extraordinary efforts to schedule the IME . . . and that such efforts were thwarted by claimant's perpetual requests and demands of rescheduling and relocating the IME ... . As such, we find that substantial evidence supports the Board's finding that claimant frustrated the carrier's right to engage an independent consultant by unreasonably refusing to attend an IME so as to warrant suspension of her benefits (*see* Workers' Compensation Law § 13-a [4] [b]...)." **Matter of Duncan v John Wiley & Sons, Inc., 2016 NY Slip Op 01881, 3rd Dept 3-17-16**

WORKER'S COMPENSATION LAW.

STATUTORY PRESUMPTION THAT UNWITNESSED ACCIDENT AROSE FROM EMPLOYMENT DID NOT CREATE A PRESUMPTION THE ACCIDENT HAD HAPPENED, DENIAL OF CLAIM AFFIRMED.

The Third Department determined there was insufficient evidence to support claimant's allegation he was injured in an accident which no one witnessed and for which claimant did not seek immediate attention medical attention. The court noted that the presumption that unwitnessed accidents arose from employment did not create a presumption that an accident had happened: "Workers' Compensation Law § 21, 'which affords a presumption that an unwitnessed or unexplained workplace accident arose out of the injured person's employment, . . . cannot be utilized to demonstrate that an accident occurred in the first place'...". **Matter of Siennikov v Professional Grade Constr., Inc., 2016 NY Slip Op 01889, 3rd Dept 3-17-16**

FOURTH DEPARTMENT

CIVIL PROCEDURE.

PLAINTIFF SHOULD HAVE BEEN ALLOWED TO AMEND THE AD DAMNUM CLAUSE OF THE COMPLAINT.

The Fourth Department determined plaintiff in a breach of contract action should have been allowed to amend its ad damnum clause: "Supreme Court abused its discretion in denying its motion to amend the ad damnum clause from $77,585.50 to $111,331.13, and we therefore modify the order by granting the motion. It is axiomatic that '[l]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit' ... . * * * ... '[I]n the absence of prejudice . . . , a motion to amend the ad damnum clause, whether made before or after the trial, should generally be granted ...". **Putrelo Constr. Co. v Town of Marcy, 2016 NY Slip Op 01949, 4th Dept 3-18-16**

CIVIL PROCEDURE, EVIDENCE.

UNSWORN, UNCERTIFIED MEDICAL DOCUMENTS PROPERLY CONSIDERED FOR SUMMARY JUDGMENT MOTION; CREDIBILITY OF AFFIANTS SHOULD NOT BE WEIGHED IN DECIDING SUMMARY JUDGMENT MOTION.

In the course of reversing Supreme Court's grant of summary judgment to defendants in a car-accident case, the court noted that unsworn and uncertified medical records were admissible to support plaintiff's serious-injury claim because the documents were submitted by the defendants or because the documents were relied upon by plaintiff's expert, who provided a sworn opinion. In addition, the court noted that the credibility of affiants should not, as a general rule, be considered in deciding a summary judgment motion: "Although . . . many of the medical reports and records submitted by plaintiff in opposition to the cross motions were unsworn and uncertified, we may consider those reports and records that were

'submitted by defendants . . . or were referenced in the reports of physicians who examined plaintiff on their behalf, and [defendants] submitted the reports of [those physicians]' ... . To the extent that plaintiff submitted unsworn and uncertified medical reports and records that were not submitted by defendants or relied upon by their expert, we may nevertheless rely on the medical opinions of plaintiff's experts because 'the various medical opinions relying on those . . . reports [and records] are sworn and thus competent evidence' ... . [T]he court erred in discounting entirely the opinion of plaintiff's treating physician due to perceived errors in his report. 'The court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned ...". **Cook v Peterson, 2016 NY Slip Op 01950, 4th Dept 3-18-16**

CRIMINAL LAW, EVIDENCE.

GRAND LARCENY CONVICTION REDUCED TO PETIT LARCENY, PROOF OF VALUE OF STOLEN PROPERTY INSUFFICIENT.

The Fourth Department, in the interest of justice, reduced defendant's grand larceny to petit larceny because of insufficient proof of the value of the stolen property: "The value of stolen property is 'the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of replacement of the property within a reasonable time after the crime' (Penal Law § 155.20 [1]). It is well settled that 'a victim must provide a basis of knowledge for his [or her] statement of value before it can be accepted as legally sufficient evidence of such value' ... . Furthermore, '[c]onclusory statements and rough estimates of value are not sufficient' to establish the value of the property ... . 'Although a victim is competent to supply evidence of original cost . . . , evidence of the original purchase price, without more, will not satisfy the People's burden' ... . Here, the victim testified that several specific items were taken, but the only evidence of the value of those items was the victim's testimony regarding the purchase price of some of them, and her hearsay testimony regarding a purported expert's appraisal of some of the property, which was based solely on her description of certain jewelry to the purported expert. Based on the evidence of value in the record, we cannot conclude 'that the jury ha[d] a reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' of $3,000 ...". **People v Slack, 2016 NY Slip Op 01930, 4th Dept 3-18-16**

CRIMINAL LAW, EVIDENCE.

JURY SHOULD HAVE BEEN INSTRUCTED ON THE DEADLY-FORCE JUSTIFICATION DEFENSE, NEW TRIAL ORDERED.

The Fourth Department reversed defendant's assault and manslaughter convictions and ordered a new trial, finding the jury should have been charged on the "deadly force" justification defense. There was evidence defendant acted to defend her brother who was struck with a champagne bottle. The assault with the bottle could constitute deadly force, justifying the use of deadly force in defense: "[T]he court erred in denying her request to charge the jury on justification using deadly physical force in defense of a third party for the assault count. There was a reasonable view of the evidence, viewed in the light most favorable to defendant, that the first victim was using deadly physical force by striking defendant's brother in the head with a champagne bottle when defendant assaulted her ... . We further agree with defendant that the error in failing to give the justification charge on the assault count requires reversal of the manslaughter count as well. Although the court instructed the jury on justification for that count, there was a 'significant factual relationship' between the two counts . . . , particularly on the issue whether defendant was the initial aggressor (*see* Penal Law § 35.15 [1] [b]). We therefore reverse the judgment and grant a new trial on both ...". **People v James, 2016 NY Slip Op 01946, 4th Dept 3-18-16**

ENVIRONMENTAL LAW, LAND USE.

EXPRESSION OF OPPOSITION TO A PROPOSED DEVELOPMENT PROJECT DID NOT CREATE A CONFLICT OF INTEREST PRECLUDING VILLAGE OFFICIALS FROM PARTICIPATING IN A SEQRA REVIEW; PLANNING BOARD DID NOT HAVE AUTHORITY TO RESCIND A NEGATIVE DECLARATION AFTER PERMITS WERE ISSUED.

The Fourth Department determined two village officials did not have a conflict of interest which would preclude their participation in a State Environmental Quality Review Act (SEQRA) review of a development project. The two had expressed opposition to the project before and after their elections, but expression of opinion does not create a conflict of interest. The Fourth Department upheld the annulment of resolutions which stated the proposed project would adversely affect the environment. The planning board had previously found no adverse impact (a negative declaration) and had issued permits. The board did not have the authority to rescind the negative declaration at that point: "[T]he Board lacked authority to rescind its negative declaration under the circumstances of this case. Here, the Board was authorized to rescind its negative declaration 'prior to its decision to undertake, fund, or approve an action,' and the Board made its decision to approve the action, i.e., the Project, when it issued the requisite special permits ...". **Matter of Pittsford Canalside Props., LLC v Village of Pittsford, 2016 NY Slip Op 01929, 4th Dept 3-18-16**

FAMILY LAW, RIGHT TO COUNSEL, APPEALS.

INADEQUATE WAIVER OF RIGHT TO COUNSEL REQUIRED REVERSAL; PRESERVATION OF THIS ISSUE NOT NECESSARY.

The Fourth Department reversed Family Court's finding respondent had willfully violated a court order because of an insufficient waiver of the right to counsel. The court noted that a prior decision requiring preservation of the right-to-proceed-pro-se issue should no longer be followed: "Although the Support Magistrate properly advised respondent that he had the right to counsel (*see* Family Ct Act § 262 [a] [vi]), we agree with respondent that the Support Magistrate failed to make a 'searching inquiry' to ensure that his waiver of the right to counsel was a knowing, voluntary and intelligent choice, and thus that he was denied his right to counsel ... . We therefore reverse the order and remit the matter to Family Court for a new hearing. To the extent that our decision in *Matter of Huard v Lugo* (81 AD3d 1265...) requires preservation of a contention that the Support Magistrate erred in allowing the respondent to proceed pro se at a fact-finding hearing, that decision is no longer to be followed." **Matter of Girard v Neville, 2016 NY Slip Op 01947, 4th Dept 3-18-16**