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CasePrepPlus

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COURT OF APPEALS

CIVIL PROCEDURE.

ALTHOUGH PLAINTIFF AND DEFENDANT ARE SPANISH COMPANIES OPERATING IN SPAIN, DEFENDANT IS SUBJECT TO NEW YORK'S LONG-ARM JURISDICTION.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the appellate division, determined that, although both plaintiff and defendant are businesses based in Spain, there were sufficient contacts with New York to support long-arm jurisdiction. Defendant's wine was distributed by a New York company, Kobrand. "Through November 2006, defendant paid commissions to plaintiff in Spain on wine defendant sold to Kobrand. In or around January 2007, defendant stopped paying commissions to plaintiff even as defendant continued to sell wine to Kobrand. Defendant contends that its obligation to pay commissions under the oral agreement expired after one year:" "... [N]ot only was defendant physically present in New York on several occasions, but its activities here resulted in 'the purposeful creation of a continuing relationship with a New York corporation'... . Defendant's contacts with New York establish that defendant purposefully availed itself of 'the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws'... . ... * * * ... [T]he parties' oral agreement was not performed 'wholly in Spain' ... . Rather ... both sides engaged in activities in New York in furtherance of their agreement. There is an articulable nexus or substantial relationship between defendant's New York activities and the parties' contract, defendant's alleged breach thereof, and potential damages. Accordingly, we hold that plaintiff's claim arises from defendant's transaction of business in New York. ... ... [D]efendant has established minimum contacts with New York by visiting the state on multiple occasions to promote its wine with the purpose of finding a United States distributor and thereafter selling wine to a New York-based distributor. ... Having done so, defendant could reasonably foresee having to defend a lawsuit in New York." ***D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 2017 N.Y. Slip Op. 04494, CtApp 6-8-17**

CRIMINAL LAW, APPEALS.

TRIAL JUDGE PROPERLY RESETTLED THE RECORD OF THE TRIAL BY CORRECTING TYPOGRAPHICAL ERRORS IN THE TRANSCRIPT WITHOUT A HEARING.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, with two concurring opinions, determined the trial judge properly resettled the record of the trial without holding a hearing. The original transcript indicated the jury was instructed the defendant was charged with "unintentional" murder. The prosecutor submitted an affirmation based upon a conversation with the court stenographer stating that the word "unintentional" was a typographical error and the stenographic notes reflected the word "intentional" was actually used. The stenographer submitted a certified corrected transcript: "Several factors support the Appellate Division's conclusion that Supreme Court acted within its discretion to resettle the transcript on the basis of the information before it. The trial judge could rely not only on the reporter's certification of the corrected transcript, but also on undisputed portions of that transcript, including: the accurate balance of the charge; the fact that two of the five alleged misstatements were attributed to defense counsel, not the court; and, most significantly, the repeated failure of any party to object to what would have been prominent misstatements of the law. Furthermore, as there was no suggestion during oral argument on the motion that any person present at the trial five years earlier could recollect what words were spoken, it is not clear what evidence beyond the reporter's original stenographic notes might have been obtained through a hearing. Although it would have been preferable for the court to have received an affidavit from the court reporter, rather than an affidavit of counsel recounting a conversation with that reporter, we cannot say that Supreme Court acted outside its discretion to resettle the transcript without a hearing." ***People v. Bethune*, 2017 N.Y. Slip Op. 04493, CtApp 6-8-17**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO EVIDENCE OF THE COMPLAINANT'S DISCLOSURE OF ALLEGED SEXUAL ABUSE UP TO SEVEN YEARS AFTER THE ABUSE CEASED, THE EVIDENCE MAY HAVE BEEN ADMISSIBLE AND DEFENSE COUNSEL USED DISCREPANCIES IN THE DISCLOSURES TO SUPPORT THE DEFENSE.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined defense counsel was not ineffective for failing to object to evidence the complainant, who alleged she was sexually abused by the defendant many years earlier, disclosed the abuse to friends three years after the abuse ceased and again four years later. Defense counsel's strategy was to show the complainant was a "troubled teen" and inconsistencies in the statements were part of a "recent fabrication" defense: "Here, defendant argues that counsel's failure to object to the testimony regarding the victim's disclosures must have arisen from his ignorance or misunderstanding of the law on prompt outcry testimony and, thus, cannot be considered a matter of strategy. We disagree. While 'it is generally improper to introduce testimony that the witness had previously made prior consistent statements' to bolster the witness's credibility, the use of prior consistent statements is permitted to demonstrate a prompt outcry, rebut a charge of recent fabrication, or 'to assist in 'explaining the investigative process and completing the narrative of events leading to defendant's arrest' ... . 'New York courts have routinely recognized that nonspecific testimony about [a] child-victim's reports of sexual abuse [does] not constitute improper bolstering [when] offered for the relevant, nonhearsay purpose of explaining the investigative process'... . A conclusion that the fact of the victim's disclosures herein to the school counselor and detective would likely be admissible to 'complete the narrative' was 'consistent with [a conclusion that] a reasonably competent attorney' could make ... . [C}ounsel was not ineffective for failure to make a motion that had little chance of success .... Instead of objecting to that testimony, counsel strategically chose to use the evidence to defendant's advantage by exploring the substance of, and the circumstances surrounding, the disclosure in depth to support the defense of recent fabrication." ***People v. Honghirun*, 2017 N.Y. Slip Op. 04496, CtApp 6-8-17**

CRIMINAL LAW, EVIDENCE.

POLICE LOST A VIDEO WHICH WAS LIKELY TO BE OF MATERIAL IMPORTANCE, FAILURE TO GIVE THE ADVERSE INFERENCE CHARGE TO THE JURY WAS (HARMLESS) ERROR.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a two judge dissenting opinion authored by Judge Wilson, determined defendant was entitled to an adverse inference charge with respect to the loss of video of a shooting, but that the failure to so charge the jury was harmless error under the facts. The defendant allegedly fired shots from across the street toward the entrance of a club. The video would have shown the victim and witnesses near the club entrance, but not the shooter: "'Once the police collected the video, the People had an obligation to preserve it ... . Under these circumstances — where defendant acted with due diligence by requesting the evidence in discovery and the lost evidence was video footage of the murder defendant was charged with committing — it cannot be said that the evidence was not 'reasonably likely to be of material importance' (Handy, 20 NY3d at 665). According to the trial testimony, the camera captured the moment when the victim was shot and the location of the two eyewitnesses at the time of the shooting. There was also testimony that the video contained footage of people going in and out of the club throughout the course of the night, making it at least possible that the video captured the earlier incident involving defendant and the bouncer — a key issue in the sequence of events. Contrary to the determination of the Appellate Division, a video of the shooting and of the eyewitnesses at or around the time of the murder is certainly 'relevant to the case' ... and is sufficient to satisfy the standard set out in Handy. Moreover, as in Handy, testimony concerning what appeared on the video came in large part from a witness whose own actions 'created the need to speculate about its contents' ... . Accordingly, the trial court erred in failing to give an adverse inference instruction." ***People v. Viruet*, 2017 N.Y. Slip Op. 04386, CtApp 6-6-17**

CRIMINAL LAW, EVIDENCE.

CONTEMPT ORDER IN A CIVIL MATTER INVOLVING THE SAME FUNDS DEFENDANT WAS ACCUSED OF STEALING IN THE CRIMINAL MATTER IS NOT MOLINEUX EVIDENCE, THE PROBATIVE VALUE OF THE ORDER ON THE QUESTION OF INTENT OUTWEIGHED ITS PREJUDICIAL EFFECT.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, determined that a contempt order in a civil proceeding involving the same funds defendant was accused of stealing in the criminal action: (1) was not Molineux evidence because it involved the same subject matter as did the criminal action; and (2) the probative value of the order on the question of intent outweighed its prejudicial effect: " 'When we limit Molineux or other propensity evidence, we do so for policy reasons, due to fear of the jury's human tendency to more readily believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime' ... . In other words, the courts limit the admission of Molineux evidence because of the danger that the jury might conclude that if the defendant did it once, he or she likely did it again. Where, as here, the evidence at issue is relevant to the very same crime for which the defendant is on trial, there is no danger that the jury will draw an improper inference of propensity because no separate crime or bad act committed by the defendant has been placed before the jury. * * * The Appellate Division correctly concluded that the contempt order was relevant to prove

defendant's larcenous intent because 'it showed that defendant's conduct did not merely constitute poor financial management but, rather, that defendant, through his businesses, intended to deprive [the business entity] of the diverted money permanently' ...". ***People v. Frumusa*, 2017 N.Y. Slip Op. 04495, CtApp 6-8-17**

INSURANCE LAW, NEGLIGENCE.

POLICY LANGUAGE MUST BE INTERPRETED TO MEAN THAT COVERAGE OF ADDITIONAL INSUREDS IS TRIGGERED ONLY WHEN THE INSURED IS NEGLIGENT, NOT MERELY WHEN THE ACTIONS OF THE INSURED HAVE A CAUSAL RELATIONSHIP WITH THE INJURY.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a two-judge dissenting opinion authored by Judge Fahey, reversing the appellate division, determined the language of the personal injury insurance policy did not support coverage of the additional insureds. The New York City Transit Authority (NYCTA) had contracted with BSI for construction work on a subway tunnel. BSI took out an insurance policy from Burlington. NYCTA, the Metropolitan Transit Authority (MTA) and New York City were named as additional insureds. An NYCTA employee was injured when a machine operated by BSI struck a live electric cable buried in concrete. The NYCTA had neglected to mark the location of the cable and turn off the power. The question before the court was whether, pursuant to the policy language, the additional insureds were covered when the insured, BSI, was not negligent, or whether the causal relationship between BSI and the accident triggered coverage of the additional insureds: "Here, the Burlington policy endorsement states that the injury must be 'caused, in whole or in part' by BSI. These words require proximate causation since 'but for' causation cannot be partial. An event may not be wholly or partially connected to a result, it either is or it is not connected. Stated differently, although there may be more than one proximate cause, all 'but for' causes bear some connection to the outcome even if all do not lead to legal liability. Thus, these words — 'in whole or in part' — can only modify 'proximate cause' ..". ***Burlington Ins. Co. v. NYC Tr. Auth.*, 2017 N.Y. Slip Op. 04384, CtApp 6-6-17**

MUNICIPAL LAW (NYC).

THE PROPOSED DEVELOPMENT OF THE OLD PARKING LOT FOR SHEA STADIUM, ON PARKLAND, IS SUBJECT TO THE PUBLIC TRUST DOCTRINE AND REQUIRES SPECIFIC ENABLING LEGISLATION, THE LEGISLATION FOR THE CONSTRUCTION OF SHEA STADIUM IS NOT APPLICABLE.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a dissenting opinion by Judge DiFiore, determined the development of the old Shea Stadium parking lot, which is on parkland (Flushing Meadows Park), was subject to the public trust doctrine, requiring specific legislation. The court held that the existing provisions of the administrative code, which approved and described the construction of Shea Stadium, could not be interpreted to allow the proposed development (Willets West) which includes the construction of a hotel, mall and residential housing: "The statutory language and legislative history demonstrate that the legislation did not authorize further developments on the tract of parkland but, rather, ensured that the City was authorized to accommodate other public uses of the stadium and appurtenant facilities. ... [T]he text of the statute and its legislative history flatly refute the proposition that the legislature granted the City the authority to construct a development such as Willets West in Flushing Meadows Park. We acknowledge that the remediation of Willets Point is a laudable goal. Defendants and various amici dedicate substantial portions of their briefs to the propositions that the Willets West development would immensely benefit the people of New York City, by transforming the area into a new, vibrant community, and that the present plan might be the only means to accomplish that transformation. Those contentions, however, have no place in our consideration of whether the legislature granted authorization for the development of Willets West on land held in the public trust. Of course, the legislature remains free to alienate all or part of the parkland for whatever purposes it sees fit, but it must do so through direct and specific legislation that expressly confers the desired alienation." ***Matter of Avella v. City of New York*, 2017 N.Y. Slip Op. 04383, CtApp 6-6-17**

MUNICIPAL LAW (NYC), EMPLOYMENT LAW.

UNION FOR NURSES EMPLOYED BY NEW YORK CITY WAS ENTITLED TO INFORMATION UNDERLYING DISCIPLINARY CHARGES LODGED AGAINST THE NURSES.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a dissenting opinion by Judge Garcia, determined two nurses facing disciplinary action for alleged time-card irregularities were entitled to some of the information upon which the charges were based. The nurses were employed by New York City's Human Resources Administration (HRA). When the request for the information was denied, the "New York State Nurses Association (NYSNA, or the Union) filed an improper practice petition with the Board of Collective Bargaining of the City of New York (the Board), alleging that it had a right to information, under New York City Collective Bargaining Law (NYCCBL) ... ." The Board found most of the requested information should be turned over to the NYSNA and the Court of Appeals agreed: "The Board held that section 12-306 (c) (4) [of the NYCCBL] extended to information 'relevant to and reasonably necessary for the administration of the parties' agreements, such as processing grievances, and/or for collective negotiations on mandatory subjects of bargaining,' citing several decisions of PERB [Public Employees Relations Board], the Board's analogue for state employees ... . As noted by the Board, PERB 'has consistently upheld the right of a union to seek information for contract administration in

the context of disciplinary grievances' ... .* * * Article VI, section 1.D. of the CBA [Collective Bargaining Agreement] defines 'grievance' to include: 'a claimed wrongful disciplinary action taken against an employee.' Thus, by defining 'grievance' to include disciplinary action, the CBA, has, as a matter of contract, incorporated as to disciplinary actions the information requirements applicable to grievances." ***Matter of City of New York v. New York State Nurses Assn.*, 2017 N.Y. Slip Op. 04492, CtApp 6-8-17**

ZONING, CONSTITUTIONAL LAW.

NYC ZONING ORDINANCES CONCERNING ADULT BOOKSTORES AND CLUBS ARE CONSTITUTIONAL AND ENFORCEABLE.

The Court of Appeals, reversing the appellate division, in a full-fledged opinion by Judge Fahey, determined New York City's zoning ordinances concerning adult bookstores and clubs were constitutional and, therefore, enforceable: "Viewed in the proper light, the evidence and the factual findings of the lower courts support only one conclusion: that the City met its burden of showing continued focus on sexually explicit activities and materials by the adult bookstores and adult eating and drinking establishments. The Appellate Division found that all but one of the adult bookstores had peep booths for viewing adult films, with an average of about 17 booths per store. Peep booths, by design, obviously promote sexual activities. The Appellate Division further found that all the bookstores used signage, displays, and layouts to promote sexually focused adult materials and activities. In addition, as the trial court found, many of the adult bookstores sold sex toys, adult novelties, and the like in the nonadult sections of the stores. This evidence showed that most of the adult bookstores predominantly emphasized the promotion of sexual materials and activities. * * * As to the adult eating and drinking establishments, the Appellate Division found that, in all the clubs, 'topless dancing takes place at all times daily for approximately 16 to 18 hours a day' and also that lap dances, a quintessentially sexual activity, were offered by dancers 'in both public and private areas of the club' ... . This evidence, without more, adequately supported the conclusion that the topless clubs retained a predominant sexual focus." ***For the People Theatres of N.Y. Inc. v. City of New York*, 2017 N.Y. Slip Op. 04385, CtApp 6-6-17**

FIRST DEPARTMENT

ANIMAL LAW, CIVIL PROCEDURE.

CHIMPANZEES NOT ENTITLED TO HABEAS CORPUS RELIEF.

The First Department, in a full-fledged opinion by Justice Webber, determined two chimpanzees. Tommy and Kiko, were not entitled to orders transferring them from cages to a sanctuary, using the rationale behind habeas corpus. The main reason underlying the decision is the fact that similar requests for relief had been denied by other courts and nothing new was presented in support of the instant requests for relief. The court, however, did run through the arguments in support of the applicability of habeas corpus criteria in this context (not all of which are summarized here): " 'The common law writ of habeas corpus, as codified by CPLR article 70, provides a summary procedure by which a person' who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention' … . While the word 'person' is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e., chimpanzees. While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees, petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty, or that the Legislature intended the term 'person' in CPLR article 70 to expand the availability of habeas protection beyond humans. No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a 'person' and entitled to habeas relief. In fact, habeas relief has never been found applicable to any animal... . The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense" (CPL 730.10[1])." ***Matter of Nonhuman Rights Project, Inc. v. Lavery*, 2017 N.Y. Slip Op. 04574, 1st Dept 6-8-17**

ARBITRATION, INSURANCE LAW.

INSURER'S MOTION TO STAY ARBITRATION SHOULD NOT HAVE BEEN DISMISSED AS UNTIMELY, RESPONDENT HAD WAIVED ARBITRATION BY STARTING LITIGATION, TIME RESTRICTIONS ON A MOTION FOR A STAY DID NOT APPLY.

The First Department, reversing Supreme Court, noted that the motion for a stay of arbitration brought by the insurer (petitioner) in this underinsured motorist benefits action, although untimely under the CPLR, should not have been dismissed on that ground. Respondent had waived arbitration by instigating litigation so the time restrictions on a motion to stay did not apply (even though the insurer had participated in the arbitration): "Petitioner seeks to permanently stay an underin-

sured motorist benefits arbitration proceeding brought by respondent in New York. The motion court erred in dismissing the motion to stay as untimely. The time restrictions set forth at CPLR 7503(c) do not apply where, as here, respondent waived her right to arbitrate by initiating litigation on the same claims ... . '[O]nce waived, the right to arbitrate cannot be regained, even by the respondent's failure to [timely] seek a stay of arbitration' ... . That petitioner participated, under objection, in the arbitration is immaterial. Even if the arbitration had been completed and an award issued, the award would be subject to vacatur on the ground that the arbitrator lacked authority to conduct the arbitration ... ". ***Matter of Allstate Ins. Co. v. Howell*, 2017 N.Y. Slip Op. 04406, 1st Dept 6-6-17**

ATTORNEYS, PRIVILEGE.

ATTORNEY-CLIENT PRIVILEGE DID NOT APPLY TO INFORMATION ON A COMPANY OWNED COMPUTER, HOWEVER ATTORNEY WORK PRODUCT PRIVILEGE MAY APPLY.

The First Department, reversing (modifying) Supreme Court, determined plaintiff could not assert attorney-client privilege to protect information on a company-owned laptop, but could assert the attorney work product privilege subject to court review of the log: "Application of the factors set forth in *In re Asia Global Crossing, Ltd*. (322 BR 247, 257 [Bankr, SD NY 2005]) indicates that plaintiff lacked any reasonable expectation of privacy in his personal use of the laptop computer supplied to him by defendant Zara USA, Inc. (Zara), his employer, and thus lacked the reasonable assurance of confidentiality that is foundational to attorney-client privilege ... . Among other factors, Zara's employee handbook, of which plaintiff, Zara's general counsel, had at least constructive knowledge... , restricted use of company-owned electronic resources, including computers, to 'business purposes' and proscribed offensive uses. The handbook specified that '[a]ny data collected, downloaded and/or created' on its electronic resources was 'the exclusive property of Zara,' emphasized that '[e]mployees should expect that all information created, transmitted, downloaded, received or stored in Zara's electronic communications resources may be accessed by Zara at any time, without prior notice,' and added that employees 'do not have an expectation of privacy or confidentiality in any information transmitted or stored in Zara's electronic communication resources (whether or not such information is password-protected).' Plaintiff avers, and defendant does not dispute, however, that, while reserving a right of access, Zara in fact never exercised that right as to plaintiff's laptop and never actually viewed any of the documents stored on that laptop. Given the lack of any 'actual disclosure to a third party, [plaintiff's] use of [Zara's computer] for personal purposes does not, standing alone, constitute a waiver of attorney work product protections' ...". ***Miller v. Zara USA, Inc.*, 2017 N.Y. Slip Op. 04407, 1st Dept 6-6-17**

CONTRACT LAW, SECURITIES.

CRITERIA FOR REFORMATION, DOCTRINES OF MUTUAL MISTAKE AND NOVATION, AND THE RIGHTS OF ASSIGNEES EXPLAINED IN THIS BREACH OF CONTRACT ACTION CONCERNING THE ISSUANCE OF WARRANTS TO PURCHASE SHARES IN DEFENDANT GEOSOURCE.

The First Department, reversing Supreme Court, determined questions of fact precluded summary judgment in this breach of contract action concerning the issuance of warrants to purchase shares in defendant GeoResources. The facts of the dispute are too complex to summarize here. The First Department explained the requirements for reformation of a contract, the doctrines of mutual mistake and novation, and the liabilities of assignee. With respect to mutual mistake, the court wrote: " 'A claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake,' and to succeed, the party seeking relief 'must establish by clear, positive and convincing evidence' that the agreement does not accurately express the parties' intentions' ... . 'Reformation based upon a scrivener's error requires proof of a prior agreement between [the] parties, which when subsequently reduced to writing fails to accurately reflect the prior agreement'... . The parties' course of performance under the contract, or their practical interpretation of a contract for any considerable period of time, is the most persuasive evidence of the agreed intention of the parties ... ".***Warberg Opportunistic Trading Fund L.P. v. GeoResources, Inc.*, 2017 N.Y. Slip Op. 04537, 1st Dept 6-8-17**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

BRIEF MENTION OF AN OFFENSE FOR WHICH THE INTERROGATING DETECTIVE KNEW DEFENDANT WAS REPRESENTED BY COUNSEL TAINTED THE INTERROGATION AND REQUIRED SUPPRESSION OF THE INTERVIEW.

The First Department, reversing the denial of defendant's motion to suppress his statements, over a two justice dissent, determined the detective's mention of a drug offense for which defendant was represented by counsel during questioning on a homicide required suppression of the interrogation: "Although the reference to the drug charges on which defendant was represented was brief and flippant, it was not, in context, innocuous or discrete and fairly separable from the homicide investigation. The detective told defendant during the questioning that he knew defendant was involved in selling drugs at the location of the murder and that the killing was over a drug debt. The remarks regarding the pending drug case went to defendant's alleged participation in the drug trade at the location of the homicide, the very activity out of which a motivation for killing the victim arose. Indeed, it succeeded in eliciting from defendant a response that may fairly be interpreted as incriminating himself in dealing drugs at the location, the alleged motivation and context out of which the homicide

occurred. Accordingly, because questioning regarding the drug case on which defendant was represented by counsel was intertwined with questioning regarding the homicide, defendant's statements should have been suppressed. However, we find no other basis for suppression. As the dissent notes, the repeated comments made to defendant by the detective and his colleagues to the effect that defendant should 'tell [his] side of the story' immediately because if he were to wait until trial, '[no] one is going to believe' him and he would be 'charged with murder, not . . . manslaughter' did not vitiate the Miranda warnings defendant had received ...". ***People v. Silvagnoli*, 2017 N.Y. Slip Op. 04392, 1st Dept 6-6-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

FALL INTO AN UNGUARDED TRENCH WARRANTED SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION.

The Fist Department determined plaintiff was properly granted summary judgment on his Labor Law §§ 240(1) and 241(6). Plaintiff was directing traffic when he was struck by a truck fell into an unguarded trench: "Plaintiff Martin Gjeka made a prima facie showing of entitlement to judgment as a matter of law on the Labor Law § 240(1) claim, by submitting his and other witnesses' testimony that he was directing traffic around an unguarded trench in the road measuring approximately five to eight feet deep, which was being excavated to allow new sewer lines to be installed for a building ... , when a truck ... traveling about 25 or 30 miles per hour, struck plaintiff, causing him to fall into the trench. Such testimony, as well as plaintiff's two expert affidavits, established that his work exposed him to an extraordinary gravity-related risk, and that the absence of any safety device such as a barrier or safety railing around the trench was a violation of Labor Law § 240(1) ... . Labor Law § 241(6) imposes on owners a nondelegable duty to comply with specific safety regulations ... . Industrial Code § 23-1.7(b)(1) requires that 'hazardous opening[s] into which a person may step or fall' must 'be guarded by a substantial cover . . . or by a safety railing." Industrial Code § 23-4.2(h) requires that "[a]ny open excavation adjacent to a . . . street, . . . or other area lawfully frequented by any person shall be effectively guarded.' Both are plainly applicable to this case." ***Gjeka v. Iron Horse Transp., Inc.*, 2017 N.Y. Slip Op. 04536, 1st Dept 6-8-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF STRUCK BY A PLANK WHICH FELL OFF A SCAFFOLD, SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY GRANTED.

The First Department determined summary judgment on plaintiff's Labor Law § 240(1) was properly granted. Plaintiff was struck by a plank which fell from a scaffold that was being dismantled: "Whether or not the scaffold provided workers at the site with adequate protection for working at an elevation, the unsecured plank falling from the scaffold and striking plaintiff as the scaffold was being moved constituted a distinct elevation-related hazard requiring the securing of the plank for the purpose of moving the scaffold ...". ***Gonzalez v. City of New York*, 2017 N.Y. Slip Op. 04555, 1st Dept 6-8-17**

MUNICIPAL LAW, ANIMAL LAW, FREEDOM OF RELIGION.

THE DECISION TO ENFORCE ANIMAL CRUELTY AND OTHER LAWS AND REGULATIONS WHICH MAY PERTAIN TO THE RITUAL KILLING OF CHICKENS AS A RELIGIOUS PRACTICE IS DISCRETIONARY, THEREFORE A MANDAMUS ACTION TO ENFORCE THE LAWS DOES NOT LIE.

The First Department, in a full-fledged opinion by Justice Gische, over a two justice dissenting opinion authored by Justice Gesmer, determined the city's decision whether to enforce animal cruelty and other laws and regulations which may pertain to the public, ritual killing of chickens in an annual religious practice (Kaporos) is discretionary and therefore cannot be enforced by a mandamus proceeding: "We hold that the laws which plaintiffs seek to compel the City defendants to enforce in this action involve the judgment and discretion of those defendants. This is because the laws themselves implicate the discretion of law enforcement and do not mandate an outcome in their application. ... There are disputes about whether the conduct complained of is in violation of the implicated laws and regulations. There are disputes about whether and to what extent the implicated laws can be enforced without violating constitutional rights belonging to the non-City defendants. Rituals involving animal sacrifice are present in some religions and although they may be upsetting to nonadherents of such practice, the United States Supreme Court has recognized animal sacrifice as a religious sacrament and decided that it is protected under the Free Exercise Clause of the Constitution, as applied to the states through the Fourteenth Amendment ... . Consequently, the decision whether and how to enforce these laws and regulatory provisions allegedly violated during Kaporos implicates the reasoning and discretion of the City defendants and the law enforcers. None of the laws or regulations plaintiffs rely on preclude the City defendants from deciding whether or not to enforce those laws in the context of Kaporos. Plaintiffs do not have a 'clear legal right' to dictate which laws are enforced and how, or against whom. Determining which laws and regulations might be properly enforced against the non-City defendants without infringing upon their free exercise of religion involves the exercise of reasoned judgment on the part of the City defendants. The outcome cannot be dictated by the court through mandamus." ***Alliance to End Chickens as Kaporos v. New York City Police Dept.*, 2017 N.Y. Slip Op. 04408, 1st Dept 6-6-17**

PERSONAL INJURY.

DEFENDANT NOT ENTITLED TO SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE, DEFENDANT STOPPED SUDDENLY ON A HIGHWAY BECAUSE THE TOP OF HIS TRUCK STRUCK AN OVERHEAD BRIDGE.

The First Department, reversing Supreme Court, determined defendant's motion for summary judgment should not have been granted in this rear-end collision case. The top of defendant's truck struck an overhead bridge and came to a sudden stop on a highway. There was evidence the truck driver was negligent for attempting to pass under the bridge in a lane which he had not used before: "A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident ... . The ... defendants argue that plaintiff's contention that a sudden, unforeseeable stop by a lead vehicle can provide such a non-negligent explanation 'is contrary to this Court's consistent holding that an allegation that the lead vehicle suddenly stopped is insufficient to rebut the presumption of negligence on the part of the rear-ending vehicle.' However, this is simply not accurate ... . * * * ... [T]he evidence suggests that plaintiff could have 'reasonably expect[ed] that traffic would continue unimpeded' ... , since traffic was flowing smoothly and he had no reason to foresee that [defendant's] truck would not clear the overpass." ***Baez-Pena v. MM Truck & Body Repair, Inc.*, 2017 N.Y. Slip Op. 04538, 1st Dept 6-8-17**

PERSONAL INJURY.

REASONABLE EXPECTATION DOCTRINE PRECLUDED SUIT AGAINST RESTAURANT FOR CHOKING ON A ONE INCH FISH BONE.

The First Department, reversing Supreme Court, determined plaintiff's complaint should have been dismissed. Plaintiff alleged she choked on a fish bone at defendant's restaurant: "Plaintiff seeks damages for injuries sustained when she choked on a fish bone while eating a fillet of flounder at defendants-appellants' restaurant. Plaintiff's negligence claim should have been dismissed pursuant to the 'reasonable expectation' doctrine, as the nearly one-inch bone on which plaintiff choked was not a 'harmful substance[]' that a consumer 'would not ordinarily anticipate' ...". ***Amiano v. Greenwich Vil. Fish Co., Inc.*, 2017 N.Y. Slip Op. 04544, 1st Dept 6-8-17**

MUNICIPAL LAW, PERSONAL INJURY.

WHETHER THE BIG APPLE MAP PROVIDED NOTICE TO THE CITY OF THE DEFECTIVE CURB WHERE PLAINTIFF FELL WAS AN APPROPRIATE QUESTION FOR THE JURY, PLAINTIFF'S VERDICT SHOULD NOT HAVE BEEN SET ASIDE.

The First Department, reversing Supreme Court, over a dissent, determined the defendant City's motion to set aside the verdict in this slip and fall case should not have been set aside. The court held that whether the Big Apple map sufficiently identified the defective curb where plaintiff fell was a jury question and the verdict should stand: "At trial, plaintiff testified that she tripped and fell, due to a defect at the corner of Madison Street and Rutgers Street. Plaintiff testified that she stepped off the curb with her left foot into the crosswalk on to Madison Street and that the tip of her right foot got caught on something on the ground, which caused her to fall and fracture her ankle. Plaintiff further testified that the curb where she tripped and fell was 'separated from the sidewalk and raised.' Plaintiff also entered into evidence photographs of the street corner where she fell that depicted a broken, cracked and defective curb in front of 197 Madison Street. Another photograph entered into evidence showed that the address of '197 Madison St.' was clearly reflected on the H and M Deli storefront awning, located at the corner of the intersection where plaintiff fell. Counsel for the City further highlighted this point during re-cross-examination of plaintiff regarding the precise location of her fall, when counsel inquired, 'In front of that H and M Deli?... The deli that is addressed 197 Madison, right?' To which plaintiff replied, 'Yes.' Additionally, the Big Apple Map, which the City stipulated to receiving, denoted an 'X' in front of 197-199 Madison Street, and, according to the Big Apple Map Legend, an 'X' indicates a 'broken, misaligned or uneven curb.' … ... [W]hile it is true that the Big Apple Map did not have an 'X' at the precise corner where plaintiff fell, the map did depict an 'X' in front of the address of 197 Madison Street, which encompasses multiple storefronts within one building, stretching from the building on the corner towards the middle of the block." ***Foley v. City of New York*, 2017 N.Y. Slip Op. 04389, 1st Dept 6-6-17**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN DENIED SOLELY ON THE GROUND THAT THE AFFIDAVIT OF SERVICE WAS FILED IN THE WRONG COURT.

The Second Department determined summary judgment should not have been granted on the ground that the affidavit of service was filed in the wrong office. Service was timely made and the error was corrected as soon as it was known: " 'The failure to file proof of service is a procedural irregularity, not a jurisdictional defect, that may be cured by motion or sua sponte by the court in its discretion' ... . Here, there is no reason to believe that the defendants did not properly and timely

serve Minard in compliance with the so-ordered stipulation dated December 8, 2014. Moreover, the defendants promptly requested permission to correct the irregularity in filing the affidavit of service after learning that it was filed in the wrong office, and there was no allegation or indication of prejudice to the plaintiff as a result of the requested correction. Under these circumstances, the Supreme Court improvidently exercised its discretion in denying the defendants' application for an extension of time to file the affidavit of service in the Clerk's office, and thereupon denying their motion for summary judgment on the ground that they failed to file proof of service in that office ... ". ***Buist v. Bromley Co., LLC*, 2017 N.Y. Slip Op. 04417, 2nd Dept 6-7-17**

CRIMINAL LAW, JUDGES.

EXCESSIVE INTERFERENCE BY THE JUDGE DEPRIVED DEFENDANT OF A FAIR TRIAL.

The Second Department determined excessive interference by the judge deprived defendant of a fair trial: " 'Trial judges have wide discretion in directing the presentation of evidence but must exercise that discretion appropriately and without prejudice to the parties' ... . While 'neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process,' the court's discretion in this area is not unfettered ... . 'The overarching principle restraining the court's discretion is that it is the function of the judge to protect the record at trial, not to make it. Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial' ... . Thus, while there is no absolute bar to a trial court asking a particular number of questions of the witnesses in order to advance the goals of truth and clarity, a court may not 'assume the advocacy role traditionally reserved for counsel, and in order to avoid this, the court's discretion to intervene must be exercised sparingly' ... . Here, notwithstanding numerous objections by defense counsel, the Supreme Court exercised little or no restraint in questioning the witnesses at length and improperly 'assume[d] the advocacy role traditionally reserved for counsel' … . We acknowledge that this trial was lengthy because it involved three codefendants and multiple complainants. However, contrary to the People's contention, the court's questioning of the witnesses far exceeded what was necessary to 'clarify[ ] confusing testimony' or facilitate 'the orderly and expeditious progress of the trial' ... . The court engaged in protracted and often unnecessary questioning on both direct and cross-examination, and at times acted as an advocate for the People ...". ***People v. Robinson*, 2017 N.Y. Slip Op. 04473, 2nd Dept 6-7-17**

EDUCATION-SCHOOL LAW.

CRITERIA FOR COURT REVIEW OF THE EXPULSION OF A STUDENT FROM A PRIVATE COLLEGE EXPLAINED.

The Second Department, upholding the expulsion of a student from a private college (Pratt Institute) based upon allegations of sexual harassment, explained the relevant court-review criteria: " '[P]rivate schools are afforded broad discretion in conducting their programs, including decisions involving the discipline, suspension and expulsion of their students' ... . 'Judicial review of the actions of a private school in disciplinary matters is limited to a determination as to whether the school acted arbitrarily and capriciously, or whether it substantially complied with its own rules and regulations' ... . Here, contrary to the petitioner's contention, Pratt Institute informed him of the specific allegations against him, and substantially complied with its sexual harassment policy ... ". ***Matter of Ibe v. Pratt Inst.*, 2017 N.Y. Slip Op. 04443, 2nd Dept 6-7-17**

FAMILY LAW, CONTRACT LAW.

A HEARING IS NECESSARY TO DETERMINE WHETHER A POSTNUPTIAL AGREEMENT IS UNCONSCIONABLE, CRITERIA EXPLAINED.

The Second Determined a hearing was necessary to determine whether a postnuptial agreement, which appeared to strip the wife of her assets, was unconscionable. The court explained the relevant law: "Postnuptial agreements are contracts which require consideration ... . Although postnuptial agreements are generally subject to ordinary principles of contract law ... , the parties, as husband and wife, have a fiduciary relationship to each other ... .To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching ... . A motion to set aside an agreement between spouses may be denied without a hearing if the agreement is fair on its face... . Here, it cannot be said that the agreement is fair on its face. It appears from the record that the defendant has received no benefit from the agreement. It also appears that she relinquished all assets of the marriage, along with her inheritance rights and right to spousal support. Where an agreement appears to be so one-sided and unfair that no rational person exercising common sense would make it, and no fair and honest person would accept it, there should be a hearing to determine whether the agreement is unconscionable in substance ... . Further, the circumstances under which the agreement was executed must be examined ... A reviewing court examining a challenge to a postnuptial agreement will view the agreement in its entirety and under the totality of the circumstances... . Without a hearing to determine the totality of the circumstances, including the extent of the parties' assets, and the circumstances surrounding the execution of the agreement, it cannot be determined on this record whether equity should intervene to invalidate the parties' agreement." ***Barclay v. Barclay*, 2017 N.Y. Slip Op. 04414, 2nd Dept 6-7-17**

FORECLOSURE, CIVIL PROCEDURE.

STATUTE OF LIMITATIONS STARTED TO RUN IN THE FIRST FORECLOSURE PROCEEDING WHEN THE DEBT WAS ACCELERATED, THE ELECTION TO ACCELERATE WAS NEVER REVOKED, THE INSTANT FORECLOSURE ACTION IS TIME-BARRED.

The Second Department, in finding the foreclosure action time-barred, noted that the debt was accelerated (in a prior foreclosure proceeding) which started the six-year statute. The election to accelerate a debt can be revoked but was not here: "An action to foreclose a mortgage is subject to a six-year statute of limitations ... . 'The law is well settled that, even if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt'... . Here, in support of her cross motion, the defendant submitted proof that the mortgage debt was accelerated on May 15, 2007, when the plaintiff commenced the first action to foreclose the subject mortgage. Thus, the six-year limitations period expired prior to the commencement of the instant action on July 9, 2013. Moreover, while a lender may revoke its election to accelerate the mortgage... , the record in this case is barren of any affirmative act of revocation occurring during the six-year limitations period subsequent to the initiation of the prior action ...". ***U.S. Bank N.A. v. Barnett*, 2017 N.Y. Slip Op. 04490, 2nd Dept 6-7-17**

INDIAN LAW, CONTRACT LAW, IMMUNITY.

CHOICE OF LAW PROVISIONS OF CONTRACT DID NOT CONSTITUTE AN UNAMBIGUOUS WAIVER OF SOVEREIGN IMMUNITY, THE INDIAN NATION WAS IMMUNE FROM SUIT IN THIS BREACH OF CONTRACT ACTION.

The Second Department, reversing Supreme Court, determined the choice of law provisions in a contract between plaintiff and defendant Unkechaug Indian Nation did not include a clear-cut waiver of sovereign immunity and must be construed against the drafter, the plaintiff here. Therefore the defendant was immune from suit for breach of contract: "Here, the plaintiff contends that the defendant waived its sovereign immunity by virtue of a choice-of-law provision stating that the contract would be governed by the laws of New York, and by the following provision of the contract: '[The] parties agree that any claim or controversy regarding this Contract shall be most conveniently and economically resolved in Suffolk County, New York, and therefore, the parties agree that any claim or action brought for enforcement, interpretation or damages under this Contract shall be brought only in Suffolk County and the parties agree to forebear from filing a claim in any other jurisdiction.' Although this clause requires 'any claim or controversy' regarding the contract to be resolved in Suffolk County, it does not require that such claim or controversy be resolved by a state court. Rather, under the clause, a party could bring a claim before a mediator, an arbitrator, a tribal court, a state court, or a federal court, as long as the selected forum was located in Suffolk County. Thus, unlike the cases involving arbitration clauses, this clause does not unequivocally express the defendant's agreement to be sued in a state court. ... The fact that the contract also includes a choice-of-law provision does not resolve the ambiguity in the subject clause, since the law of the State of New York could be applied in other forums besides a state or federal court to interpret the contract ...". ***Aron Sec., Inc. v. Unkechaug Indian Nation*, 2017 N.Y. Slip Op. 04413, 2nd Dept 6-7-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

AFTER THE JURY HAD FOUND DEFENDANT DID NOT VIOLATE LABOR LAW § 240(1), THE APPELLATE COURT DETERMINED PLAINTIFF SHOULD HAVE BEEN GRANTED SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION AT THE OUTSET, PLAINTIFF FELL FROM A LADDER WHEN THE LADDER SHIFTED.

After a full trial the jury found defendant did not violate Labor Law § 240(1) and awarded damages on plaintiff's Labor Law § 241(6) cause of action. Plaintiff had fallen from a ladder when it shifted. The Second Department determined plaintiff's motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted at the outset. Because the jury apportioned fault, the damages had to be revamped because comparative fault does not apply to a Labor Law § 240(1) cause of action. The court noted that plaintiff's undocumented immigrant status and the fact he did not pay taxes and used a coworker's name, issues raised by the defendant (apparently in opposition to plaintiff's summary judgment motion), had no relevance to credibility as to any material fact: "Before the matter proceeded to a trial on the issue of liability, the Supreme Court should have granted the plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) cause of action. The plaintiff established his prima facie entitlement to judgment as a matter of law through his deposition testimony, which indicated that he was working on an unsecured ladder that moved while he was standing on it ... . In opposition, Drake, which submitted only an attorney's affirmation, failed to raise a triable issue of fact ... . Contrary to Drake's contention, the fact that the plaintiff was an undocumented immigrant who failed to pay taxes and had used a coworker's name to obtain health insurance immediately following the accident does not present an issue relating to the plaintiff's credibility as to any material fact ... . Further, as 'contributory negligence will not exonerate a defendant who has violated [Labor Law § 240(1)] and proximately caused a plaintiff's injury' ... , the jury's finding of comparative fault, and the corresponding reduction in the damages awarded to the plaintiff, must be vacated." ***Cano v. Mid-Valley Oil Co., Inc.*, 2017 N.Y. Slip Op. 04419, 2nd Dept 6-7-17**

MEDICAL MALPRACTICE, CIVIL PROCEDURE.

CAPSULE CAMERA SWALLOWED TO VISUALIZE A PATIENT'S INTESTINES IS NOT A FOREIGN OBJECT WITHIN THE MEANING OF THE STATUTE OF LIMITATIONS, THE LIMITATIONS PERIOD IS THEREFORE NOT TOLLED UNTIL DISCOVERY OF THE CAPSULE, MEDICAL MALPRACTICE ACTION TIME-BARRED.

The Second Department determined a capsule camera swallowed by plaintiff to facilitate an intestinal examination was not a foreign object for purposes of the statute of limitations. The statute runs from discovery of a foreign object which has been left in the body during surgery. However, the capsule camera was not part of a surgical procedure and it was designed to pass out of the body normally. The plaintiff alleged that the failure to call plaintiff's attention to a 2009 CT scan on which the capsule camera was visible constituted negligence. The Second Department found that the cause of action was really "misdiagnosis" for which the foreign-object toll of the statute of limitations is not available. The action was therefore time-barred: "… In determining whether objects are foreign objects pursuant to CPLR 214-a, '[t]he question then becomes whether . . . [the objects] are analogous to tangible items like . . . [surgical] clamps . . . or other surgical paraphernalia (e.g., scalpels, sponges, drains) likewise introduced into a patient's body solely to carry out or facilitate a surgical procedure' ... . The capsule camera at issue herein was used diagnostically to visualize the condition of the plaintiff's intestines. It was not used or even introduced into the plaintiff's body in the course of a surgical procedure. Rather, the capsule camera was knowingly and intentionally swallowed by the plaintiff with the expectation that it would travel through her digestive system until eliminated in the regular course of digestion. Thus, the malpractice alleged against the moving defendants, the failure to recognize from the 2009 CT scan that the observed metallic object was a retained endoscopic capsule camera, and to advise the plaintiff of such, 'is most logically classified as one involving misdiagnosis—a category for which the benefits of the 'foreign object' discovery rule have routinely been denied' ...". ***Leace v. Kohlroser*, 2017 N.Y. Slip Op. 04429, 2nd Dept 6-7-17**

PERSONAL INJURY.

DEFENDANT DID NOT DEMONSTRATE THE SINGLE STEP DOWN WAS OPEN AND OBVIOUS, DESPITE THE PRESENCE OF A HANDRAIL, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED IN THIS SLIP AND FALL CASE.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this slip and fall case should not have been granted. Plaintiff (Ebner) alleged she did not see the single step down which caused her to fall. The Second Department found that defendant did not prove the step was open and obvious. The handrail was not demonstrated to be a sufficient visual cue: "Here, in support of its motion for summary judgment, the defendant submitted, among other things, Ebner's deposition testimony, deposition testimony of certain of the defendant's employees, and an expert affidavit. Contrary to the defendant's contention, Ebner identified the cause of her fall as her inability to see the single step on the walkway she was traversing ... . The defendant's submissions failed to eliminate triable issues of fact as to whether the step constituted a dangerous condition or whether the subject step was open and obvious, and not inherently dangerous as a matter of law ... . The affidavit of the defendant's expert failed to establish, as a matter of law, that a handrail that the defendant contends was adjacent to the walkway on the date of the subject accident provided a sufficient visual cue to alert pedestrians to the presence of the step. Furthermore, contrary to the defendant's assertion, it failed to demonstrate that it did not have constructive notice of the dangerous condition prior to the subject accident ... ". ***Ross v. Bretton Woods Home Owners Assn., Inc.*, 2017 N.Y. Slip Op. 04482, 2nd Dept 6-7-17**

PERSONAL INJURY.

THE SNOW REMOVAL CONTRACTOR WAS NOT LIABLE FOR PASSIVE OMISSIONS, FAILURE TO SALT ICY AREA DOES NOT CONSTITUTE THE LAUNCHING OF AN INSTRUMENT OF HARM.

The Second Department, in affirming defendants' motions for summary judgment in this slip and fall case, noted, with respect to the snow removal contractor, the failure to salt an icy area is not a ground for liability to a third party, failure to salt does not "launch an instrument of harm:" "A snow removal contractor cannot be held liable for personal injuries 'on the ground that the snow removal contractor's passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition' ... . For example, 'a failure to apply salt would ordinarily neither create ice nor exacerbate an icy condition, as the absence of salt would merely prevent a preexisting ice condition from improving' ... . Moreover, the exception for launching a force or instrument of harm 'cannot be triggered where . . . there is only speculation and conjecture regarding whether the contractor created or exacerbated an icy condition' ... . Here, the plaintiff alleged that [the contractor] should have cleared snow and ice from the bank's roof and awnings to prevent melting and refreezing such as that which allegedly caused his fall. However, such service was not encompassed by its contract. In any event, in failing to provide services beyond those included in its contract, [the contractor] at most failed to guard against a future possibility of ice formation. This is insufficient to support liability ... ". ***Somekh v. Valley Natl. Bank*, 2017 N.Y. Slip Op. 04487, 2nd Dept 6-7-17**

REAL ESTATE, CONTRACT LAW.

THE EMAIL EXCHANGE IN WHICH THE PURCHASE PRICE WAS AGREED TO DID NOT SATISFY THE STATUTE OF FRAUDS, SELLER WAS FREE TO BACK OUT AND SEEK A HIGHER PRICE.

The Second Department, reversing (modifying) Supreme Court, determined the exchange of emails concerning the sale of defendant's property did not satisfy the statute of frauds. Plaintiff's complaint seeking specific performance should have been dismissed. After defendant agreed via email on a purchase price he learned he could get substantially more for the property and he put the brakes on the sale to plaintiff: "The emails relied upon by the plaintiff to establish the alleged agreement among the parties for the purchase of the defendant's apartment were insufficient to satisfy the statute of frauds, as they left for future negotiations essential terms of the contemplated contract, such as a down payment, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities, and were subject to the execution of a more formal contract of sale... . Contrary to the plaintiff's contention, in the emails exchanged by and between the parties and the defendant's attorney, the parties expressly anticipated the execution of a formal contract ...". ***Saul v. Vidokle*, 2017 N.Y. Slip Op. 04485, 2nd Dept 6-7-17**

WORKERS' COMPENSATION LAW, PERSONAL INJURY.

WORKERS' COMPENSATION BOARD'S DETERMINATION PLAINTIFF WAS ENTITLED TO BENEFITS IN THIS SLIP AND FALL CASE WAS FINAL DESPITE HER LACK OF PARTICIPATION IN THE PROCEEDINGS, PLAINTIFF CANNOT BRING A LAWSUIT, WORKERS' COMPENSATION BENEFITS ARE HER ONLY REMEDY.

The Second Department, reversing Supreme Court, determined the defendant church's motion for summary judgment in this slip and fall case should have been granted. The Workers' Compensation insurance covered volunteers. The Workers' Compensation Board (WBC), with no participation by plaintiff, determined plaintiff was a covered volunteer and was entitled to benefits. Plaintiff then sued the church. The Second Department noted that the Workers' Compensation Board's finding plaintiff was a covered volunteer entitled to benefits was final because it was not appealed. The suit was therefore precluded: " '[P]rimary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board' ... . '[W]here the availability of workmen's compensation hinges upon the resolution of questions of fact or upon mixed questions of fact and law, the plaintiff may not choose the courts as the forum for the resolution of such questions' ... . '[A] plaintiff has no choice but to litigate this issue before the Board' … . Thus, the question of whether a particular person is an employee within the meaning of the Workers' Compensation Law is for the WCB to determine in the first instance ... . The findings of the WCB are final and conclusive unless reversed on direct appeal ... , and are not subject to collateral attack in a plenary action ... . This is so even where, as here, the employer has filed a compensation claim on the employee's behalf and the employee did not herself apply for or accept benefits ... ". ***Aprile-Sci v. St. Raymond of Penyafort R.C. Church*, 2017 N.Y. Slip Op. 04412, 2nd Dept 6-7-17**

THIRD DEPARTMENT

CIVIL PROCEDURE, MEDICAL MALPRACTICE, FREEDOM OF INFORMATION LAW (FOIL).

UNDER THE PUBLIC HEALTH LAW CERTAIN DOCUMENTS RELATED TO A HOSPITAL DEATH THAT WERE NOT PART OF A QUALITY ASSURANCE INVESTIGATION SHOULD HAVE BEEN MADE AVAILABLE TO PETITIONER.

The Third Department, reversing Supreme Court, determined that documents concerning the investigation into petitioner's husband's death at a hospital were discoverable under the Public Health Law as long as the documents did not relate to the quality assurance aspect of the investigation. The court noted the criteria for what is discoverable and what is available under the Freedom of Information Act are not identical: "Respondents demonstrated that Public Health Law § 2805-m applied through the affidavit of DOH's [Department of Health's] Acting Records Access Officer, who detailed the investigative process and explained how the statement of deficiencies and plan of correction, as well as the ACTS [ASPEN Complaints/Incidents Tracking System] complaint/incident investigation report, incorporated information collected by the hospital for quality assurance purposes. Our in camera review of those documents confirms that her explanation was accurate. The redactions were therefore proper insofar as they related to quality assurance information and, '[h]aving found a specific guarantee of confidentiality, the privileged information and material is not subject to release or disclosure no matter how strong the showing of need or relevancy' ... . That being said, the redacted portions of investigative notes contained in the ACTS complaint/accident investigation report also include a summary of petitioner's complaint and facts referring to hospital records with no obvious connection to quality assurance goals. This purely factual information did not, contrary to respondents' assertion, fall within an intra-agency exemption designed 'to safeguard internal government consultations and deliberations' ...". ***Matter of Pasek v. New York State Dept. of Health*, 2017 N.Y. Slip Op. 04526, 3rd Dept 6-8-17**

CIVIL PROCEDURE, PERSONAL INJURY, EVIDENCE.

THIRD DEPARTMENT, UNLIKE THE OTHER DEPARTMENTS, REQUIRES THE CPLR EXPERT-WITNESS NOTICE EVEN FOR A TREATING PHYSICIAN, PLAINTIFF WILL HAVE TO DECIDE IF THE DOCTOR WILL TESTIFY AS A FACT WITNESS, AN EXPERT WITNESS, OR BOTH, WITH THE CONSEQUENCES OF THE NOTICE FAILURE TO BE IMPOSED ACCORDINGLY.

The Third Department, over a two-justice concurrence, determined plaintiff in this slip and fall case was required to supply defendant with the expert-opinion notice required by the CPLR, even though the doctor to be deposed (Cicoria) was a treating physician (the other departments do not so require). The deposition was video-taped. The Third Department fashioned a sanction. The videotaped deposition my be used if the doctor acts as a fact witness. If the doctor is to act as an expert witness, the doctor must testify in person or submit to another deposition: "Having concluded that plaintiffs failed to provide the required expert disclosure, we turn our attention to the appropriate remedy for such noncompliance. Plaintiffs' counsel candidly conceded that he was unaware of this Court's interpretation of CPLR 3101 (d) (1) (i) and the corresponding need to file an expert disclosure for a treating physician, and the record is otherwise devoid of any indication that counsel's failure to file such disclosure was willful. Hence, we see no need to preclude plaintiffs from calling Cicoria to testify at trial. That said, defendant is correct in noting that the current procedural posture of this matter places defendant at something of a disadvantage in that defense counsel prepared for and cross-examined Cicoria as a fact witness and in the context of preserving such testimony for use at trial, which is appreciably different than deposing and cross-examining someone who has been denominated as an expert witness prior to trial. For that reason, simply permitting plaintiffs to file the required expert disclosure at this point will not suffice." ***Schmitt v. Oneonta City Sch. Dist.*, 2017 N.Y. Slip Op. 04527, 3rd Dept 6-8-17**

CRIMINAL LAW.

MOTION TO CONDITIONALLY SEAL RECORD OF A MISDEMEANOR DRUG CONVICTION SHOULD HAVE BEEN REVIEWED AND GRANTED.

The Third Department determined defendant's motion to have the record of her drug offense sealed pursuant to Criminal Procedure Law § 160.58 (CPL) should have been reviewed and granted. County Court refused to consider the motion because defendant's plea agreement did not address conditional sealing of the record. But CPL § 160.58 had not been enacted at the time of the plea: "The record establishes that defendant's misdemeanor conviction is her sole criminal offense, she has not been arrested since 2008, she has successfully completed the drug court program (thereby avoiding incarceration), she has obtained a college degree and maintained gainful employment and she continues to participate in Narcotics Anonymous. Further, although defendant has received a certificate of relief from civil disabilities, her criminal record is likely to be an impediment to both the furtherance of her career and her future employment prospects. In view of the foregoing, and given that the People now concur with the relief requested by defendant, her motion should be granted and the record of her criminal conviction conditionally sealed pursuant to CPL 160.58." ***People v. Jihan Qq.*, 2017 N.Y. Slip Op. 04524, 3rd Dept 6-8-17**

CRIMINAL LAW, JUDGES.

WHEN DEFENDANT INDICATED AT SENTENCING HE WAS NOT INVOLVED IN ONE OF THE RELEVANT OFFENSES THE SENTENCING JUDGE SHOULD HAVE QUESTIONED THE DEFENDANT ABOUT WHETHER HE WISHED TO WITHDRAW HIS PLEA, FAILURE TO DO SO REQUIRED REVERSAL.

The Third Department determined statements made by the defendant at his sentencing, denying involvement in at least one of the relevant offenses, raised questions about whether plea was voluntary and required further inquiry, including whether defendant wished to withdraw his plea: "... [W]hile the issue most often arises during the plea allocution... , the Court of Appeals has recognized that a defendant may negate an element of the crime to which a plea has been entered or make a statement suggestive of an involuntary plea at postplea proceedings, including sentencing, which may require the trial court to then conduct a further inquiry or give the defendant an opportunity to withdraw the plea ... . [W]hen confronted by County Court with the fact that he had pleaded guilty to assault in the first degree, which requires intent to cause serious physical injury to another person ... , defendant asserted that it was his deceased friend who 'actually did the shooting' and that he 'was at the wrong place at the wrong time.' County Court recognized that defendant was denying the intentional assault, but it made no further inquiry. County Court proceeded to sentencing without providing defendant with an opportunity to withdraw his guilty plea. This was error. Although defendant did not preserve his challenge to the voluntariness of his plea by making a motion to withdraw his plea, his statements at sentencing triggered the exception to the preservation requirement ... . While defendant's remarks did not necessarily implicate all of the crimes to which he pleaded guilty, because it was an integrated plea agreement with a promised aggregate sentence, the judgment must be reversed in its entirety ... ". ***People v. Gresham*, 2017 N.Y. Slip Op. 04498, 3rd Dept 6-8-17**

EDUCATION-SCHOOL LAW.

UNDER THE EDUCATION LAW, A CHARTER SCHOOL HAS THE AUTHORITY TO OVERSEE ITS OWN PRE-KINDERGARTEN PROGRAM, THERE IS NO STATUTORY AUTHORITY FOR CONTROL OF THE PROGRAM BY THE DEPARTMENT OF EDUCATION OR A SCHOOL DISTRICT.

The Third Department, in a full-fledged opinion by Justice McCarthy, reversing the Commissioner (Education) and Supreme Court, determined the Education Law did not allow the Department of Education (DOE) to regulate every aspect of a charter school's pre-kindergarten program. The relevant statute specifically allows the charter school to oversee its own program: "Initially, Education Law § 3602-ee (12) unambiguously provides charter entities with authority in regard to the programing and operations of prekindergarten programs funded pursuant to the statute. It provides, in relevant part, that 'charter schools shall be eligible to participate in universal full-day pre[]kindergarten programs under [Education Law § 3602-ee], provided that all such monitoring, programmatic review and operational requirements under [Education Law § 3602-ee] shall be the responsibility of the charter entity and shall be consistent with the requirements under [Education Law article 56]' (Education Law § 3602-ee [12]). In this context, the term 'all' could refer to 'the whole amount, quantity, or extent of,' or 'as much as possible,' or 'every' or 'any whatever' ... . Regardless of the exact word sense of 'all' that the Legislature intended, under any applicable plain and obvious meaning of the term, the Legislature's use of the term 'all' tasked the charter entity with full responsibility for the relevant 'monitoring, programmatic review and operational requirements' for the relevant prekindergarten programs (Education Law § 3602-ee [12]) ... . The plain meaning of the provision in no way indicates that another entity — such as a school district — holds concurrent responsibility or authority in this regard, let alone superior authority." ***Matter of DeVera v. Elia*, 2017 N.Y. Slip Op. 04522, 3rd Dept 6-8-17**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

PETITIONER SUBMITTED SUFFICIENT EVIDENCE THE SCHOOL DISTRICT WAS NOT PREJUDICED BY THE DELAY IN FILING A NOTICE OF CLAIM, THE SCHOOL DISTRICT PROVIDED NO EVIDENCE OF PREJUDICE, MOTION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED.

The Third Department determined petitioner's motion for leave to file a late notice of claim should have been granted. Petitioner injured his knee when he stepped into a depression in the school's parking lot. The delay in filing the notice was due to his not being aware of the nature of the injury until he underwent an MRI months after the incident. Supreme Court deemed the excuse for the delay adequate but held plaintiff did not demonstrate the school district was not prejudiced by the delay. The Third Department found that petitioner's proof that the defect in the parking lot was essentially unchanged was sufficient to shift the burden to the school district to show prejudice, which it did not do: "A finding that respondent 'is substantially prejudiced by a late notice of claim cannot be based solely on speculation and inference; rather, a determination of substantial prejudice must be based on evidence in the record' ... . '[T]he burden initially rests on the petitioner to show that the late notice will not substantially prejudice the [respondent]. Such a showing need not be extensive, but the petitioner must present some evidence or plausible argument that supports a finding of no substantial prejudice' ... . Here, petitioner identified the precise location of the incident during his General Municipal Law § 50-h examination by marking a map with a box showing where the bus was parked as he stepped off into the depression, and he represented, through his attorney, that the parking lot defect had not changed since the time of the incident. Photographs of the defect, taken within a month of the incident, were not furnished to Supreme Court, although they had been given to the Workers' Compensation Board in support of petitioner's workers' compensation claim. Respondent, despite being 'in the best position to know and demonstrate whether it has been substantially prejudiced' ... , offered absolutely no response to this contention, although it was required to rebut it 'with particularized evidence' ... . We note that Supreme Court's observation that '[s]now plowing, traffic, weather, or even repairs performed in the interim could have altered the condition' is not based on any evidence in the record and, thus, constitutes the kind of unsupported assertion of prejudice that the Court of Appeals would deem 'speculation and inference' ... . Thus, the record is devoid of any basis to conclude that the 12-week delay in filing the notice of claim caused substantial prejudice to respondent." ***Matter of Kranick v. Niskayuna Cent. Sch. Dist.*, 2017 N.Y. Slip Op. 04529, 3rd Dept 6-8-17**

FAMILY LAW.

FATHER'S MOTION TO VACATE THE DEFAULT JUDGMENT IN THIS CUSTODY MATTER SHOULD NOT HAVE BEEN DENIED, FATHER DEMONSTRATED HE WAS ILL AND, BECAUSE CUSTODY WAS AWARDED TO A NON-PARENT IN HIS ABSENCE BASED UPON UNPROVEN ALLEGATIONS, HE HAD A MERITORIOUS DEFENSE.

The Third Department determined Family Court should have granted father's motion to vacate a default judgment in a custody matter. Custody was awarded to a non-parent (aunt) by stipulation at the proceeding father didn't attend. Father let his attorney know he was ill and his attorney appeared. Father demonstrated he was ill and, because custody was

awarded to a non-parent in his absence based on unproven allegations, he had a meritorious defense: "The records included the diagnoses of cardiomyopathy, high blood pressure and angina, identification of his attending physicians, a listing of his prescribed medications and printouts of his electrocardiograms. We find that Family Court's rejection of proof that "plausibly supports" the father's contention that he was ill on the day of the trial was an abuse of discretion ... . Turning to the father's proffer of a meritorious defense, we note that, 'absent surrender, abandonment, persistent neglect, unfitness, disruption of custody over a prolonged period of time or the existence of other extraordinary circumstances,' a parent has a superior claim of custody of his or her children ... , and, in a custody case, '[t]he nonparent bears the heavy burden of establishing extraordinary circumstances' ... . Family Court accepted the unproven allegations of the petition and the stipulation by the aunt and the mother, none of which provided a factual basis for the custody determination. We also note that, in regard to the best interests of the child analysis, Family Court was not presented with evidence 'to enable it to undertake a comprehensive independent review of the children's best interests'... . Mindful that the ultimate issue in this case is the best interests of the children ... , and that visitation with a noncustodial parent is presumed to be in their best interests ... , we find that the father's challenges to the amended petition constitute meritorious defenses. Accordingly, these findings lead us to conclude that Family Court improvidently exercised its discretion in denying the father's motion to vacate the default order." ***Matter of Hannah MM. v. Elizabeth NN.*, 2017 N.Y. Slip Op. 04504, 3rd Dept 6-8-17**

FORECLOSURE, CONTRACT LAW.

QUESTIONS OF FACT ABOUT WHETHER DECEDENT'S WIFE IS A BORROWER WITHIN THE MEANING OF THE REVERSE MORTGAGE DOCUMENTS PRECLUDES SUMMARY JUDGMENT, IF DECEDENT'S WIFE IS A BORROWER SHE MAY REMAIN IN THE MORTGAGED PREMISES, IF NOT, FORECLOSURE CAN PROCEED.

The Third Department, over a two justice dissent, determined questions of fact about whether decedent's wife (defendant) is a "borrower" within the meaning of the reverse mortgage documents precluded summary judgment. If decedent's wife is a borrower, foreclosure on the mortgage cannot proceed while she resides in the home. If she is not a borrower, foreclosure can proceed upon her husband's death. The dissent argued that the documents drafted by plaintiff mortgage company were internally inconsistent and the company should therefore be precluded from claiming decedent's is not a borrower: "Undoubtedly, where there is no extrinsic evidence relevant to an ambiguity in an agreement, 'the issue is to be determined as a question of law for the court' ... . In contrast, however, '[i]f there is ambiguity in the terminology used . . . and determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury'... . This precedent establishes that the rule 'that any ambiguity in a document is resolved against its drafter[] is a rule of construction that should be employed only as a last resort'... . Here, the extrinsic evidence is relevant to the parties' intentions as to whether defendant is a '[b]orrower' and is also conflicting on that point. Viewing this evidence in the light most favorable to the nonmoving party in regard to the respective motions for summary judgment, the determination of the parties' intentions depends on the credibility of extrinsic evidence — including the credibility of defendant's claim that the parties to the note and mortgage intended for her to be able to remain in the home in the event of her husband's death — and the choices between the reasonable inferences that can be drawn from the extrinsic evidence." ***Nationstar Mtge. LLC v. Goeke*, 2017 N.Y. Slip Op. 04521, 3rd Dept 6-8-17**

MUNICIPAL LAW.

AN OPINION SURVEY WAS PROPERLY CIRCULATED BY THE VILLAGE (CONCERNING THE POLICE DEPARTMENT), THE SURVEY WAS NOT A PROHIBITED ADVISORY REFERENDUM.

The Third Department, reversing Supreme Court, determined a survey submitted to the public by the village concerning the police department was not a prohibited advisory referendum. The survey was deemed to be merely a sampling of public opinion. An advisory referendum, in contrast, requires a vote during an election. The Third Department noted that the petitioners, residents of the village, had common law taxpayer standing to bring the Article 78/declaratory judgment action because there was no other way to address the issue: "... [A] review of the case law dealing with an 'advisory referendum' establishes that each such case involves registered voters going to a polling place during a municipal election and casting a ballot on the proposed question ... . In light of this, it is our view that the proscription against an 'advisory referendum' is limited to a situation where a question that is advisory in nature is placed on the ballot for a vote by the electorate. Here, in contrast, the Board simply seeks to obtain a sampling of public sentiment regarding police services in the Village before the Board makes a decision to alter current police services. In the event that the Board decides to abolish the police department, such a local law would then be mandated to be placed on the ballot as a proposition to be voted on by the electorate at an upcoming election ... . We reject petitioners' contention that the surveys at issue here will somehow allow the Board to 'avoid governmental responsibility and shift the burden of decision [regarding police services] to a public poll' ...". ***Matter of Woodburn v. Village of Owego*, 2017 N.Y. Slip Op. 04513, 3rd Dept 6-8-17**

REAL PROPERTY.

NON-USE ALONE DOES NOT AMOUNT TO ABANDONMENT OF AN EASEMENT, RPAPL 1951 CANNOT BE USED TO RETROACTIVELY EXTINGUISH AN EASEMENT ON SOMEONE ELSE'S LAND.

The Third Department, reversing Supreme Court, determined plaintiffs were not entitled to amend their pleadings to conform to the proof after a nonjury trial in this adverse possession proceeding. Plaintiffs sought adverse possession of portions "paper streets" on both plaintiffs' and defendants' (Hart's) land arguing that any easement had been abandoned and should be extinguished pursuant to Real Property Actions and Proceedings Law (RPAPL) 1951. The court explained that non-use alone does not constitute abandonment and RPAPL 1951 cannot be used to retroactively extinguish an easement on someone else's land: "Because nonuse, as a matter of law, does not establish intent to abandon, and given that plaintiffs did not allege that the proof showed any other acts that would be cognizable in satisfying the requirement of 'unequivocal [acts] . . . clearly demonstrat[ing] the owner[s'] intention to permanently relinquish all rights to [an] easement' ... , plaintiffs' proposed amendment regarding abandonment of any easement is palpably insufficient on its face ... . As the Court of Appeals has made clear, the Legislature intended for RPAPL 1951 (2) to make 'available to owners of parcels burdened with outmoded restrictions an economical and efficient means of getting rid of them' ... . As the Legislature intended for the provision to allow landowners to seek the extinguishment of restrictions on their property, the provision does not permit plaintiffs to extinguish an easement on Hart's property. Moreover, the relevant inquiry for RPAPL 1951 focuses on 'the time the enforceability of the restriction is brought in question' ... . That time frame is a plain indication that any act by a court in extinguishing a restriction would not apply to a time prior to when the enforceability of the restriction was challenged. Therefore, as RPAPL 1951 (2) does not permit plaintiffs to retroactively extinguish an easement on Hart's property, it is inapplicable to plaintiffs' adverse possession claim." ***Ferguson v. Hart*, 2017 N.Y. Slip Op. 04523, 3rd Dept 6-8-17**

FOURTH DEPARTMENT

CIVIL PROCEDURE, PERSONAL INJURY, EVIDENCE.

ALTHOUGH DEFENDANTS SHOULD BE SANCTIONED FOR REPLACING THE STAIRS WHERE PLAINTIFF SLIPPED AND FELL, STRIKING THE ANSWER WAS TOO SEVERE, PLAINTIFF HAD PHOTOGRAPHS OF THE STAIRS AND COULD PROCEED WITH THE SUIT.

The Fourth Department determined defendants should be sanctioned for spoliation of evidence, but that striking the answer is too severe a sanction. Plaintiff allegedly slipped and fell on stairs which were replaced by defendants at a time when plaintiff's expert had yet to examine them. Plaintiff, however, had photographs of the stairs and was therefore able to proceed with the suit: "... [W]e conclude that the court abused its discretion in striking defendants' answer and granting plaintiff partial summary judgment on liability based on defendants' destruction of the stairway ... . In deciding whether to impose sanctions, and what particular sanction to impose, courts look to the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness ... . The burden is on the party requesting sanctions to make the requisite showing ... . 'It is well established that a less drastic sanction than dismissal of the responsible party's pleading may be imposed where[, as here,] the loss does not deprive the nonresponsible party of the means of establishing his or her claim or defense' ... . Here, the record does not demonstrate that plaintiff has been left 'prejudicially bereft' of the means of prosecuting her action ... , given that plaintiff has in her possession, among other evidence of the condition of the stairs, photographs of the stairs taken after the commencement of this action. Thus, we conclude that an appropriate sanction is that an adverse inference charge be given at trial with respect to any now unavailable evidence of the condition of the stairs ... ". ***Burke v. Queen of Heaven R.C. Elementary Sch.*, 2017 N.Y. Slip Op. 04593, 4th Dept 6-9-17**

CIVIL PROCEDURE, PERSONAL INJURY.

THE PRESENCE OF PLAINTIFF'S REPRESENTATIVE IN AN EXAMINATION OF PLAINTIFF BY DEFENDANT'S PHYSICIAN WAS NOT WAIVED, EXCLUSION OF THE REPRESENTATIVE WARRANTED SANCTIONS.

The Fourth Department, reversing (modifying) Supreme Court, over a dissent, determined the exclusion of plaintiff's representative (a nurse) from the examination of plaintiff by defendant's physician in this personal injury (traffic accident) action warranted sanctions: "... [A] plaintiff 'is entitled to be examined in the presence of [his or] her attorney or other . . . representative . . . so long as [that person does] not interfere with the conduct of the examinations' . . . , unless [the] defendant makes a positive showing of necessity for the exclusion of' such an individual' ... . Nonetheless ... there is no requirement that a representative of plaintiff be present during the examination, and plaintiff may waive the right to have a representative present. Two examples of waiver are set forth by the dissent, the first of which involves the plaintiff's merely appearing for the examination without a representative. Clearly, that is not the factual situation here. Second, a waiver can occur by the examined party's unreasonable delay in making a motion to enforce the right ... . Here, it was less than two months from the

November 16, 2015 examination until the January 5, 2016 motion to preclude, not the 2½ years at issue in Pendergast, the decision relied upon the dissent." ***Marriott v. Cappello*, 2017 N.Y. Slip Op. 04580, 4th Dept 6-9-17**

CRIMINAL LAW, ATTORNEYS.

PROSECUTORIAL MISCONDUCT WARRANTED A NEW TRIAL IN THE INTEREST OF JUSTICE WITHOUT ANY NEED TO EVALUATE THE EFFECT OF THE ERRORS ON THE CONVICTION.

The Fourth Department reversed defendant's conviction because of the prosecutor's misconduct: "During jury selection, the prosecutor improperly inquired if defendant 'look[ed] like an arsonist' because she was dressed in red-colored clothing. During cross-examination, the prosecutor improperly questioned defendant on her inability to make bail, thus indicating that defendant was incarcerated ... , and improperly questioned defendant about the conviction of her codefendant husband of the same crime ... . The prosecutor also improperly questioned defendant concerning the criminal history of her husband ... During summation, the prosecutor commented on the failure of defendant's husband to testify regarding her financial condition, again implying that her husband had been convicted of the same crime and was incarcerated ... . Although County Court sustained many of defense counsel's objections and gave curative instructions, we cannot conclude on this record that any resulting prejudice was alleviated... . Moreover, even when a trial court repeatedly sustains a defendant's objections and instructs the jury to disregard certain remarks by the prosecutor, '[a]fter a certain point, . . . the cumulative effect of a prosecutor's improper comments . . . may overwhelm a defendant's right to a fair trial'... , and that is the case here. We therefore 'must reverse the conviction and grant a new trial, . . . without regard to any evaluation as to whether the errors contributed to . . . defendant's conviction. The right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right' ...". ***People v. Hayward-Crawford*, 2017 N.Y. Slip Op. 04581, 4th Dept 6-9-17**

CRIMINAL LAW, EVIDENCE.

PEOPLE DID NOT DEMONSTRATE THE WARRANT WHICH WAS THE BASIS FOR DEFENDANT'S ARREST WAS VALID, THE PAT-DOWN SEARCH WAS NOT JUSTIFIED AS A SAFETY MEASURE, SEIZED DRUGS SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing County Court, determined the search of defendant's person after traffic stop was not supported by proof of a valid warrant for defendant's arrest. Defendant was a passenger in a car stopped by a sheriff's deputy. The driver was arrested for driving without a license. The deputy then checked the defendant's "data" and found defendant did not have a license and there was a warrant for defendant. The defendant was then taken into custody on the warrant and cocaine was found in a pat-down search. The People did not demonstrate that the warrant was valid at the time of the arrest. County Court ruled the search was a valid "safety pat-down" before placing defendant in the police car: " 'We agree with defendant that the court erred in upholding the search on the ground that it was a lawful 'safety pat-down.' There was no evidence in the record of the hearing to support a conclusion that 'defendant had a weapon or was a threat to [the deputy's] safety' ... . Moreover, '[a]lthough a police officer may reasonably pat down a person before he [or she] places [that person] in the back of a police vehicle, the legitimacy of that procedure depends on the legitimacy of placing [the person] in the police car in the first place' ... . Here, the People failed to establish the legitimacy of placing defendant in the patrol vehicle. First, the People failed to establish 'the existence of a validly-issued and outstanding warrant' ... . Once defendant challenged the validity of the warrant by questioning the deputy concerning the status of the warrant and whether it was still valid, the People were 'required to make a further evidentiary showing by producing the . . . warrant' … . The People did not do so. Thus, without establishing the existence of a valid and outstanding warrant, the People failed to establish the legitimacy of placing defendant in the patrol vehicle ... . Although defendant, who did not have a valid driver's license, could not have driven the stopped vehicle from the scene after the arrest of the driver, the deputy testified that, in the absence of a warrant, defendant could have called for someone to pick him up and therefore could have lawfully refused to be transported away from the scene in the patrol vehicle." ***People v. Richards*, 2017 N.Y. Slip Op. 04668, 4th Dept 6-9-17**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S MOTION TO VACATE HIS CONVICTION PROPERLY DENIED, EXTENSIVE DISSENT ARGUES NEWLY DISCOVERED THIRD-PARTY ADMISSIONS REQUIRE A NEW TRIAL.

The Fourth Department, over an extensive, comprehensive dissent, determined defendant's motion to vacate his conviction was properly denied. The defendant was convicted of kidnapping a woman (Heidi) who has never been seen since. The dissent argued newly discovered evidence, third-party admissions, required a new trial. The decision is fact-based and cannot be fairly summarized here:

FROM THE DISSENT (JUSTICE CENTRA): " 'When considering the reliability of a declaration, courts should . . . consider the circumstances of the statement, such as, among other things, the declarant's motive in making the statement—i.e., whether the declarant exculpated a loved one or inculpated someone else, the declarant's personality and mental state, and

the internal consistency and coherence of the declaration' ... . Here, Steen, Breckenridge, and Wescott were not related to defendant and were not his friends, and thus had no reason to exonerate him or implicate themselves or their friends in Heidi's disappearance. Wescott's statement to Priest revealed that she did not like discussing what happened to Heidi, and she showed fear and reluctance to speak to the police about it. The third-party admissions were made to people they knew, not strangers, and were made to provide explanations, rather than mere theories, to the listener as to what actually happened to Heidi. The majority notes that many of the third-party admissions were inconsistent with each other. At first blush, that seems to be the case inasmuch as the statements were that Heidi's body was cut up and buried in a cabin, or burned in a wood stove in the cabin, or placed in a van that was sent to Canada to be salvaged. It is certainly possible, however, that all three of those events could have occurred. I therefore conclude that the testimony of Priest, Braley, and Combes, and the statement of Wescott, would be admissible at defendant's trial, and that evidence would probably change the result of the trial ...". ***People v. Thibodeau*, 2017 N.Y. Slip Op. 04577, 4th Dept 6-9-17**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S STATEMENT THAT HE HAD A HANDGUN SHOULD HAVE BEEN SUPPRESSED, HOWEVER THE HANDGUN WOULD HAVE BEEN DISCOVERED ABSENT THE STATEMENT AND WAS ADMISSIBLE, THE SUPPRESSION ERROR THEREFORE COULD NOT HAVE AFFECTED DEFENDANT'S DECISION TO PLEAD GUILTY.

The Fourth Department, over a two-justice dissent, determined defendant's statement should have been suppressed because he was in custody, not warned of his Miranda rights, and was asked questions designed to elicit an incriminating response. However, although the statement he had a firearm should have been suppressed, the firearm would have been discovered even if the statement had not been made (inevitable discovery doctrine).Therefore the firearm need not be suppressed. Even though the conviction was by guilty plea, the court determined the suppression error could not have affected the defendant's decision to plead guilty and the conviction was affirmed: "Here, defendant's statement admitting his possession of the handgun was the tainted primary evidence arising from the unlawful pre-Miranda custodial interrogation and must be suppressed ... ; however, the inevitable discovery doctrine applies to the handgun as secondary evidence arising therefrom ... . We conclude that there was a 'very high degree of probability' that the officers would have discovered the firearm, which was found inside the right leg of defendant's pants during a lawful and routine search of defendant's person prior to his attempted flight ... . Although defendant's statement admitting to the possession of the firearm should have been suppressed, we conclude that the particular circumstances of this case permit the rare application of the harmless error rule to defendant's guilty plea ... . '[W]hen a conviction is based on a plea of guilty an appellate court will rarely, if ever, be able to determine whether an erroneous denial of a motion to suppress contributed to the defendant's decision, unless at the time of the plea he states or reveals his reason for pleading guilty' ... . 'The … doctrine is not absolute, however, and [the Court of Appeals has] recognized that a guilty plea entered after an improper court ruling may be upheld if there is no reasonable possibility that the error contributed to the plea' ... . In our view, because the firearm was not suppressed and would have been admissible at trial, there is no reasonable possibility that the court's error in failing to suppress defendant's statement admitting possession of the firearm contributed to his decision to plead guilty ... ". ***People v. Clanton*, 2017 N.Y. Slip Op. 04579, 4th Dept 6-9-17**

DISCIPLINARY HEARINGS (INMATES).

FAILURE TO PRESERVE AND PHOTOGRAPH THE CONTRABAND REQUIRED ANNULMENT OF THE CONTRABAND AND SMUGGLING DETERMINATIONS.

The Fourth Department annulled the contraband and smuggling determinations because the respondent did not preserve and photograph the items: "We ... agree with petitioner that the judgment must be modified with respect to the first misbehavior report by granting the petition in part because respondent failed to preserve and photograph the alleged contraband in violation of Department of Corrections & Community Supervision Directive No. 4910A ... , and the error cannot be deemed harmless on this record." ***Matter of Adams v. New York State Dept. of Corr. & Community Supervision*, 2017 N.Y. Slip Op. 04728, 4th Dept 6-9-17**

FREEDOM OF INFORMATION LAW (FOIL).

GRAND JURY MINUTES SHOULD NOT BE RELEASED IN THIS CIVIL RIGHTS ACTION STEMMING FROM A FATAL SHOOTING BY A POLICE OFFICER.

The Fourth Department, reversing Supreme Court, determined the grand jury minutes surrounding a fatal shooting by a police officer should not be released. Decedent's wife sought the grand jury minutes in a federal civil rights action: "We agree with the County that plaintiff failed to 'demonstrat[e] a compelling and particularized need for access' to the grand jury materials... . Such a showing must be made in order to overcome the 'presumption of confidentiality [that] attaches to the record of [g]rand [j]ury proceedings' ... , and is a prerequisite to the court's exercise of its discretion in 'balanc[ing]

the public interest for disclosure against the public interest favoring secrecy' ... . Here, plaintiff failed to establish that the discovery proceedings in federal court would not be sufficient to ascertain the facts and circumstances surrounding the shooting ...". ***Williams v. City of Rochester*, 2017 N.Y. Slip Op. 04646, 4th Dept 6-9-17**

INSURANCE LAW, TOXIC TORTS.

INSURER HAD A DUTY TO DEFEND LAWSUIT BY RESIDENTS WHICH ALLEGED THE INSURED CONTAMINATED THE AREA WITH HAZARDOUS MATERIALS, ALTHOUGH THERE WAS AN EXCLUSION FOR DAMAGES CAUSED BY HAZARDOUS MATERIALS, THE ALLEGATION OF A MALODOROUS CONDITION WAS DEEMED NOT NECESSARILY RELATED TO HAZARDOUS MATERIALS.

The Fourth Department determined defendant insurance company had a duty to defend in this toxic tort case brought by residents in the vicinity of plaintiff business (Hillcrest) which allegedly contaminated the area with hazardous materials. Although the policy excluded coverage for damages caused by hazardous material, the complaint also alleged Hillcrest caused a "malodorous condition" which, the court reasoned, was not necessarily related to hazardous materials: "It is well settled that an insurance company's duty to defend is 'exceedingly broad,' ' and is broader than the duty to indemnify ... . The duty to defend arises whenever allegations of an underlying complaint suggest 'a reasonable possibility of coverage,' 'even if facts outside the pleadings 'indicate that the claim may be meritless or not covered' ... '. '[U]pon a motion such as this[,] the court's duty is to compare the allegations of the complaint to the terms of the policy to determine whether a duty to defend exists' ... . Moreover, 'exclusions are subject to strict construction and must be read narrowly' ... . 'In order to establish that an exclusion defeats coverage, the insurer has the heavy burden' of establishing that the exclusion is expressed in clear and unmistakable language, is subject to no other reasonable interpretation, and is applicable to the facts' ...". ***Hillcrest Coatings, Inc. v. Colony Ins. Co.*, 2017 N.Y. Slip Op. 04613, 4th Dept 6-9-17**

MUNICIPAL LAW, LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH THE TOWN HIRED PLAINTIFF TO REPAIR A VACANT HOUSE, THE TOWN WAS NOT AN OWNER OR GENERAL CONTRACTOR WITHIN THE MEANING OF THE LABOR LAW, TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED FOR THE LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION STEMMING FROM PLAINTIFF'S FALL FROM A LADDER.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff town's motion for summary judgment on the Labor Law §§ 240(1) and 241(6) causes of action should have been granted. Plaintiff was hired by the town to repair a vacant house. He fell from a ladder. The Fourth Department determined the town was not an "owner" or "general contractor" within the meaning of the Labor Law statutes: "We agree with the Town that it established as a matter of law that it is not liable for plaintiff's injuries under Labor Law §§ 240 (1) and 241 (6) inasmuch as it was not an owner of the property or a general contractor on the project. For the purposes of the Labor Law, the term 'owner' encompasses the titleholder of the property where the accident occurred, as well as 'a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his [or her] benefit'... . Here, the Town did not hold title to the property, nor did it have any interest in the property... . Furthermore, even assuming, arguendo, that the Town was an owner of the property, we conclude that the Town would be entitled to the homeowner exemption under the Labor Law ... . We further conclude that the Town established as a matter of law that it was not a general contractor on the project ... . The Town submitted evidence establishing that no Town employees were on the job site, plaintiff's employer, and not the Town, directed plaintiff to the job site, and the Town did not have the authority to direct plaintiff with respect to the method and manner in which he would perform the work. Thus, the Town established that it was not a general contractor inasmuch as it was not 'responsible for coordinating and supervising the project' ... , and plaintiff failed to raise a question of fact." ***Berner v. Town of Cheektowaga*, 2017 N.Y. Slip Op. 04610, 4th Dept 6-9-17**

MUNICIPAL LAW, PERSONAL INJURY.

VILLAGE CODE DID NOT EXPLICITLY IMPOSE TORT LIABILITY FOR SIDEWALK SLIP AND FALLS ON THE ABUTTING PROPERTY OWNERS, ABUTTING PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing (modifying) Supreme Court, determined the abutting property owner (Bank of America) was not liable for this public sidewalk slip and fall. The village code placed responsibility for sidewalk maintenance on the abutting property owner, but did not explicitly impose tort liability on an abutting property owner: " 'Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions to public sidewalks is placed on the municipality and not the abutting landowner'... . 'That rule does not apply, however, if there is an ordinance or municipal charter that specifically imposes a duty on the abutting landowner to maintain and repair the public sidewalk and provides that a breach of that duty will result in liability for injuries to the users of the sidewalk; the

sidewalk was constructed in a special manner for the use of the abutting landowner; the abutting landowner affirmatively created the defect; or the abutting landowner negligently constructed or repaired the sidewalk' ... . We conclude that Bank of America and Jones Lang [the property manager] met their prima facie burden of establishing their entitlement to judgment as a matter of law ... . Although the Code of the Village of Williamsville (Code) imposes a duty on landowners to keep public sidewalks "in good order and repair" (Code § 89-3), it is undisputed that the Code does not "clearly subject landowners to . . . liability" for failing to comply with that duty ... . It is also undisputed that the public sidewalk was not constructed in a special manner for the property owner's benefit, and that neither Bank of America nor Jones Lang [the property manager] negligently constructed or repaired the sidewalk or otherwise created the defect." ***Clauss v. Bank of Am., N.A.*, 2017 N.Y. Slip Op. 04606, 4th Dept 6-9-17**

PERSONAL INJURY.

DUE TO NEGLIGENCE BY A TIRE SHOP WHICH CONCEDED LIABILITY, A WHEEL FLEW OFF DEFENDANT'S CAR AND STRUCK PLAINTIFF'S CAR, DEFENDANT-DRIVER'S CROSS MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Fourth Department, over a dissent, determined defendant's (Wagner's) cross-motion for summary judgment was properly denied. A wheel came off defendant's car and struck plaintiff's car. The defendant tire shop conceded its liability: "An owner and operator of a vehicle has a duty to inspect his or her vehicle and to discover and rectify any equipment defects ... . Moreover, a vehicle operator has a duty to act reasonably to ensure the safe operation and safe stop of her vehicle once it becomes apparent that her vehicle is experiencing a potentially injurious mechanical problem ... Here, we conclude that Wagner failed to carry her burden on the cross motion of demonstrating that she was not negligent as a matter of law in the operation of her vehicle and that there was nothing that she could have done, in the exercise of due care, to avoid the accident ... . Wagner testified at her deposition that, despite perceiving that 'something was wrong with her car,' she continued to operate her vehicle for a period of time without pulling it over fully onto the shoulder of the highway and bringing it to a stop. We note that the 'existence of an emergency and the reasonableness of a driver's response thereto generally constitute issues of fact' ...". ***Michael v. Wagner*, 2017 N.Y. Slip Op. 04578, 4th Dept 6-9-17**

PERSONAL INJURY.

BANK'S MANAGER WAS AWARE OF ICE IN THE PARKING LOT, SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, BANK DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE.

The Fourth Department determined defendant bank's (HSBC's) motion for summary judgment should not have been granted in this ice slip and fall case. The defendant bank's manager testified he was aware of ice in the parking lot. Therefore the bank did not demonstrate a lack of constructive notice of the dangerous condition: "We agree with plaintiff, however, that the court erred in granting that part of the cross motion seeking dismissal of plaintiff's claim against HSBC based on constructive notice, inasmuch as HSBC, by its own submissions, including in particular the deposition testimony of the HSBC branch manager, raised triable issues of fact in that regard ... . The branch manager testified, inter alia, that he was aware on the morning of the accident that an ice advisory was in effect, that he remembered that it was icy that day, that he observed ice on the premises when he arrived at work and, with respect to the location of plaintiff's accident, that he 'was surprised plaintiff had parked there because of how visible the ice was.' That testimony alone warranted denial of the cross motion in part, inasmuch as it raised triable issues of fact with respect to constructive notice... . We therefore modify the order by denying the cross motion insofar as it sought dismissal of plaintiff's claim based on constructive notice and reinstating that claim against HSBC." ***Zazzaro v. HSBC Bank USA, N.A.*, 2017 N.Y. Slip Op. 04607, 4th Dept 6-9-17**

PERSONAL INJURY.

PLAINTIFF'S EVIDENCE WAS SUFFICIENT TO RAISE TRIABLE QUESTIONS OF FACT ABOUT WHETHER THE DEFECT IN THE WALKWAY WAS TRIVIAL AND WHETHER THE DEFECT CAUSED THE SLIP AND FALL.

The Fourth Department determined the evidence submitted by the plaintiff raised a question of fact about the cause of her fall because the evidence identified the only reasonable cause of the fall: "We reject defendants' contentions that there was no non-trivial defect in the temporary walkway and that plaintiff can only speculate as to the cause of her fall. '[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case . . . , including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury' ... . The existence or non-existence of a defect ' is generally a question of fact for the jury' ... . Thus, 'there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable . . . and therefore . . . granting summary judgment to a defendant based exclusively on the dimension[s] of the . . . defect is unacceptable' ... . Here, the record contains testimony and averments from plaintiff and her husband describing, as well as photographs depicting, the alleged defect and its location. Such evidence, considered as

a whole, 'render[s] any other potential cause of [plaintiff's] fall [apart from the identified alleged defect] sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence' ...". ***Divens v. Finger Lakes Gaming & Racing Assn., Inc., LP*, 2017 N.Y. Slip Op. 04612 4th Dept 6-9-17**

REAL PROPERTY.

TITLE VESTS IN THE ADVERSE POSSESSOR AFTER TEN YEARS WITHOUT THE NEED FOR COURT ACTION, CONDUCT OF THE ADVERSE POSSESSOR TRUMPS THE POSSESSOR'S KNOWLEDGE OF A SURVEY SHOWING THE ENCROACHMENT.

The Fourth Department determined plaintiff had demonstrated title by adverse possession to a strip of land on her side of a chain link fence which was there when she purchased the property in 1986. The court rejected the argument that the action was time-barred because the ten-year adverse-possession period ended in 1996. Title vested in plaintiff in 1996 without the need for a court action. The court also rejected the argument that plaintiff was presented with a survey map upon purchase which showed the fence and the actual property line, and therefore plaintiff knew she didn't own the land. Even if plaintiff was aware of the encroachment shown on the survey, the court reasoned, the fact that she cultivated the land for the requisite period of time controlled: "Defendant contends that plaintiff was required to commence a judicial action after the requisite 10-year period passed, i.e., sooner than 2014, in order to gain title to the disputed land. We reject that contention on the ground that 'RPAPL 501 (2), as amended, recognizes that title, not the right to commence an action to determine title, is obtained upon the expiration of the limitations period' (Franza, 73 AD3d at 47 [additional emphasis added]). As we explained in Franza, '[A]dverse possession for the requisite period of time not only cuts off the true owner's remedies but also divests [the owner] of his [or her] estate' . . . Thus, at the expiration of the statutory period, legal title to the land is transferred from the owner to the adverse possessor . . . Title to property may be obtained by adverse possession alone, and [t]itle by adverse possession is as strong as one obtained by grant' ' (id.). Contrary to defendant's contention, plaintiff had no legal obligation to take any legal action to obtain title to the disputed land after 1996 inasmuch as title vested with her that year upon the expiration of the 10-year period. * * * Plaintiff testified that she received the survey after she closed, but that she did not know how to read the survey. When she purchased her home in 1986 and from that time forward, she believed that she owned the strip of land in dispute. Even if plaintiff had read the survey and was aware of the encroachment, the court properly determined that such would not defeat her claim of right. 'Conduct will prevail over knowledge, particularly when the true owners have acquiesced in the exercise of ownership rights by the adverse possessors. The fact that adverse possession will defeat a [survey] even if the adverse possessor has knowledge of the [survey] is not new' ... . In addition, plaintiff established that the chain-link fence was in place from at least 1986, and that she cultivated and maintained the lawn on her side of the fence from that time thereafter ...". ***Slacer v. Kearney*, 2017 N.Y. Slip Op. 04589, 4th Dept 6-9-17**

WORKERS' COMPENSATION LAW.

ACTION SEEKING PAYMENT OF ASSESSMENTS FOR A WORKERS' COMPENSATION LAW SELF-INSURANCE TRUST SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing Supreme Court, determined an action by the administrator of a Workers' Compensation Law self-insurance trust [GSIT] against employers who ceased to fund the trust should not have been dismissed: " 'Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law' ... . [W]e agree with plaintiff that the documentary evidence submitted by defendants does not conclusively establish, as a matter of law, that defendants have no contractual liability to pay the assessments at issue. * * * [T]he record establishes that in 1998 defendants and other contractors that were involved in the construction industry and subject to the Workers' Compensation Law with respect to their employees established the GSIT in order to comply with the law and provide workers' compensation benefits to their employees. Thereafter, all defendants made contributions and participated in the GSIT for varying periods of time, and there is no dispute that, by the end of the 2009 fiscal year, all defendants had ceased making contributions to the GSIT." ***NCA Comp, Inc. v. 1289 Clifford Ave.*, 2017 N.Y. Slip Op. 04575, 4th Dept 6-9-17**

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