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CasePrepPlus

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COURT OF APPEALS

CRIMINAL LAW.

JUROR WHO ASKED TO BE EXCUSED AFTER FOUR DAYS OF DELIBERATIONS BECAUSE SHE COULD NOT SEPARATE HER EMOTIONS FROM HER ANALYSIS OF THE FACTS SHOULD HAVE BEEN EXCUSED AS GROSSLY UNQUALIFIED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the appellate division, determined a juror who asked to be excused after four days of deliberations should have been discharged as "grossly unqualified." The alternate jurors had been excused. The juror repeatedly told the judge she could not separate her emotions from her analysis of the facts. The defendant was charged with stabbing the victim 38 times: "Pursuant to CPL 270.35 (1), '[i]f at any time after the trial jury has been sworn and before the rendition of its verdict . . . the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case . . . the court must discharge such juror. . . . If no alternate juror is available, the court must declare a mistrial.' As explained in *People v. Buford*, a juror is grossly unqualified 'only 'when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict' (69 NY2d at 298 ...). * * * ... [T]he record reveals that it was obvious the juror possessed a state of mind preventing her from rendering an impartial verdict and thus, she was 'grossly unqualified to serve.' The juror declared forthrightly that she could not separate her emotions from her ability to deliberate and was incapable of fulfilling her sworn duty to reach a verdict based solely on the evidence presented at trial and the law. Compelling the juror to resume deliberations could not cure the fundamental problem with her state of mind. The trial court's implicit conclusion that the juror did not 'possess[] a state of mind which would prevent the rendering of an impartial verdict' (*Buford*, 69 NY2d at 298 …) was erroneous." ***People v. Spencer*, 2017 N.Y. Slip Op. 05118, CtApp 6-22-17**

CRIMINAL LAW.

PROPER PROCEDURE FOR DETERMINING YOUTHFUL OFFENDER STATUS NOT FOLLOWED, CASE REMITTED.

The Court of Appeals, reversing the appellate division, held Supreme Court did not follow the proper procedure for making an on-the-record determination of youthful offender eligibility and remitted the matter: "We agree with defendant's contention that the trial court failed to make an on-the-record determination as to whether defendant was eligible for a youthful offender adjudication by first 'considering the presence or absence of the factors set forth in CPL 720.10 (3)' ...". ***People v. Lofton*, 2017 N.Y. Slip Op. 05119, CtApp 6-22-17**

CRIMINAL LAW.

SENTENCING COURT'S RELIANCE ON A CONFIDENTIAL DOCUMENT IN A PRE-SENTENCE REPORT, AND FAILURE TO INFORM THE DEFENDANT OF THE NATURE OF THE DOCUMENT, VIOLATED DUE PROCESS; SENTENCING COURTS ARE NOT REQUIRED TO PUT THE REASONS FOR DENIAL OF YOUTHFUL OFFENDER STATUS ON THE RECORD.

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the appellate division, determined (1) a sentencing judge need not put on the record the reasons for the denial of youthful offender status and (2) the sentencing court's failure to inform defendant of the nature of a "confidential" document included in the pre-sentence report and relied upon by the sentencing judge violated defendant's due process rights: "In its current form, CPL 390.50 — which is entitled 'Confidentiality of pre-sentence reports and memoranda' — declares that while PSIs are presumptively confidential, disclosure to the parties is required for sentencing purposes. * * * ... [I]f a court decides that it is essential to keep confidential any portion of a document that might reveal its source, the court should, at the very least, disclose the nature of the document or redacted portion thereof — to the extent possible without intruding on any necessary confidentiality — and should set forth on the record the basis for such determination. Alternatively, where possible, the court may choose not to rely on the document, and clearly so state on the record. Here, the court failed to explain the nature of the document or the reason for its confidentiality. … As a result of the court's failure to comply with its statutory obligation under CPL 390.50, defendant was deprived of the ability to respond to information that the court reviewed when imposing sentence, thus implicating his due process rights. Additionally, under the circumstances here, the appellate courts were unable to adequately review the

sentencing court's denial of disclosure. Accordingly, the order of the Appellate Division should be reversed and the case remitted to County Court for further proceedings in accordance with this opinion." ***People v. Minemier*, 2017 N.Y. Slip Op. 05120, CtApp 6-22-17**

FIRST DEPARTMENT

CIVIL PROCEDURE.

MOTION TO COMPEL DISCOVERY OF INFORMATION POSTED ON FACEBOOK SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the defendant city was entitled to compel discovery of plaintiff's Facebook posts in this wrongful arrest and prosecution action. The Facebook information tended to show the use of an alias by plaintiff (Moe), which plaintiff had denied, and included a photograph of plaintiff's nephew who was present at the premises where the search warrant was executed: "... [T]he City made a threshold showing that examination of the above Facebook accounts will result in the disclosure of relevant evidence bearing on the claim ... . As such, plaintiff is directed to review and provide or permit access to those Facebook and associated Messenger accounts, including their messenger components, and any deleted materials which contain any information connecting plaintiff to the accounts in question, connecting him to any variation of the nickname 'Moe,' or relevant to his claims that he has had no connection to the apartment searched or the contraband located thereat. Plaintiff shall also provide an authorization permitting Facebook to release the photograph purported to be of plaintiff's nephew, including any metadata associated with the photograph. Production shall be made within 30 days of this order and it is without prejudice to plaintiff seeking, prior to the expiration of the 30-day period, a protective order for expressly identified materials on these Facebook accounts seeking protection from discovery for reasons other than relevancy." ***Flowers v. City of New York*, 2017 N.Y. Slip Op. 05040, 1st Dept 6-20-17**

CRIMINAL LAW, APPEALS.

DEFENDANT EXPRESSLY DENIED THE INTENT ELEMENT OF UNLAWFUL POSSESSION OF A WEAPON DURING THE PLEA COLLOQUY, THE JUDGE DID NOT ADEQUATELY ADDRESS THE ISSUE, CONVICTION REVERSED DESPITE FAILURE TO PRESERVE THE ERROR.

The First Department, reversing defendant's conviction by guilty plea, in the absence of preservation of the error, determined the plea colloquy negated an essential element of the crime. Unlawful possession of a weapon requires an intent to use the weapon unlawfully. Although such intent can be presumed, here defendant expressly negated it: "This is a 'rare case' where the preservation requirement for challenges to guilty pleas does not apply because 'defendant's factual recitation negate[d] an essential element of the crime pleaded to' and the court 'accept[ed] the plea without making further inquiry to ensure that defendant underst[ood] the nature of the charge and that the plea [was] intelligently entered' … . The crime of attempted possession of a weapon in the second degree requires that a defendant intend to use the weapon unlawfully against another. However, during the plea colloquy, defendant explicitly, repeatedly and consistently denied any intent to use the weapon against anyone, lawfully or otherwise, at the time the police recovered it or at any other time. The court asked followup questions, but they were ineffectual because defendant's responses only reconfirmed that he expressly denied having the requisite intent. Although an express admission of unlawful intent may not have been necessary in the first place, particularly because such intent is presumed (see Penal Law § 265.15[4]), defendant expressly negated that intent." ***People v. Medina-Feliz*, 2017 N.Y. Slip Op. 05053, 1st Dept 6-20-17**

FAMILY LAW.

MOTHER'S PETITION TO RELOCATE TO FLORIDA PROPERLY DENIED, INSUFFICIENT SHOWING THE MOVE WOULD BE IN THE BEST INTERESTS OF THE CHILD.

The First Department, in a full-fledged opinion by Justice Kapnick, concluded Family Court properly denied mother's petition to relocate to Florida. Mother was not sure where she would live or work or how child care would be arranged. It did not appear father would be able to visit the child in Florida. The fact that father was behind in child support was not enough to show the relocation would be in the best interests of the child. ***Matter of Salena S. v. Ahmad G.*, 2017 N.Y. Slip Op. 05172, 1st Dept 6-22-17**

INSURANCE LAW, ENVIRONMENTAL LAW.

DAMAGE TO SOIL FROM LEAD EMISSIONS AND LEAD PAINT COULD NOT BE SEPARATED, ALTHOUGH LEAD PAINT DAMAGE WAS NOT SUBJECT TO THE POLICY EXCLUSION, THE EXCLUSION FOR LEAD EMISSIONS CONTROLLED.

The First Department, in an action seeking reimbursement for environmental cleanup costs, determined the policy exclusion from coverage of lead emissions controlled, even though the soil was also contaminated with lead paint, which was not excluded from coverage: "In this case, not only did the damage result from different sources, i.e., lead emissions and lead paint, but, also, one source is excluded from coverage and the other is not. However, the damage resulting from either

source is not readily divisible from the damage resulting from the other. The combined effect of the lead emissions and the lead paint was soil contamination — of the same soil. To the extent a particular area was contaminated solely by lead paint, it was not (and could not have been) included in the EPA's remediation efforts (see 42 USC § 9604). Moreover, claimant would not have had to pay for any damage - including lead paint damage — if not for the accompanying pollution (see 42 USC § 9607). Thus, the entire claim is barred by the pollution exclusions." ***Matter of Midland Ins. Co.*, 2017 N.Y. Slip Op. 05171, 1st Dept 6-22-17**

SECOND DEPARTMENT

CIVIL PROCEDURE.

FURTHER LAWSUITS BETWEEN HUSBAND AND WIFE PROPERLY PROHIBITED BY THE COURT.

The Second Department determined it was appropriate to prohibit further lawsuits in this long-standing series of actions between husband and wife: "The plaintiff appeals from the denial of that branch of his motion which was to enjoin the defendants from commencing any new litigation against, or engaging in any applications or motion practice in existing actions involving, the plaintiff, his medical practice, his wife, Janet Rugg Lew, or his counsel, Wand & Goody, LLP, without prior written permission of the Supreme Court. Although public policy generally mandates free access to the courts, a party may forfeit that right if he or she abuses the judicial process by engaging in vexatious litigation ... . Here, the record reflects that both the plaintiff and the defendants have engaged in extensive vexatious litigation against each other in the Family Court and the Supreme Court from 2003 to the present. Under the circumstances of this case, it would only be appropriate to enjoin the defendants from engaging in further litigation if the plaintiff was enjoined as well. Accordingly, we reverse the order entered September 3, 2014, insofar as appealed from, and grant the subject branch of the plaintiff's motion on condition that he stipulate that he be likewise enjoined from commencing any new litigation against the defendants or engaging in any applications or motion practice in existing actions involving the defendants without written permission of the Supreme Court. If the plaintiff does not so stipulate and serve and file such stipulation in accordance with the terms of this order, then we affirm the order insofar as appealed from." ***Lew v. Sobel*, 2017 N.Y. Slip Op. 05076, 2nd Dept 6-21-17**

CIVIL PROCEDURE, ATTORNEYS.

NOTICE OF APPEARANCE FILED ON BEHALF OF DEFENDANT BEFORE DEFENDANT WAS MADE A PARTY WAIVED ANY SUBSEQUENT LACK-OF-PERSONAL-JURISDICTION DEFENSE.

The Second Department determined a notice of appearance filed on behalf of a defendant (Dariusz Lojek) before he was made a party waived any subsequent defense alleging lack of personal jurisdiction. The subsequent amended summons and complaint naming Lojek as a party was deemed a nullity. After the statute of limitations passed, Lojek moved to dismiss: "On August 22, 2011, the plaintiff commenced this action to recover damages for personal injuries against Asconcio, Inter Euro, Darek Cake Company, and the Grimaldi Bakery Co. Dariusz Lojek, the principal of both Inter Euro and Darek Cake, Inc., was not initially named as a defendant in the action. However, on June 20, 2012, Dariusz Lojek's attorney filed a notice of appearance on his behalf… . Over three months later, on September 24, 2012, the plaintiff filed a supplemental summons and amended complaint … adding Dariusz Lojek … as defendant[] in the action. … Dariusz Lojek [was] served with the supplemental summons and amended complaint in December 2012. ... Since the plaintiff failed to obtain leave of court or a stipulation between the parties before serving and filing the supplemental summons and amended complaint, that service may be deemed a nullity, and the amended complaint dismissed insofar as asserted against the additional parties for lack of personal jurisdiction ... . However, lack of personal jurisdiction may be waived ... . Under the circumstances of this case, by his appearance in June 2012 and his voluntary participation in the action, Dariusz Lojek submitted to the jurisdiction of the court and waived any defense of lack of personal jurisdiction within the applicable statute of limitations ...". ***Jaramillo v. Asconcio*, 2017 N.Y. Slip Op. 05073, 2nd Dept 6-21-17**

CIVIL PROCEDURE, CONSTITUTIONAL LAW.

ATTORNEY GENERAL PROPERLY SUBPOENAED DOCUMENTS RELEVANT TO WHETHER A NON-PROFIT WHICH COUNSELS WOMEN AGAINST TERMINATING THEIR PREGNANCIES WAS PRACTICING MEDICINE WITHOUT A LICENSE, HOWEVER THE SUBPOENA MUST BE TAILORED TO PROTECT THE RIGHT TO FREEDOM OF ASSOCIATION.

The Second Department, in a full-fledged opinion by Justice Cohen, determined the attorney general properly subpoenaed documents relevant to whether the non-profit Evergreen was practicing medicine without a license, but the subpoena had to be tailored to protect the First Amendment rights of Evergreen personnel. Evergreen counsels women in an effort to convince them not to terminate their pregnancies: "There is no question that the Attorney General's investigation is of the utmost importance to protecting the health and safety of women. However, it is equally important that such investigation be carried out with respect and sensitivity to the constitutional rights of those involved. While the subpoena seeks documents that generally bear a reasonable relation to the subject matter of the Attorney General's investigation, the demands are

not narrowly tailored to require production of only those documents directly related to Evergreen's alleged unauthorized practice of medicine. Thus, we limit in scope the demands set forth in the subpoena to require the disclosure of only those documents that are substantially related to the Attorney General's legitimate need to gather evidence to determine whether Evergreen has engaged in the unauthorized practice of medicine and which do not unnecessarily intrude on Evergreen's First Amendment right to freedom of association." ***Matter of Evergreen Assn., Inc. v. Schneiderman*, 2017 N.Y. Slip Op. 05086, 2nd Dept 6-21-1**7

CIVIL PROCEDURE, EVIDENCE.

INSUFFICIENT PROOF SIGNATURE ON A POWER OF ATTORNEY WAS FORGED, SUPREME COURT REVERSED.

The Second Department, reversing Supreme Court, determined the proof of the allegedly forged signature on a power of attorney was insufficient to support declaring the power of attorney null and void: " 'A certificate of acknowledgment attached to an instrument such as a deed or a mortgage raises the presumption of due execution, which presumption . . . can be rebutted only after being weighed against any evidence adduced to show that the subject instrument was not duly executed'... . ' [A] certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing so as to amount to a moral certainty' ... . Here, the plaintiff failed to rebut the presumption of validity of the acknowledged power of attorney. Although an expert opinion is not necessarily required in order to establish that a document is a forgery, where an expert opinion is offered, the expert must 'state with reasonable professional certainty that the signature at issue is not authentic' ... . The plaintiff failed to present evidence authenticating the group of 31 exemplars upon which the plaintiff's handwriting expert primarily relied ... . Further, although the handwriting expert testified that he relied on several additional exemplars, those exemplars likewise were not authenticated ... . Consequently, the testimony of the handwriting expert should not have been considered ... . The testimony of the plaintiff and other witnesses was not sufficient to establish, to a moral certainty, that the 2002 power of attorney was forged. The plaintiff denied having signed the 2002 power of attorney. However, '[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature'...". ***Kanterakis v. Minos Realty I, LLC*, 2017 N.Y. Slip Op. 05074, 2nd Dept 6-21-17**

CIVIL PROCEDURE, PERSONAL INJURY.

NO NEW INJURIES WERE ALLEGED, THE DOCUMENT WAS A SUPPLEMENTAL, NOT AN AMENDED, BILL OF PARTICULARS, LEAVE OF COURT NOT REQUIRED.

The Second Department, reversing Supreme Court, determined the document submitted by plaintiff was a supplemental bill of particulars, not an amended bill of particulars. Therefore the document could be served without permission from the court: "In his original bill of particulars dated February 8, 2006, the injured plaintiff alleged that he sustained permanent personal injuries, including depression, insomnia, agitation, poor concentration, loneliness, and tenseness, and that his injuries were accompanied by distress, depression, stress, and psychological difficulties. After the Supreme Court's order granting the defendant's motion for summary judgment dismissing the complaint was reversed on appeal ... and the case was restored to the trial calendar, the plaintiffs served, pursuant to CPLR 3101(d), an expert witness disclosure dated August 4, 2013, and the affidavit of their expert psychologist dated April 27, 2013. Thereafter, the plaintiffs served a supplemental bill of particulars dated February 17, 2015, alleging the additional injuries or damages of post-traumatic stress disorder and future costs of long-term psychotherapy. In the order appealed from, the court, inter alia, granted that branch of the defendant's motion which was to strike the supplemental bill of particulars and denied that branch of the plaintiffs' cross motion which was to compel the defendant to accept the supplemental bill of particulars. The court found that the supplemental bill of particulars sought to add new injuries, thereby rendering it an amended bill of particulars, and that the plaintiffs failed to demonstrate a reasonable excuse for the inordinate delay in seeking leave to include the new injuries. The plaintiffs appeal. Pursuant to CPLR 3043(b), a plaintiff in a personal injury action may serve a supplemental bill of particulars containing 'continuing special damages and disabilities,' without leave of the court at any time, but not less than 30 days prior to trial, if it alleges 'no new cause of action' or claims no 'new injury.' Here, the plaintiffs sought to allege continuing consequences of the injuries suffered and described in the original bill of particulars, rather than new and unrelated injuries ... . Since the contested bill of particulars is a supplemental bill of particulars, rather than an amended bill of particulars, and was served more than 30 days prior to trial, leave of court was not required ..." ***Khosrova v. Hampton Bays Union Free Sch. Dist.*, 2017 N.Y. Slip Op. 05075, 2nd Dept 6-21-17**

EDUCATION-SCHOOL LAW, NEGLIGENCE.

LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD NOT HAVE BEEN GRANTED, NO SHOWING SCHOOL WAS AWARE OF POTENTIAL LIABILITY WITHIN 90 DAYS, NO ADEQUATE EXCUSE FOR THE DELAY, NO SHOWING SCHOOL WAS NOT PREJUDICED BY THE DELAY.

The Second Department, reversing Supreme Court, determined leave to file a late notice of claim should not have been granted in this gym-class injury case. There was no showing the school was made aware of its potential liability during the 90 days following the injury. Although a medical claim form was filled out and submitted to the school four days after the incident, the description of the incident did not alert the school to potential liability for the fall from gym equipment. A reasonable excuse for the delay was not provided, and a lack of prejudice caused by the delay was not demonstrated: "Although a medical claim form was prepared and submitted to the School District four days after the accident occurred, it merely indicated that the infant petitioner lacerated his eyebrow and fractured his wrist when he fell after hanging from a pull-up bar during physical education class. Where, as here, 'the incident and the injury do not necessarily occur only as the result of fault for which [the School District] may be liable'... , the School District's 'knowledge of the accident and the injury, without more, does not constitute actual knowledge of the essential facts constituting the claim' ... . Rather, '[i]n order to have actual knowledge of the essential facts constituting the claim, [a school district] must have knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim' ... . Contrary to the petitioners' contention, the medical claim form did not provide the School District with actual knowledge of the essential facts underlying the petitioners' claims that, inter alia, it was negligent in its ownership, operation, management, maintenance, and control of the area where the accident occurred, that it was negligent in its hiring, training, and supervision of its employees and agents, or that its employees were negligent in supervising the injured petitioner and responding to the accident ...". ***Matter of D.M. v. Center Moriches Union Free Sch. Dist.*, 2017 N.Y. Slip Op. 05090, 2nd Dept 6-21-17**

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

THERE WERE QUESTIONS OF FACT WHETHER THE SUPERVISORS' FAILURE TO TAKE APPROPRIATE ACTION ON COMPLAINTS OF SEXUAL DISCRIMINATION BY THE COMPANY PRESIDENT CONSTITUTED AIDING AND ABETTING DISCRIMINATION AND RETALIATION.

The Second Department, reversing Supreme Court, determined the sexual discrimination and retaliation causes of action against supervisors, to whom plaintiffs complained about the alleged sexual harassment by the president of the company, should not have been dismissed. It was alleged the supervisors failed to take appropriate action on the complaints and thereby aided and abetted the discrimination and (re: one supervisor) the retaliation causes of action: "An employee who did not participate in the primary violation itself, but who aided and abetted that conduct, may be individually liable based on those actions under both the NYSHRL [New York State Human Rights Law] and the NYCHRL [New York City Human Rights Law] ... . The NYSHRL and the NYCHRL each provide that it is 'an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden [thereunder], or to attempt to do so' ... . Where a defendant provided, or attempted to provide, assistance to the individual or individuals participating in the primary violation, he or she may be found liable for aiding and abetting discriminatory conduct ... . '[T]he law is clear that a supervisor need not make derogatory comments or unwelcome sexual advances to subject himself or herself to liability under the [NYSHRL]. Rather, . . . a supervisor's failure to take adequate remedial measures can rise to the level of actual participation under [the NYSHRL]' ... . Indeed, a failure to conduct a proper and thorough investigation or to take remedial measures upon a plaintiff's complaint of discriminatory conduct is sufficient to impose liability on an aiding and abetting theory ... . * * * ... [The]submissions demonstrated that triable issues of fact exist as to whether [defendant supervisor] had the 'power to do more than carry out personnel decisions made by others'... and, thus, may be held individually liable for the alleged retaliation." ***Ananiadis v. Mediterranean Gyros Prods., Inc.*, 2017 N.Y. Slip Op. 05058, 1st Dept 6-21-17**

FAMILY LAW, ATTORNEYS.

ATTORNEYS FEES IN EXCESS OF WHAT COURT AWARDED NOT AVAILABLE, NOT ENTITLED TO PAYMENT FOR APPELLATE WORK WITHOUT A RETAINER AGREEMENT, LETTER OF ENGAGEMENT IN MATRIMONIAL MATTERS IS MANDATORY.

The Second Department noted that attorney's fees greater that the amount awarded by the court cannot be sought unless the court awarded fees in an amount less than was demanded. The court further noted that a letter of engagement in a matrimonial matter is mandatory and quantum meruit relief is not available: "An attorney is not precluded from seeking fees charged pursuant to a retainer agreement that are greater than the amount granted to the client by the court in the action where the circumstances warrant, such as where the fees awarded by the court are less than the amount demanded ... . Here, the plaintiff obtained awards of the amounts demanded in both the Family Court and Supreme Court matters and, accordingly, was not entitled to additional fees. With respect to the appellate work provided, there was no written retainer agreement, which is required by 22 NYCRR 1400.3, governing such work. While the existing retainer agreements were for

'post judgment' matter, which could be understood as matter arising subsequent to the entry of the judgment of divorce, those agreements explicitly did not encompass appellate work. Therefore, the plaintiff was not entitled to payment for fees incurred for appellate work ... . Further, while in a nonmatrimonial matter the unintentional failure to provide a letter of engagement does not preclude an attorney from recovering the fair and reasonable value of his or her services pursuant to the doctrine of quantum meruit ..., this case involves postjudgment relief in a matrimonial matter, for which a written retainer agreement is required ... . In any event, the plaintiff did not assert a cause of action sounding in quantum meruit in the complaint, and there is no proof in this record of the fair and reasonable value of the plaintiff's services on the appeal. No transcript of the trial has been provided, thus precluding review of that factual issue ...". ***Hyman & Gilbert v. Withers*, 2017 N.Y. Slip Op. 05072, 2nd Dept 6-21-17**

FAMILY LAW, ATTORNEYS.

PARTY SUBJECT TO THIS ORDER OF PROTECTION PROCEEDING DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO COUNSEL.

The Second Department determined Family Court did not ensure that the party subject to an order of protection proceeding knowingly and intelligently waived his right to counsel: "A party in a proceeding pursuant to Family Court Act article 8 has the right to be represented by counsel (see Family Ct Act § 262[a][ii]), but may waive that right provided that he or she does so knowingly, intelligently, and voluntarily ... . In order to determine whether a party is validly waiving the right to counsel, the court must conduct a "searching inquiry" to ensure that the waiver is knowing, intelligent, and voluntary ... . 'While there is no rigid formula to the court's inquiry, there must be a showing that the party was aware of the dangers and disadvantages of proceeding without counsel'... , and it is the 'better practice' for the court to inquire about the litigant's ' age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, voluntary waiver' ... . Here, the record was inadequate to demonstrate that the appellant validly waived his right to counsel ... . Accordingly, the order must be reversed, and the matter remitted to the Family Court, Kings County, for a new hearing at which the appellant shall either appear with counsel or knowingly, voluntarily, and intelligently waive his right to counsel, and a new determination on the petition thereafter." ***Matter of Dixon v. Marshall*, 2017 N.Y. Slip Op. 05085, 2nd Dept 6-21-17**

FAMILY LAW, ATTORNEYS.

FAILURE TO APPOINT NEW COUNSEL IN THE THIS CUSTODY PROCEEDING, AFTER RELIEVING FATHER'S PRIOR COUNSEL, VIOLATED FATHER'S RIGHT TO COUNSEL.

The Second Department determined Family Court's failure to appoint new counsel for father after relieving father's prior counsel in this modification of custody proceeding deprived father of his right to counsel: "Under the circumstances presented, where the Family Court granted assigned counsel's motion to be relieved, refused to assign the father a new attorney, and then compelled the father to choose between representing himself or having his petition dismissed, the Family Court violated the father's right to be represented by counsel ... . The father neither forfeited his right to counsel nor knowingly, voluntarily, and intelligently waived his right to counsel ... . Moreover, the mere fact that the court granted the motion of the father's first assigned counsel to be relieved did not serve to extinguish the father's right to have another attorney assigned to represent him ... . Accordingly, upon granting the motion of the father's assigned counsel to be relieved of his assignment, the Family Court should have assigned the father new counsel ...". ***Matter of Rosado v. Badillo*, 2017 N.Y. Slip Op. 05096, 2nd Dept 6-21-17**

FORECLOSURE, EVIDENCE.

STANDING EVIDENCE DID NOT MEET THE CRITERIA FOR THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, EVIDENCE THE LOAN WAS GOING TO BE USED FOR INVESTMENT PURPOSES RAISED A QUESTION OF FACT WHETHER THE RPAPL NOTICE REQUIREMENTS FOR HOME LOANS APPLIED.

The Second Department determined the bank's motion for summary judgment in this foreclosure action should not have been granted. The bank (Nationstar) did not demonstrate the originator of the mortgage (Aurora) had standing because the relevant evidence did not meet the criteria for the business records exception to the hearsay rule. In addition, the court held that, although there was evidence the notice requirements of the Real Property Actions and Proceedings Law [RPAPL] were not met by the bank, the bank produced evidence the loan was going to be used by defendants for investment purposes and was not, therefore, a "home loan" to which the notice requirements apply: "Here, Nationstar failed to meet its prima facie burden of establishing that Aurora had standing to commence the action. In support of its motion, Nationstar relied on the affidavit of Doris Raimundi, a vice president of Nationstar, who asserted that 'pursuant to the business records of Aurora Loan Services, LLC, the original Note was held in its custody since September 23, 2009, prior to commencement of this action,' and that the note had since been delivered to Nationstar. However, Nationstar failed to demonstrate the admissibility of the records relied upon by Raimundi under the business records exception to the hearsay rule ... , since Raimundi did not attest that she was personally familiar with Aurora's record-keeping practices and procedures ... . Inasmuch as Nationstar's motion was based on evidence that was not in admissible form, it failed to establish its prima facie entitlement

to judgment as a matter of law ... . * * * Nationstar raised a triable issue of fact as to whether the subject loan was a 'home loan' ... . In particular, in light of certain written statements made by [defendant] when he applied for the loan, there is a triable issue of fact as to whether the proceeds of the loan were, in fact, used for 'personal, family, or household purposes,' or whether they were used for investment purposes ... . Thus, the defendants were not entitled to summary judgment on the ground that Aurora failed to comply with RPAPL 1304." ***Aurora Loan Servs., LLC v. Komarovsky*, 2017 N.Y. Slip Op. 05061, 2nd Dept 6-21-17**

INSURANCE LAW.

POST-DEATH INTEREST ON AN ANNUITY SHOULD NOT BE CALCULATED BY APPLYING THE INTEREST RATE AT THE TIME OF PAYMENT TO THE ENTIRE PERIOD BETWEEN THE DEATH OF THE ANNUITANT (1998) AND THE TIME OF PAYMENT (2012).

The Second Department interpreted an ambiguous term in an Insurance Law statute to determine the appropriate post-death interest to be paid on an annuity. The interest rate at the time of payment should not be applied to the entire period between the death of the annuitant (1998) and the date of payment (2012). Rather the historical interest rates during that period should be used to calculate the interest owed: "Insurance Law § 3214(c), entitled 'Interest upon proceeds of life insurance policies and annuity contracts,' provides, in relevant part, that, 'interest upon the principal sum paid to the beneficiary . . . shall be computed daily at the rate of interest currently paid by the insurer on proceeds left under the interest settlement option, from the date of the death of an . . . annuitant in connection with a death claim on such a . . . contract of annuity . . . to the date of payment and shall be added to and be a part of the total sum paid.' ... [T]he word 'currently' is ambiguous, as it could refer to the rate in effect on each date on which a daily computation must be made. Conversely, it could refer to the rate in effect on the date of payment. 'Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results'... . Applying this principle here, the calculation of interest under section 3214(c) should reflect the rates applied by the insurer in the normal course of managing its funds held on deposit, rather than arbitrarily determining the entire interest payment based on the happenstance of the interest rate in effect on the date of payment ... . Accordingly, summary judgment should have been denied to both parties in this case, as the record presents unresolved issues of fact regarding the historical interest rates used by TFLIC and its predecessor, TLICNY, between 1998 (the year of ... death) and 2012 (the year on which the proceeds of Annuity #8231 were paid)." ***Fleischman v. Transamerica Corp.*, 2017 N.Y. Slip Op. 05068, 2nd Dept 6-21-17**

MUNICIPAL LAW, IMMUNITY, PERSONAL INJURY.

COUNTY PROTECTED BY GOVERNMENTAL FUNCTION IMMUNITY, COMPLAINT ALLEGED MOTORCYCLE ACCIDENT CAUSED BY NEGLIGENT TRAFFIC CONTROL.

The Second Department determined governmental function immunity protected the county from suit in this motorcycle accident case. Plaintiff was riding in a charity event and alleged the traffic control by the county caused his injury: "The complaint alleged, among other things, that the County defendants were negligent in failing to properly control traffic along the route of the motorcycle run, and specifically, at the location of the accident. ... [T]he County defendants established their prima facie entitlement to judgment as a matter of law pursuant to the governmental function immunity defense with evidence that the conduct complained of involved the exercise of the police officers' professional judgment, and was therefore discretionary ...". ***Farrago v. County of Suffolk*, 2nd Dept 6-21-17 2017 N.Y. Slip Op. 05067**

MUNICIPAL LAW, PERSONAL INJURY.

WRITTEN NOTICE AS A PREREQUISITE FOR CITY LIABILITY APPLIES EVEN TO TRANSITORY CONDITIONS, HERE ICE ON THE SIDEWALK, SLIP AND FALL ACTION AGAINST CITY SHOULD HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined the action against the city as owner of the sidewalk where plaintiff slipped and fell on ice should have been dismissed because the city did not have written notice of the condition: "Administrative Code of the City of New York § 7-201(c) 'limits the City's duty of care over municipal streets and sidewalks by imposing liability only for those defects or hazardous conditions which its officials have been actually notified exist at a specified location' ... . Accordingly, 'prior written notice of a defect is a condition precedent which plaintiff is required to plead and prove to maintain an action against the City' ... . The only recognized exceptions to the prior written notice requirement involve situations in which either the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality ... . Neither exception is applicable here. 'Transitory conditions present on a roadway or walkway such as debris, oil, ice, or sand have been found to constitute potentially dangerous conditions for which prior written notice must be given before liability may be imposed upon a municipality' ...". ***Puzhayeva v. City of New York*, 2017 N.Y. Slip Op. 05107, 2nd Dept 6-21-17**

PERSONAL INJURY.

A GENERAL AWARENESS THAT WATER COULD COLLECT ON THE FLOOR OF THE LAUNDRY ROOM WAS INSUFFICIENT TO DEFEAT DEFENDANT'S EVIDENCE OF A LACK OF CONSTRUCTIVE NOTICE OF THE CONDITION 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 have been granted. Plaintiff testified he used the dryer in the laundry room and noticed no water on the floor. He returned to the laundry room a half hour or more later. The room was empty at that time, as it had been when he put his clothes in the dryer. After taking his clothes from dryer he slipped on water near the dryer. He did not notice the water until after he fell. The defendant submitted plaintiff's testimony in support of the summary judgment motion. The fact that water on the floor could be a recurring condition in the laundry room was not enough to defeat the evidence of a lack of constructive notice of the condition: "A defendant who moves for summary judgment in a slip-and-fall case has the initial burden of establishing, prima facie, that it neither created the alleged hazardous condition nor had actual or constructive notice of its existence ... . To provide constructive notice, 'a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it' ... . Here, the evidence submitted by the defendant in support of its motion, including the decedent's deposition testimony, was sufficient to establish, prima facie, that the defendant did not create the alleged hazardous condition or have actual or constructive notice of it ... . In opposition, the plaintiff failed to raise a triable issue of fact. A general awareness that the laundry room floor could become wet was legally insufficient to constitute constructive notice of the particular condition that allegedly caused the decedent to slip and fall ...". ***Adamson v. Radford Mgt. Assoc., LLC*, 2017 N.Y. Slip Op. 05057, 2nd Dept 6-21-17**

PERSONAL INJURY.

PLAINTIFF FELL THROUGH OPEN TRAPDOOR IN LEASED PREMISES, DOOR WAS NOT DEFECTIVE, NO BASIS FOR LIABILITY OF BUILDING OWNER.

The Second Department determined the building owner's motion for summary judgment in this slip and fall case should have been granted. The property was leased by a restaurant. Plaintiff fell through an open trapdoor. The trapdoor functioned properly and the fact that the trap door may have been installed without a permit did not raise a question of fact about the owner's liability: "The trapdoor itself was not defective or unsafe when closed, but allegedly became unsafe only upon being left open ... . This is the case even assuming the truth of the plaintiffs' allegation of a statutory violation based upon the installation of the trapdoor without a permit ... . Accordingly, under the circumstances of this case, the owner demonstrated that there was no basis for imposing liability upon it ...". ***Curran v. 201 W. 87th St., L.P.*, 2017 N.Y. Slip Op. 05064, 2nd Dept 6-21-17**

ZONING, REAL PROPERTY.

CAUSES OF ACTION SEEKING TO ENFORCE A ZONING ORDINANCE AND COVENANTS IN ANOTHER'S DEED PROPERLY DISMISSED, CRITERIA EXPLAINED.

The Second Department, in affirming the dismissal of the causes of action, explained when a resident can bring a private action to enforce a zoning ordinance and restrictive covenants in another's deed: "The Supreme Court also properly granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(3) to dismiss the plaintiff's third cause of action, which was to enjoin alleged violations of the Code of the Town of Islip and restrictive covenants and to recover damages incidental to the alleged violations, as the plaintiff lacks standing to bring such a cause of action. Generally, to maintain a private action at common law to enjoin a zoning violation, a plaintiff must establish that he or she has standing to do so by demonstrating that special damages were sustained due to the defendant's activities. To establish special damages, it is necessary to show that there is some depreciation in the value of the premises as real property arising from the forbidden use ... . The plaintiff here failed to show that there was a depreciation of the character of the immediate neighborhood, or a depreciation in the value of her premises. Furthermore, as stated previously, the plaintiff lacks standing to enforce restrictive covenants regarding the defendants' property. The language in the deed from the original grantor indicates that the covenants were not imposed for the benefit of the owner of neighboring land. Therefore, the plaintiff may not enforce the covenants as a third-party beneficiary ... .. Moreover, these covenants were not part of a common development scheme created for the benefit of all property owners within the subject development ...". ***Wheeler v. Del Duca*, 2017 N.Y. Slip Op. 05116, 2nd Dept 6-21-17**

THIRD DEPARTMENT

ADMINISTRATIVE LAW, EVIDENCE.

HEARSAY CONSTITUTED SUBSTANTIAL EVIDENCE AND SUPPORTED THE ABUSE REPORT.

The Third Department determined hearsay evidence constituted substantial evidence and supported a finding that petitioner abused a resident of a facility operated by the Office of People with Developmental Disabilities (OPWDD). A statement

from an eyewitness was the challenged hearsay: "... [I]t is well established that, in an administrative hearing, hearsay is admissible and may support a finding of substantial evidence ... Further, hearsay evidence 'may, under appropriate circumstances, form the sole basis of an agency's determination, unless the hearsay evidence is seriously controverted' ... . Here, the corroborated description of the incident by the eyewitness was only controverted by petitioner's denial that he punched the victim. Petitioner's acknowledgment that he engaged in horseplay with the victim that morning, combined with his statements on two other occasions that he did not recall whether he punched the victim, presented credibility questions for the Justice Center to resolve ... . Consequently, the Justice Center could view the corroborated description by the eyewitness as not seriously controverted and 'sufficiently reliable' so as to constitute substantial evidence ...". ***Matter of Cauthen v. New York State Justice Ctr. for the Protection of People with Special Needs*, 2017 N.Y. Slip Op. 05147, 3rd Dept 6-22-17**

ATTORNEYS.

IN THE FACE OF AN ALLEGATION OF CONFLICT OF INTEREST, SUPREME COURT PROPERLY ORDERED DEFENSE COUNSEL TO PROVIDE STATEMENTS FROM THE JOINTLY REPRESENTED DEFENDANTS CONSENTING TO THE REPRESENTATION.

The Third Department determined Supreme Court properly required defense counsel, who represented several defendants, to submit statements demonstrating the clients' consent to joint representation (to address potential conflicts of interest): "With respect to defense counsel's potential conflict of interest, we first note that defendants failed to preserve any objection that plaintiff lacked standing to raise the issue or failed to file her cross motion in a timely manner. Nor did Supreme Court err in ordering defense counsel to obtain the written statements. '[A] lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests' ... . Notwithstanding such a conflict, a lawyer may still represent a client if '(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing' ... . All Supreme Court's order effectively does is assure compliance with this rule ... . Considering the differing roles of each defendant, we conclude that Supreme Court prudently directed defense counsel to provide the client statements." ***Bynum v. Camp Bisco, LLC*, 2017 N.Y. Slip Op. 05143, 3rd Dept 6-22-17**

DISCIPLINARY HEARINGS (INMATES).

WITNESS TESTIMONY TAKEN OUTSIDE THE INMATE'S PRESENCE REQUIRED ANNULMENT AND EXPUNGEMENT.

The Third Department determined the determination should be annulled and expunged because a witness's testimony was taken outside the inmate's presence without his permission: "In disciplinary hearings, an inmate has a conditional right to call witnesses on his or her behalf and '[a]ny witness shall be allowed to testify at the hearing in the presence of the inmate unless the hearing officer determines that so doing will jeopardize institutional safety or correctional goals' ... . The regulation promulgated by the Department of Corrections and Community Supervision requires that, prior to excluding a witness from testifying at the hearing, the Hearing Officer must 'determine' that his or her presence will threaten institutional safety or correctional goals and inform the inmate of such reason ... . Here, although petitioner conceded at the hearing that one inmate who was in the special housing unit could testify outside his presence, the Hearing Officer failed to set forth, either on the record or on the witness interview sheet, any reason for the other requested witness to testify outside petitioner's presence. Furthermore, the record does not disclose, with regard to this witness, any reason that the presence of the inmate would jeopardize institutional safety or correctional goals ... . As there was no adherence to the Department's regulation, the determination must be annulled ... . Furthermore, although petitioner was asked what questions he would pose to the requested witness and was permitted to hear the recorded testimony of that inmate, he repeatedly objected to the testimony of the inmate being taken outside his presence. As such, petitioner did not waive his right to receive a reason for the exclusion of that witness ...". ***Matter of Kalwasinski v. Venettozzi*, 2017 N.Y. Slip Op. 05139, 3rd Dept 6-22-17**

MEDICAID, ADMINISTRATIVE LAW.

CAP ON STATE MEDICAID FUNDS USED FOR ADMINISTRATIVE COSTS AND EXECUTIVE PAY PROPERLY PROMULGATED BY DEPARTMENT OF HEALTH, CAP ON EXECUTIVE PAY FROM ALL SOURCES EXCEEDED DOH'S REGULATORY AUTHORITY.

The Third Department, in a full-fledged opinion by Justice Peters, over a partial concurrence/dissent, determined the Department of Health's (DOH's) regulations placing caps on expenditure of state Medicaid funds for administrative costs and executive pay were properly promulgated. However, placing a cap on executive pay from all sources (called the "soft cap") was deemed to exceed the Department of Health's authority (disagreeing with the Second Department): "On balance, the Boreali factors weigh heavily in favor of DOH. Accordingly, we conclude that the subject regulations, to the extent that they place a limit on administrative costs and executive compensation paid for by state funds and state-authorized payments, do not violate the separation of powers doctrine... . … DOH exceeded its authority in adopting the soft cap

portion of 10 NYCRR part 1002. First, by attempting to regulate executive compensation from all sources, DOH was acting on its own ideas of sound public policy. Relatedly, inasmuch as the soft cap provision ventures outside DOH's legislative mandate to manage the efficient and effective use of taxpayer money for health care and related services, DOH was not engaged in mere interstitial rulemaking ... . Finally, DOH has no special expertise in administering regulations governing the overall executive compensation or competence in regulating corporate governance as such." ***Matter of Leadingage N.Y., Inc. v. Shah*, 2017 N.Y. Slip Op. 05136, 3rd Dept 6-22-17**

MEDICAL MALPRACTICE, EVIDENCE, PERSONAL INJURY.

PLAINTIFF'S EXPERT DID NOT RAISE A QUESTION OF FACT IN THIS MEDICAL MALPRACTICE ACTION.

The Third Department determined plaintiff's expert did not raise a question of fact in this medical malpractice action. Plaintiff injured her shoulder when she caught a patient (Lisa Clark) who started to fall as she was being transferred from a sideboard to a physical therapy bed. The action was deemed to sound in medical malpractice: "The gravamen of plaintiff's claim is that initiating a slide board transfer of Clark with minimal to moderate assistance deviated from the applicable standard of care, thereby causing Clark's fall and plaintiff's injuries. Defendants met their initial burden of establishing entitlement to judgment as a matter of law by submitting, among other things, an expert affidavit from a physical therapist opining that utilizing a slide board transfer with minimal assistance did not deviate from the accepted standard of care and noting, based on a review of Clark's records, that Clark had successfully completed slide board transfers with minimal or moderate assistance on prior occasions ... . Thus, 'the burden shifted to plaintiff to present expert medical opinion evidence that there was a deviation from the accepted standard of care' ... . In opposition, plaintiff submitted, among other things, the affidavit of an orthopedic surgeon, Matthew J. Nofziger. Even assuming that Nofziger was qualified to provide an opinion with respect to the standard of care used in the physical therapy field for the purpose of assessing the appropriateness of transfer procedures ... , we find his affidavit to be insufficient to raise a triable issue of fact. Although Nofziger criticized the assessment of Clark's physical and cognitive abilities prior to the slide board transfer, he failed to identify or define the applicable standard of care appropriate in this case, merely asserting, in a conclusory manner, that Clark required a higher level of assistance than was provided to her ... . Nor did Nofziger set forth any particular actions or procedures that could have prevented Clark from falling, thereby failing to establish the requisite nexus between the alleged malpractice and plaintiff's injury ... . Therefore, even if considered, Nofziger's affidavit was patently insufficient to raise a triable issue of fact as to whether the transfer procedure used in this case deviated from the applicable standard of care ...". ***Webb v. Albany Med. Ctr.*, 2017 N.Y. Slip Op. 05146, 3rd Dept 6-22-17**

PERSONAL INJURY, IMMUNITY.

CAUSE OF ACTION BASED UPON THE ALLEGATION THE HIGHWAY SHOULDER WAS TOO NARROW, RESULTING IN CLAIMANT'S STRIKING A DISABLED VEHICLE, PROPERLY NO-CAUSED, STATE ENTITLED TO QUALIFIED IMMUNITY.

The Third Department determined claimant's negligent highway design action was properly no-caused after a non-jury trial. Claimant struck a disabled vehicle that was on the shoulder of the road. Claimant alleged the four-foot wide shoulder was too narrow. The state was entitled to qualified immunity for the highway design: "Defendant has a 'duty to keep its roadways in a reasonably safe condition,' but 'is afforded 'a qualified immunity from liability arising out of a highway planning decision' ... . Qualified immunity does not attach where defendant's 'study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan,' however, and it falls on defendant to show that its actions resulted from a sufficiently deliberative process ... . Claimant cites various alleged deficiencies in the design of Route 7 relating to his assertion that the four-foot wide shoulder where the disabled vehicle was parked was too narrow. Route 7 is a four-lane freeway originally designed for traffic speeds of 70 miles per hour but, due to it being on a prolonged incline, a third 'climbing lane' was added in the westbound direction to allow slow vehicles to make their way uphill without posing difficulties for other drivers. The credible proof at trial indicated that the shoulder width reflected the slower vehicles traveling in a climbing lane that was wide enough, in any case, to allow vehicles to pass a disabled vehicle on the shoulder. The record further reveals that the shoulder design was appropriate under the guidelines in place when the road was designed and built ... . Inasmuch as the shoulder 'that was installed met the relevant design standards in effect at the time of its construction,' the Court of Claims properly concluded that defendant cannot be held liable for that design ...". ***Lake v. State of New York*, 2017 N.Y. Slip Op. 05142, 3rd Dept 6-22-17**

VEHICLE AND TRAFFIC LAW.

HOLDING A GPS DEVICE WHILE DRIVING VIOLATES VEHICLE AND TRAFFIC LAW § 1225-D.

The Third Department determined petitioner was properly found guilty of operating a motor vehicle while using a portable electronic device by the appeals board of the Department of Motor Vehicles. Petitioner was driving holding a GPS device: "We agree with the Appeals Board that a hand-held GPS device meets the statutory definition of a 'portable electronic device' inasmuch as it is a 'hand-held device with mobile data access' (Vehicle and Traffic Law § 1225-d [2] [a]). In our view, it

is mobile and receives data to calculate a driver's geographical location and to communicate directions. Moreover, a review of the pertinent legislative history regarding Vehicle and Traffic Law § 1225-d demonstrates that the Legislature intended Vehicle and Traffic Law § 1225-d (2) (a) to encompass any portable electronic device that diverts a driver's attention away from the road and prevents the full use of a driver's hands ... . Thus, we are satisfied that the Appeals Board's interpretation of Vehicle and Traffic Law § 1225-d (2) (a) as encompassing a hand-held GPS device was rational ... . We also agree that there is ample support for the Appeals Board's determination that petitioner was using the GPS device. Petitioner concedes that, while he was driving, he was holding the device in his hand and 'view[ing] the GPS navigation system to read directions.' Accordingly, we find that the determination was supported by substantial evidence ...". ***Matter of Clark v. New York State Dept. of Motor Vehs.*, 2017 N.Y. Slip Op. 05133, 3rd Dept 6-22-17**