CasePrepPlus

July 5, 2017

An advance sheet service summarizing recent and significant New York appellate cases

Editor: **Bruce Freeman**

NEW YORK STATE BAR ASSOCIATION
Serving the legal profession and the community since 1876

COURT OF APPEALS

CONTRACT LAW, TRUSTS AND ESTATES.

THE DOCTRINE OF PROMISSORY ESTOPPEL CAN BE APPLIED TO BYPASS THE STATUTE OF FRAUDS IF THE RESULT OF ENFORCING THE STATUTE WOULD BE UNCONSCIONABLE, THE RESULT HERE WAS NOT UNCONSCIONABLE.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a dissent (raising a different issue), agreeing with the Third Department, held that the doctrine of promissory estoppel can be applied to bypass the Statute of Frauds if enforcing the Statute of Frauds would lead to an unconscionable result. Here, however, disagreeing with the Third Department, the Court of Appeals found that enforcement of the Statute of Frauds would not lead to an unconscionable result. The case involved devised property with a mortgage on it. The decedent, in an earlier will, provided that the mortgage should be paid off with estate funds. However, that provision was not included in a subsequent will. The petitioners sought to enforce an oral agreement to pay off the mortgage. Because the value of the property was about three times the amount of the mortgage, the Court of Appeals reasoned the result was not unconscionable and the Statute of Frauds should be enforced: " 'The Statute of Frauds was designed to guard against the peril of perjury; to prevent the enforcement of unfounded fraudulent claims. But, as Professor Williston observed: 'The Statute of Frauds was not enacted to afford persons a means of evading just obligations; nor was it intended to supply a cloak of immunity to hedging litigants lacking integrity; nor was it adopted to enable defendants to interpose the Statute as a bar to a contract fairly, and admittedly, made' ... , In other words, equity 'will not permit the statute of frauds to be used as an instrument of fraud' ... . We hold that where the elements of promissory estoppel are established, and the injury to the party who acted in reliance on the oral promise is so great that enforcement of the statute of frauds would be unconscionable, the promisor should be estopped from reliance on the statute of frauds. * * * The standard for unconscionability where one party is seeking to avoid the statute of frauds must be equally demanding, lest the statute of frauds be rendered a nullity. ... 'The strongly held public policy reflected in New York's Statute of Frauds would be severely undermined if a party could be estopped from asserting it every time a court found that some unfairness would otherwise result. For this reason, the doctrine of promissory estoppel is properly reserved for that limited class of cases where the circumstances are such as to render it unconscionable to deny the promise upon which the plaintiff has relied' ...". ***Matter of Hennel*, 2017 N.Y. Slip Op. 05266, CtApp 6-29-17**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

PROSECUTOR'S CHARACTERIZATION OF DNA EVIDENCE WAS NOT IMPROPER, DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE CHARACTERIZATION WAS NOT INEFFECTIVE ASSISTANCE.

The Court of Appeals, reversing the appellate division, determined the characterization of the DNA evidence by the prosecutor was not improper, and defense counsel's failure to object to the characterization did not constitute ineffective assistance: "The People's forensic expert gave statistical testimony regarding the likelihood ('1.661 quadrillion times more likely') that defendant and his deceased wife, rather than two randomly selected individuals, were contributors to a DNA mixture profile drawn from a blood stain on defendant's sweatshirt. The prosecutor, during his summation, summarized this testimony by telling the jury that the victim's DNA was "on" defendant's sweatshirt. Defense counsel's failure to object to this characterization did not amount to ineffective assistance of counsel. The expert testimony regarding the 'likelihood ratio' here contrasts with the testimony at issue in *People v. Wright* (25 NY3d 769 [2015]), which 'only indicated that defendant could not be excluded from the pool of male DNA contributors, and . . . provided no statistical comparison to measure the significance of those results' ... . Nor did counsel's other alleged errors of representation, either individually or collectively, deprive defendant of meaningful representation." ***People v. Ramsaran*, 2017 N.Y. Slip Op. 05268, CtApp 6-29-17**

CRIMINAL LAW, CONSTITUTIONAL LAW.

NEW YORK'S PERSISTENT FELONY OFFENDER SENTENCING SCHEME IS CONSTITUTIONAL, IT DOES NOT INVOLVE PROOF OF A FACT OTHER THAN A PRIOR FELONY CONVICTION.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, reaffirmed its prior holdings finding New York's persistent felony offender sentencing scheme constitutional: "The Sixth and Fourteenth Amendments guarantee criminal defendants

in state courts 'the right to a speedy and public trial, by an impartial jury.' To satisfy that right, the People must prove each element of a crime beyond a reasonable doubt. Among those elements is any fact — other than one admitted by the defendant or involving the mere fact of a prior felony conviction ... — that has the effect of increasing the prescribed range of penalties to which a defendant is exposed ... . [W]e have held that the [persistent felony offender] statute ... exposes defendants to an enhanced sentencing range based only on the existence of two prior felony convictions ... . As we have consistently explained, the existence of those prior convictions — each the result of either a guilty plea or a jury verdict — is the 'sole determinant of whether a defendant is subject to recidivist sentencing as a persistent felony offender' ... . Only after the existence of those prior convictions is established and the maximum permissible sentence raised does Supreme Court have 'the discretion to choose the appropriate sentence within a sentencing range prescribed by statute' ... , 'The court's opinion is, of course, subject to appellate review, as is any exercise of discretion. The Appellate Division, in its own discretion, may conclude that a persistent felony offender sentence is too harsh or otherwise improvident' and reduce it in the interest of justice to a sentence within the statutory range fixed by the legislature for the crime of conviction, without regard to the persistent felony offender enhancement ... . 'In this way, the Appellate Division can and should mitigate inappropriately severe applications of the statute' … . In other words, the statute mandates a two-part process: in step one, the court adjudicates the defendant a persistent felony offender if the necessary and sufficient fact of the two prior convictions is proved beyond a reasonable doubt, thereby exposing him to the sentencing range applicable to such offenders; in step two, it evaluates what sentence is warranted and sets forth an explanation of its opinion on that question for the record ...". ***People v. Prindle*, 2017 N.Y. Slip Op. 05267, CtApp 6-29-17**

CRIMINAL LAW, EVIDENCE.

PHOTOGRAPH TAKEN FROM A WEBSITE NOT SUFFICIENTLY CONNECTED TO THE DEFENDANT, CONVICTION REVERSED.

The Court of Appeals, in a full-fledged opinion by Judge Stein, with a concurring opinion by Judge Rivera, reversing the Appellate Division, determined that a photograph taken from a website, allegedly depicting the defendant with a handgun similar to the handgun used in the robbery, was not adequately authenticated. The conviction was reversed. The evidence tying the defendant to the website was not strong enough. There was no showing defendant controlled the website, or that others did not have access to the website: "… [T]he evidence presented here of defendant's connection to the website or the particular profile was exceedingly sparse ... . For example, notably absent was any evidence regarding whether defendant was known to use an account on the website in question, whether he had ever communicated with anyone through the account, or whether the account could be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account, or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein. Without suggesting that all of the foregoing information would be required or sufficient in each case, or that different information might not be relevant in others, we are convinced that the authentication requirement cannot be satisfied solely by proof that defendant's surname and picture appears on the profile page. Thus, even if we were to accept that the photograph could be authenticated through proof that the website on which it was found was attributable to defendant, the People's proffered authentication evidence failed to actually demonstrate that defendant was aware of — let alone exercised dominion or control over — the profile page in question ... . In sum, the People failed to demonstrate that the photograph was a fair and accurate representation of that which it purported to depict. Nor — assuming adoption of the test urged by the People (or some variation thereof) — did the People present sufficient evidence to establish that the website belonged to, and was controlled by, defendant." ***People v. Price*, 2017 N.Y. Slip Op. 05174, CtApp 6-27-17**

CRIMINAL LAW, INSURANCE LAW.

BAIL BONDSMAN IS NOT ENTITLED TO KEEP THE PREMIUM POSTED TO UNDERWRITE A BAIL BOND IF BAIL IS SUBSEQUENTLY DISAPPROVED AND THE ARRESTEE IS NOT RELEASED.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, determined the defendant bail bondsman, Judelson, who agreed to underwrite a $2 million bail bond in return for a premium of $120,560, could not keep the premium when bail was disapproved and the arrestee, Bogoraz, was not released. The bond was posted, but bail was disapproved at the subsequent hearing: "The question before us ultimately turns on when a 'premium' is earned. The use of the word 'premium' in [Insurance Law] section 6804 (a) is significant because that term connotes a consideration paid to an insurer for assuming a risk ... . Risk, when used 'with reference to insurance, describes the liability assumed as specified on the face of the policy' ... . Notably, in 1997, when the legislature amended section 6804 to increase premium rates to sureties, the sponsor justified the change as providing 'an incentive to assume more risk by bonding agents' ... . When does a bail bond surety incur risk? In our view, the risk associated with the bail bond is that the principal admitted on bail will fail to appear and the bail bond will be forfeited ... . If the posted collateral does not cover the bail bond, the surety may suffer a financial loss. The surety does not incur this risk when the principal is not released and so has no opportunity to jump bail ... . While the surety assumes a binding obligation to pay the bail upon posting the bail bond, no risk attaches from this obligation alone. Risk is triggered only when the court takes additional steps following the posting — approving the bail bond and issuing a

certificate authorizing the principal's release ... . When a hearing is ordered under CPL 520.30, the court approves or disapproves the bail bond after the hearing ... . If the court disapproves the bail bond, the surety never runs the risk it contracted to insure." ***Gevorkyan v. Judelson*, 2017 N.Y. Slip Op. 05176, CtApp 6-27-17**

EDUCATION-SCHOOL LAW, CONSTITUTIONAL LAW.

LAWSUIT ALLEGING THE FAILURE TO PROVIDE SOUND BASIC EDUCATION CAN PROCEED, BUT ONLY WITH RESPECT TO SCHOOL DISTRICTS IN NEW YORK CITY AND SYRACUSE.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined a lawsuit alleging school districts' failure to provide the sound basic education guaranteed by the state constitution could proceed, but only with respect to school districts in New York City and Syracuse. The attempt to state causes of action statewide was rejected. The complaint must specifically allege the failure district by district. A second lawsuit, alleging failure to properly fund the schools in New York City, brought by different plaintiffs [Aristy-Farer], was dismissed in its entirety: "The NYSER [New Yorkers for Students' Educational Rights] plaintiffs have sufficiently alleged deficient inputs and outputs with respect to New York City and, although in less detail, Syracuse, that give defendants adequate notice of what a potential remedy could require of them. In that regard, the NYSER complaint alleges deficient inputs (a lack of qualified teachers and principals, low levels of support staff, outdated curricula, unsuccessful English as a Second Language programs, overly large class sizes, lack of basic materials such as textbooks and chalk, a reduction in after-school and summer programs, and inadequate and unclean buildings and facilities) with respect to Syracuse and New York City, with some degree of specificity. The complaint further alleges deficient outputs with respect to those school districts (poor standardized test proficiency, high failure and drop-out rates, poor English proficiency, and inability to meet basic requirements to gain admission to gain admission to City or State colleges because their high schools do not offer basic course requirements). The complaint also alleges a causal link between inadequate State funding and the failure of those two school districts to provide a sound basic education. ... [G]oing forward, plaintiffs here will need to adduce evidence at trial proving, on the basis of current data, that the State has breached its constitutional obligation to provide a sound basic education to students in public schools. Should plaintiffs be successful, it will be up to the State to craft an appropriate response, subject to judicial review, because the courts have 'neither the authority, nor the ability, nor the will, to micromanage education financing' ...". ***Aristy-Farer v. State of New York*, 2017 N.Y. Slip Op. 05175, CtApp 6-27-17**

FIRST DEPARTMENT

CIVIL PROCEDURE.

LAWSUIT INVOLVED WITNESSES AND DOCUMENTS LOCATED IN RUSSIA, DISMISSAL BASED UPON THE DOCTRINE OF FORUM NON CONVENIENS WAS PROPER.

The First Department determined the lawsuit was properly dismissed under the doctrine of forum non conveniens. The lawsuit involved people and documents located in Russia. The fact that defendants wired money from New York was not a sufficient contact: " 'The application of the doctrine of forum non conveniens is a matter of discretion to be exercised by the trial court ...' . Contrary to plaintiff's argument, 'the availability of another suitable forum' is not 'a prerequisite for applying the conveniens doctrine' ... . Considering all the relevant factors, the motion court providently exercised its discretion in applying the doctrine of forum non conveniens. What is left of the instant New York state complaint ... is the claim that plaintiff (a Cypriot corporation with an office in Canada) should have received dividends from Yugraneft (a Russian company that owns an oil field in Siberia). The key events underlying the claim took place in Russia, where the bulk of the witnesses and documents are located. That the individual defendants may have wired funds from New York does not require a contrary result ... . '[O]ur courts should not be under any compulsion to add to their heavy burdens by accepting jurisdiction of a cause of action having no substantial nexus with New York' ...". ***Norex Petroleum Ltd. v. Blavatnik*, 2017 N.Y. Slip Op. 05310, 1st Dept 6-29-17**

CRIMINAL LAW.

DEFENDANT DID NOT DEMONSTRATE HE WOULD NOT HAVE PLED GUILTY HAD THE COURT WARNED HIM OF THE DEPORTATION CONSEQUENCES OF THE PLEA.

The First Department determined defendant did not meet his burden of proof on his claim that he would not have pled guilty the court's failure to warn him of the deportation consequences of the plea: "By pleading guilty, defendant received a lenient disposition, which included a sentence of probation if he complied with all plea conditions. Defendant faced extensive prison terms if convicted after trial of the crimes that led to his 2002 and 2005 pleas, and acquittal of any of those crimes was unlikely. One of the two drug sales involved in the case resulting in the 2002 plea carried a potential life sentence, and the strength of the People's case regarding those sales was apparent from the felony complaint. The facts set forth in the complaint supported a compelling inference that, in both instances, defendant was a participant in a drug-selling operation. A defense that, on two separate days, defendant did nothing more than innocently direct the undercover buyer to a source

of drugs offered little hope of success. Defendant failed to demonstrate that he had significant ties to the United States. The evidence showed that he had a daughter in the Dominican Republic, but no family in the United States, at the time of his 2002 plea. Defendant's claim of an impending marriage to a United States citizen was undermined by the fact that he did not marry that person, despite ample opportunity to do so long before being incarcerated and deported. Accordingly, we conclude that defendant failed to establish that he was prejudiced by the court's failure to warn him of the immigration consequences of his plea at the 2002 proceeding, or by any misleading immigration-related remarks by his counsel at the 2005 proceeding, where defendant again received a lenient disposition involving yet another serious drug charge." ***People v. Corporan*, 2017 N.Y. Slip Op. 05178, 1st Dept 6-27-17**

CRIMINAL LAW, APPEALS.

THE SEARCH WAS NOT INCIDENT TO ARREST AS THE SUPPRESSION COURT RULED, CASE REMITTED FOR CONSIDERATION OF AN ALTERNATE GROUND FOR A VALID SEARCH WHICH WAS ARGUED BUT NOT RULED UPON BELOW.

The First Department determined the seizure of a knife from the defendant was not the result of a valid search incident to arrest. Because the People also argued the seizure was justified for officer safety, but the suppression court did not rule on that issue, the matter was remitted: "Although the record supports a finding that the officer had probable cause to arrest defendant for assault based on reliable information from the assault victim, the People failed to meet their burden ... of demonstrating that the officer intended to arrest defendant for the assault at the time he recovered the knife ... . The officer's testimony, viewed as a whole, indicates that, when he noticed the knife upon approaching defendant and retrieved it from defendant's pocket, the officer's intent was to inquire about the assault in order to verify that defendant was indeed the man who had assaulted the victim. Further, it was not until after the officer had retrieved the knife and confirmed that it was a gravity knife that he asked about the assault. The People argue, in the alternative, as they did at the hearing, that the officer's act of taking the knife from defendant's pocket, where the handle of the knife and its clip were in plain view, was permissible as a self-protective minimal intrusion ... . . However, as the hearing court did not rule on this issue in denying the suppression motion, and therefore did not rule adversely against defendant on this point, we may not reach it on this appeal ...". ***People v. Simmons*, 2017 N.Y. Slip Op. 05179, 1st Dept 6-27-17**

INSURANCE LAW, CONTRACT LAW.

INSURERS' RESPONSES TO INSUREDS' CLAIMS UNDER THE INSURANCE CONTRACTS AMOUNTED TO A DENIAL OF LIABILITY, INSUREDS NOT OBLIGATED TO COOPERATE OR OBTAIN CONSENT TO SETTLE.

The First Department determined the insurer's responses to the insureds' claims amounted to a denial of coverage. Therefore the insureds were not obligated to cooperate with the insurers or obtain the insurers' consent to settle: "Defendants' [insurers'] unreasonable delay in dealing with plaintiffs' claims under the insurance contracts, consistently stated position that the various regulatory investigations and civil actions concerning plaintiffs' alleged late trading and marketing-timing transactions did not constitute claims under the contracts, and insistence that in any event disgorgement payments such as those demanded by the regulators were not insurable as a matter of law constitute a denial of liability under the contracts that justifies plaintiffs' settlement of those claims without defendants' consent ... . The record does not support defendants' contention that plaintiffs breached their obligation to cooperate, but in any event defendants' repudiation of liability for plaintiffs' claims also excuses plaintiffs from performance of that obligation ... . The "reservation of rights" language in defendants' letters to plaintiffs does not change this result ... .". ***J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 2017 N.Y. Slip Op. 05181, 1st Dept 6-27-17**

MENTAL HYGIENE LAW.

STATE'S EXPERT DID NOT ESTABLISH RESPONDENT SEX OFFENDER SHOULD BE SUBJECT TO CIVIL COMMITMENT, SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined the state did not demonstrate respondent (sex offender) should be subject to civil commitment. The conclusory allegations of the state's expert were belied by the respondent's record: "The testimony of the State's experts fell short of the 'detailed psychological portrait' necessary to establish, by clear and convincing evidence, that respondent's disorders result in his having serious difficulty controlling sexually-offending conduct ... . Although respondent's criminal history includes sexual misconduct, the evidence at trial showed that he spent 24 years in prison without any inappropriate sexual behavior, and successfully completed multiple sex offender treatment programs, including one that he took voluntarily ... . The State's experts' conclusory testimony that respondent showed only limited gains from the treatment programs is belied by his sex offender treatment records, which are replete with notes showing that he has good impulse control, takes full responsibility for his crimes, expresses remorse for the harm to his victims, and demonstrates honesty and empathy in disclosing his sex offending behavior." ***Matter of State of New York v. Howard H.*, 2017 N.Y. Slip Op. 05311, 1st Dept 6-29-17**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANTS HAD CONSTRUCTIVE NOTICE OF A DEFECTIVE TAILGATE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff had raised a question of fact about defendants' constructive notice of a defective truck tailgate. Plaintiff, a truck driver, was injured when loading a pallet onto the truck (owned by defendants and rented to plaintiff's employer). Plaintiff alleged his injury was caused by the deteriorated condition of the tailgate (a gap which caused the pallet to get stuck and then roll on the sloping tailgate). Plaintiff's experts raised a question of fact about whether the condition developed over a period of months: "... [P]laintiff raised a triable issue of fact whether defendants had constructive notice of the alleged defects by submitting an affidavit by a licensed engineer and motor vehicle inspector who opined that the alleged defects developed over the course of months as a result of wear and tear and improper maintenance. Contrary to defendants' contention, plaintiff's expert's opinions are based on evidence in the record, namely, plaintiff's description of the alleged gap ... and the photographs that he testified accurately depicted the alleged slope at the time of his accident ... , and are not inadmissible merely because the expert examined the truck more than a year after the accident occurred ...". ***Rosada v. Mendon Truck Rentals, Inc.*, 2017 N.Y. Slip Op. 05314, 1st Dept 6-29-17**

PERSONAL INJURY.

CONVENIENCE STORE HAD TAKEN ADEQUATE MEASURES TO ADDRESS TRACKED IN SLUSH AND SNOW DURING A STORM, DEFENDANTS' SUMMARY JUDGMENT MOTION IN THIS SLIP AND FALL CASE WAS PROPERLY GRANTED.

The First Department determined the convenience store's motion for summary judgment in this slip and fall case was properly granted. Plaintiff alleged she slipped and fell on tracked in slush and snow at the front counter during a snow storm. Defendants had put a mat down, marked the area with a cone, and mopped the area 15 minutes before plaintiff fell: "Defendants were not required to provide a constant, ongoing remedy for an alleged slippery condition caused by moisture tracked indoors during a storm ... . Moreover, defendants demonstrated that they employed reasonable maintenance measures to prevent such a condition ..., by laying out a mat, placing an orange cone on the floor, and regularly mopping the store during the day, including within 15 minutes before plaintiff's accident. These actions were 'reasonable measures to remedy a hazardous condition' ... . The record also shows that defendants did not have constructive notice of the dangerous wet condition. The fact that it was snowing, with water and slush tracked in, does not constitute notice of a particular dangerous situation, warranting more than the laying of floor mats ... ". ***O'Sullivan v. 7-Eleven, Inc.*, 2017 N.Y. Slip Op. 05321, 1st Dept 6-29-17**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

MOTION TO SET ASIDE THE VERDICT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED, PHOTOGRAPHS TAKEN TWO WEEKS AFTER THE ACCIDENT SHOULD NOT HAVE BEEN EXCLUDED, CONTRACT SPECIFICATIONS FOR WORK ON THE AREA OF THE FALL SHOULD NOT HAVE BEEN EXCLUDED, SUBPOENAS FOR WITNESSES WHO HAD NOT BEEN DEPOSED SHOULD NOT HAVE BEEN QUASHED.

The First Department determined the defendants' motion to set aside the verdict in this slip and fall case should not have been granted. The First Department further held that photographs of the sinkhole where plaintiff fell (taken two weeks after the injury) and the contract specifications for repair of the sinkhole should not have been excluded from evidence. In addition plaintiff's subpoenas for a city inspector and a principal of the contractor (Halcyon) which repaired the sinkhole should not have been quashed. The fact that those witnesses were not deposed did not preclude plaintiff's calling them at trial: "... [T]he trial court erred in precluding pictures of the accident site ... . Plaintiff authenticated the photographs at his deposition, and further testimony at trial could have explained how and why the scene depicted in the photos did or did not differed from the scene on the day of the accident ... . Exclusion of the photographs meant that plaintiff was unable to show the jury the hole into which he allegedly fell. Nor should the court have precluded the City's specifications incorporated into its contract with Halcyon. The specifications were expressly incorporated into the contract between Halcyon and the City; thus, they applied not only to the City itself, but also to third parties. Therefore, they were admissible as potential evidence of defendants' negligence... , and indeed, the City failed to show how the specifications transcended the duty of reasonable care. The trial court's exclusion of this evidence regarding the specifications hobbled plaintiff's ability to prove that the City had engaged in affirmative negligence — the very basis upon which the trial court granted the directed verdict. Likewise, the court erred in quashing the subpoenas directed to the City's onsite inspector and a principal of Halcyon ... . Although plaintiff did not formally name the City's onsite inspector and the principal of Halcyon as witnesses, nothing in the CPLR requires a party to generate a trial witness list, nor does the record indicate that the individual court rules required him to do so ... . Indeed, there is no requirement that a party depose a witness in order to call him or her as a witness at trial." ***Gonzalez v. City of New York*, 2017 N.Y. Slip Op. 05180, 1st Dept 6-27-17**

TAX LAW (NYC), MUNICIPAL LAW (NYC).

SPRINT IS NOT A UTILITY AND THEREFORE IS NOT EXEMPT FROM THE UNINCORPORATED BUSINESS INCOME TAX.

The First Department, in a full-fledged opinion by Justice Sweeney, determined plaintiff (Sprint) was not a "utility" within the meaning of the relevant statutes and therefore was required to pay both the Utility Tax and the Unincorporated Business Income Tax (UBT). If Sprint were deemed a utility, as opposed to a vendor of utility services, it would have been exempt from the UBT: "The question in Cable & Wireless [Cable & Wireless v. City of N.Y. Dept. of Fin. (190 Misc 2d 410, 416 [Sup Ct, NY County 2001])], as it is here, was whether the plaintiff telecommunications firm was a utility or a vendor of utility services. The plaintiff there argued, as plaintiff does here, that, under the plain statutory language, it was 'supervised' by the PSC [Public Service Commission] and thus must be classified as a utility. In rejecting plaintiff's argument, the court conducted an extensive review of the legislative history of the statutes and their amendments, including the history of the circumstances surrounding the statutes' initial passage in 1933 and their amendments through the 1940s to more recent times. After holding that plaintiff had the burden of proving that it was a supervised utility and thus exempt from the tax at issue, the court held that 'in using the words subject to the supervision of the [PSC],' the City Council did not envision imposing the Utility Tax on gross income on entities such as [the plaintiff] which exhibit none of the characteristics of the monopolies to which the tax was intended to apply' ... . The plaintiff was therefore not a utility and was not entitled to an exemption from the UBT. We find the reasoning in Astoria [Matter of Astoria Gas Turbine Power, LLC v. Tax Commn. of City of N.Y. (7 NY3d 451 [2006])] and Cable & Wireless to be equally applicable to the present case. By its own admission, plaintiff is "a competitive entity" that does not enjoy monopoly status. As a result, the 'light regulation' by the PSC to which it is subject does not rise to the level of 'supervision' necessary to classify it as a utility and thus warrant an exemption from the UBT."
***Sprint Communications Co., L.P. v. City of N.Y. Dept. of Fin.*, 2017 N.Y. Slip Op. 05194, 1st Dept 6-27-17**

SECOND DEPARTMENT

CIVIL PROCEDURE.

DEFENDANTS, OPERATORS OF A VIRGINIA HOTEL WHERE PLAINTIFF WAS INJURED IN A SHOWER, DEMONSTRATED THE ABSENCE OF BUSINESS TIES TO NEW YORK, THE FACT THAT NEW YORKERS CAN MAKE RESERVATIONS THROUGH A WEBSITE IS NOT ENOUGH.

The Second Department determined defendants' hotel's motion to dismiss based upon the lack of business ties to New York was properly granted. Plaintiff was injured in a shower in the hotel, which is located in Virginia. The defendants demonstrated they did not do business in New York. The fact that reservations could be made through a website (accessed in New York) was not enough. There was no showing the injury was linked to the use of the website: "... [T]he plaintiffs failed to demonstrate that the defendants purposefully availed themselves of the privilege of conducting business in New York. Moreover, accepting as true the plaintiffs' allegation that the defendants were involved in maintaining or operating a website that permitted consumers in New York to make reservations at the subject hotel in Virginia, they failed to make a prima facie showing that there was a substantial relationship between the causes of action asserted in the complaint and any alleged transaction of business through that website ... . The plaintiffs also failed to make a prima facie showing that personal jurisdiction exists under CPLR 302(a)(4) based on ownership, use, or possession of any real property within the state ... . Furthermore, contrary to their contention, the plaintiffs have not made 'a sufficient start' to warrant holding this branch of the defendants' motion in abeyance while discovery is conducted on the issue of jurisdiction ... . The plaintiffs have not alleged facts which would support personal jurisdiction under either CPLR 302(a)(1) or CPLR 302(a)(4), and thus have failed to indicate how further discovery might lead to evidence showing that personal jurisdiction exists here ... ".
***Leuthner v. Homewood Suites by Hilton*, 2017 N.Y. Slip Op. 05212, 2nd Dept 6-28-17**

CIVIL PROCEDURE, ATTORNEYS.

ALTHOUGH PLAINTIFF'S COUNSEL HAD NOTIFIED ALL PARTIES HE WAS NO LONGER REPRESENTING PLAINTIFF, THE PROPER PROCEDURE FOR WITHDRAWAL OF AN ATTORNEY OF RECORD HAD NOT BEEN FOLLOWED, THEREFORE THE STIPULATION OF DISCONTINUANCE SIGNED BY PLAINTIFF PRO SE WAS NOT VALID.

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate a stipulation of discontinuance should not have been denied. At the time plaintiff signed the discontinuance pro se, his attorney (Mulhern) had notified all parties he was no longer representing plaintiff, but the proper procedure for withdrawing as counsel had not been followed. Therefore the stipulation of discontinuance was not valid: " 'Although a client may, as a matter of public policy, discharge an attorney at any time, with or without cause ..., an attorney of record in an action may only withdraw or be changed or discharged in the manner prescribed by statute'... . 'Until an attorney of record withdraws or is changed or discharged in the manner prescribed by CPLR 321, his [or her] authority as attorney of record for his [or her] client continues, as to adverse parties, unabated' ... . Here, at the time that the plaintiff executed the stipulation of discontinuance, he and Mulhern had not

signed and filed a consent to change attorney form or sought a court order permitting Mulhern to withdraw as the plaintiff's counsel. Thus, as to the defendants, Mulhern still was the plaintiff's attorney ... , and the plaintiff was not permitted to act pro se without consent of the court ... . Accordingly, the plaintiff's motion to vacate the stipulation of discontinuance should have been granted." ***Garafalo v. Mayoka*, 2017 N.Y. Slip Op. 05201, 2nd Dept 6-28-17**

CRIMINAL LAW, ATTORNEYS, APPEALS.

TWO OF THE COUNTS TO WHICH DEFENDANT PLED GUILTY WERE NOT SUPPORTED BY THE FACTS ALLEGED, THE ISSUE WAS NOT RAISED ON APPEAL, THEREFORE THE MOTION TO VACATE THE CONVICTION WAS PROCEDURALLY BARRED, STRONG DISSENT.

The Second Department, over a dissent, determined defendant's motion to vacate his conviction on ineffective assistance grounds was properly denied because the issue could have been appealed. Defendant pled guilty to three counts charging robbery second. However the underlying factual allegations for two of the counts only supported robbery third. Defendant was sentenced to consecutive five year terms of imprisonment, one for each robbery second count. The issue was not raised on appeal and a writ of error coram nobis was denied: **FROM THE DISSENT:** "I understand that we are constrained by CPL 440.10(2)(2), which provides that a court must deny a motion to vacate a judgment of conviction where the ground or issue raised upon the motion could have been raised on a direct appeal from the judgment of conviction and the defendant unjustifiably failed to do so ... . Here, the defendant, although represented by appellate counsel, failed to raise, on his direct appeal, the meritorious issues he now raises on his CPL 440.10 motion ... . The defendant filed an application for a writ of error coram nobis, claiming that his appellate counsel was ineffective for failing to raise these issues. However, that application was summarily denied ... . Under these unique circumstances, where the defendant has no other apparent avenue of relief in the New York State court system, it would be fundamentally unfair and unjust to apply the procedural bar set forth in CPL 440.10 to his claims. Accordingly, while I understand the reasoning the majority applies in reaching its determination, I cannot join it, and must respectfully dissent." ***People v. McKenzie*, 2017 N.Y. Slip Op. 05243, 2nd Dept 6-28-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

UPWARD DEPARTMENT FROM THE PRESUMPTIVE RISK LEVEL NOT AUTHORIZED, CRITERIA EXPLAINED.

The Second Department, reversing County Court, determined the upward departure from the presumptive risk level was not authorized. The facts were not discussed but the applicable law was clearly explained: "Once the presumptive risk level has been established at a risk level hearing, the court is permitted to depart from it if 'special circumstances' warrant a departure ... . An upward departure is permitted only if the court concludes, upon clear and convincing evidence, that there exists an aggravating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the Guidelines ... . 'Under SORA, a court must follow three analytical steps to determine whether or not to order a departure from the presumptive risk level indicated by the offender's guidelines factor score. At the first step, the court must decide whether the aggravating or mitigating circumstances alleged by a party seeking a departure are, as a matter of law, of a kind or to a degree not adequately taken into account by the guidelines' ... . 'At the second step, the court must decide whether the party requesting the departure has adduced sufficient evidence to meet its burden of proof in establishing that the alleged aggravating or mitigating circumstances actually exist in the case at hand. If the party applying for a departure surmounts the first two steps, the law permits a departure, but the court still has discretion to refuse to depart or to grant a departure' … . If, however, the People do not satisfy the first two requirements, the court does not have the discretion to upwardly depart from the presumptive risk level ... . Under the circumstances presented, the People did not meet their burden of proof with respect to the first two requirements. Therefore, an upward departure was not authorized ... ". ***People v. Cassarly*, 2017 N.Y. Slip Op. 05251, 2nd Dept 6-28-17**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

SUPREME COURT DID NOT ERR IN HOLDING THE SORA HEARING IN DEFENDANT'S ABSENCE WITHOUT MAKING A DETERMINATION OF DEFENDANT'S COMPETENCE, THERE WERE CLEAR SIGNS DEFENDANT DID NOT UNDERSTAND THE PROCEEDINGS.

The Second Department, in a full-fledged opinion by Justice Roman, held Supreme Court did not err in excluding defendant from the SORA proceeding because of unruly behavior and proceeding with the hearing without a determination of defendant's competency. Defendant's competency had been called into question by defendant's past behavior, his behavior at the SORA hearing, and defense counsel's statements to the court. The opinion is comprehensive and includes an extensive discussion of the due process rights afforded defendants in SORA proceedings, parole revocation proceeding, and proceedings under the Mental Hygiene Law: "While the absence of a provision in SORA for a proceeding involving a defendant who is incapacitated is an issue which the Legislature may wish to address, we hold that if, and when, the defendant is mentally competent to understand the nature of the SORA proceeding, a de novo SORA risk assessment hearing may be held. Correction Law § 168-o(2) permits a sex offender required to register pursuant to SORA to petition the court annually for modification of his or her risk level classification ... . Although the statute places the burden on a defendant seeking modification to prove the facts supporting the requested modification by clear and convincing evidence ... , in light of the

fact that an incompetent defendant is not 'present' at the original hearing, the burden should remain with the People at the subsequent hearing at which the defendant is, for the first time, present. This approach fulfills the court's mandatory obligations under SORA and ensures the statute's goal of protecting the public, while, at the same time, affording the defendant the opportunity to be present and heard on the issue of his risk level designation when he is competent to do so." ***People v. Parris*, 2017 N.Y. Slip Op. 05252, 2nd Dept 6-28-17**

DEFAMATION.

REVIEW OF PLAINTIFF'S WORK POSTED ON YELP WAS OPINION, NOT ACTIONABLE LIBEL.

The Second Department determined that a review of plaintiff's work at defendant's home posted on Yelp was not actionable as libel per se. The review was an expression of opinion by a dissatisfied customer: "After the plaintiff installed a custom home theater system in the defendant's home, the defendant posted a review of the services she received from the plaintiff on the Internet website Yelp.com. The plaintiff commenced this action, alleging, among other things, that the review constituted libel per se. The defendant moved, inter alia, pursuant to CPLR 3211(a)(7) to dismiss that cause of action. The Supreme Court granted that branch of the defendant's motion. A 'libel action cannot be maintained unless it is premised on published assertions of fact' ... . Whether an allegedly defamatory statement constitutes actionable fact or nonactionable opinion is a question of law to be resolved by the courts ... . In resolving that question, '[r]ather than sifting through a communication for the purpose of isolating and identifying assertions of fact,' the courts should 'consider the content of the communication as a whole,' and 'look to the over-all context in which the assertions were made' to determine 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff'... . Here, given the context in which the challenged statements were made and viewing the content of the review as a whole, a reasonable reader would have believed that the writer of the review was a dissatisfied customer who utilized the Yelp website to express an opinion ...". ***Crescendo Designs, Ltd. v. Reses*, 2017 N.Y. Slip Op. 05198, 2nd Dept 6-28-17**

FAMILY LAW.

THE RECORD SUPPORTED A NEGLECT FINDING BASED UPON FATHER'S ABUSE OF MOTHER, FAMILY COURT REVERSED.

The Second Department, reversing Family Court, determined the record supported a neglect finding based upon domestic abuse witnessed or overheard by the children: "Contrary to the Family Court's conclusion, impairment or an imminent danger of impairment to the physical, mental, or emotional condition of the subject children could be inferred from the father's conduct ... . A single act of domestic violence in the presence of a child ... , or within the hearing of a child ... , may be sufficient for a neglect finding. In this case, there was evidence of repeated acts of domestic violence while the children were present in the household ... , which the eldest child attributed to the father's drug use. Furthermore, the father did not testify, warranting the "strongest negative inference" against him ... . Under these circumstances, the Family Court's findings that the subject children were not neglected are not supported by the record. Accordingly, we reverse the order, reinstate the petitions, find that the children are neglected within the meaning of Family Court Act § 1012(f), and remit the matter to the Family Court, Kings County, for a dispositional hearing and determinations thereafter." ***Matter of Jihad H. (Fawaz H.)*, 2017 N.Y. Slip Op. 05224, 2nd Dept 6-28-17**

FAMILY LAW.

SUPREME COURT IMPROPERLY AWARDED CUSTODY TO FATHER, RELIEF WHICH HAD NOT BEEN REQUESTED BY FATHER, WITHOUT A BEST INTERESTS HEARING, AFTER MOTHER ASKED TO APPEAR AT A HEARING BY TELEPHONE.

The Second Department, reversing Supreme Court, determined the award of custody to father, which father had not requested, when mother asked to appear at a hearing by telephone was improper. The hearing was to determine father's allegation mother had violated the visitation provisions of the consent order awarding custody to her. The child had appealed. The best interests of the child are paramount and don't appear to have been considered by the court: "The paramount concern in any custody or visitation determination is the best interests of the child ... . 'In order to modify a consent order granting sole custody to a parent, there must be a showing of a change [in] circumstances such that modification is required to protect the best interests of the child' ... . 'Custody determinations should generally be made only after a full and plenary hearing and inquiry. This general rule furthers the substantial interest, shared by the State, the [child], and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interests of the child' ... . Reversal or modification of an existing custody order 'should not be a weapon wielded as a means of punishing a recalcitrant' or contemptuous parent ... . Moreover, where no party has moved for a change in custody, a court may not modify an existing custody order in a non-emergency situation absent notice to the parties, and without affording the custodial parent an opportunity to present evidence and to call and cross-examine witnesses ...". ***Matter of Noel v. Melle*, 2017 N.Y. Slip Op. 05226, 2nd Dept 6-28-17**

FAMILY LAW, ATTORNEYS.

FATHER TOLD THE COURT HE HAD RETAINED COUNSEL BUT COUNSEL COULD NOT ATTEND THE PETITION-TO-RELOCATE HEARING THAT DAY, COURT WENT AHEAD WITH THE HEARING, FATHER DEPRIVED OF HIS STATUTORY RIGHT TO COUNSEL.

The Second Department, reversing Family Court, determined father had been deprived of his right to counsel in mother's relocation-petition proceeding. Father appeared for the hearing and told the court he had retained an attorney but the attorney could not attend that day. The court went ahead with the hearing: "After the court granted assigned counsel's request to be relieved, it adjourned the hearing until June 24, 2016, so that the father could retain counsel. On June 24, 2016, the father told the court that he had retained an attorney but that the attorney could not be in court that day. The court, however, proceeded with the hearing after stating that it had no choice but to proceed. We agree with the father's contention that he was deprived of his statutory right to counsel ... . Under the circumstances, instead of ordering the hearing to proceed, the Family Court should have granted an adjournment ... . Accordingly, reversal is required, without regard to the merits of the father's position, and we remit the matter ... for a new hearing and new determination thereafter ...". ***Matter of Charbonneau v. Charbonneau*, 2017 N.Y. Slip Op. 05221, 2nd Dept 6-28-17**

FORECLOSURE, CIVIL PROCEDURE.

QUESTION OF FACT WHETHER WITHDRAWAL OF PRIOR FORECLOSURE PROCEEDING CONSTITUTED THE REVOCATION OF THE ELECTION TO ACCELERATE THE DEBT, THEREBY STOPPING THE RUNNING OF THE SIX-YEAR STATUTE OF LIMITATIONS.

The Second Department determined the lender had raised a question of fact whether it had revoked its election to accelerate the debt by withdrawing a prior foreclosure action. The six-year statute of limitations began to run when the debt was accelerated by the first foreclosure action. If the withdrawal of that action revoked the debt acceleration, the statute would have stopped running at that point rendering the instant action timely: " '[E]ven 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' ... . A lender may revoke its election to accelerate the mortgage, but it must do so by an affirmative act of revocation occurring during the six-year statute of limitations period subsequent to the initiation of the prior foreclosure action ... . [T]he defendant submitted proof that, on August 16, 2011, [the lender] moved for, and on September 22, 2011, was granted, an order that discontinued the foreclosure action, canceled the notice of pendency, and vacated the judgment of foreclosure and sale it had been granted. The defendant thereby raised a triable issue of fact ... as to whether [the lender's] motion 'constituted an affirmative act by the lender to revoke its election to accelerate' ... Contrary to the plaintiff's contention, this case is distinguishable from the cases in which, because '[t]he prior foreclosure action was never withdrawn by the lender, but rather, dismissed . . . by the court, [i]t cannot be said that [the] dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate' ...". ***NMNT Realty Corp. v. Knoxville 2012 Trust*, 2017 N.Y. Slip Op. 05230, 2nd Dept 6-28-17**

INSURANCE LAW.

THE $2,000,000 REPLACEMENT INSURANCE POLICY WAS CANCELLED FOR NON-PAYMENT JUST HOURS BEFORE PLAINTIFF WAS STRUCK BY THE INSURED'S CAR, THE FACT THAT A PREMIUM SUFFICIENT FOR THE PRIOR $1,000,000 POLICY HAD BEEN PAID WAS OF NO CONSEQUENCE.

The Second Department, reversing Supreme Court, over a two-justice dissent, determined the umbrella policy had been cancelled for non-payment just hours before plaintiff (Garcia) was struck by the car owned by the insured, Rakowski. The Second Department rejected the argument that the insurance contract was divisible. The GEICO policy in effect was a $2,000,000 umbrella policy which represented an increase from a prior $1,000,000 policy. The additional premium ($199) for the $2,000,000 policy had not been paid, but the premium in an amount equal to the premium for the prior $1,000,000 policy ($306) had been paid. The Second Department held that the $1,000,000 coverage was no longer available. Only the $2,000,000 policy was in effect, and that was cancelled for failure to pay the additional $199 premium: "As Garcia points out, forfeiture is not favored in the law... , and, where cancellation of an entire policy would result in forfeiture, courts may be reluctant to hold that an insurance contract is not divisible ... . There is, however, no forfeiture here. Rakowski asked for, and received, a $2,000,000 policy, and she had $2,000,000 in coverage from the outset of the policy period, October 10, 2005. Because she only paid part of the premium, her coverage was cancelled, upon notice, when the prorated premium for the coverage she contracted for was exhausted. In other words, Rakowski got everything she paid for, and she forfeited nothing. That Rakowski "just missed" being insured for the injuries caused to Garcia is unfortunate, but nonetheless irrelevant to this analysis. GEICO sent its cancellation notice more than six months before Rakowski's vehicle struck Garcia. We are not free to alter the meaning of the policy to avoid the result caused by Rakowski's nonpayment of the premium for her $2,000,000 policy ...". ***Garcia v. Government Empls. Ins. Co.*, 2017 N.Y. Slip Op. 05202, 2nd Dept 6-28-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANTS DID NOT CONTROL THE MANNER OF PLAINTIFF'S WORK AND PLAINTIFF WAS ENGAGED IN ROUTINE MAINTENANCE, NOT CONSTRUCTION. LABOR LAW §§ 200 AND 240(1) CAUSES OF ACTION PROPERLY DISMISSED.

The Second Department determined the Labor Law §§ 200 and 240(1) causes of action were properly dismissed. Plaintiff fell from a ladder attached to the side of a tanker truck and alleged the fall was caused by the design of the ladder and the absence of safety device. Because the Labor Law § 200 cause of action was based upon the manner in which the work was performed, the fact that defendants did not control the manner of plaintiff's work entitled defendants to summary judgment. The Labor Law § 240(1) cause of action was properly dismissed because plaintiff was engaged in routine maintenance, not construction, demolition, etc.: " 'When the methods or materials of the work are at issue, recovery against the owner or general contractor cannot be had . . . unless it is shown that the party to be charged had the authority to supervise or control the performance of the work' ... . A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed ... . The ... defendants ... established, prima facie, that they were entitled to judgment as a matter of law dismissing the Labor Law § 240(1) causes of action asserted against each of them by showing that the plaintiff's work did not constitute erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure within the meaning of Labor Law § 240(1) ...". ***Kearney v. Dynegy, Inc.*, 2017 N.Y. Slip Op. 05209, 2nd Dept 6-28-17**

PERSONAL INJURY.

EXPOSED TREE ROOT OVER WHICH PLAINTIFF TRIPPED AND FELL WAS OPEN AND OBVIOUS.

The Second Department determined an exposed tree root was an open and obvious condition. Plaintiffs' slip and fall complaint was properly dismissed: " 'A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property'... . However, a landowner has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that the tree root was an open and obvious condition and inherent or incidental to the nature of the property, and was known to the injured plaintiff prior to the accident ... . . In opposition, the plaintiffs failed to raise a triable issue of fact." ***Commender v. Strathmore Ct. Home Owners Assn.*, 2017 N.Y. Slip Op. 0519, 2nd Dept 6-28-17**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF BICYCLIST STRUCK FROM BEHIND, NO EVIDENCE OF PLAINTIFF'S COMPARATIVE NEGLIGENCE, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff bicyclist was entitled to summary judgment in this traffic accident case. Plaintiff was in the bicycle lane when he was struck from behind by defendant's (Reyes') car. There was no evidence plaintiff was comparatively negligent: "Here, the evidence submitted on the plaintiff's motion, which included the deposition transcripts of the plaintiff and Reyes, demonstrated, prima facie, that Reyes was negligent as a matter of law because he violated Vehicle and Traffic Law § 1163(a)... . The deposition testimony showed that Reyes struck the rear of the plaintiff's bicycle while making a right turn from Wythe Avenue onto North 6th Street. The plaintiff was in the bicycle lane and ahead of the defendants' vehicle when the accident occurred. This evidence demonstrated that Reyes failed to yield the right-of-way to the plaintiff, that the turn could not be made with reasonable safety, and that Reyes failed to see that which he should have seen. The evidence submitted in support of the motion also demonstrated that Reyes's negligence was the sole proximate cause of the subject accident, without any comparative negligence on the plaintiff's part. In opposition, the defendants failed to raise a triable issue of fact." ***Harth v. Reyes*, 2017 N.Y. Slip Op. 05204, 2nd Dept 6-28-17**

NEGLIGENCE, EVIDENCE.

DOCTRINE OF RES IPSA LOQUITUR RAISED A QUESTION OF FACT IN THIS ESCALATOR ACCIDENT CASE.

The Second Department, reversing Supreme Court, determined defendant Port Authority was not entitled to summary judgment in this slip and fall case. Plaintiff alleged she was walking up a stopped escalator when it suddenly started moving downward, causing her to fall. The doctrine of res ipsa loquitur raised a question of fact: " 'Where the actual or specific cause of an accident is unknown, under the doctrine of res ipsa loquitur a jury may in certain circumstances infer negligence merely from the happening of an event and the defendant's relation to it' ... . In order to rely on the doctrine of res ipsa loquitur, a plaintiff must show that the event was of a kind that ordinarily does not occur in the absence of someone's negligence, that it was caused by an agency or instrumentality within the exclusive control of the defendant, and that it was not due to any voluntary act or contribution on the part of the plaintiff ... . 'To rely on res ipsa loquitur a plaintiff need not conclusively

eliminate the possibility of all other causes of the injury. It is enough that the evidence supporting the three conditions afford a rational basis for concluding that it is more likely than not' that the injury was caused by defendant's negligence' ... . Here, the plaintiffs pointed to evidence that, once this particular escalator is stopped, it will not reset itself or otherwise restart on its own. Someone has to restart the escalator by physically using a specific key at the top or bottom of the escalator in order for the escalator to start moving again. Similarly, there was evidence that the only possible way to reverse the direction of the escalator was to use that specific key. Only Port Authority employees had access to the key, which was kept in a locked cabinet in the office of a unit maintenance supervisor. The fact that the escalator was open to the public does not remove it from the exclusive control of the Port Authority because the mechanism for controlling the escalator was locked and accessible only by a specific key ... ". ***Ramjohn v. Port Auth. of N.Y. & N.J.*, 2017 N.Y. Slip Op. 05254, 2nd Dept 6-28-17**

THIRD DEPARTMENT

FAMILY LAW.

TERMINATION OF PARENTAL RIGHTS PROCEEDING REMITTED FOR AGE-APPROPRIATE CONSULTATION CONCERNING THREE OF THE CHILDREN TO DETERMINE THEIR WISHES.

The Third Department determined Family Court did not engage in an age-appropriate consultation concerning three of the children to determine their wishes in this "termination of parental rights" proceeding. The matter was remitted for that purpose: "Contrary to the argument by the attorney for the three younger children, the mere participation at the hearing and the giving of a closing statement, without more, by the attorney who represented Dawn, Summer and Samantha do not satisfy the age-appropriate consultation requirement of Family Ct Act § 1089 (d). The closing statement by the attorney for the three younger children was devoid of any statement indicating the preferences of Dawn, Summer or Samantha ... ... Nor does the attorney for the three younger children point to any other evidence in the record that reflects their wishes. We are mindful that the court is ultimately guided by the best interests of the children ... . The Legislature, however, has made it explicitly clear that a permanency hearing 'shall' include an age-appropriate consultation ... , carry significance and cannot be lightly overlooked. Given that the record does not disclose the wishes of Dawn, Summer or Samantha, the matter must be remitted so that Family Court may conduct the age-appropriate consultation under Family Ct Act § 1089 (d) with respect to these children." ***Matter of Dawn M. (Michael M.)*, 2017 N.Y. Slip Op. 05282, 3rd Dept 6-29-17**

MEDICAL MALPRACTICE, PERSONAL INJURY.

JUDGE'S INADEQUATE AND IMPROPER RESPONSE TO JURY QUESTIONS REQUIRED A NEW TRIAL IN THIS MEDICAL MALPRACTICE CASE, DEFENSE VERDICT REVERSED.

The Third Department, reversing the defense verdict in this medical malpractice trial, determined the judge's response to jury questions was inadequate and improper. The judge did not respond at all to one question. And the judge's response was different from the response discussed with counsel: "... [I]n addition to Supreme Court's failure to respond in the manner it had discussed with counsel, the response given did not fully or adequately answer the multiple questions asked by the jury. Indeed, the jury note requested 'a clear explanation of 'care and treatment,' and also asked whether 'care and treatment' include[d] paperwork/documentation & policy? Or only the physical 'care & treatment' given?' Importantly, the question of whether 'care and treatment' include[d] paperwork/documentation & policy?' was written by the jury as a stand alone question. The jury's multiple questions clearly demonstrated that the jurors were confused as to whether, and in what manner, they were permitted to consider the alleged lack of documentation in determining whether defendant deviated from the standard of care. By failing to provide clarification on this point and by stating, matter-of-factly, that care and treatment included only the physical treatment and care given, Supreme Court precluded the jury from fairly considering a critical issue presented at trial ... ". ***Meyer v. Saint Francis Hosp., Poughkeepsie, N.Y.*, 2017 N.Y. Slip Op. 05286, 3rd Dept 6-28-17**

FOURTH DEPARTMENT

CIVIL PROCEDURE, EMPLOYMENT LAW.

PLAINTIFF'S MOTION TO COMPEL POST-JUDGMENT DISCOVERY TO DETERMINE DAMAGES SHOULD HAVE BEEN GRANTED, DEFENDANTS' ANSWER HAD BEEN STRUCK FOR FAILURE TO COMPLY WITH A DISCOVERY ORDER AND A DEFAULT JUDGMENT HAD BEEN GRANTED.

The Fourth Department determined plaintiff's motion seeking discovery to determine damages after defendants' answer had been struck should have been granted. Plaintiff alleged defendants had breached "noncompete" provisions of an employment agreement. Defendant (Morrow) did not show up for a deposition and defendants did not provide discovery. Supreme Court granted plaintiff's motion to strike the answer and enter judgment for plaintiff, but denied plaintiff's motion for post-judgment discovery: "We agree with plaintiff that it is entitled to discovery in order to establish its damages ... . A 'defendant's obligation to afford [a] plaintiff the opportunity to pursue discovery [is not] terminated when the answer [is] stricken,' inasmuch as a plaintiff should not be 'handicapped in the proof of its damages by [a] defendant's prior defiance

of orders, notices, or subpoenas calling for his production of records or the taking of a deposition' ... . Thus, a 'plaintiff, if it chooses to do so, may press its right to discovery in advance of the inquest, whether for direct use as evidence in proving its damages or for the procurement of information that may lead to such evidence' ... . Here, plaintiff is entitled to an order compelling Morrow's compliance with the discovery demands insofar as those demands are 'material and necessary' to establish plaintiff's damages (CPLR 3101 [a]). We therefore reverse the order insofar as appealed from and grant that part of the motion seeking an order to compel discovery from Morrow with respect to damages only." ***ICM Controls Corp. v. Morrow*, 2017 N.Y. Slip Op. 05355, 4th Dept 6-30-17**

CIVIL PROCEDURE, MUNICIPAL LAW, PERSONAL INJURY.

COUNTY LAW § 308 DOES NOT PROHIBIT DISCOVERY OF 911 CALL RECORDS IN A CIVIL LAWSUIT, INCLUDING THE RECORDS OF 911 CALLS MADE BY NONPARTIES.

The Fourth Department, in a full-fledged opinion by Justice DeMoyer, determined Supreme Court properly ordered the county to provide to plaintiff records of 911 calls made during a severe winter storm. Plaintiff's decedent was stranded in his car during the storm and called 911 for help. Help did not arrive until nearly 24 hours later, after plaintiff's decedent died. In addition to the records of plaintiff's decedent's 911 call (which the county provided), plaintiff sought records of 911 calls made by others during the storm. The county argued the list of parties allowed access to 911 call records in County Law § 308 (4) was exclusive, and did not include parties in civil lawsuits. The Fourth Department determined the county's argument was not supported by the legislative history of the statute: "Here, the context and legislative history of section 308 (4) paint a different picture than defendants' de-contextualized analysis suggests. Section 308 was enacted as part of article 6 of the County Law, which contains 59 discrete provisions related almost exclusively to the financing of a uniform, statewide telephonic emergency response system. * * * ... County Law § 300 reveals unmistakably that the Legislature was motivated to adopt County Law article 6 in order to update the emergency response system across the State and to mitigate the financial burden of that endeavor for local governments. It is hardly surprising, then, that section 308 (4) lacks the hallmark language of other statutory provisions which specifically cut off a civil litigant's access to certain classes of evidentiary materials for reasons of public policy...". ***Abate v. County of Erie*, 2017 N.Y. Slip Op. 05351, 4th Dept 6-30-17**

CRIMINAL LAW.

FOR CAUSE CHALLENGE TO JUROR WHO WANTED TO HEAR FROM EVERYONE (IMPLICITLY INCLUDING THE DEFENDANT) SHOULD HAVE BEEN GRANTED, CONVICTION REVERSED.

The Fourth Department, reversing defendant's conviction, determined a for cause challenge to a juror who said she would like to hear from everybody (implicitly including the defendant) should have been granted: "Upon being asked by defense counsel whether she thought that she 'would have to hear from [defendant] in order to determine what the verdict should be,' the prospective juror responded, in relevant part, that she 'would like to hear from everyone involved.' Defense counsel later asked the prospective juror, by way of confirmation, whether she had said that she would 'like to hear from [defendant],' and the prospective juror reiterated that she 'would like to hear from everyone.' We conclude that the prospective juror's responses suggested that defendant had an obligation to testify, thereby casting serious doubt on her ability to render an impartial verdict ... . We further conclude that the prospective juror's silence when the court subsequently asked the entire panel whether anyone 'needs to hear from the defendant or must hear from the defendant before he or she renders a verdict' did not constitute an unequivocal assurance of impartiality that would warrant denial of defendant's challenge for cause ...". ***People v. Hargis*, 2017 N.Y. Slip Op. 05363, 4th Dept 6-30-17**

CRIMINAL LAW, APPEALS.

DEFENDANT WAS ERRONEOUSLY TOLD HE COULD APPEAL THE GRAND JURY EVIDENCE ISSUES AFTER ENTERING A GUILTY PLEA, HIS MOTION TO WITHDRAW HIS PLEA UPON LEARNING OF THE ERROR SHOULD HAVE BEEN GRANTED.

The Fourth Department determined defendant's motion to withdraw his guilty plea should have been granted. Defendant was told he could appeal the court's ruling that the grand jury minutes constituted legally sufficient evidence of the charges in the indictment. However the denial of a motion to dismiss arguing the insufficiency or inadmissibility of the grand jury evidence is not appealable after a guilty plea: We agree with defendant … that the court erred in denying his motion to withdraw his plea of guilty. 'A trial court is constitutionally required to ensure that a defendant, before entering a guilty plea, has a full understanding of what the plea entails and its consequences' ... . It is nevertheless well established that a guilty plea is not invalid merely because the court 'failed to specifically enumerate all the rights to which the defendant was entitled and to elicit from him or her a list of detailed waivers before accepting the guilty plea' ... . Where the record establishes, however, that the court incorrectly advised the defendant of the consequences of his guilty plea, the resulting plea 'must be vacated because it was not knowingly, intelligently and voluntarily entered' ... . Here, the court incorrectly advised defen-

dant with respect to the rights that defendant was forfeiting in pleading guilty. It is well established that a defendant who pleads guilty may not challenge on appeal the sufficiency or the admissibility of the evidence before the grand jury ... . The record establishes, however, that defendant asked to be assured that he could raise those issues on appeal from a judgment entered upon his plea of guilty, and the court assured him that he could do so. Given those assurances, which ended up being false, defendant accepted the plea deal, and entered a guilty plea. When defendant learned that he would not be able to raise on appeal the above grand jury issues, he made a motion to withdraw his plea, which the court denied. Under the circumstances, that was error." ***People v. Colon*, 2017 N.Y. Slip Op. 05343, 4th Dept 6-30-17**

CRIMINAL LAW, APPEALS.

MULTIPLICITOUS COUNTS OF SEX OFFENSE INDICTMENT DISMISSED IN THE INTEREST OF JUSTICE, THE COUNTS CHARGED SINGLE UNINTERRUPTED OFFENSES WHICH SHOULD NOT HAVE BEEN SPLIT INTO TWO COUNTS EACH.

The Fourth Department, in the interest of justice, determined several counts of the sex offense indictment were multiplicitous and therefore must be dismissed. The defendant was charged with two counts for single uninterrupted events, touching the victim's vagina while simultaneously having the victim touch his penis: "An indictment is multiplicitous 'when a single offense is charged in more than one count'... . A person commits the criminal offense of sexual abuse in the first degree when he or she subjects a person under 11 years old to sexual contact ... . Nevertheless, a defendant may not be charged with separate counts of sexual abuse in the first degree for each instance of unlawful sexual contact where the instances of sexual contact constitute 'a single, uninterrupted criminal act' ... . Here, for each instance of defendant touching a victim's vagina, defendant was properly charged with a single and distinct count. By contrast, for each instance of defendant compelling a victim to touch his penis while defendant was simultaneously touching that victim's vagina, defendant was charged with two separate counts. Charging two separate counts under those facts was improper inasmuch as the actions alleged in each pair of counts constituted a single, uninterrupted criminal act. We thus conclude that the indictment was multiplicitous, and we therefore dismiss counts 2, 5, 13 through 17, and 25 through 28 of indictment No. 5548 ...". ***People v. Sprague*, 2017 N.Y. Slip Op. 05347, 4th Dept 6-30-17**

CRIMINAL LAW, EVIDENCE.

PEOPLE PROPERLY ALLOWED TO IMPEACH THEIR OWN WITNESS, THE WITNESS' TESTIMONY AFFIRMATIVELY DAMAGED THE PEOPLE'S CASE AND WAS NOT, AS ARGUED BY THE CONCURRING JUSTICES, MERELY NEUTRAL OR UNHELPFUL.

The Fourth Department, over a two-justice concurrence, determined the People were properly allowed to impeach their own witness when the witness testified she did not see the driver of the car from which shots were fired. She had previously stated the defendant was the driver. The concurring justices argued that the witness's changed testimony did not affirmatively damage the People's case, but was merely neutral and unhelpful, and therefore impeachment was not appropriate. However, the concurring justices deemed the error harmless: "Contrary to defendant's … contention, the court properly allowed the People to impeach the credibility of the victim's girlfriend when she testified that she did not see the driver of the vehicle who shot the victim, which contradicted her grand jury testimony and her sworn statement identifying defendant as the shooter. It is well established that '[e]vidence of a prior contradictory statement may be received for the limited purpose of impeaching the witness's credibility with respect to his or her testimony . . . [where, as here], the testimony on a material fact' . . . tend[s] to disprove the party's position or affirmatively damage[s] the party's case' ... . We conclude that the testimony of the witness denying that she saw the driver related to a material fact, the identity of the shooter, and affirmatively damaged the People's case ... , particularly because the victim did not testify." ***People v. Ellison*, 2017 N.Y. Slip Op. 05339, 4th Dept 6-30-17**

DEFAMATION, EMPLOYMENT LAW, MUNICIPAL LAW, IMMUNITY.

QUESTIONS OF FACT RAISED WHETHER DEFAMATORY STATEMENTS WERE MOTIVATED SOLELY BY MALICE, THEREBY OVERCOMING QUALIFIED IMMUNITY, AND WERE MADE WITHIN THE SCOPE OF EMPLOYMENT, THEREBY RENDERING THE EMPLOYER VICARIOUSLY LIABLE.

The Fourth Department, modifying Supreme Court, determined the defamation causes of action properly survived summary judgment with respect to the speaker (Cramer) and the defamation causes of action against Cramer's employers (the village and fire department), based upon vicarious liability, should not have been dismissed. Cramer had made statements to her employer that plaintiff was a child molester and she had tapes to prove it. There was evidence the statements were motivated solely by malice (and therefore not protected by qualified immunity) and were made within the scope of Cramer's employment: "We conclude that defendants met their initial burden of establishing that any alleged statements are protected by a qualified privilege inasmuch as they were made between members of the organization in connection with

plaintiff's application for membership, and thus 'the burden shifted to plaintiff[] to raise a triable issue of fact whether the statements were motivated solely by malice' ... . 'If [Cramer's] statements were made to further the interest protected by the privilege, it matters not that [she] also despised plaintiff. Thus, a triable issue is raised only if a jury could reasonably conclude that malice was the one and only cause for the publication' ... . Plaintiff provided the deposition testimony of the assistant fire chief, who testified that Cramer told him to 'go tell [plaintiff] for me that if he continues with this application I'm going to pull out tapes that I have that shows he's a child molester and that it's going to ruin his life.' Plaintiff also provided the deposition testimony of a woman who was at the Fire Department ... and heard Cramer call plaintiff a 'child molester'; that same witness heard Cramer call plaintiff a pedophile in 2011. A Fire Department employee testified in his deposition that he heard Cramer say to her husband that she had proof that plaintiff was a 'child molester.' In light of that evidence, we therefore conclude that plaintiff raised an issue of fact whether Cramer's statements were motivated solely by malice and thus are not protected by a qualified privilege. 'An employer may be held vicariously liable for an allegedly slanderous statement made by an employee only if the employee was acting within the scope of his or her employment at the time that the statement was made'... . We further conclude that defendants failed to establish their entitlement to judgment as a matter of law that Cramer was not acting within the scope of her employment when she allegedly made the statements to the assistant fire chief and/or at the meeting ...". ***Stevenson v. Cramer*, 2017 N.Y. Slip Op. 05353, 4th Dept 6-30-17**

FAMILY LAW.

THE RECORD DID NOT SUPPORT THE AWARD OF PRIMARY PHYSICAL CUSTODY TO MOTHER, FAMILY COURT REVERSED, ALTHOUGH THE CHILD WISHED TO STAY WITH MOTHER, THAT FACTOR WAS AFFORDED LITTLE WEIGHT DUE TO THE CHILD'S YOUNG AGE.

The Fourth Department, reversing Family Court, determined there was not a sound and substantial basis in the record for awarding primary physical custody to the mother. Although the child wished to stay with mother, the Fourth Department accorded that factor little weight because of the child's young age and mother's permissive parenting style: "It is well settled that, in determining the child's best interests, a court should consider '(1) the continuity and stability of the existing custodial arrangement, including the relative fitness of the parents and the length of time the present custodial arrangement has continued; (2) [the] quality of the child's home environment and that of the parent seeking custody; (3) the ability of each parent to provide for the child's emotional and intellectual development; (4) the financial status and ability of each parent to provide for the child; (5) the individual needs and expressed desires of the child; and (6) the need of the child to live with siblings' ... . Additionally, a preexisting custody arrangement established by agreement is 'a weighty factor,' but is not absolute ... . With respect to the first factor, although the mother has been the child's primary caretaker since birth, her living arrangements were unstable. The mother and the child had lived in seven different residences over the three years preceding the hearing, which resulted in the child changing schools every year. As the court recognized in its decision, the father is the more stable parent. Concerning the quality of the home environment, the father and his wife own a home where the child has his own room, his own bed, and age-appropriate toys. In contrast, the mother's chaotic living arrangements have put the child in regular contact with a half-sister who abuses drugs and have resulted in the child living in a home that was infested with fleas." ***Matter of Braga v. Bell*, 2017 N.Y. Slip Op. 05348, 4th Dept 6-30-17**

FAMILY LAW, CIVIL RIGHTS LAW.

HEARING NECESSARY ON MOTHER'S PETITION TO CHANGE THE SURNAME OF ONE OF THE CHILDREN, MATTER REMITTED.

The Fourth Department, reversing Supreme Court, determined a hearing should have been held on mother's petition to change the surname of one of their children. The petition was opposed by father: " 'Civil Rights Law § 63 authorizes an infant's name change if there is no reasonable objection to the proposed name, and the interests of the infant will be substantially promoted by the change' ... . With respect to infants, the statute provides in relevant part, that, if the court is 'satisfied . . . that the petition is true, . . . that there is no reasonable objection to the change of name proposed, and . . . that the interests of the infant will be substantially promoted by the change,' the court may grant the petition (§ 63). With respect to the interests of the infant, 'the issue is not whether it is in the infant's best interests to have the surname of the mother or father, but whether the interests of the infant will be promoted substantially by changing his [or her] surname' ... . Such a determination 'requires a court to consider the totality of the circumstances' ... . Contrary to petitioner's contention, respondent raised reasonable objections to the petition ... . Petitioner is seeking to change the sons' names to a surname that is not used by either parent or the sons' half-sibling ... . While 'neither parent has a superior right to determine the surname of the child,' we have stated that 'a father has a recognized interest in having his child bear his surname' ... . Respondent also contends that an order granting the petition will have a deleterious effect on his relationship with his sons ... . Although petitioner contends that the sons desire the name change, that contention is based on hearsay, and respondent challenges that contention. Inasmuch as the court did not conduct an in camera interview with them, we cannot resolve that disputed issue on this

record. In any event, the sons are now of sufficient age and maturity to express their preference for a particular surname, and they have a right to be heard ...". ***Matter of Niethe (McCarthy--DePerno)*, 2017 N.Y. Slip Op. 05371, 4th Dept 6-30-17**

FORECLOSURE, EVIDENCE.

PROOF OF STANDING DID NOT MEET CRITERIA OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, BANK'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN DENIED.

The Fourth Department, reversing Supreme Court, determined the bank's proof in this foreclosure action did not meet the criteria of the business records exception to the hearsay rule: "We agree with defendants that the affidavit submitted by plaintiff in support of its motion was insufficient to establish standing. The Caliber employee who authored the affidavit stated that Caliber maintains plaintiff's books and records pertaining to the mortgage account; plaintiff had physical possession of the original note before the action was commenced and remained in physical possession of the original note as of the date of the motion; and he was personally familiar with Caliber's record-keeping practices. However, plaintiff failed to demonstrate that its records pertaining to defendants' account were admissible as business records (see CPLR 4518 [a]), inasmuch as the affiant did not swear that he was personally familiar with plaintiff's record-keeping practices and procedures... . Contrary to plaintiff's contention, the mere attachment of a copy of the note to the verified complaint does not demonstrate that plaintiff had physical possession of the original note when the action was commenced ... , and thus is insufficient to establish standing." ***The Bank of N.Y. Mellon v. Anderson*, 2017 N.Y. Slip Op. 05349, 4th Dept 6-30-17**

INSURANCE LAW.

ALTHOUGH NO SPECIAL RELATIONSHIP EXISTED BETWEEN BROKER AND PLAINTIFF, CAUSE OF ACTION BASED UPON PLAINTIFF'S SPECIFIC REQUEST FOR FLOOD INSURANCE (WHICH WAS NOT INCLUDED IN THE POLICY) SURVIVED SUMMARY JUDGMENT.

The Fourth Department determined summary judgment was properly awarded to the insurance broker (First Niagara) because no special relationship existed with plaintiff. Plaintiff specifically asked defendant whether plaintiff had flood insurance and further stated plaintiff wanted flood insurance. Defendant never responded. After flood damage occurred plaintiff learned the policy did not include flood insurance. Although no special relationship existed, plaintiff's cause of action based upon the specific request for flood insurance survived summary judgment: " 'As a general principle, insurance brokers have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so' ... . 'Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide[ ] or direct a client to obtain additional coverage' ... . '[A] special relationship may arise where (1) the agent receives compensation for consultation apart from payment of the premiums . . . (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent . . . ; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on' ... . … [w]e conclude that 'the record in the instant case presents only the standard consumer-agent insurance placement relationship' ... . We further conclude, however, that First Niagara failed to tender 'sufficient evidence to eliminate any material issues of fact from the case' relating to plaintiff's specific request for flood insurance coverage ... . [T]here are triable issues of fact concerning whether plaintiff made a specific request for flood insurance coverage prior to the flood event ... ". ***Petri Baking Prods., Inc. v. Hatch Leonard Naples, Inc.*, 2017 N.Y. Slip Op. 05338, 4th Dept 6-30-17**

INSURANCE LAW, CONTRACT LAW, LANDLORD-TENANT.

INSURER'S DISCLAIMER OF COVERAGE IN THIS SLIP AND FALL CASE IS NOT SUFFICIENT PROOF THE TENANT FAILED TO PROCURE THE INSURANCE REQUIRED BY THE LEASE, SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined summary judgment on the breach of contract cause of action should not have been granted. The property owner (the church) in this parking lot slip and fall case alleged that the lessee (Stepping Stones) failed to procure the insurance required by the lease. That allegation was based on the insurer's disclaimer of coverage. The Fourth Department noted that the disclaimer could be erroneous and was therefore not proof of a breach of the lease: "In denying Stepping Stones's motion in part and sua sponte granting summary judgment to the Church defendants on the breach of contract claims, the court reasoned that the Church defendants were entitled to judgment on the ground that, '[i]f the insurance carrier provided by Stepping Stones fails to cover the broad coverage demanded by the Lease, then Stepping Stones has breached the Lease agreement.' On appeal, Stepping Stones addresses only the court's determination with respect to the breach of contract claims. We agree with Stepping Stones that the court erred in granting summary judgment to the Church defendants on those claims, and we therefore modify the order accordingly. The mere fact that the insurance carrier disclaimed coverage for the accident does not establish as a matter of law that Stepping

Stones failed to obtain the necessary coverage. It is possible that the insurance carrier's disclaimer was improper, and that possibility may be explored by way of a declaratory judgment action ... ". ***Strong v. St. Thomas Church of Irondequoit*, 2017 N.Y. Slip Op. 05333, 4th Dept 6-30-17**

MENTAL HYGIENE LAW.

ALTHOUGH DEFENDANT'S STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) CONDITIONS WERE VIOLATED, THE VIOLATIONS PERTAINED TO DRUG USE, NOT SEXUAL MISCONDUCT, EVIDENCE LINKING DEFENDANT'S COCAINE USE TO SEXUAL AROUSAL WAS DEEMED SUFFICIENT TO WARRANT CIVIL COMMITMENT.
The Fourth Department, over a substantive dissent, determined the evidence was sufficient to support the revocation of defendant sex offender's strict and intensive supervision and treatment (SIST) status and the imposition of civil commitment (as a dangerous sex offender). The SIST violations related to cocaine use, not sexual misconduct. Evidence linked defendant's cocaine use to sexual arousal. The dissent argued such proof was insufficient because there was no showing defendant's use of cocaine led to his inability to control (as opposed to difficulty in controlling) his sexual behavior: "Here, petitioner's expert testified that respondent suffers from antisocial personality disorder, substance abuse disorder, and severe cocaine and alcohol use disorder. Respondent's instant SIST violations included the use of cocaine on at least two occasions within one month of release to the community. Respondent has violated the conditions of SIST release on two prior occasions, and those violations also involved cocaine use. Petitioner's expert described respondent's cocaine use upon his most recent release to be of an 'escalating' nature, and opined that respondent is unable to curb his craving for cocaine and has demonstrated a lack of cooperation with, and resentment toward, substance abuse and sex offender treatment. Petitioner's expert further opined that respondent's sex offending behavior is 'linked' with his cocaine usage and his sexual arousal has become conditioned to his cocaine usage. Moreover, every examiner who has evaluated respondent has concluded that his sex offending behavior is linked to his substance abuse, and the hearing record contains numerous admissions by respondent that his sex offending behavior is linked to his cocaine use. Petitioner's expert testified that, based on his Static-99 scores, respondent was at a moderate to high risk of recidivism, and respondent's score on the Acute-2007 placed him in the high range risk of recidivism. Although respondent's expert testified that respondent had 'put some distance' between his cocaine use and his sex offending behavior, respondent's expert also agreed that '[t]here's no doubt that one could lead to the other.' We thus conclude that petitioner established by the requisite clear and convincing evidence that respondent's substance abuse was linked to his sex offending behavior and that respondent is a dangerous sex offender requiring confinement ...". ***Matter of State of New York v. William J.*, 2017 N.Y. Slip Op. 05335, 4th Dept 6-30-17**

MUNICIPAL LAW, PERSONAL INJURY.

LEAVE TO FILE LATE NOTICE OF CLAIM FOR HUSBAND'S DERIVATIVE CLAIM SHOULD HAVE BEEN GRANTED.
The Fourth Department, reversing Supreme Court, determined the motion for leave to file a late notice of claim with respect to husband's derivative claim stemming from wife's injuries should have been granted. Because the county was deemed to have knowledge of the wife's claim within 90 days, the county must also be deemed to have had timely knowledge of the derivative claim: "Here, respondent contends that it did not receive actual knowledge of the facts constituting the husband's claim because it did not receive knowledge of the injuries or damages claimed by the husband. We reject that contention. '[C]ourts have granted leave to serve a supplemental or amended notice of claim to add a derivative cause of action for loss of consortium . . . where such claim results from the same facts as were alleged in a timely and otherwise admittedly valid notice of claim for personal injuries' ... . Indeed, courts have generally recognized that derivative causes of action '[are] predicated upon exactly the same facts' as the injured party's claims ... . As a result, where it has been determined that the respondent received timely notice of the injured claimant's claims, 'there can be no claim of prejudice to respondent" resulting from a late notice of a derivative claim …". Although we recognize that claimants did not file a timely notice of claim for the injuries sustained by claimant Melody L. Darrin (wife), the court's determination to grant the application with respect to her suggests that the court determined that respondent had actual knowledge of the facts underlying her claim. Inasmuch as the husband's derivative claim is 'predicated upon exactly the same facts' as the wife's claims ... , we discern no rational basis upon which the court could have granted the application with respect to the wife but not the husband ...".
***Matter of Darrin v. County of Cattaraugus*, 2017 N.Y. Slip Op. 05352, 4th Dept 6-30-17**

PARTNERSHIPS, CONTRACT LAW.

DEFENDANT DEMONSTRATED NO PARTNERSHIP HAD BEEN FORMED, SUMMARY JUDGMENT IN THIS ACTION ALLEGING BREACH OF A PARTNERSHIP AGREEMENT PROPERLY GRANTED.
The Fourth Department, over a dissent, determined summary judgment was properly granted to defendant in this breach of a partnership agreement action. Defendant demonstrated no partnership had been formed: " 'A partnership is an association of two or more persons to carry on as co-owners a business for profit' (Partnership Law § 10 [1]). Where, as here,

there is no written partnership agreement between the parties, a court looks to the parties' conduct, intent, and relationship to determine whether a partnership existed in fact ... . The relevant factors are (1) the parties' intent, whether express or implied; (2) whether there was joint control and management of the business; (3) whether the parties shared both profits and losses; and (4) whether the parties combined their property, skill, or knowledge ... . No single factor is determinative; a court considers the parties' relationship as a whole ... . * * * Although plaintiff testified that he interpreted defendant's silence as an agreement to an equal partnership, the documentary evidence undermines any such assumption. * * * ... [T]he evidence demonstrates that the parties never shared the intent to enter into a partnership, although they initially had explored the possibility of one." ***Hammond v. Smith*, 2017 N.Y. Slip Op. 05337, 4th Dept 6-30-17**

PERSONAL INJURY, CIVIL PROCEDURE.

CONCLUSORY ALLEGATIONS THAT THE LANDLORD WAS AN OWNER OF OR A PARTNER IN THE BUSINESS WHICH LEASED THE PREMISES WHERE PLAINTIFF'S DECEDENT WAS INJURED SHOULD NOT HAVE SURVIVED THE MOTION TO DISMISS.

The Fourth Department, modifying Supreme Court, over a dissent, determined conclusory allegations that the landlord (Miranda) was an owner of the business (Molly's Pub) in which plaintiff's decedent was injured were insufficient to survive a motion to dismiss in this wrongful death action: "We agree with Miranda … that the court erred in denying his motion to dismiss the complaint against him pursuant to CPLR 3211 (a) (7), and we therefore modify the order accordingly. The conclusory allegations in the complaint alleging liability on the same grounds as those alleged against the [pub] defendants based upon the alleged ownership or partnership interest in the operation of Molly's Pub are insufficient to state a cause of action against him. ... Miranda submitted the lease, which provides that he shall not be liable for injury to persons or for any defects in the building. He also submitted an affidavit in which he stated that he has no ownership interest in Molly's Pub, that did he not exercise any control over the operation of Molly's Pub ... , that he had no actual or constructive notice of a dangerous or defective condition on the premises and that he was 'merely an out-of-possession landlord.' ... '[W]hile it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support . . . Indeed, a cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations' ... . Here, plaintiff failed to allege any facts to support his allegation that Miranda had an ownership or partnership interest in the operation of Molly's Pub." ***Sager v. City of Buffalo*, 2017 N.Y. Slip Op. 05340, 4th Dept 6-30-17**

PERSONAL INJURY, EVIDENCE.

QUESTION OF FACT WHETHER PLAINTIFF'S LANE CHANGE CONSTITUTED A NON-NEGLIGENT EXPLANATION FOR THIS REAR-END COLLISION, PLEA TO FOLLOWING TOO CLOSELY IS NEGLIGENCE PER SE ONLY IF THE VIOLATION IS UNEXCUSED.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this rear-end collision case should not have been granted. Defendant raised a question of fact whether the cause of the accident was plaintiff's sudden lane change. The fact that defendant pled guilty to a traffic violation, following too closely, would constitute negligence per se only if unexcused: "Plaintiff ... submitted the deposition testimony of defendant, who stated that he did not see plaintiff's vehicle until immediately before the accident, when plaintiff moved from the middle lane to the right lane and slammed on his brakes in an instant or quickly, i.e., plaintiff's action was not a slow and cautious movement to which defendant could react ... . Defendant explained that he had not seen plaintiff's vehicle before the collision because he had been paying attention to the road in front of him and, when plaintiff engaged in his maneuver (changed lanes), defendant slammed on his brakes and tried to steer into the shoulder to avoid the accident, which caused the back end of the trailer that was attached to the truck to swing out, and the left corner of the truck struck plaintiff's vehicle. Based on the foregoing, we conclude that plaintiff 'failed to meet his initial burden of establishing his entitlement to judgment as a matter of law inasmuch as he submitted the deposition testimony in which [defendant] provided a nonnegligent explanation for the collision,' namely, that plaintiff caused the collision when he suddenly changed lanes in response to slowing traffic in the middle and left lanes of the highway and abruptly stopped in the right lane in front of defendant ... . [W]e reject plaintiff's contention that he established defendant's negligence as a matter of law by submitting evidence of defendant's guilty plea of following too closely (Vehicle and Traffic Law § 1129 [a]). 'It is well settled that the fact that [the] driver entered a plea of guilty to a Vehicle and Traffic Law offense is only some evidence of negligence and does not establish his negligence per se' ... . 'Rather, it is the unexcused violation of the Vehicle and Traffic Law [that] constitutes negligence per se' ... . Here, upon defendant's explanation, the trier of fact could excuse the violation on the ground that plaintiff cut in front of defendant and immediately stopped, thereby failing to provide defendant with adequate time to create the 'reasonable and prudent' distance between the vehicles that is required by the statute ...". ***Gardner v. Chester*, 2017 N.Y. Slip Op. 05336, 4th Dept 6-30-17**

VEHICLE AND TRAFFIC LAW, CONSTITUTIONAL LAW.

MOTOR VEHICLES REGULATION WHICH ALLOWS A LIFETIME DRIVING BAN TO BE IMPOSED UPON DRIVERS WITH MULTIPLE DWI CONVICTIONS IS NOT VOID FOR VAGUENESS.

The Fourth Department determined the regulation which allows the commissioner of motor vehicles to impose a lifetime driver's license revocation for persons with multiple driving while intoxicated convictions was not unconstitutionally vague: "... [T]he regulation does not give respondent "unfettered discretion" to deny an application. Section 136.5 formalized the manner in which the Commissioner would exercise her discretion by 'ensur[ing] that her discretion is exercised consistently and uniformly, such that similarly-situated applicants are treated equally' ... . Additionally, the regulation puts the public on notice of respondent's general policy with respect to relicensing a person whose driver's license has been revoked for multiple alcohol- or drug-related transgressions ... . In petitioner's case, he faces a lifetime ban because he has at least five such convictions or incidents, as defined in the regulation ... . Nevertheless, the Commissioner reserved the discretion to deviate from her general policy in 'unusual, extenuating and compelling circumstances' ... . That exception ensures that respondent has the flexibility to grant an application for relicensing where extraordinary circumstances render the application of the general policy inappropriate or unfair ... . Thus, reading the language of the challenged exception within the context of the regulation as a whole, we conclude that 15 NYCRR 136.5 (d) is not unconstitutionally vague." ***Matter of Gurnsey v. Sampson*, 2017 N.Y. Slip Op. 05350, 4th Dept 6-30-17**

To view archived issues of CasePrepPlus,
visit www.nysba.org/caseprepplus.