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Editor: **Bruce Freeman**

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# FIRST DEPARTMENT

## CRIMINAL LAW.

FAILURE TO SEEK THE COURT'S PERMISSION BEFORE RE-PRESENTING THE MURDER CHARGE TO THE GRAND JURY WAS A JURISDICTIONAL DEFECT NOT SUBJECT TO A HARMLESS ERROR ANALYSIS.

The First Department, over a dissent, determined that the People's failure to seek the court's permission to re-present the murder charge to the grand jury was a jurisdictional defect to which a harmless error analysis could not be applied. The dissent argued the error was harmless because defendant (Allen) was acquitted of the murder charge (and convicted of manslaughter). The majority argued that the illegal murder charge loomed over the entire trial and necessarily affected defense strategy and jury deliberations: "The murder charge lacked jurisdictional legitimacy, violating Allen's constitutional right to be tried for a felony only upon a valid indictment ... . While the trial for murder did not violate double jeopardy, it cannot be doubted that the presence of the charge "impugn[ed] the very integrity of the criminal proceeding" (*Mayo*, 48 NY2d at 252). There is nothing to suggest that *Mayo* is limited to double jeopardy cases in the manner suggested by the dissent; indeed, the *Mayo* court recognized that errors of 'constitutional magnitude . . . are so fundamental that their commission serves to invalidate the entire trial,' and are not susceptible to a traditional spillover analysis, which has its 'most convincing application in the area of trial errors concerning the admissibility of evidence'... . … Although defendant Allen was ultimately acquitted of the murder charge, the charge's presence loomed over the trial, and in some way influenced the verdict. Rather than continuing to deliberate concerning Allen's innocence — including evidence suggesting that he was surprised by the shooting, and may have intended that the victim receive no more than a 'clipping' — the jury may have concluded that it had sufficiently grappled with the proof by acquitting him of the most serious charge." ***People v. Allen*, 2017 N.Y. Slip Op. 05501, 1st Dept 7-6-17**

# SECOND DEPARTMENT

## CIVIL PROCEDURE, PERSONAL INJURY, TOXIC TORTS.

TRIAL JUDGE'S INSTRUCTIONS TO THE JURORS AFTER THEY RETURNED AN INCONSISTENT VERDICT WERE INADEQUATE, NEW TRIAL ORDERED.

The Second Department determined the trial judge's responses to an inconsistent verdict were inadequate and ordered a new trial, granting defendant's motion to set aside the verdict. The jury, in this lead paint poisoning case, found that the defendant property owner was negligent but that the negligence was not the proximate cause of the injury. However the jury went on to award plaintiff $250,000 in damages. The judge sent the jury back, instructing them that they could not award damages unless they found the negligence was the proximate cause of the injuries. The judge did not inform the jury they could adhere to their original finding on proximate cause. The jury returned a second verdict, this time finding defendant's negligence was the proximate cause of the injuries: "Here, the jury's first verdict was internally inconsistent when it awarded damages to the plaintiff despite finding that the defendant's negligence was not a substantial factor in causing the plaintiff's injuries ... . Thus, the Supreme Court properly directed the jury to reconsider the verdict. Notwithstanding, the record supports the conclusion that the second round of deliberations resulted in an unreliable verdict ... . Specifically, the court failed to provide clear instructions to the jury regarding how to proceed with respect to the interrogatories concerning damages if it again found that the defendant's negligence was not a substantial factor in causing the plaintiff's injuries. This failure may have induced the jury to decide, out of confusion or frustration, to simply forgo the issue altogether by finding that the defendant's negligence was a substantial factor in causing the plaintiff's injuries. Moreover, the court's response to the jury note to simply follow the instructions on the new verdict sheet was inadequate. 'Even after reconsideration by the jury, a trial court has discretion to set aside a verdict which is clearly the product of substantial confusion among the jurors' ... . Under these circumstances, the court should have granted that branch of the defendant's motion which was to set aside the second jury verdict and directed a new trial ...". ***Cleveland v. Djeu*, 2017 N.Y. Slip Op. 05417, 2nd Dept 7-5-17**

## CONTRACT LAW, CONDOMINIUMS.

CONDOMINIUM BOARD STATED BREACH OF CONTRACT CAUSES OF ACTION AGAINST THE FIRM WHICH INSPECTED THE CONDOMINIUMS DURING CONSTRUCTION.

The Second Department determined plaintiff, suing on behalf of condominium owners, had stated breach of contract causes of action against the defendant (KEPC) which had inspected the condominiums during construction on behalf of the developer (SDS). The complaint sufficiently alleged plaintiff was a third-party beneficiary of the oral contract between KEPC and SDS and was a successor-in-interest to the contract between KEPC and SDS: "A nonparty to a contract may maintain a cause of action alleging breach of contract only if it is an intended, and not a mere incidental, beneficiary of the contract ... . However, "the identity of a third-party beneficiary need not be set forth in the contract or, for that matter, even be known as of the time of its execution" ... . A party asserting rights as a third-party beneficiary must allege: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for its benefit, and (3) that the benefit to it is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate it if the benefit is lost ... . 'In determining third-party beneficiary status, it is permissible for the court to look at the surrounding circumstances as well as the agreement' ... . … Condominium unit owners may also be considered successors-in-interest to the condominium sponsor's construction contracts under certain circumstances ... . Whether a party is a successor-in-interest to the performance of a particular contract is generally a question of fact that depends on the circumstances of the case ...". ***Board of Mgrs. of 100 Congress Condominium v. SDS Congress, LLC*, 2017 N.Y. Slip Op. 05414, 2nd Dept 7-5-17**

## COURT OF CLAIMS, TRUSTS AND ESTATES.

NOTICE OF INTENTION TO FILE A CLAIM CAN BE FILED BY ANY INTERESTED PERSON, THE NOTICE WAS NOT INVALID BECAUSE THE FILER, DECEDENT'S WIFE, WAS NOT REPRESENTING DECEDENT'S ESTATE AT THE TIME.

The Second Department, reversing the Court of Claims, determined a notice of intention to file a claim for medical malpractice was valid. A notice of intention to file a claim, unlike a notice of claim, may be filed by any "interested person," here the wife of decedent (who was not representing the decedent's estate at the time): "The claimant's husband (hereinafter the decedent) was treated at Stony Brook University Hospital (hereinafter Stony Brook) from February 13, 2005, through March 3, 2005. The decedent was later treated at Mount Sinai Hospital from March 18, 2006, until his death on October 30, 2006. On April 19, 2006, the claimant, 'as Proposed Guardian for' the decedent, filed a notice of intention to file a claim against the defendant State of New York to recover damages for medical malpractice that allegedly occurred while the decedent was treated at Stony Brook (hereinafter the notice of intention). On January 3, 2008, the claimant was granted letters of administration for the decedent's estate. On January 11, 2008, the claimant filed a claim against the defendant to recover damages for medical malpractice, wrongful death, and loss of services. The Court of Claims should have denied the defendant's motion pursuant to Court of Claims Act §§ 10 and 11 to dismiss so much of the claim as sought to recover damages for the decedent's conscious pain and suffering arising from medical malpractice. Contrary to the defendant's contention and the court's conclusion, the notice of intention filed by the claimant on April 19, 2006, was not invalid on the ground that the claimant lacked the authority to file it on behalf of the decedent, as the notice may be given by 'any interested person'... . The Court of Appeals' decision in *Lichtenstein v. State* (93 NY2d 911) does not compel a different result, as that case involved the filing of a claim itself, as opposed to a notice of intention to file a claim." ***Matter of Dolce v. State of New York*, 2017 N.Y. Slip Op. 05434, 2nd Dept 7-5-17**

## CRIMINAL LAW.

EMPANELING AN ANONYMOUS JURY VIOLATED THE CRIMINAL PROCEDURE LAW AND WAS NOT HARMLESS ERROR.

The Second Department, reversing (over a dissent) defendants' convictions in a gang assault case, and granting leave for the People to appeal to the Court of Appeals, determined it was reversible error to empanel an anonymous jury. The trial judge explained his reasoning for not revealing the jurors' names as follows: "I know the last five years an increasing number of jurors told me that A, they feel uncomfortable walking in and out of the courtroom to their cars; B, they feel really uncomfortable giving their names, especially in violent felonies." The Second Department held the empaneling of an anonymous jury violated the criminal procedure law and the error was not harmless (the dissent argued the error was harmless): "The best evidence of the Legislature's intent is the text of the statute itself ... . Where the statutory language is clear and unambiguous, a court should construe it so as to give effect to the plain meaning of the words used ... . CPL 270.15(1)(a) provides, in part, 'the court shall direct that the names of not less than twelve members of the panel be drawn and called as prescribed by the judiciary law.' CPL 270.15(1-a) provides: 'The court may for good cause shown, upon motion of either party or any affected person or upon its own initiative, issue a protective order for a stated period regulating disclosure of the business or residential address of any prospective or sworn juror to any person or persons, other than to counsel for either party. Such good cause shall exist where the court determines that there is a likelihood of bribery, jury tampering or of physical injury or harassment of the juror.' Read together, these sections of CPL 270.15 prohibit a trial court from withholding the names of prospective jurors. The plain language of CPL 270.15(1)(a) provides that the names be called. CPL 270.15(1-a) allows for

the issuance of a protective order regulating disclosure of addresses. It does not allow for the issuance of a protective order regulating disclosure of names." ***People v. Flores*, 2017 N.Y. Slip Op. 05457, 2nd Dept 7-5-17**

## CRIMINAL LAW.

DEFENDANT CHARGED WITH INSURANCE FRAUD INVOLVING AIG, FOR CAUSE CHALLENGE TO JUROR WHO WORKED FOR AIG SHOULD HAVE BEEN GRANTED.

The Second Department, reversing defendant's convictions, determined the "for cause" challenge to a juror should have been granted. Defendant was charged with offenses related to insurance fraud. The insurer was AIG. The prospective juror worked for AIG: "Here, during the first round of jury selection, prospective juror No. 16 indicated that she worked for AIG. Upon inquiry by the defendant, the prospective juror explained that her job involved analyzing the financial policies for three divisions at AIG: '[a]sset management, financial services, and domestic life.' We note that, in response to the defendant's questions, the prospective juror did not provide a completely unequivocal assurance that she could be fair and impartial. She thought that she could be fair and impartial, but conceded that there 'may be' a conflict of interest from the defendant's perspective, and that it might be better if she were on a different case so as to enable the defendant to feel 'comfortable' that he 'wouldn't be prejudiced in any way.' Thereafter, the County Court denied the defendant's for-cause challenge without asking the prospective juror any questions about her employment at AIG or how it might affect her ability to serve as a juror, notwithstanding that the court had an obligation to try and determine '[a]ll issues of fact or law arising on the challenge' (CPL 270.20[2]). Contrary to the County Court's determination, the prospective juror's professional relationship with AIG, her employer, rendered her unsuitable for jury service and necessitated her removal for cause (see CPL 270.20[1][c]... ). We note that AIG drafted and funded the insurance check underlying several counts of the indictment, and AIG was the named complainant in the count alleging insurance fraud in the third degree. Under all the circumstances, there was a considerable risk that the prospective juror could unwittingly give undue credence to witnesses from AIG and her service would give rise to the perception that the defendant did not receive a fair trial ...". ***People v. Guldi*, 2017 N.Y. Slip Op. 05459, 2nd Dept 7-5-17**

## FAIR HOUSING ACT, CONDOMINIUMS.

PLAINTIFF CONDOMINIUM OWNER STATED A CAUSE OF ACTION AGAINST THE CONDOMINIUM DEFENDANTS FOR VIOLATION OF THE FAIR HOUSING ACT.

The Second Department, reversing Supreme Court, determined plaintiff had stated a cause of action for violation of the Fair Housing Act. Plaintiff, a condominium owner, alleged she was denied access to common areas of the defendants' (Vista's) condominium complex because of her ethnicity: "The Supreme Court ... erred in granting that branch of the Vista defendants' motion which was pursuant to CPLR 3211(a) to dismiss the third cause of action to recover damages for housing discrimination in violation of the federal Fair Housing Act (42 USC § 3601 et seq.) insofar as asserted against them. That statute provides, in relevant part, that 'it shall be unlawful . . . [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin' (42 USC § 3604[b]). At the motion to dismiss stage, all that is required are sufficiently pleaded allegations that plaintiffs are part of a protected class and that defendants took actions against them that are forbidden by the Fair Housing Act on the basis of their membership in the protected class ... . In this case, the complaint alleged, inter alia, that the Vista defendants discriminated against the plaintiff and her family 'in an effort to prevent [them] from utilizing the facilities upon the common area,' and that the Vista defendants had engaged in a pattern of discrimination against the plaintiff and her family because they are of Hispanic descent. Accepting these allegations as true, and affording the plaintiff the benefit of every possible favorable inference, the complaint adequately stated a cause of action to recover damages for housing discrimination in violation of the Federal Fair Housing Act (42 USC § 3601 et seq.) insofar as asserted against the Vista defendants." ***Gutierrez v. McGrath Mgt. Servs., Inc.*, 2017 N.Y. Slip Op. 05425, 2nd Dept 7-5-17**

## FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW, EVIDENCE.

BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE NOT MET IN THIS FORECLOSURE ACTION, BANK'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined the bank did not meet the requirements for the business records exception to the hearsay rule, the bank's motion for summary judgment should not have been granted: "In support of its motion, the plaintiff relied upon the affidavit of Meldin Rhodes, assistant secretary of Nationstar Mortgage, LLC, the current loan servicer. Rhodes averred that "servicing records" showed that the notice of default was mailed to the defendant on November 2, 2011, and the RPAPL 1304 notice was mailed on December 28, 2012. Attached to Rhodes's affidavit were copies of the notice of default and the RPAPL 1304 notice purportedly sent by Bank of America, N.A. (hereinafter BOA), the prior loan servicer, to the defendant. The plaintiff failed to demonstrate the admissibility of the records relied upon by Rhodes under the business records exception to the hearsay rule (see CPLR 4518). Rhodes, an employee of the current loan servicer, did not aver that he was personally familiar with the record keeping practices and procedures of BOA, the prior loan servicer. Thus, Rhodes

failed to lay a proper foundation for admission of records concerning service of the required notices, and his assertions based on these records were inadmissible ... . Inasmuch as the plaintiff failed to tender sufficient evidence to demonstrate the absence of triable issues of fact as to its strict compliance with RPAPL 1304 and the notice requirement in the mortgage, its motion should have been denied, without regard to the sufficiency of the opposition papers ...". ***Deutsche Bank Natl. Trust Co. v. Carlin*. 2017 N.Y. Slip Op. 05421, 2nd Dept 6-5-17**

### MENTAL HYGIENE LAW, CRIMINAL LAW.

FOR CAUSE CHALLENGE TO A JUROR IN THIS SEX-OFFENDER CIVIL COMMITMENT ACTION SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED.

The Second Department, reversing Supreme Court, determined defendant sex offender's "for cause" challenge to a juror should have been granted in this civil commitment proceeding: "The record of the voir dire reveals that after the appellant's counsel disclosed that the appellant previously had committed rapes and robberies against 11 different victims and had been dubbed "the Flatbush rapist" in 1991, a prospective juror repeatedly turned away from counsel, said "Wow" on numerous occasions, and acknowledged that she remembered the Flatbush rapist. She further expressed the concern that 'I got too many granddaughters,' and when asked at various points if the appellant's prior offenses might influence her ability to be fair, she remarked 'I just went blank,' 'I don't know, I—it—,' and 'You know I'm looking at the man and I'm—I know his face, but that's when he was young and I'm like, wow.' Significantly, the prospective juror never unequivocally asserted that she could be fair and impartial following these remarks. The appellant's subsequent challenge to the prospective juror for cause was denied, and the appellant utilized a peremptory challenge to remove her from the panel." ***Matter of State of New York v. Keith G.*, 2017 N.Y. Slip Op. 05444, 2nd Dept 7-5-17**

### PERSONAL INJURY, MUNICIPAL LAW, IMMUNITY.

CITY NOT LIABLE FOR A CITY EMT'S REFUSAL TO OFFER MEDICAL ASSISTANCE TO PLAINTIFF'S DECEDENT, A RESTAURANT EMPLOYEE WHO HAD COLLAPSED WHILE THE EMT WAS IN THE RESTAURANT.

The Second Department determined the city defendants did not owe a duty of care to plaintiff's decedent (Rennix) despite the misconduct of a city employee. The city employee, an emergency medical technician (EMT) named Jackson, was in a restaurant when a restaurant employee collapsed. Because Jackson was not supposed to be on a break, she did not attempt to help plaintiff's decedent, who died before the ambulance arrived. Rennix was pregnant and her baby also died. Because there was no special relationship between the city and plaintiff's decedent, the city was not liable: "A municipal emergency response system is a governmental function, and thus where an emergency medical technician is alleged to have been negligent while acting in this governmental capacity, the municipality cannot be held liable unless it owed a 'special duty' to the injured party ... . There are three recognized situations in which a special duty may arise: '(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation' ... . The plaintiffs contend that the first category applies to the circumstances here, and a special duty arose from Jackson's violation of Penal Law § 195.00(2), which criminalizes official misconduct. * * * Here, the plaintiffs' claim fails at the first step of the analysis, as Rennix was not of a class for whose particular benefit the statute was enacted." ***Rennix v. Jackson*, 2017 N.Y. Slip Op. 05471, 2nd Dept 7-5-17**

## THIRD DEPARTMENT

### CIVIL PROCEDURE.

PURSUANT TO THE PERMISSIVE COUNTERCLAIM RULE, THE DOCTRINE OF RES JUDICATA DID NOT APPLY; PRETRIAL MOTION TO DISMISS IS RARELY APPROPRIATE WITHIN THE SIMPLIFIED SMALL CLAIMS PROCEDURE.

The Third Department, reversing County Court, determined the small claims action seeking damages for intentional infliction of emotional distress and malicious prosecution was not precluded by the doctrine of res judicata. The prior action between the same parties was a property dispute concerning a right-of-way. Although the small claims matter arose from the property dispute, pursuant to the permissive counterclaim rule, the doctrine of res judicata did not apply. The Third Department also determined the pretrial motion to dismiss the small claims matter should not have been granted, noting such a motion should rarely be entertained within the simplified small claims procedure: "The doctrine of res judicata provides that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' ... . Nevertheless, the permissive counterclaim rule operates to 'save from the bar of res judicata those claims for separate or different relief that could have been but were not interposed in the parties' prior action' so long as the second action is not based on 'a preexisting claim for relief that would impair the rights or interests established in the first action' ... . … We also find that County Court erred in addressing the merits of defendants' pretrial motion to dismiss as it related to the malicious prosecution claim inasmuch as informal

and simplified procedures govern small claims actions (see UCCA 1804), and pretrial motions to dismiss should rarely be entertained ... . In light of the fact that plaintiff, who appears pro se, has not yet had the opportunity to present his evidence at a hearing, we find that substantial justice will best be served by remittal to City Court for a prompt trial ... ". ***Rackowski v. Araya*, 2017 N.Y. Slip Op. 05481, 3rd Dept 7-6-17**

## CRIMINAL LAW.

COUNTY COURT JUDGE DID NOT HAVE THE AUTHORITY TO ISSUE A VERDICT BASED UPON THE REVIEW OF THE TRANSCRIPT OF THE PRIOR NON-JURY TRIAL WHICH HAD BEEN HELD BEFORE A DIFFERENT JUDGE AND REVERSED.

The Third Department, reversing the conviction and ordering a new trial, determined the judge to which the previously tried (and reversed) case had been reassigned, did not, pursuant to the Judiciary Law, have the power to issue a verdict based upon a review of the transcript of the prior non-jury trial. Manifest necessity required a mistrial. New trial will not violate double jeopardy rule: "As is relevant here, Judiciary Law § 21 provides that a trial judge 'shall not decide or take part in the decision of a question, which was argued orally in the court, when he [or she] was not present and sitting therein as a judge.' This statute has been interpreted to allow a substitute judge to preside over an already-commenced jury trial or decide a purely legal question, but it prohibits a substitute judge from weighing testimony or making factual and credibility determinations when he or she did not hear the witnesses' testimony firsthand .... . Here, Judiciary Law § 21 precluded County Court from rendering a verdict inasmuch as this was a nonjury trial and, in deciding the ultimate issue of guilt, County Court was required to weigh testimony and make factual determinations based upon testimony it did not hear and observe ... . In view of the improper comments and actions of County Court ... that led to the case being reassigned after the close of proof, coupled with the application of Judiciary Law § 21, we find that a mistrial was manifestly necessary such that double jeopardy does not bar a retrial. Accordingly, we conclude that a new trial is warranted." ***People v. Banks*, 2017 N.Y. Slip Op. 05474, 3rd Dept 7-6-17**

## CRIMINAL LAW.

DELAY DUE TO MOTION PRACTICE BY CO-DEFENDANTS NOT CHARGEABLE TO THE PEOPLE, DEFENDANT'S MOTION TO DISMISS FOR A SPEEDY TRIAL VIOLATION SHOULD NOT HAVE BEEN GRANTED.

The Third Department determined the defendant's motion to dismiss based upon a speedy trial violation should not have been granted. The relevant period of postreadiness delay was due to motion practice by co-defendants and was therefore not chargeable to the People for any of the defendants: "The five codefendants who were named with defendant in the joint indictment were arrested and arraigned at various times. During the 27-day period that Supreme Court charged to the People as postreadiness delay, several of these codefendants were engaged in motion practice, including motions that were due but had not yet been filed, were awaiting the People's response, or were awaiting the court's decision. In a prosecution involving a single defendant, delay resulting from motion practice is not chargeable to the People (see CPL 30.30 [4] [a]...). Likewise, periods of delay that result from motion practice by any codefendant in a joint prosecution are excludable as to all of them ... . Defendant did not meet his burden to show that the delay resulting from his codefendants' motion practice was unreasonably lengthy or that the exclusion provided by CPL 30.30 (4) (d) should not be applied here for any other reason ... . As the language of CPL 30.30 (4) (d) implies, a defendant's remedy for delays caused by codefendants in a joint prosecution is to move for severance. Here, although defendant was represented by counsel throughout the pertinent period, he neither moved for severance at any time nor showed that good cause for severance existed ... . Thus, the 27-day period charged by Supreme Court to the People as postreadiness delay should not have been added to the 163-day period of prereadiness delay, with the result that the People declared readiness within six months and complied with their statutory obligation." ***People v. Chrysler*, 2017 N.Y. Slip Op. 05477, 3rd Dept 7-6-17**

## CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S REQUEST TO REPRESENT HIMSELF SHOULD HAVE BEEN GRANTED, NEW TRIAL ORDERED.

The Third Department, reversing the convictions, determined defendant's request to represent himself should have been granted: "At an appearance on May 19, 2014, defendant's counsel informed County Court (Drago, J.) that defendant wanted to represent himself at trial. The court duly inquired into defendant's educational background, which included a GED earned in 2003, and engaged in an extensive colloquy with defendant emphasizing the importance of having counsel represent him. During this exchange, when asked to explain his decision, defendant gave the extraordinary response, 'I don't really have much explanation for it, just like I've been making bad choices, why not continue.' Defendant then illogically acknowledged this was a bad choice on his part. County Court understandably encouraged defendant to reconsider his decision, and directed that a transcript of the proceeding be provided to the trial judge who would make the decision on the application. When the trial began on May 27, 2014, County Court (Catena, J.), having reviewed the transcript, directly addressed the representation issue with defendant. Defendant elaborated that he had decided to represent himself because he had been unrepresented for the 'first seven months of incarceration' and felt he had 'a better chance of representing

[himself].' He continued, 'So I feel like nobody's going to fight for my life like I'm going to fight for it.' After confirming that assigned counsel was prepared to go forward, County Court denied defendant's request to proceed pro se, reasoning that it would not be appropriate or a 'wise choice' for defendant to do so. As understandable as that reasoning is, the issue is not whether defendant was making a prudent decision, but whether he had the capacity to knowingly waive his right to counsel ... . While defendant's initial extraordinary explanation raised a cause for concern, we conclude that his confirmation at trial demonstrates that he knowingly and unequivocally waived his right to counsel. Since defendant was improperly denied the right to proceed pro se, the judgment must be reversed and the matter remitted for a new trial ... ". ***People v. Curry*, 2017 N.Y. Slip Op. 05475, 3rd Dept 7-6-17**

## CRIMINAL LAW, ATTORNEYS.

MOTION TO VACATE THE CONVICTION, ALLEGING DEFENSE COUNSEL'S FAILURE TO INVESTIGATE, SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Third Department determined defendant's motion to vacate the judgment of conviction should not have been denied without a hearing. Defendant denied stealing the victim's wallet. The trial evidence indicated there were security cameras on businesses which may have captured the events, Defendant alleged his attorney did not make any effort to investigate whether videos existed and did not interview a man who was present during the incident: "... [W]e agree with defendant that he alleged certain 'non-record facts' that 'are material and, if established, . . . would entitle him to relief' so as to warrant a hearing ... . Defendant, in particular, averred that defense counsel rendered ineffective assistance by failing to engage in needed discovery related to his claim that he did not take the victim's wallet. The trial evidence established that the incident occurred in an area surrounded by businesses with security cameras installed and that defense counsel was aware of this fact. Defense counsel, according to defendant, did not investigate whether those security cameras captured the incident on video prior to trial and did not obtain the footage to determine whether it undercut the victim's claim that defendant had robbed him. Defendant further noted that he was with another man when the incident occurred and alleged that defense counsel failed to interview that individual to learn whether his testimony would be helpful to the defense. If defense counsel failed without reason to investigate known proof that had the potential to corroborate defendant's account of events, it 'may have amounted to less than meaningful representation' ... . Inasmuch as those questions 'cannot be determined on the motion papers, . . . we remit for a hearing where proof can be presented on' them ...". ***People v. Cruz*, 2017 N.Y. Slip Op. 05476, 3rd Dept 7-6-17**

## CRIMINAL LAW, EVIDENCE.

HATE CRIMES SHOULD NOT HAVE BEEN DISMISSED UPON A READING OF THE GRAND JURY MINUTES.

The Third Department, in a full-fledged opinion by Justice Peters, determined County Court should not have dismissed two hate crimes (attempted murder and assault) upon reading the grand jury minutes. Defendant, who is white, shot the victim, who is black, after a tirade of racial slurs: "Viewed most favorably to the People, the evidence before the grand jury provided a prima facie case of the hate crimes of attempted murder in the first degree and assault in the first degree. The foregoing testimony established that defendant repeatedly hurled several denigrating, racial slurs at the victim alone, whom he did not know, from the outset of the confrontation until the moment before he shot the victim at point blank range. Racial animosity and the use of epithets relating to a protected attribute, such as race, are probative of a defendant's motive and intent for purposes of proving a hate crime ... . The grand jury could have rationally inferred from this evidence — as well as the testimony that defendant had, just a half hour earlier, openly stated to another bar patron that he 'hate[d] black people' — that the acts constituting the crimes at issue were motivated 'in whole or in substantial part' by the victim's race (Penal Law § 485.05 [1] [b...). Because the grand jury could have rationally drawn the inference of guilt from this proof, the fact '[t]hat other, innocent inferences could possibly be drawn from the facts is irrelevant'... . Accordingly, we modify the judgment and reinstate counts 1 and 2 of the indictment." ***People v. Spratley*, 2017 N.Y. Slip Op. 05478, 3rd Dept 7-6-17**

## DISCIPLINARY HEARINGS (INMATES), CIVIL PROCEDURE.

COMMISSIONER AND CENTRAL OFFICE REVIEW COMMITTEE ARE NOT NECESSARY PARTIES FOR A REVIEW OF A DISCIPLINARY DETERMINATION 3RD DEPT.

The Third Department, reversing Supreme Court, determined the Commissioner of Corrections and Community Supervision and the Central Office Review Committee (hereinafter CORC) were not necessary parties to this review of a disciplinary proceeding and other grievances: " 'CPLR 1001 (a) states that an individual or entity is a necessary party to litigation 'if complete relief is to be accorded between the persons who are parties to the action' or if the entity [or individual] 'might be inequitably affected by a judgment in the action [or proceeding]' ... . Here, respondent maintains that the Commissioner and CORC are necessary parties to this action because complete relief cannot be accorded in their absence. Although respondent correctly notes that the Commissioner is the individual who renders the final determination in tier III disciplinary proceedings ... and CORC is the entity having the final decision on whether to grant or deny an inmate grievance ... , the failure to name either the Commissioner or CORC as a party has never before inequitably affected them or prevented this Court from according complete relief in similar proceedings... . Moreover, in light of the fact that respondent, the Commis-

sioner and CORC are integrally related inasmuch as they each fall under the umbrella of the Department of Corrections and Community Supervision, we find that the Commissioner and CORC are at no risk of prejudice and would not be 'inequitably affected by a judgment' if they were not joined in this proceeding ... . Under these circumstances, we conclude that the Commissioner and CORC are not necessary parties, and the failure to name them in proceedings such as this can be ignored." ***Matter of Green v. Uhler*, 2017 N.Y. Slip Op. 05491, 3rd Dept 7-6-17**

## FAMILY LAW.

PURSUANT TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC) A CHILD CAN NOT BE PLACED IN ANOTHER STATE ABSENT THAT STATE'S PERMISSION, EVEN IF PLACEMENT IS WITH A RELATIVE WITH PARENTAL CONSENT.

The Third Department, in a full-fledged opinion by Justice Egan, determined that the Interstate Compact on the Placement of Children (ICPC) does not allow the placement of a child in another state absent that state's permission, even when the placement is with a relative (custody, Family Ct Act article 6) and does not involve placement in foster care (neglect, Family Ct Act article 10). Here the grandmother, who lives in North Carolina, sought custody of the child with mother's consent. The North Carolina authorities, however, determined placement with grandmother would not be appropriate because she was caring for three other children: "The case law interpreting the ICPC is limited and is complicated by both the interplay between related and often (as is the case here) contemporaneous proceedings brought under Family Ct Act articles 6 and 10 ... and the overarching desire to effectuate an appropriate placement for a child — particularly in those situations where the relevant statutory scheme may be more of an impediment than an aid in achieving a placement that is consistent with the child's best interests. Here, although there is no question that the grandmother's efforts to seek custody of the child were well-intentioned, the fact remains that, at the time that the grandmother's custody petition was filed, DSS had custody of the child in the context of the then-pending Family Ct Act article 10 proceeding ... . To that end, '[w]here the custody of a child who is under the supervision of [DSS] is transferred to the custody of a parent or relative in another state, the provisions of the ICPC apply' ... — even where, as here, there is a pending Family Ct Act article 6 petition for custody ...". ***Matter of Dawn N. v. Schenectady County Dept. of Social Servs.*, 2017 N.Y. Slip Op. 05482, 3rd Dept 7-6-17**

## PRODUCTS LIABILITY, CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

DEFENDANTS DID NOT AFFIRMATIVELY DEMONSTRATE THEIR PRODUCTS WERE NOT THE SOURCE OF ASBESTOS EXPOSURE, POINTING TO GAPS IN PLAINTIFFS' PROOF IS NOT ENOUGH, DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED 3RD DEPT.

The Third Department, reversing Supreme Court, determined defendants' motions for summary judgment dismissing this asbestos-related products liability action should not have been granted. Defendants merely pointed to gaps in plaintiffs' proof and did not submit prima facie proof demonstrating their products were not the source of asbestos exposure. Therefore summary judgment should have been denied without any reference to the opposing papers: "In February 2015, plaintiff Eileen A. O'Connor was diagnosed with pleural mesothelioma. Alleging that her illness stemmed from exposure to equipment containing asbestos while working at the Westchester County Department of Labs and Research (hereinafter WCDLR) from approximately 1975 to 1979, O'Connor, along with her husband, derivatively, commenced this personal injury action in 2015 against, among others, defendants Fisher Scientific Company, LLC, Thomas Scientific, Inc. and VWR International, LLC (hereinafter collectively referred to as defendants) ... . * * * ... [T]he proof submitted by defendants, respectively, failed to establish that they did not sell asbestos-containing products to WCDLR during the time that O'Connor was employed or that O'Connor was not exposed to any such products ... . * * * ... [D]efendants failed to establish, prima facie, that they could not have caused O'Connor's asbestos-related illness... . Fisher Scientific's lack of documentation from the 1970s does not establish that it did not sell asbestos-containing products to WCDLR. Otherwise, defendants, respectively, 'merely pointed to perceived gaps in plaintiff[s'] proof, rather than submitting evidence showing why [plaintiffs'] claims fail' ...". ***O'Connor v. Aerco Intl., Inc.*, 2017 N.Y. Slip Op. 05487, 3rd Dept 7-6-17**

## WORKERS' COMPENSATION LAW.

EMPLOYER DID NOT DEMONSTRATE CLAIMANT'S PREEXISTING CONDITION HINDERED HER EMPLOYABILITY, THEREFORE EMPLOYER WAS NOT ENTITLED TO REIMBURSEMENT FROM THE SPECIAL DISABILITY FUND.

The Third Department determined claimant's employer was not entitled to relief from the special disability fund. Claimant had work-related injuries. In order to recover from the fund, the employer was required to demonstrate the claimant: (1) had a preexisting disability (which affected her employability); and (2), the pre-existing condition combined with the work-related injuries constituted a permanent disability greater than that caused by the work-related injuries alone: " 'In order to be entitled to receive reimbursement from the Fund pursuant to Workers' Compensation Law § 15 (8) (d), the employer must demonstrate that the claimant suffered from (1) a preexisting permanent impairment that hindered job potential, (2) a subsequent work-related injury, and (3) a permanent disability caused by both conditions that is materially and substantially greater than would have resulted from the work-related injury alone'... . 'The question with regard to the first requirement is not whether the preexisting condition is an obstacle or handicap to the claimant's particular employment but, rather,

whether it would be a hindrance to the claimant's general employability' ... . We agree with the Board that the employer did not demonstrate that claimant's preexisting asthma condition hindered, or was likely to hinder, her employability. The record reflects that, although claimant suffered from asthma since at least 1999, she was taking medication, including the use of an inhaler. The record contains no evidence that claimant was under any restrictions because of her asthma, that her asthma affected her ability to perform her job or that it hindered her employability. Notably, 'preexisting conditions that are controlled by medication have been found, without more, not to constitute a hindrance to employability' ...". ***Matter of Murphy v. Newburgh Enlarged City Sch. Dist.*, 2017 N.Y. Slip Op. 05500, 3rd Dept 7-6-17**

# FOURTH DEPARTMENT

## CIVIL PROCEDURE, APPEALS.

ACTION SEEKING INJUNCTION WAS NOT STARTED WITH A SUMMONS AND COMPLAINT, COURTS DID NOT HAVE JURISDICTION OVER THE MATTER, THE PAPERS WERE NOT APPEALABLE.

The Fourth Department determined that the town's attempt obtain an injunction requiring respondents to tear down structures which violated the zoning code was invalid. The action was brought by an order to show cause, but no summons or complaint had been filed. Therefore the courts did not have jurisdiction over the matter: " '[T]he valid commencement of an action is a condition precedent to [Supreme Court's] acquiring the jurisdiction even to entertain an application for a[n] . . . injunction'... . Here, however, there is no action supporting the application for an injunction. Indeed, the order to show cause and supporting papers themselves constitute the only request for an injunction. While 'courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal' ... , more than improper form is involved here ... . Converting the order to show cause and supporting papers into a summons and complaint in these circumstances would effectively permit the Town to seek an injunction by motion, a result that is at odds with the well-established principle that '[t]he pendency of an action is an indispensable prerequisite to the granting of a[n] . . . injunction' ... . We thus conclude that the court lacked jurisdiction to entertain the Town's request ... . Without an underlying action the order putatively on appeal does not constitute an appealable paper... . The appeal must therefore be dismissed." ***Matter of Town of Cicero v. Lakeshore Estates, LLC*, 2017 N.Y. Slip Op. 05524, 4th Dept 7-7-1**

## CORPORATION LAW.

COMPLAINT STATED A CAUSE OF ACTION AGAINST THE LEGAL OWNER OF A LIMITED LIABILITY COMPANY UNDER THE ALTER EGO DOCTRINE BUT NOT AGAINST AN EQUITABLE OWNER OF THE COMPANY.

The Fourth Department, reversing Supreme Court, over a concurrence, determined plaintiff had stated a cause of action against McDonald, the sole owner, officer and member of a limited liability company (Hyperion). The complaint alleged McDonald had rendered the LLC judgment proof such that it could not satisfy a debt owed to plaintiff. The court further found that the allegations against another party, who was alleged to be an "equitable owner" of the LLC, were not sufficient. Implicit in that ruling was the principle that a non-owner could be liable under a "piercing the corporate veil" or "alter ego" theory. The concurrence noted the issue whether the "piercing the corporate veil" or "alter ego" theory could apply to an "equitable" as opposed to "legal" owner of a corporate entity has not been determined in New York: "Plaintiff sufficiently alleges in the amended complaint that McDonald, 'through [his] domination of [Hyperion], abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against [her]' ... Plaintiff specifically alleged that McDonald took actions calculated to make Hyperion judgment-proof by undercapitalizing the LLC ... , and dissolving and thereafter diverting the assets of Hyperion to a new entity ... , without reserving funds to satisfy the judgment debt ... . We therefore conclude that, at this stage of the litigation, plaintiff sufficiently alleged that McDonald 'engaged in acts amounting to an abuse or perversion of the LLC form to perpetrate a wrong or injustice against [her]' to survive his motion to dismiss the amended complaint ... ".

**FROM THE CONCURRENCE:**

"While the principle that a nonshareholder may be liable as an equitable owner has been used by other courts in cases involving piercing the corporate veil ... , the Court of Appeals has not expressly decided the issue ... . The adoption of that concept by the Court of Appeals would involve wide-ranging policy considerations inasmuch as it would expand the pool of potential defendants subject to an alter ego theory to include non-owners (such as affiliated business entities, managers and employees), and could potentially reduce the protections afforded when forming a business entity. That concern may be even more significant to a limited liability company that, if the members so provide in their articles of organization, may be under the control of a manager or managers, rather than under the control of the members (see Limited Liability Company Law § 408 [a])." ***Grigsby v. Francabandiero*, 2017 N.Y. Slip Op. 05539, 4th Dept 7-7-17**

## CRIMINAL LAW.

A JURY'S FAILURE TO RENDER A VERDICT ON A COUNT OF AN INDICTMENT IS THE EQUIVALENT OF AN ACQUITTAL ON THAT COUNT.

The Fourth Department noted that the absence of a verdict on a count of an indictment is the equivalent of an acquittal on that count: "Defendant contends that the judgment must be modified by reversing those parts convicting him under counts 9 and 10 of the indictment because he was not indicted in count 9, which charged two codefendants with criminal possession of a weapon in the second degree, and the jury did not render a verdict on count 10. As the People correctly concede, defendant is correct. It is well settled that '[t]he New York State Constitution guarantees that [n]o person shall be held to answer for a[n] infamous crime . . . unless on indictment of a grand jury' ... , and defendant was not charged in count 9 of the indictment. Although defendant was charged with criminal possession of a weapon in the second degree in count 10 of the indictment, the jury did not render a verdict on that count. It is well settled that a jury's failure to render a verdict upon every count upon which it was instructed to do so 'constitutes an acquittal on every count on which no verdict was rendered'... . We therefore modify the judgment by reversing those parts convicting defendant under counts 9 and 10, and by dismissing count 10 of the indictment with respect to defendant." ***People v. Samuel*, 2017 N.Y. Slip Op. 05542, 4th Dept 7-7-17**

## CRIMINAL LAW.

PEOPLE'S REQUEST FOR AN ADJOURNMENT WHEN TWO DEPUTIES DID NOT SHOW UP FOR A MAPP HEARING SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing County Court, determined County Court should have granted the People's request for an adjournment after two deputies did not show up for a Mapp hearing: "We agree with the People that the court erred in refusing to grant their request for an adjournment. It is well settled that 'the decision to grant an adjournment is a matter of discretion for the hearing court'... . There are, however, well settled considerations to help guide a court in the exercise of its discretion. As relevant herein, for instance, 'when [a] witness is identified to the court, and is to be found within the jurisdiction, a request for a short adjournment after a showing of some diligence and good faith should not be denied merely because of possible inconvenience to the court or others' ... . Additional relevant considerations in determining whether to grant a request for an adjournment include whether it was the moving party's first request, whether the subject witness or witnesses would offer material testimony favorable to that party, and the degree of prejudice to the nonmovant ... . Here, the deputies who conducted the warrantless search were under subpoena and were identified to the court. Contrary to defendant's contention, the court was entitled to rely on the prosecutor's representation in open court concerning the issuance of subpoenas inasmuch as a prosecutor is an officer of the court with an 'unqualified duty of scrupulous candor' ... . Moreover, the request was the People's first request for an adjournment, the testimony of the witnesses would be material and favorable to the People, and there was minimal prejudice to defendant, who had been released from custody on his own recognizance. In contrast, the People suffered severe prejudice because the refusal to grant an adjournment resulted in the suppression of all physical evidence." ***People v. Schafer*, 2017 N.Y. Slip Op. 05551, 4th Dept 7-7-17**

## CRIMINAL LAW, APPEALS.

FAILURE TO FOLLOW PROCEDURE FOR SENTENCING A SECOND FELONY OFFENDER RENDERED THE SENTENCE ILLEGAL, SENTENCE CANNOT STAND DESPITE FAILURE TO RAISE THE ISSUE ON APPEAL.

Although the issue was not raised on appeal, the Fourth Department determined the failure to follow the procedure for sentencing a second felony offender required resentencing: "We address the illegality of 'the sentence . . . despite defendant's failure to raise the issue in the trial court or on appeal' ... . The presentence report available to the court and uncontested by the parties at sentencing indicates that defendant had been convicted of a prior felony for which he may have been sentenced within the 10-year period preceding commission of the first count of CSCS in the third degree, as tolled by Penal Law § 70.06 (1) (b) (v) and excluding from that statutory period the time during which defendant was incarcerated on the prior felony ... . Where, as here, 'information available to the court or to the [P]eople prior to sentencing for a felony indicate[d] that . . . defendant may have previously been subjected to a predicate felony conviction' ... , 'the People were required to file a second felony offender statement in accordance with CPL 400.21 and, if appropriate, the court was then required to sentence defendant as a second felony offender' ... The People nevertheless failed to file a second felony offender statement herein, and the court illegally sentenced defendant, a known predicate felon, as a first felony drug offender ... . Moreover, as the People correctly concede, if defendant was properly sentenced as a first felony drug offender, the imposition of three years of postrelease supervision is illegal because the applicable period for such an offender upon conviction of a class B felony is 'not less than one year and no more than two years' ... . Inasmuch as we cannot allow an illegal sentence to stand, we modify the judgment by vacating the sentence imposed, and we remit the matter to County Court for the filing of a predicate felony offender statement and resentencing in accordance with the law." ***People v. Mattice*, 2017 N.Y. Slip Op. 05558, 4th Dept 7-7-17**

## CRIMINAL LAW, EVIDENCE.

THE FAILURE TO PLACE THE PHOTOGRAPH WHICH WAS THE BASIS FOR THE POLICE OFFICER'S IDENTIFICATION OF THE DEFENDANT IN EVIDENCE RENDERED THE OFFICER'S IDENTIFICATION TESTIMONY UNRELIABLE, NEW TRIAL ORDERED.

The Fourth Department, over a dissent, determined the identification testimony by a police officer was unreliable because the photograph upon which the officer's identification was based was not put in evidence at the hearing. A new trial was ordered. The dissent noted that this is the first case holding an identification unreliable where an unduly suggestive police identification procedure was not involved: "At the hearing, the People attempted to introduce in evidence a photograph that was allegedly used by the undercover officer. The court refused to admit the photograph in evidence, however, on the grounds that the People failed to produce it during discovery and that, in their discovery responses, the People expressly denied the existence of any photographs in the People's possession. Thus, the photograph, i.e., the linchpin to the undercover officer's identification of defendant, was not before the court, and we conclude that its absence created a presumption of unreliability in the pretrial identification of defendant by the undercover officer ...".

**FROM THE DISSENT:**

I do not believe that there is any legal basis to suppress identification testimony of a defendant based on the alleged unreliability of the witness's identification unless the identification is the product of unduly suggestive police procedures ... . Indeed, a suppression court is not required to make 'a threshold inquiry into the reliability of . . . identification testimony' ... , and 'the reliability of untainted in-court identification testimony presents an issue of fact for jury resolution' ... . This is the first reported case in New York where identification testimony has been suppressed in the absence of a finding that the identification was influenced by unduly suggestive police procedures." ***People v. Reeves*, 2017 N.Y. Slip Op. 05526, 4th Dept 7-7-17**

## CRIMINAL LAW, EVIDENCE.

TROOPER DID NOT HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY WHEN DEFENDANT WAS QUESTIONED ABOUT THE CONTENTS OF BAGS IN HIS VEHICLE, DEFENDANT'S NERVOUSNESS AND INCONSISTENT ANSWERS DID NOT JUSTIFY THE QUESTIONING, MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined the trooper who stopped defendant's vehicle did not have a founded suspicion of criminal activity at the time the trooper asked questions which amounted to a De Bour level two inquiry: "Defendant appeals from a judgment convicting him upon his plea of guilty of possessing or transporting 30,000 or more unstamped cigarettes ... . When a State Trooper pulled over defendant for speeding on Interstate 81, he noticed 'several large nylon bags' with 'square edged contours' filling the area behind the driver's seat. The Trooper initially asked defendant what was inside the bags, i.e., whether there was luggage in the bags, and defendant gave a series of increasingly implausible answers, including 'clothing,' 'presents,' 'riding toys,' and 'bicycles.' Defendant asked if he could leave, but the Trooper instead requested that he exit the vehicle while the Trooper spoke to two passengers. When the Trooper returned to speak to defendant, but before he advised defendant of his Miranda rights, defendant admitted that the bags contained nearly 300 cartons of untaxed cigarettes purchased from an Indian reservation. * * * We conclude … that the Trooper's initial inquiry concerning the contents of the bags constituted a level two common-law inquiry, which required a founded suspicion of criminality that was not present at the time ... . Indeed, we note that nervousness, fidgeting, and illogical or contradictory responses to level one inquiries do not permit an officer to escalate an encounter to a level two De Bour confrontation ... . Here, the facts are even more strongly in favor of defendant inasmuch as defendant's evasive and inconsistent answers were themselves induced by a level two inquiry from the Trooper. Because a founded suspicion of criminality did not arise until after the Trooper asked defendant what was inside the bags, the court erred in refusing to suppress the evidence." ***People v. Gates*, 2017 N.Y. Slip Op. 05549, 4th Dept 7-7-17**

## ENVIRONMENTAL LAW, CIVIL PROCEDURE.

DEC CONTRACTORS HAD THE RIGHT TO ENTER PROPERTY TO TEST FOR GASOLINE CONTAMINATION WITHOUT SIGNING THE PROPERTY OWNER'S ACCESS AGREEMENT, BECAUSE ONLY A CHANGE IN FORM WAS REQUIRED, THE DEC'S ACTION WAS CONVERTED TO A DECLARATORY JUDGMENT ACTION.

The Fourth Department, reversing Supreme Court, determined the Department of Environmental Conservation (DEC) and its contractors had the right to enter respondent's property to test for gasoline contamination without signing an access agreement with the property owner. The property owner had refused entry to DEC contractors because its proposed access agreement was rejected by the DEC. The Fourth Department further determined a declaratory judgment action was the appropriate vehicle for the relief requested by the DEC and converted the action accordingly: "We ... agree with the DEC that the Oil Spill Act authorizes it and its contractors or agents to enter suspected spill sites. Navigation Law § 178 provides, in pertinent part, that '[t]he department is hereby authorized to enter and inspect any property or premises for the purpose of

inspecting facilities and investigating either actual or suspected sources of discharges or violation of this article or any rule or regulation promulgated pursuant to this article.' * * * Where an unregulated discharge takes place, ... the 'person' responsible 'shall immediately undertake to contain such discharge' ... . As this does not always occur, 'the [DEC] may undertake the removal of such discharge and may retain agents and contractors who shall operate under the direction of [the DEC] for such purposes' ... , and in reading the Act's sections together to best effectuate the Legislature's intended objectives ... , we conclude that the DEC's contractors who 'operate under the direction of [the DEC]' to investigate and remediate suspected and actual discharges of petroleum are authorized by statute, like the DEC, to enter the subject property for such purposes without acceding to landowner access agreements, but remaining subject only to restrictions imposed by law." ***Matter of State of New York (Essex Prop. Mgt., LLC)*, 2017 N.Y. Slip Op. 05525, 4th Dept 7-7-17**

## ENVIRONMENTAL LAW, MUNICIPAL LAW.

LOCAL LAW WHICH CONFLICTED WITH THE STATE ENVIRONMENTAL QUALITY REVIEW ACT WAS PROPERLY DECLARED INVALID.

The Fourth Department determined Supreme Court properly declared invalid a local law which conflicted with the State Environmental Quality Review Act (SEQRA). The local law allowed the classification of a restaurant with a drive-through window as a Type I project. However, the Fourth Department held the intent of SEQRA was to classify such a restaurant as a Type II project: "We ... conclude that the court properly declared that Local Law No. 9-2014 is invalid inasmuch as it is inconsistent with 6 NYCRR 617.5 (c) (7) to the extent that it classifies '[d]rive-through stations or windows' such as 'restaurants' as Type I actions under SEQRA. A local law that is 'inconsistent with SEQRA' must be invalidated ... . Here, although 6 NYCRR 617.5 (c) (7) does not explicitly include the construction of a restaurant with a drive-through window as a Type II action, we conclude that the Department of Environmental Conservation contemplated restaurants with drive-through windows as Type II actions when it promulgated that regulation ... . We similarly conclude that the court properly annulled defendant's classification of the project as a Type I action on the ground that the classification was affected by an error of law inasmuch as Local Law No. 9-2014 is inconsistent with SEQRA ... . Nonetheless, the court should have declined to accept, without a revised review by defendant, plaintiff's contention that the project should be classified as a Type II action ... . We therefore modify the judgment by annulling the determination that the project is a Type II action, and we remit the matter to defendant for a new determination." ***Miranda Holdings, Inc. v. Town Bd. of Town of Orchard Park*, 2017 N.Y. Slip Op. 05554, 4th Dept 7-7-17**

## FAMILY LAW.

EVIDENCE MOTHER HAD BEEN ARRESTED FOR A DRUG OFFENSE WAS ENOUGH TO WARRANT A HEARING ON FATHER'S PETITION FOR A CUSTODY MODIFICATION.

The Fourth Department determined father's petition to modify custody should not have been denied without a hearing. The evidence that mother had been arrested for a drug offense, in addition to allegations of corporal punishment by mother's boyfriend, were enough to warrant a hearing: "We ... agree with the father that he made a sufficient evidentiary showing of a change in circumstances to require a hearing with respect to certain remaining allegations in the amended petition. It was undisputed that the mother was facing prosecution for criminal possession of a controlled substance in Georgia. Although the mother submitted a negative drug test in support of her motion, the drug test was performed on a hair follicle sample that she submitted well after her arrest, and the assertions by the mother's attorney regarding how far back such a test could detect drug use raises an issue to be resolved at an evidentiary hearing, not on a motion to dismiss. Considering the mother's history of drug and alcohol addiction, as acknowledged by the parties in the parenting agreement, we conclude that the allegation that the mother was arrested and being prosecuted for criminal possession of a controlled substance is sufficient to warrant a hearing ... , inasmuch as such conduct, including the mother's possible unlawful use of a controlled substance, 'is plainly relevant to her fitness as a parent' ...". ***Matter of Farner v. Farner*, 2017 N.Y. Slip Op. 05545, 4th Dept 7-7-17**

## INSURANCE LAW, CIVIL PROCEDURE.

DATE OF LOSS MEANS THE DATE OF THE DENIAL OF THE CLAIM, NOT THE DATE OF THE EVENT TRIGGERING THE CLAIM, CAUSE OF ACTION NOT BARRED BY TWO YEAR STATUTE OF LIMITATIONS.

The Fourth Department, reversing Supreme Court, overruling Fourth Department precedent, determined causes of action stemming from a 2009 home burglary should not have been dismissed as barred by the two year statute of limitation. The term "date of loss" in the policy was interpreted to mean the date of the claim denial, not the date of the burglary: "Plaintiff commenced this action more than two years after the 2009 theft. Interpreting the phrase 'date of loss" as the date on which the theft occurred, defendant contends that the action is time-barred under the terms of the policy. Plaintiff, on the other hand, interprets the phrase 'date of loss' as the date on which the claim was denied and, as a result, contends that the action was timely commenced. We agree with plaintiff. Despite cases holding that 'date of loss' means the date of the underlying catastrophe, including cases from this Department (*see Baluk v. New York Cent. Mut. Fire Ins. Co.*, 114 AD3d 1151; *Klawiter v. CGU/OneBeacon Ins. Group*, 27 AD3d 1155), the Court of Appeals has found a distinction between the generic phrase 'date of loss,' and the term of art 'inception of loss' (see Medical Facilities v. Pryke, 95 AD2d 692, 693, affd 62 NY2d 716; Proc v. Home

Ins. Co., 17 NY2d 239, 243-244, rearg denied 18 NY2d 751; Steen v. Niagara Fire Ins. Co., 89 NY 315, 322-325). As the Second Circuit noted in Fabozzi v. Lexington Ins. Co. (601 F3d 88, 91), those cases have not been overruled or disavowed in any way. Indeed, as the First Department recognized in Medical Facilities, 'nothing in [Proc] suggests an intention to alter [the] general rule' ... , which is 'that an action for breach of contract commences running at the time the breach takes place' ... . Thus, only the very specific 'inception of loss' or other similarly 'distinct language' permits using the catastrophe date as the limitations date ... . Here, the policy did not contain the specific 'inception of loss' or other similarly distinct language, and we thus disavow our decisions in Baluk and Klawiter to the extent that they hold otherwise. Inasmuch as '[a]mbiguities in an insurance policy are to be construed against the insurer' ... , we conclude that the two-year limitations period contained in the policy did not begin to run until 'the loss [became] due and payable' ...". ***Lobello v. New York Cent. Mut. Fire Ins. Co.*, 2017 N.Y. Slip Op. 05543, 4th Dept 7-7-17**

## LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH PLAINTIFF'S DECEDENT FELL FROM EITHER A LADDER OR A SCAFFOLD, THERE WAS NO EVIDENCE THE LADDER OR SCAFFOLD TIPPED OR SHIFTED, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiff was not entitled to summary judgment on the Labor Law § 240(1) cause of action. Although plaintiff's decedent fell from either a ladder or a scaffold (no witnesses) there was no evidence the ladder tipped or the scaffold was defective: " 'A plaintiff is entitled to summary judgment under Labor Law § 240 (1) by establishing that he or she was subject to an elevation-related risk, and [that] the failure to provide any safety devices to protect the worker from such a risk [was] a proximate cause of his or her injuries' ... . Here, it is undisputed that the safety ladder used by decedent did not tip, and that the scaffolding did not collapse, tip, or shift. Decedent, himself the only witness to the accident, was unable to provide any testimony or statement concerning how the accident happened. Thus, we note that this case is unlike those cases in which the plaintiff's version of his or her fall is uncontroverted because the plaintiff is the only witness thereto ... . It is now axiomatic that '[t]he simple fact that plaintiff fell from a ladder [or a scaffold] does not automatically establish liability on the part of [defendants]'... . Thus, we conclude that the court erred in determining that plaintiff met her initial burden on her motion by simply establishing that decedent fell from a height. We further conclude that plaintiff's submissions raise triable issues of fact as to, inter alia, how the accident happened, from where decedent fell—the ladder or the scaffold, and whether a violation of Labor Law § 240 (1) occurred." ***Hastedt v. Bovis Lend Lease Holdings, Inc.*, 2017 N.Y. Slip Op. 05522, 4th Dept 7-7-17**

## LANDLORD-TENANT.

BROKER WHICH NEGOTIATED A 2001 LEASE NOT ENTITLED TO COMMISSION ON THE 2011 LEASE BETWEEN THE SAME PARTIES, 2011 LEASE WAS DEEMED A NEW LEASE, NOT A RENEWAL OF THE 2001 LEASE.

The Fourth Department determined defendant landlord's motion for summary judgment in the action by a real estate broker seeking a commission based upon a lease should have been granted. The broker had negotiated the original lease in 2001 and was paid a commission. The question was whether the second lease in 2011 was a renewal of the original lease or a new lease, for which no commission was due. The Fourth Department held the 2011 lease was a new lease: "... [W]e agree with defendants that they met their burden on their motion by establishing that the 2011 lease was a new lease, rather than a renewal of the 2001 lease. In support of their motion, defendants submitted evidence establishing that, under the 2011 lease, HealthNow was leasing only part of the subject building, rather than the whole building as called for under the 2001 lease. In addition, the 2011 lease called for First Columbia [landlord] to make structural changes to the building to accommodate HealthNow's [tenant's] changing needs, and to install a backup generator at a cost in excess of $300,000. Furthermore, the rent was higher in the 2011 lease, it was not calculated in accordance with the terms for a renewal as provided in the 2001 lease, and the 2011 lease was for a term of seven years, whereas the 2001 lease called for a renewal term of five years. Finally, defendants established that the 2011 lease was not the result of any brokerage services performed by plaintiff." ***Baumann Realtors, Inc. v. First Columbia Century-30, LLC*, 2017 N.Y. Slip Op. 05546, 4th Dept 7-7-17**

## PERSONAL INJURY.

INITIAL ACCIDENT FURNISHED A CONDITION FOR THE SUBSEQUENT ACCIDENT WHICH INJURED PLAINTIFF, BUT WAS NOT THE PROXIMATE CAUSE OF THE SUBSEQUENT ACCIDENT.

The Fourth Department, over a dissent, determined the initial accident was not the proximate cause of the third accident in which plaintiff was injured. In the initial accident a car driven by Sheehan struck a barrier. The Sheehan car was left in the roadway. Plaintiff, who was not injured, got out of the Sheehan car and went to a safe area. The Sheehan car was then struck by another car driven by a non-party. Plaintiff went back to the accident scene where he was injured when there was yet another collision involving a third car driven by Gilray. The majority held that the initial accident created a condition

for the accident which injured plaintiff, but was not the proximate cause of that accident: "Sheehan's negligence, if any, 'did nothing more than to furnish the condition or give rise to the occasion by which [plaintiff's] injury was made possible and which was brought about by the intervention of a new, independent and efficient cause' ... . Prior to the Gilray accident, the situation resulting from the first accident 'was a static, completed occurrence' with plaintiff and all of the passengers of Sheehan's vehicle safely off the roadway ... . The Gilray accident arose from a 'new and independent cause and not as [the] consequence of [Sheehan's] original act[]' ... . 'The risk undertaken by plaintiff' in returning to the roadway was created by himself ... '."

**FROM THE DISSENT:**

"Under the circumstances of this case, a factfinder could reasonably conclude that a foreseeable consequence of Sheehan's negligence in losing control, striking the barrier, and leaving the disabled vehicle obstructing the left lane of a divided roadway without activating the flashing hazard lights at night is that motorists, unable to see the vehicle at they approached, would strike it ... . In determining that the situation resulting from Sheehan's accident was a static, completed occurrence prior to Gilray's collision, the majority fails to account for the critical facts that the disabled vehicle was not moved safely off the roadway and instead remained in a position of peril obstructing the left lane without its flashing hazard lights activated, and that plaintiff was injured while positioned near the disabled vehicle ...". ***Serrano v. Gilray*, 2017 N.Y. Slip Op. 05523, 4th Dept 7-7-17**

## PERSONAL INJURY, IMMUNITY.

QUESTION OF FACT WHETHER THE ROAD ON WHICH PLAINTIFF WAS DRIVING HIS ATV WHEN HE WAS INJURED WAS SUITABLE FOR RECREATIONAL USE, SUMMARY JUDGMENT FINDING THE LANDOWNER WAS IMMUNE FROM SUIT UNDER THE RECREATIONAL USE IMMUNITY PROVISION OF GENERAL OBLIGATIONS LAW § 9-103 SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, in a full-fledged opinion by Justice Curran, over a two-justice dissent, reversing Supreme Court, determined defendant landowner was not entitled, as a matter of law, to immunity from a personal injury suit under the "recreational use immunity" provision of the General Obligations Law. Therefore the landowner's motion for summary judgment should not have been granted. Plaintiff was injured when the all terrain vehicle (ATV) he was driving struck a pothole on defendant's dirt road. Pursuant to the General Obligations Law, if the road were deemed suitable for recreational use the landowner would be immune from suit. The majority concluded the road was used for two-way traffic to access homes. Therefore a question of fact had been raised about whether the road was suitable for recreational use within the meaning of the statute. "... [T]he portion of property where plaintiff fell is not the type of property that the Legislature intended to cover under General Obligations Law § 9-103... . ... [C]ourts should ask whether the property 'is the sort which the Legislature would have envisioned as being opened up to the public for recreational activities as a result of the inducement offered in the statute. In other words, is it a type of property which is not only physically conducive to the particular activity or sport but is also a type which would be appropriate for public use in pursuing the activity as recreation?' ... . Application of the statutory immunity to the road at issue would lead to its application to potentially any road in a rural area, which is inconsistent with the idea that this statute is in derogation of the common law and should therefore be narrowly construed ... .

**FROM THE DISSENT:**

"We respectfully dissent inasmuch as we conclude that defendant, the property owner, is entitled to immunity from liability under the recreational use statute (see General Obligations Law § 9-103). In particular, we disagree with the majority's conclusion that the property at issue is not suitable for the recreational activity in which plaintiff was engaged at the time of his accident, i.e., operation of an all-terrain vehicle (ATV). We would therefore affirm the order granting defendant's motion for summary judgment dismissing the complaint." ***Cummings v. Manville*, 2017 N.Y. Slip Op. 05530, 4th Dept 7-7-17**

## PERSONAL INJURY, MUNICIPAL LAW, IMMUNITY.

COUNTY DID NOT DEMONSTRATE THE INSTALLATION OF A GUARD RAIL WAS PRECEDED BY A DELIBERATIVE DECISION-MAKING PROCESS, SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined that the county had not sufficiently demonstrated a deliberative decision-making process preceding the installation of a particular type of roadway guard rail. It was alleged plaintiff's decedent's car was launched 90 feet after striking the sloping end of the guard rail. The county's summary judgment motion, based upon qualified immunity, should not have been granted: "We conclude that the County failed to meet its initial burden of establishing its entitlement to summary judgment based on qualified immunity ... . In particular, the County failed to establish that the decision to change the end assembly of the guide rail from a Type I to a Type II end assembly was 'the product of a deliberative decision-making process, of the type afforded immunity from judicial interference'... . Rather,

the record reflects that the decision to change the guide rail end assembly was made after Phelps [the guard rail installer] conducted a walk-through and learned that the owners of a hay field needed a 'field drive' to allow them to access County Route 41. Although the County submitted evidence that the change order completed by Phelps was signed by FRA [the engineers], there is no showing by the County that there was prior input from FRA regarding the change and, importantly, no analysis to support the decision for the change. Moreover, although the County contended on its motion that it followed the requisite standards of the New York State Department of Transportation, we note that the County's expert erroneously combined the criteria for two separate uses of Type II end assemblies into one standard." ***Morris v. Ontario County*, 2017 N.Y. Slip Op. 05533, 4th Dept 7-7-17**

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