CasePrepPlus

November 15, 2017

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

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FIRST DEPARTMENT

CIVIL PROCEDURE.

TRIAL COURT VIOLATED THE LAW OF THE CASE DOCTRINE, PRIOR RULING BY THE COMMERCIAL DIVISION BECAME THE LAW OF THE CASE.

The First Department determined the law of the case doctrine prohibited the trial court, a court of coordinate jurisdiction, from deviating from a prior ruling in the commercial division. The commercial division had ruled the plaintiff restaurant's exhaust system violated the NYC Mechanical Code: "The 'law of the case doctrine is designed to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case' ... . Here, the trial court was prohibited from finding that plaintiff's commercial kitchen exhaust system did not violate the Mechanical Code. The trial court adopted the earlier finding ... when it held that [the] orders were the 'law of the case,' and limited the issue at trial ...". ***Glaze Teriyaki, LLC v. MacArthur Props. I, LLC*, 2017 N.Y. Slip Op. 07770, First Dept 11-9-17**

PERSONAL INJURY, MUNICIPAL LAW.

POLICE OFFICER DID NOT ACT IN RECKLESS DISREGARD FOR SAFETY IN THIS INTERSECTION ACCIDENT CASE, OFFICER WAS AUTHORIZED TO DRIVE THROUGH A RED LIGHT EVEN IF THE SIREN AND EMERGENCY LIGHTS WERE NOT ACTIVATED.

The First Department determined the city's motion for summary judgment was properly dismissed in this traffic accident case involving a police car. The court held that the officer was engaged in an emergency operation when he went through a red light at an intersection and struck plaintiff's car. Even if the siren and emergency lights were not on, the officer was authorized to proceed through the intersection: "Defendants' motion for summary judgment was properly granted since the record shows that defendant Kohler, a police officer, was operating a police vehicle while performing an emergency operation and did not recklessly disregard the safety of others before the accident happened ... . The fact that Koehler was mistaken in believing that plaintiff was stopping her vehicle when he proceeded to pass through the red light did not render his conduct reckless. Koehler testified that as he approached the intersection, he reduced his speed and looked left and right. He was traveling approximately 10 miles above the speed limit when the accident occurred. Koehler attempted to avoid colliding with plaintiff by braking hard and turning the steering wheel to the right upon realizing that plaintiff's vehicle had entered the intersection ... . The fact that there is a question as to whether the police vehicle's lights and siren were activated is not material because Koehler was not required to activate either of these devices in order to be entitled to the statutory privilege of passing through a red light ...". ***Lewis v. City of New York*, 2017 N.Y. Slip Op. 07785, First Dept 11-9-17**

PRODUCTS LIABILITY, PERSONAL INJURY.

PLAINTIFFS ENTITLED TO SUMMARY JUDGMENT ON THEIR DEFECTIVE DESIGN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE.

The First Department, in a full-fledged opinion by Justice Kern, determined plaintiffs were entitled to summary judgment on their defective design cause of action in this products liability case. The product is a "fire pot" which burns a gel poured into a cup. Apparently the gel exploded. There was expert testimony that it is difficult to see whether the gel is burning and reloading the gel while it is burning will cause it to explode: "... [P]laintiffs have established, as a matter of law, that the product at issue, consisting of the fire pot and the fuel gel, was defectively designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiffs' injuries. Plaintiffs have submitted evidence, including expert affidavits, demonstrating that the product has minimal utility, serving a purely decorative purpose, that it poses an extraordinary safety risk in that it can explode and propel flaming fuel gel onto persons in its vicinity and cause them to catch fire when a person attempts to light the fire pot with the fuel gel while the fire pot is already lit or hot, that when the fuel gel in the fire pot is lit but burns down, it has a nearly invisible flame, which can mislead users into perceiving the flame as extinguished and the fuel gel exhausted, that the viscosity of the fuel gel makes it easily adherent to skin and clothing which makes it very difficult to extinguish and that alternative and safer designs are available in that instead of designing the fire pot with a deep-seated stainless steel cup into which the fuel gel is poured, the product could have been designed using fuel gel in nonrefillable metal cans or cartridges that get inserted directly into the fire pot, which would eliminate the

design defect that causes an explosion upon refueling the fire pot with the fuel gel as well as the related dangers flowing from the fuel gel flame being difficult to visually discern when the fuel gel burns down and the viscosity of the fuel gel. Finally, the experts opined that the defective design of the product was a substantial factor in causing plaintiffs' injuries. In opposition, defendant has failed to raise an issue of fact as to whether the product was designed in a reasonably safe manner or whether the defective design was a substantial factor in causing plaintiffs' injuries." **M.H. v. Bed Bath & Beyond Inc., 2017 N.Y. Slip Op. 07790, First Dept 11-9-17**

SECOND DEPARTMENT

CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE STAYED THE ENFORCEMENT OF PLAINTIFFS' JUDGMENT PURSUANT TO CPLR 5240 BASED ON COUNTERCLAIMS ASSERTED BY DEFENDANTS, ACTION ON THE COUNTERCLAIMS COULD PROCEED DESPITE ENFORCEMENT OF THE JUDGMENT.

The Second Department, in a "summary judgment in lieu of complaint" action on a note, determined Supreme Court should not have stayed the enforcement of a judgment because defendants had asserted counterclaims. The counterclaims could proceed despite enforcement of the judgment: "The Supreme Court erred in, upon renewal and reargument, staying enforcement of a judgment in favor of the plaintiffs. Pursuant to CPLR 5240, a court may, on its own initiative or on motion, stay the enforcement of a judgment. The purpose of this 'broad discretionary power' is to permit the trial court to 'prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court' ... . Here, that the defendants remain free to assert their counterclaims against the plaintiffs in a separate action does not preclude enforcement of the judgment in favor of the plaintiffs and against the defendants. The defendants proffered no evidence that permitting the plaintiffs to enforce the judgment would cause unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice." ***Castle Restoration & Constr., Inc. v. Castle Restoration, LLC*, 2017 N.Y. Slip Op. 07703, Second Dept 11-8-17**

CIVIL PROCEDURE.

AFFIRMATIVE DEFENSE WHICH ARISES FROM THE ACTION BROUGHT IS NOT TIME-BARRED.

The Second Department determined an affirmative defense was not time-barred. Plaintiffs alleged a local law was not properly enacted and was therefore invalid. Defendants asserted in their answer that the law was properly enacted a valid as an affirmative defense: "... [T]he Supreme Court erred when it, in effect, dismissed the defendants' affirmative defense. '[T]he statute of limitations governs the commencement of an action, not the assertion of a defense' (... see CPLR 201, 217). If a defense 'arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed' (CPLR 203[d] ...) . * * * ... [T]he defendants' answer does not seek any affirmative relief. Rather, it raises a defense that is 'predicated on [an] act or fact growing out of the matter constituting the cause or ground of the action brought' by the plaintiffs ... . In other words, the assertion that the Local Law was not validly enacted in accordance with the applicable referendum procedures specified in state and local law 'arises from, and directly relates to' the plaintiffs' claim that the Local Law was, in fact, enacted in accordance with the applicable referendum procedures and that they were therefore entitled to a declaration that the Local Law was valid ... . Accordingly, the court erred when it, in effect, dismissed the affirmative defense contained in the defendants' answer alleging that the Local Law was not validly enacted on the ground that the affirmative defense was time-barred (see CPLR 203[d]). Since the merits of the defendants' affirmative defense were not reached by the court, it should not have awarded judgment in favor of the plaintiffs." ***Matter of Jenkins v. Astorino*, 2017 N.Y. Slip Op. 07730, Second Dept 11-8-17**

CIVIL PROCEDURE.

DUE DILIGENCE STANDARD FOR SERVICE OF PROCESS PURSUANT TO CPLR 308(4) WAS MET.

The Second Department determined Supreme Court should not have dismissed the complaint in this foreclosure action on the ground that efforts to serve the defendant were inadequate pursuant to CPLR 308(4). The Second Department found the efforts to serve defendant met the due diligence standard: "Here, the affidavit of the process server demonstrated that three visits were made to the homeowner's residence, each on different days and at different times of the day. The process server also described in detail his unsuccessful attempt to obtain an employment address for the homeowner, including interviewing a neighbor. Under these circumstances, the Supreme Court improperly concluded that the due diligence requirement was not satisfied ...". ***U.S. Bank, N.A. v. Cepeda*, 2017 N.Y. Slip Op. 07767, Second Dept 11-8-17**

CIVIL PROCEDURE, DEBTOR-CREDITOR.

SUMMARY JUDGMENT ENTERING A RENEWAL JUDGMENT PROPERLY GRANTED, CRITERIA EXPLAINED.

In finding plaintiff was properly granted summary judgment in this action for entry of a renewal judgment the court explained the criteria: "The Supreme Court properly granted the plaintiff's motion for summary judgment and entered a renewal judgment pursuant to CPLR 5014(1). The plaintiff established its prima facie entitlement to a renewal judgment as a matter of law by showing: (1) the existence of the original judgment; (2) that the defendant was the judgment debtor; (3) that the original judgment was docketed at least nine years prior to the commencement of this action; and (4) that the original judgment remains partially or completely unsatisfied ...". ***Jones Morrison, LLP v. Schloss*, 2017 N.Y. Slip Op. 07712, Second Dept 11-8-17**

CIVIL PROCEDURE, FORECLOSURE.

BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR OF DEFAULT IN THIS FORECLOSURE ACTION, THE ACTION SHOULD NOT HAVE BEEN DISMISSED AS ABANDONED.

The Second Department determined Supreme Court should not have dismissed this foreclosure action as abandoned because the bank moved for an order of reference within one year of the default: "CPLR 3215(c) provides that '[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.' However, '[i]t is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)' ... . Rather, it is enough that the plaintiff timely takes 'the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference' to establish that it 'initiated proceedings for entry of a judgment within one year of the default' for the purpose of satisfying CPLR 3215(c) ... . '[A]s long as proceedings are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal' ... . This is so even where, as here, a timely motion for an order of reference is subsequently withdrawn ... . Here, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (see RPAPL 1321[1]) ... within one year of the defendant's default. Accordingly, the plaintiff did not abandon the action ...". ***Wells Fargo Bank, N.A. v. Mayen*, 2017 N.Y. Slip Op. 07768, Second Dept 11-817**

CIVIL PROCEDURE, FRAUD, ATTORNEYS, EVIDENCE .

ALLEGATION THAT LAW FIRM ADDUCED FALSE EVIDENCE IN A PROCEEDING MUST BE ASSERTED IN A MOTION TO VACATE THE JUDGMENT IN THAT PROCEEDING, NOT AS A NEW ACTION.

The Second Department noted that an action alleging attorneys adduced false testimony in a prior court proceeding must be brought as a motion to vacate the judgment in the prior case, not as a new action: "Generally, a party who has lost an action as a result of alleged fraud or false testimony cannot collaterally attack the judgment in a separate action against the party who adduced the false evidence, and the plaintiff's remedy lies exclusively in moving to vacate the judgment ... . Under an exception to that rule, a separate action may be commenced where the alleged perjury or fraud in the underlying action was 'merely a means to the accomplishment of a larger fraudulent scheme' ... which was 'greater in scope than the issues determined in the prior proceeding' ... . Here, the moving defendants established their prima facie entitlement to summary judgment dismissing the causes of action alleging fraud, aiding and abetting fraud, violation of Judiciary Law § 487, and prima facie tort insofar as asserted against them by demonstrating that the plaintiffs are merely attempting to collaterally attack an order issued in the underlying action. In opposition, the plaintiffs only raised conclusory and unsubstantiated allegations that the moving defendants' fraud in the underlying action was 'merely a means to the accomplishment of a larger fraudulent scheme' ...". ***DeMartino v. Lomonaco*, 2017 N.Y. Slip Op. 07706, Second Dept 11-8-17**

CIVIL PROCEDURE, TRUSTS AND ESTATES.

SUPREME COURT SHOULD NOT HAVE AWARDED A MONEY JUDGMENT AGAINST DEFENDANT PERSONALLY, DEFENDANT WAS ONLY A PARTY TO THE ACTION AS A TRUSTEE.

The Second Department, reversing Supreme Court, determined Supreme Court exceeded its authority when it, sua sponte, awarded a money judgment against defendant personally. Defendant was only a party to the action in his representative capacity (trustee): " '[A] court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party' ... . Here, the Supreme Court not only strayed from this principle ... , but did so by purporting to impose liability on an individual who was not even a party to the action. 'It has been repeatedly held that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and strangers to any right or liability as an individual, and consequently a former judgment concludes a party only in the character in which he was sued' ... ". ***Magid v. Sunrise Holdings Group, LLC*, 2017 N.Y. Slip Op. 07718, Second Dept 11-8-17**

CRIMINAL LAW.

ASKING DEFENDANT DURING A TRAFFIC STOP WHETHER HE HAD ANYTHING ILLEGAL IN THE CAR WAS NOT JUSTIFIED BY A FOUNDED SUSPICION, ALL PHYSICAL EVIDENCE TAKEN FROM THE CAR AND SUBSEQUENT STATEMENTS AT THE POLICE STATION SHOULD HAVE BEEN SUPPRESSED.

The Second Department, over a dissent, determined the motion to suppress physical evidence (stolen property and a handgun) and subsequent statements made at the police station should have been granted. All charges except the traffic violations which led to the vehicle stop were dismissed. The arresting officer observed the defendant make an illegal turn and run a red light. Shortly after the vehicle stop, before the officers had any reason to suspect defendant's involvement in a recent robbery, the arresting officer asked defendant whether he had anything illegal in the car. The Second Department held that question was not justified by a suspicion of criminal activity: "The evidence established that the officer did not have a 'founded suspicion that criminality [was] afoot' that would justify his question as to whether the defendant had anything illegal in the vehicle ... . Although the stop was justified by the traffic violations, the intrusiveness of the officer's conduct exceeded that which is permissible during a normal traffic stop ... . '"[A] request for information involves basic, nonthreatening questions regarding, for instance, identity, address or destination. . . . Once [an] officer asks more pointed questions . . . the officer is no longer merely seeking information . . . [and the inquiry] must be supported by a founded suspicion that criminality is afoot'... . Thus, the ... handbag, the cell phone, and the camera should have been suppressed as fruit of an illegal search, as well as the gun that was subsequently found upon an inventory of the vehicle ... . [T]he suppression record did not demonstrate that the causal connection between the illegal search and the defendant's statements was sufficiently attenuated to purge the taint of the illegal search ... " ***People v. Newson*, 2017 N.Y. Slip Op. 07752, Second Dept, 11-8-17**

CRIMINAL LAW, APPEALS.

ARREST WAS NOT AUTHORIZED, CONVICTION FOR RESISTING ARREST REVERSED IN THE INTEREST OF JUSTICE (ERROR NOT PRESERVED).

The Second Department, reversing defendant's conviction for resisting arrest in the interest of justice (error not preserved), determined the arrest was not authorized. The complainant told the police a man in a white BMW had pointed a gun at him. When the complainant saw the defendant and another man standing near a white BMW he said "that's them." Because the officers did not know which of the two men pointed the gun at the complainant, they did not have probable cause to arrest the defendant at the time he fled: "A person is guilty of resisting arrest when he or she intentionally prevents or attempts to prevent a police officer from effectuating an authorized arrest of himself or herself or another person ... . 'A key element of resisting arrest is the existence of an authorized arrest, including a finding that the arrest was premised on probable cause' ... . Although the defendant's contention that the prosecution failed to present legally sufficient evidence of an authorized arrest is unpreserved for appellate review ... , we reach it in the exercise of our interest of justice jurisdiction ... . Viewing the evidence in the light most favorable to the People ... , we agree with the defendant that the evidence was not legally sufficient to establish the element of authorized arrest because, as a matter of law, the evidence failed to establish that the police had probable cause to arrest the defendant. Generally, information provided by an identified citizen accusing another individual of a specific crime is legally sufficient to provide the police with probable cause to arrest ... . However, at the time that the complainant pointed to the defendant and [another] and stated 'that's them,' the police officers had only been informed that one individual pointed a firearm at the complainant. Therefore, under the circumstances presented here, the officers could not have concluded that it was more probable than not that the defendant ... had been driving the white BMW and pointed a firearm at the complainant. Accordingly, the evidence was legally insufficient to establish the defendant's guilt of the crime of resisting arrest." ***People v. Andrews*, 2017 N.Y. Slip Op. 07747, Second Dept 11-8-17**

CRIMINAL LAW, ATTORNEYS.

FAILURE TO REQUEST A JURY CHARGE ON THE INTOXICATION DEFENSE MAY HAVE BEEN A STRATEGIC DECISION WHICH THE APPELLATE COURT WILL NOT SECOND GUESS IN HINDSIGHT.

The Second Department determined defense counsel was not ineffective for failing to request a jury instruction on the intoxication defense in this murder and manslaughter case (two victims). Defense counsel had requested jury charges on the justification defense and lesser included offenses. It is possible defense counsel made a strategic decision against requesting the intoxication defense instruction: "Assuming, without deciding, that the evidence at trial was sufficient to warrant an intoxication charge ... , defense counsel was not ineffective for failing to request that charge in this case ... . Defense counsel prudently pursued a justification defense, which would have been a total defense to the top count of murder in the second degree. Moreover, defense counsel successfully requested the lesser-included offenses of manslaughter in the first degree and manslaughter in the second degree, and the latter count was submitted over the People's objection. Defense counsel could have strategically determined that requesting an intoxication charge would have undermined, or distracted from, the justification defense in this particular case. Although reasonable legal minds may differ on the better strategy with respect to a charge of intoxication, we cannot second-guess defense counsel's decision with the benefit of hindsight. Accordingly,

the defendant has not demonstrated the absence of strategic or other legitimate explanations for defense counsel's failure to request an intoxication charge ... ". ***People v. Pagan*, 2017 N.Y. Slip Op. 07753, Second Dept 11-8-17**

CRIMINAL LAW, EVIDENCE.

DUCT TAPE USED TO SILENCE AND RESTRAIN THE VICTIM WAS A DANGEROUS INSTRUMENT WITHIN THE MEANING OF THE ROBBERY FIRST STATUTE, KIDNAPPING BASED UPON THE RESTRAINT OF THE VICTIM DID NOT MERGE WITH ROBBERY, DISSENT DISAGREED.

The Second Department affirmed, over a dissent, defendant's robbery and kidnapping convictions. The robbery first degree conviction was premised upon the use of duct tape over the victim's mouth and around the victim's wrists as constituting a dangerous instrument capable of inflicting serious injury. The kidnapping conviction was premised upon the restraint of the victim with duct tape. The dissent argued the tape was not a dangerous instrument and, under the facts, kidnapping merged with the robbery: "Here ... the duct tape used by the defendant constituted a dangerous instrument. 'Any instrument, article or substance, no matter how innocuous it may appear to be when used for its legitimate purpose, becomes a dangerous instrument when it is used in a manner which renders it readily capable of causing serious physical injury. The object itself need not be inherently dangerous. It is the temporary use rather than the inherent vice of the object which brings it within the purview of the statute' ... . [T]he convictions of kidnapping in the second degree and unlawful imprisonment in the first degree did not merge with the robbery convictions. The defendant's act of locking the complainant inside the storage unit was a crime in itself committed after the robbery had been completed that did not merge therewith ...". ***People v. Williams*, 2017 N.Y. Slip Op. 07758, Second Dept 11-8-17**

CRIMINAL LAW, EVIDENCE, CONSTITUTIONAL LAW, APPEALS.

UNEXPECTED ABSENCE OF A PROSECUTION WITNESS AFTER ARRESTING OFFICERS TESTIFIED ABOUT THE WITNESS'S INVOLVEMENT IN DEFENDANT'S ARREST DEPRIVED DEFENDANT OF HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, CONVICTION REVERSED IN THE INTEREST OF JUSTICE (ERROR NOT PRESERVED).

The Second Department, reversing defendant's conviction, determined, in the interest of justice (error not preserved), the defendant was deprived of his right to confront a witness against him. A witness to the stabbing, Torres, could not be located and did not testify at the trial. Before it was clear Torres would not testify, two officers had already testified to facts that made it obvious Torres had identified the defendant as the perpetrator: "The record reveals … that the trial court understood full well the risk that the jurors, based on the detailed testimony of the arresting officers, might conclude that Torres—now a nontestifying witness—had identified the defendant as one of the perpetrators. … … [D]uring the jury's deliberations, the jurors specifically requested a readback of [a police officer's] testimony regarding 'what Jose Torres told him relating to the perpetrator's identification and what happened when he identified the defendant.' The requested testimony was read to the jury without any limiting instruction. Under the unusual circumstances presented, the jury's note demonstrates that the risk foreshadowed by the trial court had materialized, namely, that the jury had inferred from the arresting officers' testimony that Torres had identified the defendant as one of Rivera's attackers. Although neither side can be faulted for the introduction of the arresting officers' testimony at a time when everyone believed in good faith that Torres would testify, once it became clear that Torres would not be produced as a witness, the arresting officers' testimonial hearsay regarding the information conveyed to them by Torres violated the defendant's constitutional right to confront the witnesses against him ...". ***People v. Tavarez*, 2017 N.Y. Slip Op. 07756, Second Dept 11-8-17**

ENVIRONMENTAL LAW, ZONING, MUNICIPAL LAW.

PLANNING BOARD'S APPROVAL OF DEVELOPMENT INCLUDING WETLANDS NEEDED APPROVAL BY THE ARMY CORPS OF ENGINEERS, REQUEST FOR A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the town planning board's approval of the development of land should be annulled. The land included wetlands which required an investigation and approval by the Army Corps of Engineers (ACOE) and those requirements had not been met. The petitioners' request for a Supplemental Environmental Impact Statement (SEIS) should have been granted: " 'A lead agency's determination whether to require a SEIS . . . is discretionary' ... . 'The lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from: (a) changes proposed for the project; (b) newly discovered information; or (c) a change in circumstances related to the project' ... . 'The decision to prepare a SEIS as a result of newly discovered information must be based upon . . . (a) the importance and relevance of the information; and (b) the present state of the information in the EIS' ... . The limitations that apply to a court's review of an agency's SEQRA determination, that is, only to ascertain whether the agency took a hard look at the relevant areas of environmental concern and made a reasoned elaboration of the basis for its determination, also apply to the agency's determination regarding whether a SEIS is needed, and the court may no more substitute its judgment on this point than it may on other aspects of agency decision-making ... . Here, the petitioners contend that a SEIS is needed because Scenic never obtained a jurisdictional de-

termination from the United States Army Corps of Engineers (hereinafter ACOE) validating [the developer's] delineation of wetlands on the subject property. They argue that, prior to issuing the determinations challenged on appeal, the Planning Board was presented with critical new evidence demonstrating that no jurisdictional determination had been issued by the ACOE for the subject property. The petitioners are correct." ***Matter of Shapiro v. Planning Bd. of the Town of Ramapo*, 2017 N.Y. Slip Op. 07734, Second Dept 11-8-17**

ENVIRONMENTAL LAW, ZONING, MUNICIPAL LAW.

PLANNING BOARD DID NOT TAKE THE REQUISITE HARD LOOK AT THE IMPACT OF THE PROPOSED DEVELOPMENT, SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT REQUIRED.

The Second Department, reversing (in part) Supreme Court, determined the town planning board did not take the requisite "hard look" at the combined effect of the proposed development and the proximity of the development to a gas line. Therefore a Supplemental Environmental Impact Statement (SEIS) was required. Petitioner's arguments that the proposed development conflicted with the town's comprehensive plan and constituted prohibited spot zoning were rejected: "... [W]e agree with the petitioner's contention that the Town Board failed to take a 'hard look' at the environmental impact of placing the proposed development in close proximity to the existing Columbia Gas pipeline, and the combined environmental impact of the pipeline and the development together. The Draft Environmental Impact Statement (hereinafter DEIS) contains only a brief mention of the pipeline which bisects the property, and Columbia Gas was omitted from the list of 'interested agencies.' In addition, there is nothing in the Town Board's determinations that suggests that it considered these issues outside the context of the DEIS and the final environmental impact statement (hereinafter FEIS), and they are not discussed in the Town's SEQRA findings statement. Thus, the record supports the petitioner's contention that the Town Board did not take a 'hard look' at these issues or make a "reasoned elaboration" of the basis for its determination regarding them ... , and the Supreme Court should have annulled the Town Board's determination resolving to approve the findings statement pursuant to SEQRA for the proposed zone change." ***Matter of Youngewirth v. Town of Ramapo Town Bd.*, 2017 N.Y. Slip Op. 07744, Second Dept 11-8-17**

FAMILY LAW.

DERIVATIVE NEGLECT FINDING CANNOT BE BASED UPON A PRIOR ADJOURNMENT IN CONTEMPLATION OF DISMISSAL (ACD) WHICH IS NOT A DETERMINATION ON THE MERITS.

The Second Department determined Family Court should not have made a finding of derivative neglect based upon a prior ACD (adjournment in contemplation of dismissal) which is not a determination on the merits: " 'Where a person's conduct toward one child demonstrates a fundamental defect in the parent's understanding of the duties of parenthood, or demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in his or her care, an adjudication of derivative neglect with respect to the other children is warranted' ... . 'In determining whether a child born after the underlying acts of neglect should be adjudicated as a child who was derivatively neglected, the determinative factor is whether, taking into account the nature of the conduct and any other pertinent considerations, the conduct that formed the basis for a finding of neglect as to one child is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists' ... . However, '[a]n ACD is emphatically not a determination on the merits. It is not akin to a finding of parental neglect, but, rather, it leaves the question unanswered' ... . Here, the Family Court did not enter a finding of neglect against the father in 2015. Instead, it entered an ACD against him based on his admission that he failed to provide a stable home for the child. Moreover, the DSS did not seek to reopen the earlier proceeding to establish the father's neglect based on his failure to comply with the conditions set forth by the court. Under these circumstances, the court erred in entering a finding of derivative neglect against the father ...". ***Matter of Delilah D. (Richard D.)*, 2017 N.Y. Slip Op. 07724, Second Dept 11-8-17**

FAMILY LAW.

THIRD CHILD SHOULD HAVE BEEN FOUND TO HAVE BEEN DERIVATIVELY NEGLECTED BASED UPON PROOF FATHER INJURED THE TWO OTHER CHILDREN.

The Second Department determined Family Court properly found that a child (Nasir) was not derivatively abused based upon proof father had injured the two other children, but should have found the child derivatively neglected: " '[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent' ... . Contrary to the contention of ACS [Administration for Children's Services), the Family Court properly found that ACS failed to establish that Nasir was derivatively abused by the father ... . However, we agree with ACS that it established, by a preponderance of the evidence ... , that the father derivatively neglected Nasir ... . "The focus of the inquiry to determine whether derivative neglect is present is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent's understanding of the duties of parenthood. Such flawed notions of parental responsibility are generally reliable indicators that a parent who has abused one child will place his or her other children at substantial risk of harm" ... The father's physical abuse of Nyair demonstrated a fundamental defect in his understanding of parental duties relating to the care of children, placing Nasir in imminent danger of impairment of his

physical, mental, or emotional condition... . Accordingly, the court should have made a finding that the father derivatively neglected Nasir." ***Matter of Nyair J. (Vernon J.)*, 2017 N.Y. Slip Op. 07729, Second Dept 11-8-17**

FAMILY LAW.

ALTHOUGH CHILD RESIDED WITH NON-PARENT FOR A NUMBER OF YEARS, THE ARRANGEMENT WAS TEMPORARY TO ALLOW FATHER TO ATTEND LAW SCHOOL, NON-PARENT'S PETITION FOR CUSTODY PROPERLY DISMISSED WITHOUT A HEARING.

The Second Department determined Supreme Court properly dismissed without a hearing a non-parent's petition seeking custody of a child. Although the child resided with the petitioner for a significant period of time, there was evidence the arrangement was temporary to allow father, who was working full-time, to attend law school at night: "The Court of Appeals has created a 'two-prong inquiry for determining whether a nonparent may obtain custody as against a parent' ... . 'First, the nonparent must prove the existence of extraordinary circumstances such as surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time' ... . 'If extraordinary circumstances are established such that the nonparent has standing to seek custody, the court must make an award of custody based on the best interest of the child' ... . 'A hearing to determine the issue of standing is not necessary where there are no triable issues of fact raised in the papers submitted'... . ... [T]he period of time when the child resided primarily with the petitioner and not the father largely coincided with the period of time when the father was working full time and attending law school at night. During that period of time, the father contributed financially to the child's support. The petitioner and the father completed certain forms designating the petitioner as the child's caregiver for stated purposes, yet these forms were for a limited duration, and some of the forms contained notations to the effect that the father was not giving up his custodial rights." ***Matter of Schmitt v. Troche*, 2017 N.Y. Slip Op. 07732, Second Dept 11-8-17**

INSURANCE LAW.

INSURED SETTLED THE MATTER WITHOUT INSURER'S CONSENT, INSURER NOT OBLIGATED TO DEFEND OR INDEMNIFY INSURED.

The Second Department determined the insurer (Southwest) was entitled to summary judgment declaring it was not obligated to defend or indemnify the insured (Ralex). Ralex had settled the matter without Southwest's consent: "Here, the subject insurance policy Southwest issued to Ralex provided that '[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without [Southwest's] consent.' Contrary to Ralex's contention, this provision is not ambiguous. 'Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous the terms are to be taken and understood in their plain, ordinary and proper sense' ... . Moreover, 'New York law views an insurer's right to consent to any settlement as a condition precedent to coverage' ... . Here, the Supreme Court properly granted that branch of Southwest's motion which was pursuant to CPLR 3211(a)(1), since the documentary evidence it submitted showed that Ralex undertook its own defense in the underlying action, agreed to settle the underlying action, and incurred defense costs without first obtaining Southwest's consent. By doing so, Ralex breached the insurance contract and is not entitled to coverage ...". ***Ralex Servs., Inc. v. Southwest Mar. & Gen. Ins. Co.*, 2017 N.Y. Slip Op. 07763, Second Dept 11-8-17**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

BECAUSE THERE WAS EVIDENCE PLAINTIFF FELL OFF A BEAM IN THIS LABOR LAW § 240(1) ACTION, IN ADDITION TO EVIDENCE HE TRIPPED OVER DEBRIS, THE TRIAL JUDGE ERRED IN REFUSING TO INSTRUCT THE JURY TO DECIDE WHETHER PLAINTIFF FELL OFF THE BEAM, MOTION TO SET ASIDE THE VERDICT IN THE INTEREST OF JUSTICE SHOULD HAVE BEEN GRANTED.

The Second Department determined plaintiff's (Duran's) motion pursuant to CPLR 4404 (a) to set aside the verdict in the interest of justice and for a new trial on the cause of action alleging a violation of Labor Law § 240(1) should have been granted. Plaintiff alleged he fell from a beam which was four feet above the ground. There was evidence plaintiff previously alleged in a document that he fell over debris, but there was a question whether plaintiff, who spoke Spanish, understood the statement in the document. Plaintiff's counsel asked that the jury be instructed to decide whether plaintiff fell off the beam, but the trial judge refused that request: "... Supreme Court erred in denying the plaintiffs' request to ask the jury to determine not only whether the temple violated Labor Law § 240(1), but also to determine whether Duran fell off the beam ... . Under the particular circumstances of this case, this constituted a fundamental error warranting a new trial because the court's instructions failed to explain to the jury that, in light of arguably inconsistent accounts of how the accident occurred, the jury was entitled to find that Duran did not fall from the beam or, alternatively, that he did fall from the beam but no safety device was required under Labor Law § 240(1). Further, there was sufficient evidence of juror confusion with respect to this issue ... . Notably, the jury requested a readback of Labor Law § 240(1). The court's errors in failing to properly charge the jury and add the interrogatory requested by the plaintiffs prejudiced a substantial right and warrants a new trial ...". ***Duran v. Temple Beth Sholom, Inc.*, 2017 N.Y. Slip Op. 07708, Second Dept 11-8-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

NO SUPERVISORY CONTROL OVER THE MANNER OF PLAINTIFF'S WORK, INJURY WAS NOT THE RESULT OF THE ABSENCE OR FAILURE OF A SAFETY DEVICE, LABOR LAW §§ 200 AND 240(1) CAUSES OF ACTION PROPERLY DISMISSED.

The Second Department determined defendants' motions for summary judgment on the Labor Law §§ 200 and 240(1) causes of action were properly granted. The plaintiff was injured when attempting to move a 500-600 pound piece of granite. A co-worker lost his grip and the granite fell 18 or 20 inches onto plaintiff's toe. Because the defendants did not exercise and supervisory control over the manner of plaintiff's work, the Labor Law § 200 cause of action was dismissed. Monitoring safety conditions does not amount to supervisory control. Because the action did not involve the failure or absence of a safety device, the Labor Law § 240(1) cause of action was dismissed: " 'Where . . . a claim arises out of the means and methods of the work, a [defendant] may be held liable for . . . a violation of Labor Law § 200 only if [it] had the authority to supervise or control the performance of the work' ... . General supervisory authority for the purpose of overseeing the progress of the work is insufficient to impose liability under the statute ... . Here, the defendants established, prima facie, that the plaintiff's injuries arose solely out of the manner of his employer's work and the defendants exercised no supervisory control over that work ... . The defendants' authority to monitor safety conditions at the work site is merely indicative of their 'general supervision and coordination of the work site and is insufficient to trigger liability' ... , The Supreme Court properly granted that branch of the defendants' motion which was for summary judgment dismissing the Labor Law § 240(1) cause of action insofar as asserted against them. In cases involving falling objects, section 240(1) applies only when 'the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute' ... . Here, the defendants established, prima facie, that the granite stone did not fall because of the absence or inadequacy of a safety device ... ". ***Portalatin v. Tully Constr. Co.- E.E. Cruz & Co.*, 2017 N.Y. Slip Op. 07762, Second Dept 11-8-17**

PERSONAL INJURY.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT PULLED IN FRONT OF PLAINTIFF AFTER TURNING ON HIS TURN SIGNAL BUT PLAINTIFF ONLY HAD ONE OR TWO SECONDS TO REACT.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this traffic accident case should have been granted. Plaintiff had the right of way when defendant (Mack) turned on his turn signal and attempted a u-turn. Plaintiff had only one or two seconds to react and was not, therefore, comparatively negligent: "The plaintiff established that he was traveling with the right-of-way when Mack, who had stopped in a parking or merging lane to the right of the plaintiff's lane of travel, suddenly attempted to make a U-turn in front of the plaintiff's vehicle and struck the plaintiff's vehicle. Although Mack testified at his deposition that he had activated his left-turn signal before he began to move his vehicle, the plaintiff, who had the right-of-way, was nevertheless entitled to anticipate that Mack would obey the traffic law requiring him to yield ... . The plaintiff testified at his deposition that only one or two seconds passed between the time Mack's vehicle suddenly pulled out and the collision, such that, while he attempted to brake and veer to the left, he could not avoid the collision. Indeed, Mack admitted that only a '[s]plit second' passed between the time he moved his vehicle and the collision. '[A] driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision' ...". ***Criollo v. Maggies Paratransit Corp.*, 2017 N.Y. Slip Op. 07704, Second Dept 11-8-17**

PERSONAL INJURY.

DEFENDANT DRIVER DID NOT DEMONSTRATE FREEDOM FROM COMPARATIVE FAULT AS A MATTER OF LAW IN THIS BICYCLE-CAR COLLISION CASE, DESPITE VIDEO SHOWING PLAINTIFF DARTING INTO TRAFFIC.

The Second Department determined defendant driver was not entitled to summary judgment in this traffic accident case. Video showed plaintiff darting out on his bicycle into the street. However defendant driver is obligated to see what can be seen and did not demonstrate freedom from comparative fault as a matter of law: " 'A driver is bound to see what is there to be seen with the proper use of his [or her] senses, and there can be more than one proximate cause of an accident' ... . In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, the driver must demonstrate, prima facie, inter alia, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident ... . Here, although the surveillance video demonstrated that the plaintiff was negligent in darting out on his bicycle into oncoming traffic (see Vehicle Traffic Law § 1231), the defendants failed to establish, prima facie, that Vazquez saw what was to be seen, and that she exercised reasonable care in attempting to avoid the collision ...". ***Ellis v. Vazquez*, 2017 N.Y. Slip Op. 07709, Second Dept 11-8-17**

PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFF'S MOTION FOR JUDGMENT AS A MATTER OF LAW SHOULD HAVE BEEN GRANTED, DESK LEFT UNATTENDED ON A DOLLY BY DEFENDANT MOVER FELL OVER ONTO PLAINTIFF.

The Second Department, reversing Supreme Court, determined plaintiff's motion for judgment as a matter of law should have been granted. An employee of defendant moving company (Fisher) left a desk that was upright (on its side) on a dolly unattended. The desk fell over, injuring plaintiff: " 'A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party' ... . In considering the motion, the evidence must be viewed in the light most favorable to the nonmoving party, and the court must afford the nonmoving party 'every inference which may properly be drawn from the facts presented' ... . The defendants do not dispute that they, through their employee, created the condition that the plaintiff alleges existed. There was no evidence, and the defendants did not assert, that Fisher exercised reasonable care when he left the desk unattended on the dolly. The defendants' contention that an issue of fact existed as to whether the accident happened at all is unsupported by the record and based upon speculation ... . Based on this record, the Supreme Court should have granted the plaintiff's motion for judgment as a matter of law pursuant to CPLR 4401, made at the close of the evidence ...". ***Canale v. L & M Assoc. of N.Y., Inc.*, 2017 N.Y. Slip Op. 07701, Second Dept 11-8-17**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

PRIMARY ASSUMPTION OF RISK PRECLUDED RECOVERY FOR INJURY DURING GYM CLASS, INHERENT COMPULSION DOCTRINE INAPPLICABLE.

The Second Department determined plaintiff's negligence cause of action against the school district and another student were properly dismissed under the doctrine of primary assumption of risk. Plaintiff, a student, was injured in a basketball game during gym class when he was allegedly kicked by the student defendant. Plaintiff chose to play basketball among other possible activities. Therefore he could not take advantage of the "inherent compulsion" doctrine. Plaintiff's assertion at the 50-h hearing that he was intentionally kicked did not raise a question of fact because the pleadings did not include an intentional tort or any mention of intentional conduct: "Under the doctrine of primary assumption of risk, by engaging in a sport or recreational activity, a participant 'consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation' ... . '[B]y freely assuming a known risk, a plaintiff commensurately negates any duty on the part of the defendant to safeguard him or her from the risk' ... . If the risks of the activity are fully comprehended or perfectly obvious, the plaintiff has consented to them and the defendant has performed its duty... . However, a plaintiff will not be deemed to have assumed the risks of reckless or intentional conduct, or concealed or unreasonably increased risks ... . Here, the defendants established, prima facie, that the plaintiff voluntarily engaged in the activity of basketball and was aware of the risks inherent in the activity, including the possibility of contact or collision with other participants ... ... Also contrary to the plaintiff's contention, he did not raise a triable issue of fact as to the application of the inherent compulsion doctrine, which 'provides that the defense of assumption of the risk is not a shield from liability, even where the injured party acted despite obvious and evident risks, when the element of voluntariness is overcome by the compulsion of a superior' ... . The plaintiff testified at his deposition that he chose to play basketball from a number of options. Consequently, the inherent compulsion doctrine is inapplicable ...". ***Hanson v. Sewanhaka Cent. High Sch. Dist.*, 2017 N.Y. Slip Op. 07711, Second Dept 11-8-17**

TRUSTS AND ESTATES.

EXECUTOR'S DISCLOSURE OF THE INFORMAL ACCOUNTING OF THE ESTATE TO BENEFICIARIES WAS SUFFICIENT, BENEFICIARY'S MOTION TO SET ASIDE A RELEASE PROPERLY DENIED.

The Second Department determined the executor's informal accounting and disclosures to beneficiaries were sufficient, therefore the release signed by a beneficiary could not be set aside: " '[A] fiduciary, as an executor or trustee, is obligated to account for his or her decisions and actions in administering an estate or trust' ... . 'While formal accountings of an estate are done in the context of a judicial proceeding, [a] fiduciary may also account informally by obtaining receipts and releases from interested parties regarding the handling of the estate or trust' ... . '[S]uch an informal accounting is as effectual for all purposes as a settlement pursuant to a judicial decree' ... . '[I]f a fiduciary gives full disclosure in his [or her] accounting, to which the beneficiaries are parties . . . they should have to object at that time or be barred from doing so after the settlement of the account' ... . 'Where the validity of a release is challenged, the fiduciary must affirmatively demonstrate that the beneficiaries were made aware of the nature and legal effect of the transaction in all its particulars' ... . Here, the documents provided by [the executor] to ... the ... beneficiaries along with the release made the beneficiaries aware of all the distributions that would be made from the estate. The tax return showed that [the executor] would receive a greater share of the estate as a result of bank accounts she held jointly with the decedent. Thus, the Surrogate's Court correctly denied [the beneficiary's] motion to set aside the release." ***Matter of Spacek*, 2017 N.Y. Slip Op. 07737, Second Dept 11-8-17**

THIRD DEPARTMENT

ATTORNEYS, PRIVILEGE, CIVIL PROCEDURE.

REPORT BY CONSULTANT IN THIS BILLING DISPUTE NOT PROTECTED BY ATTORNEY-CLIENT, ATTORNEY WORK-PRODUCT OR MATERIAL-PREPARED-FOR-LITIGATION PRIVILEGES, CRITERIA EXPLAINED.

The Third Department affirmed most of Supreme Court's rulings on the disclosure of documents in a billing dispute, including a report from a consultant, finding that the documents were not protected by privileges for attorney-client communications, attorney work-product, or material prepared for litigation. The criteria for all were described: "... [T]he report 'does not include any legal advice, legal analysis or discussion of legal issues' nor does it disclose confidences of defendant, and … it is not a communication 'of a legal character' ... . * * *Thus, the report was not protected by the attorney-client privilege. ... [T]he report was not protected from disclosure as attorney work product, as this 'privilege should be narrowly applied to materials prepared by an attorney, acting as an attorney, which contain his [or her] analysis and trial strategy' ... . Materials such as reports prepared by a third party, a nonlawyer consultant, during an investigation do not ordinarily qualify under this exception ... . * * * With regard to the claim that the report was protected from disclosure as material prepared for litigation, defendant's 'burden was to demonstrate that [the report] was obtained solely for litigation purposes' ... , which 'cannot be satisfied with wholly conclusory allegations'... . '[M]ixed or multipurpose reports are not free from disclosure' ...". ***NYAHSA Servs., Inc., Self-Insurance Trust v. People Care Inc.*, 2017 N.Y. Slip Op. 07909, Third Dept 11-9-17**

CIVIL PROCEDURE.

MOTION TO AMEND PLEADINGS NO LONGER REQUIRES A SHOWING OF THE MERIT OF THE PROPOSED AMENDMENT, THIRD DEPARTMENT JOINS THE OTHER THREE DEPARTMENTS.

The Third Department, in a full-fledged opinion by Justice Mulvey, following the other three departments, determined that a motion to amend the pleadings no longer requires a demonstration of the merit of the proposed amendment: "We have previously adhered to a rule requiring the proponent of a motion for leave to amend a pleading to make a 'sufficient evidentiary showing to support the proposed claim' ... , that is, to make an 'evidentiary showing that the proposed amendments have merit' ... . However, we are persuaded to depart from that line of authority and follow the lead of the other three Departments, and we now hold that '[n]o evidentiary showing of merit is required under CPLR 3025 (b)' ... . Thus, the rule on a motion for leave to amend a pleading is that the movant need not establish the merits of the proposed amendment and, '[i]n the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit'... . The rationale for adopting this rule is that the liberal standard for leave to amend that was adopted by the drafters of the CPLR is inconsistent with requiring an evidentiary showing of merit on such a motion. 'If the opposing party [on a motion to amend] wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment [or to dismiss] upon a proper showing' ... " ***NYAHSA Servs., Inc., Self-Insurance Trust v. People Care Inc.*, 2017 N.Y. Slip Op. 07918, Third Dept 11-9-17**

CRIMINAL LAW, APPEALS.

PLEA COLLOQUY RAISED QUESTIONS ABOUT DEFENDANT'S MENTAL HEALTH, NARROW EXCEPTION TO PRESERVATION REQUIREMENT ALLOWED ISSUE TO BE HEARD ON APPEAL, PLEA VACATED.

The Third Department, vacating defendant's guilty plea, determined that defendant, during the plea colloquy, raised a mental health issue that was not adequately addressed by the judge. Because the issue was raised in the colloquy, it was appealable despite the lack of preservation: "... [D]efendant acknowledged during the plea colloquy that he had mental health problems, including posttraumatic stress disorder that caused him to experience hallucinations, that he heard a voice telling him to commit the crime at issue and that he was taking multiple medications, including Zoloft, to address his mental health problems. Although County Court observed that defendant appeared coherent and responsive during the plea proceedings, it did not ascertain if he was aware that a possible defense, emanating from his mental state at the time that he committed the crime, was available and that he was waiving it by pleading guilty. Inasmuch as an essential element of attempted burglary in the third degree is the intent to commit a crime inside a building that one has unlawfully entered ... , and defendant's mental state potentially negated such intent, County Court should have conducted a further inquiry before accepting defendant's guilty plea... . Accordingly, under the circumstances presented, we find that the guilty plea was not knowing, voluntary and intelligent and must be vacated." ***People v. Rogers*, 2017 N.Y. Slip Op. 07889, Third Dept 11-9-17**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER'S REQUEST FOR A WITNESS SHOULD NOT HAVE BEEN DENIED, NEW HEARING ORDERED.

The Third Department determined the petitioner was entitled to a new hearing because the witness he requested could have provided relevant information. The request should not have been denied by the hearing officer: "... [P]etitioner was

improperly denied a witness. The Hearing Officer denied petitioner's request to question a correction officer who searched the empty cell on the day prior to that upon which petitioner was alleged to have thrown the bottle, and petitioner claimed that the officer could confirm that the bottle was already in the empty cell. Contrary to the Hearing Officer's conclusion, the testimony of this correction officer regarding whether the bottle was already in the empty cell would not have been irrelevant." ***Matter of Castillo v. Annucci*, 2017 N.Y. Slip Op. 07922, Third Dept 11-9-17**

PERSONAL INJURY, MUNICIPAL LAW.

QUESTION OF FACT WHETHER THE RECKLESS DISREGARD OF SAFETY STANDARD WAS MET IN THIS PARKING LOT FRONT-END LOADER ACCIDENT CASE, VILLAGE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined the village's motion for summary judgment in this front-end loader/pedestrian accident case should not have been granted. Plaintiff was injured when the front-end loader backed up over her in a municipal parking lot at night. The parking lot was deemed a "highway" for purposes of the applicability of the "reckless disregard for safety" standard for machinery used in highway work. But the Third Department held there were questions of fact about whether the reckless disregard standard was met. The court noted that the usual safety precautions used during the day were not used at night, when the accident occurred: "Vehicle and Traffic Law § 1103 (b) provides that the safety rules and regulations governing the operation of vehicles upon highways (i.e., the 'rules of the road') will 'not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway . . . [or] to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway' . ... [T]he Legislature has provided vehicles engaged in such road work the benefit of a lesser standard of care ..., … a 'reckless disregard for the safety of others' ... . * * * While we agree with Supreme Court that the [parking] lot constituted a highway so as to invoke the provisions of Vehicle and Traffic Law § 1103 (b), that determination, standing alone, did not serve to insulate defendants from all potential liability for their actions that evening and entitle them to summary judgment. ... Given [the] acknowledgment that the Village had a safety zone policy in place that called for the establishment of work zones when heavy machinery was being operated in parking lots during the daytime and chose not to implement it during nighttime operations, [the] candid testimony that a flagperson would have been helpful and may have been able to stop plaintiff before she crossed behind the loader and the lack of any admissible expert opinion dispositive of defendants' claim that it did not act with recklessness, defendants failed to establish their entitlement to summary judgment as a matter of law ...". ***Freitag v. Village of Potsdam*, 2017 N.Y. Slip Op. 07919, Third Dept 11-9-17**

UNEMPLOYMENT INSURANCE, CORPORATION LAW.

CLAIMANT WAS NOT TOTALLY UNEMPLOYED WHEN WINDING UP HIS CORPORATION'S BUSINESS, ACTUAL FINANCIAL GAIN IS NOT A PREREQUISITE TO FINDING A CLAIMANT IS NOT TOTALLY UNEMPLOYED.

The Third Department determined claimant was not totally unemployed and was therefore not entitled to unemployment insurance benefits. Claimant was winding up his corporation's business during the relevant period of time: " '[A] corporate officer who performs activities in connection with the winding up of a corporation will not be considered totally unemployed, even if his or her activities in this regard are minimal' ... . Following the sale of the business, claimant took measures in winding up the business during the time period in question, including changing the company name with the Department of State as required by the purchase agreement, distributing the monthly installment payments received from the purchaser of the business, and writing checks from the company account for accountant and counsel fees, taxes, insurance costs, a charitable contribution, office supplies and other business expenses. Under these circumstances, the Board's determination that claimant was not totally unemployed is supported by substantial evidence and will not be disturbed ... . 'Contrary to claimant's assertion, actual financial gain is not a prerequisite to a finding that a claimant is not totally unemployed' ...". ***Matter of Lasker (Commissioner of Labor)*, 2017 N.Y. Slip Op. 07924, Third Dept 11-9-17**

FOURTH DEPARTMENT

CIVIL PROCEDURE.

FAILURE TO INCLUDE RETURN DATE IN A NOTICE OF PETITION IS NO LONGER A JURISDICTIONAL DEFECT, HERE THERE WAS ACTUAL NOTICE AND NO PREJUDICE.

The Fourth Department noted that the failure to include a return date in a notice of petition is no longer a jurisdictional defect and can be overlooked where notice was actually provided: "A 'notice of petition shall specify the time and place of the hearing on the petition' (CPLR 403 [a]). The omission of a return date in a notice of petition does not, however, deprive a court of personal jurisdiction over the respondent ... . Indeed, such a technical defect is properly disregarded under CPLR 2001 so long as the respondent had adequate notice of the proceeding and was not prejudiced by the omission ... . Here, it is undisputed that respondent had ample notice of the proceeding from its inception. Moreover, respondent has not identified

any prejudice from the omitted return dates. The technical defects in the notices of petition should therefore be disregarded under CPLR 2001 ...". ***Matter of Bender v. Lancaster Cent. Sch. Dist.*, 2017 N.Y. Slip Op. 07853, Fourth Dept 11-9-17**

CIVIL PROCEDURE, MUNICIPAL LAW, MENTAL HYGIENE LAW.

TOWN'S REQUEST FOR AN ADJOURNMENT OF A HEARING ABOUT THE PLACEMENT OF A RESIDENCE FOR THE DEVELOPMENTALLY DISABLED IN THE TOWN WAS PROPERLY DENIED, THE REASONS FOR THE REQUEST FOR THE ADJOURNMENT WERE NOT PROVIDED UNTIL AFTER THE FACT.

The Fourth Department, over a dissent, determined the town's request for an adjournment of a hearing was properly denied. After the hearing, the NYS Off. for People with Dev. Disabilities permitted the establishment of a community residential facility for the developmentally disabled within the town. Although the town requested that the hearing be adjourned, it did offer timely explanations of the reasons for the adjournment: "Petitioner (the town) contends that, if it had been given additional time to prepare for the hearing, it could have proposed alternative sites, and thus the denial of an adjournment was an abuse of discretion. If petitioner believed that another site would be appropriate, however, it should have suggested another site in response to the sponsoring agency's initial notice or, if needed, asked for time to find such a site ... . Instead, petitioner decided to object to the facility outright ... , which led the sponsoring agency to request an 'immediate hearing' ... . We therefore respectfully disagree with our dissenting colleague that there was no reason for petitioner to anticipate preparing for a hearing upon receiving notice from the sponsoring agency. We further respectfully disagree with our dissenting colleague that an adjournment should have been granted so that petitioner could study traffic and waste disposal concerns. In its requests for an adjournment, petitioner did not state that it needed time to study those issues. It was not until after the decision of respondent's Acting Commissioner, in which she stated that petitioner's traffic and septic concerns were not based on any studies, that petitioner argued that it should have been granted an adjournment to study those issues. To the extent that petitioner contends that its stated reason of needing 'time to prepare' encompassed those specific issues, we reject that contention. To conclude otherwise would mean that adjournments should always be granted upon request, even when it is well settled that the decision to grant or deny an adjournment is a matter of discretion ...". ***Matter of Town of Boston v. New York State Off. for People with Dev. Disabilities*, 2017 N.Y. Slip Op. 07803, Fourth Dept 11-9-17**

CONTRACT LAW.

CONTRACT WHICH CALLED FOR THE PRICE FOR EXHIBITS AT TRADE SHOWS TO BE AMORTIZED OVER UPCOMING EVENTS WAS NOT AN AGREEMENT TO AGREE AND WAS SUFFICIENTLY DEFINITE, LIQUIDATED DAMAGES CLAUSE ENFORCEABLE.

The Fourth Department determined a contract was not an agreement to agree and was sufficiently definite, and the liquidated damages clause was enforceable. The parties agreed that plaintiff would provide exhibit services at several trade shows with the price amortized over the upcoming shows. Defendant informed plaintiff it was not going to participate in the 2016 shows and this breach of contract action was brought: "The agreement itself is ... sufficient to establish a binding contract inasmuch as the parties agreed to a fixed cost for each show that defendant was required to attend and set a minimum amount that defendant was obligated to spend in aggregate over the four shows ... . '[W]here the parties have completed their negotiations of what they regard as essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement, if some objective method of determination is available, independent of either party's mere wish or desire' ... . 'Where, as here, the parties to the agreement were sophisticated business [entities], and the terms of the agreement were mutually negotiated, with each party represented by experienced counsel, a liquidated damages provision which is reached at arm's length is entitled to deference' ... . The evidence in the record ... establishes that plaintiff's damages 'are sufficiently difficult to ascertain to satisfy the first requirement of a valid liquidated damages provision' ... . With respect to the second requirement, we conclude that the negotiated amount of liquidated damages is not 'conspicuously disproportionate to [plaintiff's] foreseeable losses' ...". ***RES Exhibit Servs., LLC v. Genesis Vision, Inc.*, 2017 N.Y. Slip Op. 07796, Fourth Dept 11-9-17**

CRIMINAL LAW.

BECAUSE PROMISE IN PLEA AGREEMENT RE CREDIT FOR JAIL TIME COULD NOT BE FULFILLED, SENTENCE VACATED AND CASE REMITTED FOR A SENTENCE WHICH COMPORTS WITH DEFENDANT'S LEGITIMATE EXPECTATIONS.

The Fourth Department, reversing (modifying) Supreme Court, determined that defendant was entitled to a sentence which comported with his expectations based upon the plea agreement. The Fourth Department vacated his sentence. It turned out defendant could not be credited with jail time in accordance with the plea agreement: "The promise with respect to jail time credit ... could not be fulfilled. Penal Law § 70.30 (3) provides that '[t]he term of a definite sentence . . . imposed on a

person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence.' Such credit, however, 'shall not include any time that is credited against the term . . . of any previously imposed sentence . . . to which the person is subject' ... . Thus, 'a person is prohibited from receiving jail time credit against a subsequent sentence when such credit has already been applied to time served on a previous sentence' ... . The correctional facility to which defendant was committed therefore properly determined that defendant was prohibited from receiving jail time credit against his sentence on the conviction of attempted CPCS in the fourth degree for the time that he had served between sentencing on the prior conviction and the subsequent sentencing proceeding ... . It is well established that '[a] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored' ... . 'The choice rests in the discretion of the sentencing court' and there is no indicated preference for one course over the other' ... . Where, as here, 'the originally promised sentence cannot be imposed in strict compliance with the plea agreement, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations' ... . We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court to impose a sentence that comports with defendant's legitimate expectations of the negotiated plea agreement or to afford defendant an opportunity to withdraw his plea." ***People v. Drake*, 2017 N.Y. Slip Op. 07844, Fourth Dept 11-9-17**

CRIMINAL LAW.

SUPERIOR COURT INFORMATION (SCI) JURISDICTIONALLY DEFECTIVE BECAUSE THE A FELONY COMPLAINT WAS NOT DISMISSED UNTIL AFTER THE PLEA TO THE SCI.

The Fourth Department, reversing defendant's conviction by waiver of indictment and plea to a superior court information (SCI), noted that defendant was still charged with an A felony at the time of the waiver and plea. The A felony complaint was not dismissed until after the plea: "In a prior appeal, we reversed the judgment of conviction, determining that the superior court information (SCI) was jurisdictionally defective inasmuch as defendant had been charged with, inter alia, a class A felony and thus could not validly waive indictment or consent to be prosecuted by an SCI ... . We thus vacated the plea and waiver of indictment and dismissed the SCI, noting that 'the People may present the case to the [g]rand [j]ury' ... . On remittal, the People did not present the case to a grand jury but, rather, made a second attempt to proceed by SCI. As the People correctly concede, the SCI is again jurisdictionally defective inasmuch as the felony complaint charging defendant with the class A felony was not dismissed until after the waiver of indictment and plea to the SCI. As a result, defendant was still 'charged' with a class A felony when he waived indictment and consented to be prosecuted by an SCI. 'Where, as here, a defendant is charged with a class A felony, the defendant cannot validly waive indictment or consent to be prosecuted by a superior court information' ... . We therefore vacate defendant's plea and his waiver of indictment, and we dismiss the SCI, noting again that 'the People may present the case to the [g]rand [j]ury' ...". ***People v. Priest*, 2017 N.Y. Slip Op. 07859, Fourth Dept 11-9-17**

CRIMINAL LAW.

SECTION EIGHT HOUSING SUBSIDIES ARE NOT ADMINISTERED BY THE DEPARTMENT OF SOCIAL SERVICES, THEREFORE A WELFARE FRAUD PROSECUTION CANNOT BE BASED UPON SECTION EIGHT BENEFITS.

The Fourth Department, reversing defendant's welfare fraud conviction, determined the statute required that the fraud involve a program administered by the department of social services. Here the fraud involved the federal section eight housing subsidy program, which was not administered by the department of social services: "... [D]efendant's interpretation of the statutory definition of public assistance benefits is supported by the legislative history of the statute, which shows that it was enacted primarily to combat Medicaid fraud ... , and Medicaid benefits are administered by the department of social services or social services district. In addition, we note that the People's interpretation of the statute would extend its reach beyond its intended meaning to include any 'money, property or services provided directly or indirectly through programs of the federal government,' without qualification ... For example, under the People's interpretation, veteran's benefits would be 'money, property or services' falling within the definition of '[p]ublic assistance benefits' ... , but it seems unlikely that the Legislature intended the improper receipt of such benefits to be considered welfare fraud. We conclude that both [the People's and defendant's] interpretations of the statute are plausible. In such situations, the rule of lenity applies and we must adopt the interpretation of the statute that is more favorable to defendant ... . The People were therefore required to establish that the Section 8 funds were 'administered by the department of social services' ... , which they failed to do." ***People v. Davis*, 2017 N.Y. Slip Op. 07800, Fourth Dept 11-9-17**

CRIMINAL LAW.

STREET STOP JUSTIFIED, FACTS AND LAW EXPLAINED IN DETAIL.

The Fourth Department, in finding the street stop of defendant was justified, provided a useful, detailed discussion of the facts and the law (too detailed to summarize here): "... [W]e agree with the People that the officer had at least the requisite

founded suspicion that criminal activity was afoot, and thus that his initial approach of defendant was proper under level two. When defendant then immediately fled, the officer pursued him, which was a level three intrusion requiring reasonable suspicion that defendant had committed or was committing a crime. 'In determining whether a pursuit was justified by reasonable suspicion, the emphasis should not be narrowly focused on . . . any . . . single factor, but [rather should be based] on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer' ... . We also note that, although 'flight alone is insufficient to justify pursuit, defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that the suspect may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit' ... . Here, we agree with the People that the specific information known to the officer, coupled with the officer's observations of defendant's actions, furtive behavior, and immediate flight, gave the officer reasonable suspicion to believe that defendant was engaged in criminal activity, thereby justifying the officer's pursuit, detainment, and search of defendant." ***People v. Jones*, 2017 N.Y. Slip Op. 07808, Fourth Dept 11-9-17**

CRIMINAL LAW, APPEALS, ATTORNEYS.

JURY INSTRUCTION ALLOWED JURY TO CONSIDER UNCHARGED OFFENSE, A FUNDAMENTAL ERROR THAT NEED NOT BE PRESERVED, JURY SHOULD HAVE BEEN INSTRUCTED ON A LESSER INCLUDED OFFENSE, PROSECUTOR SHOULD NOT HAVE REFERRED TO EVIDENCE WHICH WAS DESTROYED.

The Fourth Department ordered a new trial on the assault and unlawful imprisonment charges and reached a prosecutorial misconduct issue in the interest of justice (error not preserved). The prosecutorial misconduct, referring to evidence (a bloody t-shirt) which had been destroyed, was not deemed reversible. The Fourth Department found that a jury instruction on assault allowed the jury to consider a theory about how the victim was injured which was not charged in the indictment. Such an error affects the fundamental right to be tried only on what has been charged and need not be preserved. The Fourth Department also found that the evidence supported both the charged and a lesser included unlawful imprisonment offenses. The judge's refusal to charge the jury on the lesser included was reversible error: "... [The] conviction of assault in the second degree must be reversed because Supreme Court's instruction created the possibility that the jury convicted him upon a theory different from the one charged in the indictment. ... As a preliminary matter, we reject the People's contention that defendant was required to preserve his contention for our review. It is well settled that 'defendant has a 'fundamental and nonwaivable' right to be tried only on the crimes charged' ... . With respect to the merits of defendant's contention, '[w]here the court's jury instruction on a particular count erroneously contains an additional theory that differs from the theory alleged in the indictment, as limited by the bill of particulars, and the evidence adduced at trial could have established either theory, reversal of the conviction on that count is required because there is a possibility that the jury could have convicted the defendant upon the uncharged theory' ... . We may not apply harmless error analysis to such an error because it would be impossible to determine whether the jury based its guilty verdict on the uncharged theory ...". ***People v. Barber*, 2017 N.Y. Slip Op. 07807, Fourth Dept 11-9-17**

CRIMINAL LAW, MUNICIPAL LAW.

GRAND JURY EVIDENCE SUFFICIENT TO SUPPORT OFFERING A FALSE INSTRUMENT FOR FILING CHARGES, INSTRUMENTS WERE PREPARED FOR A PRIVATE COMPANY UNDER CONTRACT WITH THE COUNTY, COUNTY COURT REVERSED.

The Fourth Department, reversing County Court, determined the "offering a false instrument for filing" charges should not have been dismissed based upon the evidence presented to the grand jury. Defendant was a county employee who worked with a private company (Casella) which managed a land fill under a contract with the county. The documents in question were submitted by the defendant to Casella. County Court found that the documents were submitted to a private party, not the government. The Fourth Department disagreed, finding a sufficient relationship between Casella and the county to support the charges: " 'The essential elements of the crime of offering a false instrument for filing in the first degree . . . are (1) knowledge that a written instrument contains a false statement or false information, (2) intent to defraud the State or any political subdivision thereof, and (3) offering or presenting such instrument to a public office or public servant with the knowledge or belief that it will be filed' ... . The term 'public servant' is defined as '(a) any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee' ... . Here, we agree with the People that the evidence before the grand jury was legally sufficient to establish that Casella, in accepting the reports from defendant for purposes of complying with the County's permit issued by the State, was 'not acting as a private concern' but rather was exercising a governmental function as an agent of the County ... , and thus was acting as a public servant within the meaning of the statute. In addition, we conclude that the evidence before the grand jury, viewed in the light most favorable to the People ... , was sufficient to allow the grand jury to infer that defendant intended to defraud the County by submitting reports with

fabricated information while still receiving a salary as a County employee ...". ***People v. Rafferty*, 2017 N.Y. Slip Op. 07797, Fourth Dept 11-9-17**

DEFAMATION.

SIGN ON PLAINTIFF'S PROPERTY SAYING THE DEFENDANT "SCREWED US BEWARE" WAS ACTIONABLE DEFAMATION, MOTION TO DISMISS THE DEFAMATION COUNTERCLAIM IN THIS CONTRACT ACTION PROPERLY DENIED.

The Fourth Department, over a dissent, determined a sign on plaintiff's property saying "R. KESSLER [the defendant] SCREWED US BEWARE" was actionable defamation. Therefore the defendant's defamation counterclaim survived a motion to dismiss: "... Supreme Court properly denied that part of plaintiffs' motion pursuant to CPLR 3211 (a) (7) seeking to dismiss the defamation counterclaim. Contrary to plaintiffs' contention, the statement is 'reasonably susceptible of a defamatory connotation' ... . Furthermore, it is a mixed statement of opinion and fact and thus is actionable inasmuch as it is 'an opinion that implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it' ... . The answer thus sufficiently states a counterclaim for defamation ... ". ***Sallustio v. R. Kessler & Assoc., Inc.*, 2017 N.Y. Slip Op. 07792, Fourth Dept 11-9-17**

INSURANCE LAW, CIVIL PROCEDURE, ATTORNEYS, PRIVILEGE.

SUPREME COURT ERRED IN ORDERING DISCLOSURE OF SOME OF THE INSURER'S RECORDS AND MATERIALS, INCLUDING THE LEGAL OPINION OF OUTSIDE COUNSEL.

The Fourth Department, reversing (modifying Supreme Court) determined plaintiff was not entitled to disclosure of the pre-disclaimer opinion of outside counsel for the insurer, and was not entitled to the insurer's manual without an in camera review of the manual for relevance. Supreme Court properly ordered disclosure of the pre-disclaimer claim notes which included statements made by the insured (father of the injured infant): "... [T]he court properly ordered disclosure of pre-disclaimer claim notes containing statements made by the father. It is well settled that 'there must be full disclosure of accident reports prepared in the ordinary course of business that were motivated at least in part by a business concern other than preparation for litigation' ... . Here, the father made his statements to defendant's investigators before defendant made the decision to disclaim, and there is no dispute that defendant's employees relied on those statements in making that decision. ... [T]he court abused its discretion in granting that part of plaintiff's motion seeking disclosure of the legal opinion of outside counsel and pre-disclaimer claim notes related thereto and denying that part of defendant's cross motion seeking a protective order with respect to those items, and we therefore modify the order accordingly. Although reports prepared in the regular course of business are discoverable ... , documents prepared by an attorney that are 'primarily and predominantly of a legal character,' and made to furnish legal services, are absolutely privileged and not discoverable, regardless of whether there was pending litigation at the time they were prepared ... . [T]he court abused its discretion in granting that part of plaintiff's motion seeking disclosure of defendant's reserve information and denying that part of defendant's cross motion with respect thereto inasmuch as that information is not "material and necessary" to the action (CPLR 3101 [a]...). ... [T]he court abused its discretion in granting that part of plaintiff's motion seeking disclosure of defendant's claim investigation manual and denying that part of defendant's cross motion with respect thereto without first conducting an in camera review." ***Celani v. Allstate Indem. Co.*, 2017 N.Y. Slip Op. 07799, Fourth Dept 11-9-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PRIME CONTRACTOR DID NOT CONTRACT WITH PLAINTIFF'S EMPLOYER, DID NOT SUPERVISE PLAINTIFF'S WORK AND DID NOT HAVE CONTROL OVER THE WORKSITE, ITS MOTION FOR SUMMARY JUDGMENT IN THIS LABOR LAW §§ 241(6), 200 AND COMMON LAW NEGLIGENCE ACTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this Labor Law §§ 241(6), 200 and common law negligence action should have been granted. Plaintiff was struck by a car while working in the median of a highway. Defendant, Oakgrove, was a prime contractor with whom the injured plaintiff's employer did not contract. And Oakgrove had no supervisory control over the plaintiff or the worksite: " 'The owner or general contractor is not synonymous with the prime contractor . . . Generally speaking, the prime contractor for general construction (especially in State construction projects) has no authority over the other prime contractors . . . unless the prime contractor is delegated work in such a manner that it stands in the shoes of the owner or general contractor with the authority to supervise and control the work' ... . Here, Oakgrove and Foit-Albert were both prime contractors, and plaintiff's employer contracted only with Foit-Albert. Oakgrove did not supervise or instruct plaintiff. Rather, plaintiff reported to a supervisor at Foit-Albert. Oakgrove established as a matter of law that it had no control over plaintiff or the work he was performing, and plaintiff failed to raise a triable issue of fact ... . Oakgrove ... established that it did not have control over the work

site at the time of plaintiff's accident .... Thus, the court should have dismissed the Labor Law § 200 claim and common-law negligence cause of action ... ". ***Knab v. Robertson*, 2017 N.Y. Slip Op. 07822, Fourth Department 11-9-17**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INJURY WHILE LIFTING A HEAVY OBJECT FROM A HORIZONTAL TO A VERTICAL POSITION NOT ENCOMPASSED BY LABOR LAW § 240(1).

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment in this Labor Law § 240(1) action should have been granted. Plaintiff was injured when a heavy object being lifted from a horizontal to a vertical position shifted momentarily. The Fourth Department found that the activity during which plaintiff was injured did not involve a risk covered by Labor Law § 240(1): " 'Liability may . . . be imposed under [Labor Law § 240 (1)] only where the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' ... . 'Consequently, the protections of [the statute] do not encompass any and all perils that may be connected in some tangential way with the effects of gravity' ... . Rather, the statute 'was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person' ... . Here, the harm to plaintiff was not 'the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' ... ; rather, the submissions establish that plaintiff was injured while lifting the heavy switchgear segment when the weight thereof momentarily shifted to his side as a result of instability or a slight downward movement of half an inch on the coworker's side ... . Although plaintiff's back injury 'was tangentially related to the effects of gravity upon the [switchgear segment that] he was lifting, it was not caused by the limited type of elevation-related hazards encompassed by Labor Law § 240 (1)' ... . We thus conclude that defendants established as a matter of law that plaintiff's injuries resulted from a 'routine workplace risk[]' of a construction site and not a 'pronounced risk[] arising from construction work site elevation differentials' ...". ***Horton v. Board of Educ. of Campbell-Savona Cent. Sch. Dist.*, 2017 N.Y. Slip Op. 07806, Fourth Dept 11-9-17**

PERSONAL INJURY, MUNICIPAL LAW.

TEMPORARY ROAD WORK TRAFFIC CONTROL MAY HAVE FURNISHED THE CONDITION FOR THE ACCIDENT BUT WAS NOT THE PROXIMATE CAUSE OF THE DRIVER STRIKING THE PEDESTRIAN PLAINTIFF, SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED TO THE ROAD WORK DEFENDANTS.

The Fourth Department, reversing Supreme Court, determined the traffic control measures taken by the defendants doing work on or near a road furnished the condition for the accident but was not the proximate cause of the accident. Defendant driver swerved to avoid a rear-end collision with a car that made a sudden left turn. The driver struck plaintiff, who was standing in the parking lane getting ready to cross the street: "Even assuming, arguendo, that the accident occurred within a 'work zone' … and defendants-appellants were negligent in the design and placement of temporary traffic control ... , ... we conclude that such negligence was not a proximate cause of the accident ... . 'A showing of negligence is not enough; there must also be proof that the negligence was a proximate cause of the event that produced the harm' ... . We reject plaintiffs' contention that the temporary traffic control at the site was a proximate cause of the accident. Any negligence with respect to the construction work merely furnished the condition or occasion for plaintiff being struck by a vehicle while crossing the street and was not a proximate cause of the accident ...". ***Gregory v. Cavarello*, 2017 N.Y. Slip Op. 07791, Fourth Dept 11-9-17**

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