CasePrepPlus

December 20, 2017

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

Editor: **Bruce Freeman**

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

COURT OF APPEALS

CIVIL PROCEDURE.

EVEN WHERE THE CLASS HAS NOT BEEN CERTIFIED, CPLR 908 REQUIRES THE PUTATIVE CLASS MEMBERS BE GIVEN NOTICE OF THE SETTLEMENT OR DISMISSAL OF THE ACTION.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a three-judge dissent, determined notice of the settlement or dismissal of a class action lawsuit, where the class has not been certified, must be provided to all members of the putative class pursuant to CPLR 908: "CPLR 908 provides that '[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court,' and that '[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.' On this appeal, we must determine whether CPLR 908 applies only to certified class actions, or also to class actions that are settled or dismissed before the class has been cer-tified. We conclude that CPLR 908 applies in the pre-certification context. As a result, notice to putative class members of a proposed dismissal, discontinuance, or compromise must be given." ***Desrosiers v. Perry Ellis Menswear, LLC*, 2017 N.Y. Slip Op. 08620, CtApp 12-12-17**

CRIMINAL LAW.

WHERE THE DEFENDANT AND THE IDENTIFYING WITNESS APPEAR TO BELONG TO DIFFERENT RACIAL GROUPS, THE DEFENDANT, UPON REQUEST, IS ENTITLED TO A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION, IRRESPECTIVE OF WHETHER THE ISSUE WAS RAISED AT TRIAL.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge concurring opinion, determined that, in a case where there is a question whether defendant and the identifying witness belong to different racial groups, upon request, a defendant is entitled to a so-called cross-racial identification jury instruction. The issue need not have come up at trial either during cross-examination of the identifying witness or by the presentation of expert opinion evidence: "In light ... the cross-race effect, which has been accepted by a near consensus in the relevant scientific community of cognitive and social psychologists, and recognizing the very significant part that inaccurate identifications play in wrongful convictions, we reach the following holding: in a case in which a witness's identification of the defendant is at issue, and the identifying witness and defendant appear to be of different races, a trial court is required to give, upon request, during final instructions, a jury charge on the cross-race effect, instructing (1) that the jury should consider whether there is a difference in race between the defendant and the witness who identified the defendant, and (2) that, if so, the jury should consider (a) that some people have greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race and (b) whether the difference in race affected the accuracy of the witness's identification. The instruction would not be required when there is no dispute about the identity of the perpetrator nor would it be obligatory when no party asks for the charge ...". ***People v. Boone*, 2017 N.Y. Slip Op. 08713, CtApp 12-14-17**

ENVIRONMENTAL LAW.

LEAD AGENCY TOOK THE REQUISITE HARD LOOK AT LEAD DUST AND NOISE CONCERNS RAISED IN CONNECTION WITH CONSTRUCTION NEAR A SCHOOL IN NEW YORK CITY AND, AFTER IMPOSING MITIGATION MEASURES, PROPERLY APPROVED THE CONSTRUCTION.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, determined the challenge to the Final Environmental Impact Statement (FEIS) allowing construction of a 400 bed residential facility near a school in New York City was properly denied. The petitioners (neighbors and parents of school children) were primarily concerned with lead dust and noise. The court found that the lead agency (Department of Health [DOH]) had taken the requisite "hard look" at the lead dust and noise concerns (which were addressed by mitigation measures). The opinion includes a concise and uncomplicated explanation of the environmental-impact-statement procedures required by the State Environmental Quality Review Act (SEQRA): "Preventing the migration and inhalation of lead dust was one of the environmental risks the agency specifically set out to measure and mitigate ... . In recognition of the risk, DOH imposed a battery of construction protocols to monitor and contain airborne dust. DOH reasonably concluded that these mitigation measures were sufficient to ensure that airborne lead levels remained within acceptable ... limits, and explained its assessment fully in the DEIS [Draft Environmental

Impact Statement] and FEIS. ... DOH conducted a detailed analysis of construction noise, employing assumptions based on reasonable worst case scenarios. In assessing both the dangers of construction noise and the most appropriate mitigation measures, DOH acted within its 'considerable latitude in evaluating environmental effects and choosing among alternatives' … . The fact that petitioners would have preferred different or additional mitigation measures presents a difference of opinion about the best way to address the environmental impacts that the agency, not the courts, must consider and resolve. In fact, the agency considered the opinions of petitioners' experts and determined that the lower noise levels for which they advocated were 'not often achieved in densely-populated urban locations such as NYC.' DOH also considered that its levels did not exceed the City Manual's recommendation." ***Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan*, 2017 N.Y. Slip Op. 08621, CtApp 12-12-17**

INSURANCE LAW.

REINSURANCE POLICIES TO BE INTERPRETED USING STANDARD CONTRACT PRINCIPLES, THERE IS NO PRESUMPTION OR RULE OF CONSTRUCTION CONCERNING WHETHER A COVERAGE CAP INCLUDES ONLY LOSS, OR INCLUDES BOTH LOSS AND LITIGATION COSTS.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, answered a question from the Second Circuit about how to interpret reinsurance policies. The Court of Appeals held that a 2004 decision by that court did not impose a presumption or rule of construction to be applied to reinsurance policies. Rather each reinsurance policy is to be interpreted using standard contract principles. The underlying issue in the case is whether the cap in a reinsurance policy was limited to the amount of loss, or whether the cap included litigation costs. The opinion includes a clear explanation of the two types of reinsurance policies (not summarized here): "... New York law does not impose either a rule, or a presumption, that a limitation on liability clause necessarily caps all obligations owed by a reinsurer, such as defense costs, without regard for the specific language employed therein." ***Global Reins. Corp. of Am. v. Century Indem. Co.*, 2017 N.Y. Slip Op. 08711, CtApp 12-14-17**

MEDICAL MALPRACTICE.

PARENTS' MEDICAL MALPRACTICE ACTION FOR EXTRAORDINARY EXPENSES ASSOCIATED WITH THE CARE OF A CHILD BORN WITH A GENETIC DEFECT AFTER IN VITRO FERTILIZATION ACCRUES UPON THE BIRTH OF THE CHILD, NOT WHEN THE EGG WAS IMPLANTED.

The Court of Appeals, in a full-fledged opinion by Jude DiFiore, over a dissent, determined that the statute of limitations in these actions stemming from in vitro fertilization began to run upon the baby's birth, not when the egg was implanted. Here the eggs were not screened for a genetic defect (Fragile X trait). The lawsuits were based upon the theory that, but for the malpractice, the babies would not have been born and sought compensation for the extraordinary expenses necessary to care for the children: "In 1978, this Court recognized a new, narrow cause of action permitting parents to recover the extraordinary care and treatment expenses 'accruing as a consequence of the birth' of a child with a disability ... . This claim, 'founded essentially upon a theory of negligence or medical malpractice,' requires 'a duty flowing from defendants to [plaintiffs] and that the breach of that duty was the proximate cause of the birth of their infants' ... . The claim is restricted to those instances in which the plaintiffs can demonstrate 'that but for the defendants' breach of their duty to advise plaintiffs, the latter would not have been required to assume these [extraordinary financial] obligations' ... . In other words, parents bringing this type of action may seek to recover only 'the increased financial obligation arising from the extraordinary medical treatment rendered the child during minority'... . No recovery is allowed for any consequent psychic or emotional damages ..., nor may parents recover the ordinary costs of raising a healthy child born by reason of so-called wrongful conception... . The extraordinary expenses claim belongs to the parents alone — the child cannot bring a claim for 'wrongful life' ... . This is because, as a matter of public policy, an infant born in an impaired state suffers no legally cognizable injury in being born compared to not having been born at all ... . The action's gravamen is that, but for defendants' negligence, the parents would not have conceived or given birth to a child requiring extraordinary expenses for treatment and care. Plaintiffs allege that, by failing to take steps to detect that the egg donor was a carrier for Fragile X and therefore that the embryo may have had the Fragile X trait, defendants left the parents in an uninformed state as to whether to avert pregnancy or birth — and the associated costs resulting from birth. Given the nature of these allegations, it follows that until the alleged misconduct results in the birth of a child, there can be no extraordinary expenses claim. Moreover, we have stated that the 'legally cognizable injury' is that the parents will incur extraordinary expenses to care for and treat the child ... . These expenses arise 'as a consequence of the birth' ... , not just the conception. Prior to a live birth, it is impossible to ascertain whether parents will bear any extraordinary expenses ... . Due to these unique circumstances, the cause of action accrues upon the birth of an infant with a disability. This date appropriately balances the competing statute of limitations policy concerns — it gives parents a reasonable opportunity to bring suit while at the same time limiting claims in a manner that provides certainty and predictability to medical professionals engaged in fertility treatment and prenatal care ...". ***B.F. v. Reproductive Medicine Assoc. of N.Y., LLP*, 2017 N.Y. Slip Op. 08712, CtApp 12-14-17**

SECURITIES, CONTRACT LAW.

THE RESIDENTIAL MORTGAGE-BACKED SECURITIES CONTRACTS PROVIDED FOR THE SOLE REMEDY OF CURE AND REPURCHASE, PLAINTIFF TRUSTEE'S CAUSES OF ACTION FOR GENERAL CONTRACT DAMAGES DISMISSED.

The Court of Appeals, in a full-fledged opinion by Judge Stein, over an extensive two-judge dissent, determined plaintiff trustee (HSBC) was limited to the cure and repurchase remedy described in the contracts for these residential mortgage-backed securities, and could not sue for general contract damages: "In these appeals stemming from four residential mortgage-backed securities (RMBS) transactions, we are asked to decide whether claims for general contract damages based on alleged breaches of a 'no untrue statement' provision can withstand a motion to dismiss based on a contract provision mandating cure or repurchase as the sole remedy for breaches of mortgage loan-specific representations and warranties. We hold that, inasmuch as the claims for general contract damages at issue here are grounded in alleged breaches of the mortgage loan-specific representations and warranties to which the limited remedy fashioned by the sophisticated parties applies, plaintiffs' claims for general contract damages should be dismissed. * * * ... . [I]t is readily apparent from the face of the complaints that the alleged breaches of the No Untrue Statement Provision are, in fact, based upon alleged breaches of the Mortgage Representations. ... [T]he sole remedy for breaches of the Mortgage Representations is cure or repurchase. HSBC cannot "subvert this 'exclusive remedies' limitation" of liability by simply re-characterizing its claims ... . Rather, '[r]eading the [contracts] as a harmonious and integrated whole' ... and honoring 'the exclusive remedy that the[se] [sophisticated] parties fashioned' ... , we conclude that the Sole Remedy Provision applies, precluding HSBC from seeking general contract damages for the particular claims challenged on this appeal." ***Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 2017 N.Y. Slip Op. 08622, CtApp 12-12-17**

FIRST DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

DEFENDANTS' MOTION TO FILE A LATE ANSWER PURSUANT TO CPLR 3012 AFTER A DEFAULT IN THIS FORECLOSURE PROCEEDING WAS PROPERLY DENIED, FIVE FACTORS TO BE CONSIDERED EXPLAINED, ALLEGATION DEFENDANTS WERE CHEATED WAS NOT A DEFENSE.

The First Department, over an extensive dissent, determined defendants' motion to file a late answer in this foreclosure proceeding was properly denied. Shortly after giving their son, Luigi, powers of attorney, Luigi took out a mortgage to buy a condominium, using his parents' (defendants') home as collateral. Luigi defaulted and eventually the foreclosure action was started. After a default in the foreclosure proceedings, the defendants hired counsel and moved to file a late answer. The First Department went through each of the five factors to be considered, noting that the defendants' claim to have first learned of the mortgage when they were served in the foreclosure action was not credible, and the allegation defendants were cheated by their son is not a defense (the powers of attorney were not fraudulently obtained): "Under CPLR 3012(d), a trial court has the discretionary power to extend the time to plead, or to compel acceptance of an untimely pleading 'upon such terms as may be just,' provided that there is a showing of a reasonable excuse for the delay. In reviewing a discretionary determination, the proper inquiry is whether the court providently exercised its discretion. In Artcorp Inc. v. Citirich Realty Corp. (140 AD3d 417 [1st Dept 2016]), we adopted the factors set forth in Guzetti v. City of New York (32 AD3d 234, 238 (id.) [1st Dept 2006] [McGuire, J., concurring]) as those that 'must . . . be considered and balanced' in determining whether a CPLR 3012(d) ruling constitutes an abuse of discretion. Those factors include the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense ... . * * * Of these five factors, three — - the lack of a potential meritorious defense, which is the most notable, the length of the delay, and the willfulness of the default — weigh against granting the motion. The remaining factors, whether the delay was excusable and whether there was any possibility of prejudice to an adverse party, are arguably neutral. Therefore, considering and weighing the five Artcorp/Guzzetti factors, we conclude that Supreme Court properly denied the ... motion." ***Emigrant Bank v. Rosabianca*, 2017 N.Y. Slip Op. 08716, First Dept 12-14-17**

LABOR LAW-CONSTRUCTION LAW.

ALTHOUGH PLAINTIFF FELL OFF A LOADING DOCK WHILE WAITING TO SIGN IN TO WORK IN A BUILDING, HIS INJURY OCCURRED AT THE CONSTRUCTION SITE AND WHILE HE WAS ENGAGED IN WORK INVOLVING A GRAVITY-RELATED RISK WITHIN THE MEANING OF LABOR LAW § 240(1).

The First Department, over a two-justice dissent, determined the motion to dismiss plaintiff's Labor Law § 240(1) cause of action was properly denied. Plaintiff fell off a loading platform while waiting to sign in to work painting upper floors of a building. The dissent argued that plaintiff was not at the construction site, within the meaning of the statute, at the time of the injury: "Rather than isolating the moment of a plaintiff's injury, the general context of the work is what should be taken into account ... . Clearly, at the time of the accident, plaintiff was entering the building and reporting to the construction site through the only means of access the owner made available to him and all other construction workers. Arguments that

plaintiff's injury did not occur at a 'construction site,' under the circumstance of this case, places an unintended limitation on Labor Law § 240(1). While at the precise moment of plaintiff's injury he was awaiting clearance to enter the building and he slipped or fell off a permanent structure, there is no merit to [defendant's] further contention that plaintiff was not actually engaged in work involving a gravity-related risk ... . We have held that injuries sustained while a worker was on site, although entering or exiting the site, or on a break, come within the protections of Labor Law § 240(1) ... . It is, therefore, of no moment the elevated loading dock is a permanent fixture that existed before the project began ... ". ***Hoyos v. NY-1095 Ave. of the Ams.*, LLC, 2017 N.Y. Slip Op. 08717, First Dept 12-14-17**

MENTAL HYGIENE LAW, CIVIL PROCEDURE.

MENTAL HEALTH LEGAL SERVICE (MHLS) HAS ORGANIZATIONAL STANDING TO BRING AN ARTICLE 78 PROCEEDING TO REQUIRE THE BRONX PSYCHIATRIC CENTER TO PROVIDE A COMPLETE COPY OF A PATIENT'S MEDICAL RECORD PRIOR TO AN INVOLUNTARY RETENTION HEARING, AND, ON THE MERITS, MHLS IS ENTITLED TO SUCH RECORDS.

The First Department, in a full-fledged opinion by Justice Renwick, over a two-justice dissenting opinion, determined the Mental Hygiene Legal Service (MHLS) was entitled to a copy of the psychiatric patient's full medical chart prior to an involuntary-retention hearing under the Mental Hygiene Law. As a preliminary matter, the First Department held MHLS has organizational standing to bring the underlying Article 78 proceeding which was triggered by the Bronx Psychiatric Center's (BPC's) refusal to provide the medical record: "In order to retain a patient involuntarily for more than 60 days, the hospital must obtain a court order so directing, although the patient may remain hospitalized while the application for such an order is pending ... . The hospital must show 'that the patient is mentally ill and in need of continued, supervised care and treatment, and that the patient poses a substantial threat of physical harm to himself and/or others'... . On the other hand, MHLS has a duty '[t]o provide legal services and assistance to patients or residents and their families related to the admission, retention, and care and treatment of such persons' ... . MHLS further has a duty '[t]o initiate and take any legal action deemed necessary to safeguard the right of any patient or resident to protection from abuse or mistreatment' ... This Court has found organizational standing under exceptional circumstances involving organizations that were dedicated to protecting a class of individuals who suffered injuries which certain statutes were intended to guard against, and who could not otherwise act in their own interests. ... We find that MHLS has demonstrated a clear legal right to mandamus relief ... . [W]hen read together, [the] statutory duty and regulatory provisions impose upon BPC a compulsory duty to provide MHLS with a copy of its clients' complete medical charts before their respective retention hearings under MHL 9.31 and 9.33 are held." ***Matter of Mental Hygiene Legal Serv. v. Daniels*, 2017 N.Y. Slip Op. 08645, First Dept 12-12-17**

PERSONAL INJURY.

PHOTOGRAPH OF SIDEWALK DEFECT RAISED A QUESTION OF FACT ABOUT CONSTRUCTIVE NOTICE IN THIS SLIP AND FALL CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined that the long-time existence of the sidewalk defect could be inferred from the photograph. Defendants were therefore not able to show the absence of constructive notice and defendants' motion for summary judgment in this slip and fall case should not have been granted: "Owner defendants failed to make a prima facie showing that they lacked actual or constructive notice of the defect in the sidewalk that allegedly caused plaintiff to trip and fall ... . A jury could infer from plaintiff's photograph of the defective condition that the condition existed for a sufficient length of time for owner defendants to have discovered it and had time to repair it ... . In opposition, plaintiff raised an issue of fact as to whether the defect was actionable and not trivial. A photograph of the sidewalk at the time of plaintiff's accident showed the condition of the sidewalk to be well-worn, with cracks between the slabs, and the defect shown in close-up appeared to be capable of causing plaintiff to trip and fall ...". ***Flanders v. Sedgwick Ave. Assoc., LLC*, 2017 N.Y. Slip Op. 08718, First Dept 12-14-17**

SECURITIES, CONTRACT LAW.

UNDER THE TERMS OF THE RELEVANT CONTRACTS, WHICH MUST BE INTERPRETED TOGETHER TO GIVE EFFECT TO THEIR TERMS, PLAINTIFF DID NOT HAVE STANDING TO SUE IN ONE ASPECT OF THIS ACTION STEMMING FROM THE SALE OF ALLEGEDLY DEFECTIVE RESIDENTIAL MORTGAGE-BACKED SECURITIES.

The First Department, in a full-fledged opinion by Justice Moskowitz, modifying Supreme Court, in actions stemming from the sale of allegedly defective residential mortgage-backed securities, determined that, according to the terms of the relevant contracts, plaintiff did not have standing to sue in one aspect of the action because a critical assignment had not been accomplished in accordance with the contract. The opinion is fact-specific and too complex to fairly summarize here. With respect to Supreme Court's failure to interpret the two relevant agreements such that both are given effect, the court explained: "In interpreting a contract a court should favor an interpretation that gives effect to all the terms of an agreement rather than ignoring terms or interpreting them unreasonably ... . Indeed, 'where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect' ... . We have also found that 'agreements executed

at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one' ... . Thus, in failing to harmonize the ... agreement[s], the motion court essentially read ... terms out of existence." ***U.S. Bank N.A. v. GreenPoint Mtge. Funding, Inc.*, 2017 N.Y. Slip Op. 08644, First Dept 12-12-17**

TRUSTS AND ESTATES, CORPORATION LAW.

UNDER THE TERMS OF THE LIMITED LIABILITY AGREEMENT, THE ESTATE OF A DECEASED MEMBER OF THE LIMITED LIABILITY COMPANY (LLC) WAS NOT A MEMBER OF THE LLC AND THEREFORE COULD NOT PARTICIPATE IN THE RUNNING OF THE LLC OR INSPECT ITS BOOKS AND WAS NOT OWED A FIDUCIARY DUTY.
The First Department, in a full-fledged opinion by Justice Kapnick, determined the limited liability agreement controlled in this action by the estate of a member of the limited liability company (LLC) against the LLC. Under the terms of the agreement the estate of the deceased member (Alex) was not a member of the LLC and therefore could not participate in the running of the company, could not demand to inspect the LLC's books, and was not owed a fiduciary duty: "Ultimately, the parties disagree on the Estate's rights and status under the LLC Agreement ... . The Estate contends that it stepped into Alex's shoes upon his death, and that it possesses all of his rights and privileges as a Member under the LLC Agreement. Defendants, on the other hand, contend that under the terms of the LLC Agreement, the Estate is considered the successor in interest of a Withdrawing Member (Alex) with rights only to potential distributions, and no rights to control or participate in the running of the company." ***Estate of Calderwood v. ACE Group Intl. LLC*, 2017 N.Y. Slip Op. 08750, First Dept 12-14-17**

SECOND DEPARTMENT

APPEALS.

SECOND DEPARTMENT ASKED FOR FURTHER SUBMISSIONS TO DETERMINE WHETHER PLAINTIFF BROUGHT A FRIVOLOUS APPEAL.
The Second Department asked for further submissions to determine whether sanctions should be imposed for a frivolous appeal. After a judgment of foreclosure against the mortgagor, the mortgagor deeded the property to plaintiff. Plaintiff then brought a motion to quiet title which was dismissed based upon the foreclosure documents. The plaintiff then appealed, despite having brought identical proceedings in another matter which also had gone up on appeal: "Here, as in Carbone v. Deutsche Bank Natl. Trust Co., a case involving the same plaintiff and almost identical facts, by submitting the judgment of foreclosure and sale and other documents from the prior foreclosure action, the Bank established that it had a defense founded upon documentary evidence; namely, that Carbone took the property subject to a valid judgment of foreclosure and sale, and that the instant action is an improper collateral attack upon the judgment ... . Thus, since the Bank established that it had a defense founded upon documentary evidence which conclusively disposed of the plaintiff's causes of action as a matter of law... , the Supreme Court properly granted the Bank's motion pursuant to CPLR 3211(a)(1) to dismiss the complaint, and properly denied Carbone's cross motion for summary judgment on the complaint. In addition, since the plaintiff has raised arguments on this appeal that appear to be 'completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law' (22 NYCRR 130-1.1[c][1]), the appeal may be frivolous... . Accordingly, we direct the submission of affirmations or affidavits on the issue of whether, and in what amount, costs or sanctions in connection with this appeal should or should not be imposed on the plaintiff." ***Carbone v. US Bank N.A.*, 2017 N.Y. Slip Op. 08653, Second Dept 12-13-17**

ATTORNEYS, APPEALS.

APPELLANT AND ATTORNEY SANCTIONED FOR BRINGING MERITLESS APPEAL.
The Second Department determined the appeal in this real property dispute warranted sanctions against one appellant and his attorney ($500 each). It appears that the appellants entered a stipulation of settlement in which they stated they owned real property, knowing they did not own the property. The appeal was brought after Supreme Court enforced the stipulated settlement (requiring appellants to pay $1.8 million plus costs): "We reject the appellants' argument that they were unaware, at the time of the stipulation of settlement, that the City of Peekskill owned the subject property. Nearly two years prior to the stipulation of settlement, in a proceeding to foreclose a tax lien, in an order and judgment of the Supreme Court, Westchester County (Walker, J.), dated October 1, 2012, the City of Peekskill was granted permission to file a deed conveying the subject property to the City of Peekskill as owner in fee simple absolute. Dashley Realty appealed, and this Court affirmed the judgment ... . The appellants failed to demonstrate sufficient cause to vacate the stipulation of settlement, as their purported mistake in not knowing about the City's ownership when they entered into the stipulation of settlement on August 11, 2014, is belied by the order and judgment dated October 1, 2012, Dashley Realty's appeal from that judgment, and attorney George W. Echevarria's representation of Dashley Realty on that appeal. Under the circumstances of this case, including, but not limited to, the appellants' attempt to vacate the stipulation of settlement based upon their purported

mistake, we find that much of the conduct of the appellant Cirilo Rodriguez and attorney George W. Echevarria, including their prosecution of this appeal, which is based upon the same meritless arguments advanced on the cross motion to vacate the stipulation of settlement, has been 'undertaken primarily to delay or prolong the resolution of the litigation' (22 NYCRR § 130—1.1[c][2]). We find that this conduct warrants sanctions in the amount of $500 each on the appellant Cirilo Rodriguez and attorney George W. Echevarria ...". ***ATS-1 Corp. v. Rodriguez*, 2017 N.Y. Slip Op. 08651, Second Dept 12-13-17**

CRIMINAL LAW, CONSTITUTIONAL LAW.

ABSENCE OF A SIGNED WRITTEN WAIVER OF INDICTMENT REQUIRED BY THE NYS CONSTITUTION IS A JURISDICTIONAL DEFECT, GUILTY PLEA VACATED.

The Second Department vacated defendant's guilty plea because the record did not include a signed written waiver of indictment, as required by the NYS Constitution: "... [T]he record on appeal does not contain a signed waiver of the defendant's right to be prosecuted by an indictment. Although a written waiver of indictment appears in the record, it was not signed by the defendant. Furthermore, contrary to the People's contention, although the transcript of the plea proceedings indicates that the defendant signed a document denominated as a written indictment waiver, that reference in the transcript alone is insufficient to satisfy the constitutional requirement that a waiver of indictment 'be evidenced by written instrument signed by the defendant' ... . Since the failure to comply with this constitutional requirement amounts to a jurisdictional defect in the plea proceedings ...". ***People v. Eulo*, 2017 N.Y. Slip Op. 08684, Second Dept 12-13-17**

EMPLOYMENT LAW, EDUCATION-SCHOOL LAW, DEFAMATION.

NEGLIGENT HIRING AND RETENTION CAUSE ACTION BASED UPON A JANITOR'S CALLING PLAINTIFF'S DAUGHTER NAMES PROPERLY SURVIVED SUMMARY JUDGMENT, PROOF JANITOR WAS AN INDEPENDENT CONTRACTOR INSUFFICIENT, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, DEFAMATION, AND PRIMA FACIE TORT CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED.

The Second Department determined the Department of Education's (DOE's) motion for summary judgment in this negligent hiring and retention action was properly denied. The complaint alleged that a school janitor called plaintiff's daughter "retarded" and "bitch" in front of other students. The DOE argued the janitor was an independent contractor, not an employee, and therefore the DOE could not be liable under the doctrine of respondeat superior. However, the proof of the janitor's independent contractor status was deemed insufficient to support summary judgment. The Second Department went on to find that the intentional infliction of emotional distress, prima facie tort, and slander causes of action against the DOE should have been dismissed: "As to the cause of action to recover damages for intentional infliction of emotional distress, the defendants established, prima facie, as a matter of law, that the isolated incident of name calling by the janitor, while unquestionably objectionable, did not rise to the level of extreme and outrageous conduct required to sustain such a cause of action ... . As to the cause of action to recover damages for slander, the defendants established, prima facie, as a matter of law, that the janitor's statements were nonactionable expressions of opinion, and not facts, about the plaintiff's daughter... . Finally, as to the cause of action to recover damages for prima facie tort, the defendants established, prima facie, that the plaintiff did not incur special damages, a necessary element of the prima facie tort cause of action ...". ***Gadson v. City of New York*, 2017 N.Y. Slip Op. 08657, Second Dept 12-13-17**

FAMILY LAW, ATTORNEYS.

ALTHOUGH FATHER HAD THE RIGHT TO WAIVE COUNSEL AND PROCEED PRO SE IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, FAMILY COURT PROPERLY REFUSED HIS UNTIMELY REQUEST.

The Second Department determined Family Court properly refused father's untimely request to proceed pro se in this termination of parental rights proceeding: "A parent in a proceeding pursuant to Social Services Law § 384-b to terminate parental rights has the right to the assistance of counsel (see Family Ct Act § 262[a][iv]). A parent, however, may waive the right to counsel and opt for self-representation ... . However, the right to self-representation is 'not . . . unfettered' ... . In order to invoke the right to defend pro se, '(1) the request [must be] unequivocal and timely asserted, (2) there [must be] a knowing and intelligent waiver of the right to counsel, and (3) the defendant [must not have] engaged in conduct which would prevent the fair and orderly exposition of the issues'... . 'An application is timely interposed when it is asserted before the trial commences'... . 'If the request is made thereafter, the right is severely constricted' and the trial court must exercise its sound discretion and grant the request only under compelling circumstances'... . Here, the Family Court providently exercised its discretion in denying the father's request to represent himself since it was untimely, and the father proferred (*sic*) no compelling circumstances to justify the need to grant the application ...". ***Matter of Sarah J. A. (Ramadan G. O.-A.)*, 2017 N.Y. Slip Op. 08661, Second Dept 12-13-17**

FAMILY LAW, CRIMINAL LAW.

FAMILY OFFENSES OF DISORDERLY CONDUCT, MENACING AND AGGRAVATED HARASSMENT NOT PROVEN.

The Second Department, modifying Family Court, determined the family offenses of disorderly conduct, menacing and aggravated harassment were not proven. It was alleged father threatened to punch mother and sent vulgar and insulting text

messages: "… [T]he Supreme Court erred in determining that the father had committed the family offenses of disorderly conduct and menacing in the third degree. The evidence did not establish that the father intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm... . The father's verbal threat to punch the mother was insufficient to support a finding of menacing in the third degree, inasmuch as the statute 'requires a physical menace,' i.e., a physical act which places the victim in fear of imminent serious injury'... . Further, there was no showing that the father placed the child in imminent fear of physical injury, or that he intended to do so ... . Contrary to the mother's contention, the evidence did not support a finding that the text messages the father sent to her constituted the family offense of aggravated harassment in the second degree. Although the text messages were vulgar and insulting, they did not contain any true threats of physical harm to the mother or the child, or of unlawful harm to the mother's property ...". ***Paruchuri v. Akil*, 2017 N.Y. Slip Op. 08675, Second Dept 12-13-17**

MENTAL HYGIENE LAW, EVIDENCE.

STATE'S EXPERTS SHOULD NOT HAVE RELIED ON HEARSAY EVIDENCE OF CONVICTIONS WHICH WERE VACATED BASED UPON DNA EVIDENCE, NEW MENTAL ABNORMALITY TRIAL ORDERED, SEALED CRIMINAL RECORDS PROPERLY CONSIDERED, FAILURE HOLD PROBABLE CAUSE HEARING AND TRIAL WITH STATUTORY TIME FRAMES DID NOT VIOLATE DUE PROCESS.

The Second Department, in a comprehensive opinion by Justice Sgroi, determined that a detained sex offender, Kerry K, was entitled to a new civil commitment trial on the issue of mental abnormality and, if necessary, a new dispositional hearing. The finding that Kerry K suffered from a mental abnormality was based in part on hearsay about a conviction which had been vacated based upon DNA evidence (after defendant served 11 years in prison). The Second Department further held that the fact that the probable cause hearing and trial did not occur within the statutory time-frames was not a jurisdictional defect or a violation of due process. And the fact that sealed criminal records were relied upon by the state's experts was deemed proper: "The experts' testimony about the vacated 1982 convictions ... did not satisfy the reliability and relevance requirements for admission of hearsay basis evidence. As the Court of Appeals has observed, 'unlike adjudications and admissions of guilt, an acquittal cannot provide the basis for reliability' ... . Further, '[c]harges that resulted in acquittal are surely more prejudicial than probative on the question of the respondent's mental abnormality' ... . Thus, 'acquittal of criminal charges bars admission of those accusations, absent some other basis to substantiate them' ... . In the present case, the information regarding the 1982 convictions was even less reliable and relevant than information concerning charges of which a respondent has merely been acquitted. An acquittal on a particular charge indicates that the People were unable to prove the defendant's guilt of that charge beyond a reasonable doubt. Here, in contrast, the 1982 convictions were vacated, on consent of the Suffolk County District Attorney's Office, based on the results of DNA testing conducted by Kerry K.'s and the State's experts, and Kerry K. later affirmatively proved his innocence by clear and convincing evidence ... . Thus, it was error to permit the State's experts to testify about the 1982 convictions, and this error deprived Kerry K. of due process ...". ***Matter of State of New York v. Kerry K.*, 2017 N.Y. Slip Op. 08671, Second Dept 12-13-17**

MUNICIPAL LAW.

IN THIS CONDEMNATION PROCEEDING, VALUATION OF REAL PROPERTY BASED UPON THE ASSUMPTION A SPECIAL USE PERMIT WOULD BE GRANTED WAS NOT SUPPORTED BY THE EVIDENCE.

The Second Department determined the valuation of land for condemnation purposes should not have been based upon the assumption a special use permit would be granted, allowing the construction of retail stores on the property: "The Supreme Court also erred in determining that the highest and best use of parcel 1 and parcel 2 on the date of the taking was retail use at the maximum allowable density. 'The measure of damages in a condemnation case must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time'... . The determination of highest and best use must be based upon evidence of a use which reasonably could or would be made of the property in the near future ... . 'Ordinarily potential uses the court may consider in determining value are limited to those uses permitted by the zoning regulations at the time of taking' ... . However, when there is a reasonable probability of rezoning, some adjustment must be made to the value of the property to reflect that fact ... . Here, the claimants failed to establish that there was a reasonable probability that they would have been granted a special use permit ... . The expert planner did not review the history of any special use permit applications to the Town Board, or reference any large-scale retail developments that were located on the vesting date in the immediate area of the subject property." ***Matter of Town of Oyster Bay v. 55 Motor Ave. Co.*, LLC, 2017 N.Y. Slip Op. 08672, Second Dept 12-13-17**

PERSONAL INJURY.

RELEASE SIGNED BY PLAINTIFF INDOOR ROCK CLIMBER INVALID PURSUANT TO GENERAL OBLIGATIONS LAW, COMPLAINT ALLEGED INJURY CAUSED BY CONCEALED DEFECT WHICH WOULD NOT BE COVERED BY THE ASSUMPTION OF RISK DOCTRINE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined an indoor rock-climber's action against the defendant rock-climbing facility properly survived defendant's motion for summary judgment. The released signed by the plaintiff was invalid pursuant to the General Obligations Law. And the assumption of risk doctrine did not preclude the suit because the complaint alleged a concealed risk (a gap between two mats concealed by velcro): "... [T]he release of liability that the injured plaintiff signed is void under General Obligations Law § 5-326 because the defendant's facility is recreational in nature ... . 'Relieving an owner or operator of a sporting venue from liability for inherent risks of engaging in a sport is justified when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' ... . 'If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty' ... . Moreover, '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' ... . Here, the defendant failed to establish, prima facie, that the doctrine of primary assumption of risk applies. The defendant submitted the injured plaintiff's deposition testimony, which reveals triable issues of fact as to whether the gap in the mats constituted a concealed risk and whether the injured plaintiff's accident involved an inherent risk of rock climbing ... . Since the defendant failed to establish its prima facie entitlement to judgment as a matter of law, its motion was properly denied, regardless of the sufficiency of the opposition papers...". ***Lee v. Brooklyn Boulders, LLC*, 2017 N.Y. Slip Op. 08660, Second Dept 12-13-17**

PERSONAL INJURY, EVIDENCE.

PHOTOGRAPHS OF UNEVEN SIDEWALK WHERE PLAINTIFF FELL WERE PROPERLY AUTHENTICATED AND SHOULD NOT HAVE BEEN EXCLUDED, NEW TRIAL ORDERED.

The Second Department, reversing the judgment by jury verdict, determined the photographs taken of the sidewalk where plaintiff fell should not have been excluded from evidence. Plaintiff took the pictures herself a few days after her fall: "The plaintiff commenced this action to recover damages for injuries she allegedly sustained in a trip and fall on an uneven sidewalk condition on premises possessed by the defendant ... (... CSC). The case proceeded to a trial against CSC, at which the plaintiff attempted to introduce into evidence photographs of the area where she fell, but the Supreme Court refused to admit them into evidence on the ground that the plaintiff did not lay a proper foundation for their admission. ... In order to admit the photographs proffered at trial into evidence, the plaintiff was required to authenticate them by laying a proper foundation, which generally requires proof that the photographs were taken close in time to the accident and fairly and accurately represent the conditions as they existed on the date of the accident... . Contrary to the determination of the Supreme Court, the plaintiff properly authenticated the photographs by testifying that she took them a few days after the accident, and that they fairly and accurately depicted the area where she fell at the time of her accident. ... [T]his error was not harmless, since the photographs were illustrative of the plaintiff's trial testimony and were highly relevant to the issues of constructive notice and trivial defect that were raised at trial ...". ***Davidow v. CSC Holdings, Inc.*, 2017 N.Y. Slip Op. 08655, Second Dept 12-13-17**

PERSONAL INJURY, MUNICIPAL LAW.

WET AND MUDDY CONDITION OF A FIELD WAS OPEN AND OBVIOUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this slip and fall case, determined the muddy, wet conditions surrounding a town baseball field constituted a non-actionable open and obvious condition: "Each of the defendants established its prima facie entitlement to judgment as a matter of law by demonstrating that the muddy condition of the field, caused by rain, was an open and obvious condition readily observable by those employing the reasonable use of their senses, and not inherently dangerous... . In opposition, the plaintiff failed to raise a triable issue of fact. The plaintiff relied on the affidavit of an expert whose opinion concerning the maintenance of the subject field was conclusory and speculative with no independent factual basis, and thus, insufficient to defeat a motion for summary judgment ...". ***Sirianni v. Town of Oyster Bay*, 2017 N.Y. Slip Op. 08707, Second Dept 12-13-17**

REAL PROPERTY LAW, APPEALS.

PLAINTIFFS ENTITLED TO DAMAGES FOR REDUCED PROPERTY VALUE, PUNITIVE DAMAGES, AND INJUNCTIVE RELIEF IN THIS TRESPASS BY ENCROACHMENT ACTION, APPELLATE COURT CAN MAKE ITS OWN CREDIBILITY ASSESSMENTS IN THE APPEAL OF A BENCH TRIAL.

The Second Department, modifying Supreme Court, determined plaintiffs' property did not lose all its value, as the trial judge found, in this trespass action, but instead the value was decreased by $325,000. In addition, plaintiffs were entitled to punitive damages and the defendants were required to tear down the encroaching structures. Plaintiffs own a single family

house. Defendants built a six-story structure next door. Defendants, apparently knowingly, placed 17 I-beams on plaintiffs' property for support during excavation and construction. Parts of the completed structure encroached on plaintiffs' property as well. The Second Department noted that, in reviewing a bench trial, the appellate court can make its own judgments about the credibility of witnesses (the appraisers in this case): "The measure of damages for a continuing trespass upon real property or permanent injury to property is the 'loss of market value, or the cost of restoration'... . ... The Supreme Court's determination that the plaintiffs' property had 'zero' value as a result of the subject encroachments was not supported by the weight of the evidence ... . Nevertheless, the encroachments of the 17 I-beams, which intruded less than one foot over the plaintiffs' property line but extended approximately 25 feet below the ground, were significant ... . The plaintiffs are also entitled to an award of punitive damages. 'A party seeking to recover punitive damages for trespass on real property has the burden of proving that the trespasser acted with actual malice involving intentional wrongdoing, or that such conduct amounted to a wanton, willful, or reckless disregard of the party's right of possession' ... . Here, the record demonstrates that the architectural plans for the development of the defendants' property provided that the I-beams were to be installed on the plaintiffs' property. The record also shows that the I-beams were installed solely to provide support or shoring during excavation of the defendants' property, and that they could have been, but were not, removed during a subsequent phase of the construction despite a timely demand by the plaintiffs for such removal. ... Contrary to the defendants' contention, the weight of the evidence supports the Supreme Court's determination that the plaintiffs were entitled to a permanent injunction prohibiting them from maintaining encroachments that projected over the plaintiffs' property and directing them to remove the roof cap and the brick facade trim that were projecting into the plaintiffs' air space. 'An invasion of another's . . . airspace need not be more than de minimis in order to constitute a trespass' ... , and, on this record, the balance of the equities favors the imposition of the limited injunctive relief granted by the court ...". ***Arcamone-Makinano v. Britton Prop., Inc.*, 2017 N.Y. Slip Op. 08650, Second Dept 12-13-17**

REAL PROPERTY LAW, REAL ESTATE.

SECOND PURCHASER OF REAL PROPERTY DEMONSTRATED HE WAS A BONA FIDE PURCHASER WITHOUT NOTICE OF THE PLAINTIFF'S PRIOR PURCHASE CONTRACT, PLAINTIFF'S FILING OF A NOTICE OF PENDENCY DID NOT SERVE AS A SUBSTITUTE FOR RECORDING OF THE CONTRACT.

The Second Department determined the purchaser of real property, Bolender, had demonstrated he was a bona fide purchaser who did not have notice of plaintiff's prior purchase contract. Although plaintiff had filed a notice of pendency after the deed was transferred to Bolender but before the deed was recorded, the notice of pendency was not sufficient to put Bolender on notice: "To establish that he was a bona fide purchaser for value, Bolender had the burden of proving that he purchased the property for valuable consideration and that he did not purchase with 'knowledge of facts that would lead a reasonably prudent purchaser to make inquiry' ... . 'When two or more prospective buyers contract for a certain property, pursuant to Real Property Law §§ 291 and 294, priority is given to the buyer whose conveyance or contract is first duly recorded'... . Here, Bolender established, prima facie, his entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him. His submissions demonstrated that he was a bona fide purchaser for value, that he purchased the subject property for valuable consideration, without prior notice of the plaintiff's alleged interest in the subject property, and without knowledge of facts that would lead a reasonably prudent purchaser to make such an inquiry. Bolender further demonstrated that the deed for the subject property was delivered to him on November 21, 2014, and recorded on December 27, 2014. In opposition, the plaintiff failed to raise a triable issue of fact. Contrary to the plaintiff's assertion, the proof that it filed a notice of pendency ... failed to raise a triable issue of fact. Although New York has a so-called "race-notice" statutory scheme... , having failed to avail itself of the protection of either Real Property Law §§ 291 or 294, the plaintiff may not successfully contend that its filing of a notice of pendency serves as a substitute for the recording of a conveyance or a contract ...". ***139 Lefferts, LLC v. Melendez*, 2017 N.Y. Slip Op. 08647, Second Dept 12-13-17**

THIRD DEPARTMENT

CONTRACT LAW, INSURANCE LAW.

ALLEGATION THAT DEFENDANT INSURER PRESSURED PHYSICIANS TO FIND NO CAUSAL CONNECTION BETWEEN THE ACCIDENT AND INJURY IN NO-FAULT CASES STATED A CAUSE OF ACTION UNDER THE GENERAL BUSINESS LAW, EMOTIONAL DISTRESS IS NOT AN ELEMENT OF DAMAGES FOR BREACH OF CONTRACT, THE ALLEGATIONS DID NOT SUPPORT A CLAIM FOR PUNITIVE DAMAGES.

The Third Department, partially reversing Supreme Court, over a two-justice concurrence, determined plaintiff's General Business Law (deceptive business practices) cause of action should not have been dismissed for failure to state a cause of action. The plaintiff alleged the defendant insurance company pressured physicians to find no causal connection between the injury and the accident (no-fault claims). The Third Department further found that the claims for consequential damages for emotional distress and punitive damages, stemming from breach of contract, were properly dismissed. The concurring justices argued that the emotional distress was a legitimate damages-claim for breach of contract: "... [P]laintiff alleged that defendant engaged in a consumer-oriented pattern and practice aimed at the public at large of wrongfully denying claims

for no-fault benefits by pressuring the physicians it hired to perform IMEs to provide medical reports that would support the denial of benefits and, further, that she suffered injury as a result of that practice. Such allegations are sufficient to plead a cause of action pursuant to General Business Law § 349 'at this early prediscovery stage'... . ... It has long been the rule that 'absent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty'... .. As Supreme Court noted, plaintiff failed to satisfy this standard because she did not allege the existence of any relationship or duty between the parties separate from the contractual obligation. ... Plaintiff's claim for punitive damages was likewise properly dismissed. Punitive damages may be recovered for breach of contract 'only where a defendant's conduct was (1) actionable as an independent tort, (2) egregious, (3) directed toward the plaintiff and (4) part of a pattern directed at the public' ... . Plaintiff's allegations that defendant engaged in unfair claim settlement practices do not allege a tort independent of the parties' contract sufficient to state a claim for recovery of punitive damages ...". ***Brown v. Government Employees Ins. Co.*, 2017 N.Y. Slip Op. 08774, Third Dept 12-14-17**

CRIMINAL LAW, APPEALS.

DEFENDANT WAS NOT FULLY INFORMED OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, CONVICTION REVERSED IN THE INTEREST OF JUSTICE.

The Third Department, reversing defendant's conviction by guilty plea in the interest of justice, determined the defendant was not sufficiently informed of the rights he was giving up by entering a plea: " 'When a defendant opts to plead guilty, he [or she] must waive certain constitutional rights — the privilege against self-incrimination and the rights to a jury trial and to be confronted by witnesses'... . 'While there is no mandatory catechism required of a pleading defendant, there must be an affirmative showing on the record that the defendant waived his or her constitutional rights'... .. The Court of Appeals has made clear that the trial judge has the responsibility to ensure that the defendant fully understands the plea and its consequences ... . During the plea colloquy, County Court did not reference the privilege against self-incrimination or the right to be confronted by witnesses and, although defendant was advised of his right to a trial, the court did not specify a jury trial. 'We cannot conclude that defendant's guilty plea was knowing, voluntary and intelligent as there was neither an affirmative showing on the record that defendant waived his constitutional rights nor any indication that he consulted with his attorney about the constitutional consequences of a guilty plea' ...". ***People v. Cotto*, 2017 N.Y. Slip Op. 08759, Third Dept 12-14-17**

CRIMINAL LAW, EVIDENCE.

SUPREME COURT SHOULD HAVE ORDERED AND REVIEWED THE VICTIM'S PSYCHIATRIC FILE IN THIS RAPE PROSECUTION, NO OPPORTUNITY FOR APPELLATE REVIEW, NEW TRIAL ORDERED.

The Third Department, reversing defendant's rape conviction, determined Supreme Court should have ordered the victim's psychiatric records for an in camera review for relevance: "Prior to trial, the People disclosed that the victim had indicated that she had received treatment for bipolar disorder and depression and, further, produced a copy of the medical record from the sexual assault examination that was conducted on the day after the incident in which the victim had also reported a past medical history of 'bipolar' and that she was taking prescription medications for that condition. Defendant requested that the court issue a subpoena duces tecum to obtain the victim's mental health records and conduct an in camera review to ascertain whether they contained any information relevant and material to the victim's credibility. ... Supreme Court erred when it declined to order production of the victim's mental health records and to review them in camera. Inasmuch as those records were never produced and were not part of the record, we are unable to remit the matter for a reconstruction hearing ... . Moreover, without knowing the content of those records, we are unable to determine whether the information that they contain is merely cumulative to the information provided to defendant about the victim's mental health history that was used as a basis for cross-examination, or whether the records contain additional relevant and material information bearing on her credibility. Similarly, our lack of knowledge of the contents of the victim's mental health records precludes us from determining whether the court's error in this regard was harmless. Accordingly, the judgment of conviction must be reversed and the matter remitted for a new trial." ***People v. Kiah*, 2017 N.Y. Slip Op. 08752, Third Dept 12-13-17**

DISCIPLINARY HEARINGS (INMATES).

VIOLATION OF A DIRECTIVE BY THE PRISON DID NOT WARRANT ANNULMENT OF THE DISCIPLINARY DETERMINATION.

The Third Department, reversing Supreme Court, found that petitioner's disciplinary determination should not have been annulled based upon a violation of a directive by the prison. Petitioner was found guilty of possessing a weapon and tampering with property: "... [T]he violation of former Directive No. 4910 (V) (C) (2) did not entitle petitioner to the annulment of the determination of guilt. Former Directive No. 4910 (V) (C) (2) provided that '[t]he search of a [s]pecial [h]ousing [u]nit cell shall be conducted with the inmate removed from the cell for the duration of the search. The inmate shall be placed in a vacant cell and not allowed to carry anything. If a vacant cell is not available, the inmate is to be taken to the far end of the tier and held for the duration of the search.' It is uncontested that, here, petitioner was placed in a recreation area — and

not in a vacant cell or at the far end of the tier — while his cell was searched. Although the placement of petitioner in the recreation area violated former Directive No. 4910 (V) (C) (2), we reject petitioner's contention that the proper remedy is annulment. Not all administrative violations invalidate agency actions, and the proper remedy for an administrative violation must take into account the purpose of the regulation that was violated... . Here, a plain reading of former Directive No. 4910 (V) (C) (2) establishes that the provision is intended to promote institutional safety rather than to protect an inmate's interests in regard to the search of his or her cell. Accordingly, we perceive no reason that petitioner would automatically be entitled to suppression of any evidence recovered from a search due to a violation of a directive that was not intended to protect his rights in regard to that search. Moreover, petitioner does not allege that his placement in the recreation area somehow prejudiced him ...". ***Matter of Tenney v. Annucci*, 2017 N.Y. Slip Op. 08794, Third Dept 12-14-17**

WORKERS' COMPENSATION LAW.

CLAIMANT, WHO HAD RETIRED, BUT CLAIMS TO HAVE REATTACHED TO THE LABOR MARKET, DID NOT DEMONSTRATE HIS INABILITY TO FIND COMPARABLE WORK WAS RELATED TO HIS ASBESTOS-CAUSED DISABILITY, MATTER REMITTED.

The Third Department, reversing the Workers' Compensation Board, determined the claimant, who had retired but claimed to have reattached to the labor market, had not demonstrated his inability to find comparable work was related to his asbestos-caused disability: "We agree with the employer that the Board failed to address its argument that claimant had not satisfied his burden of establishing that his inability to find work, and the related loss of earnings, was causally related to his disability. In order to be entitled to benefits, a claimant who has previously voluntarily retired but claims to have subsequently reattached to the labor market must demonstrate that his or her 'earning capacity and his [or her] ability to find comparable employment had been adversely affected by his [or her] disability' ... . This burden requires a claimant to demonstrate 'that other factors totally unrelated to his [or her] disability did not [cause the] adverse affect on his [or her] earning capacity' ... . Despite the employer arguing that claimant had failed to meet his burden in this regard, the Board did not discuss or make findings as to whether claimant had established a relevant nexus between his work-related disability and his unsuccessful job search. As the Board failed to engage in its fact-finding role and deprived the employer of consideration of the merits of the issue, we must reverse the Board's decision in order to allow that review to occur ...". ***Matter of Pontillo v. Consolidated Edison of N.Y., Inc.*, 2017 N.Y. Slip Op. 08760, Third Dept 12-14-17**

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