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COURT OF APPEALS

ADMINISTRATIVE LAW, EVIDENCE, APPEALS.

BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE NYC COMMISSION ON HUMAN RIGHTS' RULING THAT CONSTRUCTION OF A HANDICAPPED ACCESSIBLE ENTRANCE WOULD NOT CAUSE UNDUE HARDSHIP TO THE PROPERTY OWNERS APPELLATE REVIEW CAN GO NO FURTHER, EXTENSIVE TWO-JUDGE DISSENT.

The Court of Appeals, over a two-judge dissenting opinion, determined that substantial evidence supported the NYC Commission on Human Rights' ruling that the conversion of a window to a handicapped-accessible entrance for a tenant in petitioners' building would not cause petitioners undue hardship. The dissent argued petitioners had carried their burden of proof on that issue by presenting evidence the conversion presented many structural issues which might necessitate evacuation of the building. The majority simply decided there was sufficient evidence to support the Commission's ruling and an appellate court's review power stops there: "In light of the Commission's ruling in favor of respondents and because petitioners have the burden of demonstrating undue hardship … , the issue is whether there is substantial evidence to support the Commission's conclusion that petitioners failed to carry that burden. 'Quite often there is substantial evidence on both sides' of an issue disputed before an administrative agency ... , and the substantial evidence test 'demands only that a given inference is reasonable and plausible, not necessarily the most probable'… . Applying this standard, '[c]ourts may not weigh the evidence or reject [a] determination where the evidence is conflicting and room for choice exists' ... . Instead, 'when a rational basis for the conclusion adopted by the [agency] is found, the judicial function is exhausted. The question, thus, is not whether [the reviewing court] find[s] the proof . . . convincing, but whether the [agency] could do so' ...". ***Matter of Marine Holdings, LLC v. New York City Commn. on Human Rights*, 2018 N.Y. Slip Op. 03303, CtApp 5-8-18**

CRIMINAL LAW.

PLACE OF BUSINESS EXCEPTION TO THE STATUTE CRIMINALIZING POSSESSION OF A FIREARM AS A FELONY DID NOT APPLY TO A MANAGER OF A MCDONALD'S RESTAURANT, AS OPPOSED TO A MERCHANT, STOREKEEPER OR PRINCIPAL OPERATOR.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurring opinion, determined that the "place of business" exception to the statute criminalizing possession of an unlicensed firearm as a felony did not apply to defendant, who was a swing manager at a McDonald's restaurant. While working at the restaurant the defendant's firearm discharged accidentally and wounded him: "The question presented on this appeal is whether the "place of business" exception to Penal Law § 265.03 (3) applies to an employee who possessed an unlicensed firearm at work. Defendant contends that 'place of business' simply means one's place of employment, and therefore the exception applies. We read the exception to narrowly encompass a person's 'place of business,' when such person is a merchant, storekeeper, or principal operator of a like establishment." ***People v. Wallace*, 2018 N.Y. Slip Op. 03305, CtApp 5-8-18**

ANIMAL LAW, APPEALS.

LEAVE TO APPEAL DENIAL OF HABEAS CORPUS RELIEF FOR TWO CHIMPANZEES DENIED, THOUGHTFUL CONCURRING OPINION QUESTIONS THE ANALYSIS USED BY THE APPELLATE DIVISION AND SUGGESTS RECOGNIZING THE CHIMPANZEES' RIGHT TO LIBERTY.

The Court of Appeals denied the motion for leave to appeal in a case seeking habeas corpus relief for two chimpanzees alleged to be confined by their owners to small cages in a warehouse and a cement storefront in a crowded residential area. Judge Fahey wrote a thoughtful concurring opinion questioning the rationale used by the Appellate Division to deny relief: "The Appellate Division's conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species ... . The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. Moreover, the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species. ... Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary

cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention. To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect ...". ***Matter of Nonhuman Rights Project, Inc. v. Lavery*, 2018 N.Y. Slip Op. 03309, CtApp 5-8-18**

CRIMINAL LAW, EVIDENCE.

EVIDENTIARY RULING BY A TRIAL JUDGE WAS NOT THE LAW OF THE CASE AND WAS PROPERLY RECONSIDERED PRIOR TO TRIAL BY A NEW TRIAL JUDGE, STATEMENT HEARD IN THE BACKGROUND OF A 911 CALL IDENTIFYING DEFENDANT AS THE SHOOTER SHOULD NOT HAVE BEEN ADMITTED AS AN EXCITED UTTERANCE, NO EVIDENCE THE DECLARANT SAW THE SHOOTING.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a concurring opinion, reversing defendant's conviction, determined that a statement heard in the background of a 911 call should not have been admitted as an excited utterance. The statement ostensibly identified the defendant as the man who had just shot three people. Other than the defendant's fingerprint found on the van the shooter got into, there was no evidence identifying the defendant as the shooter. Two trial judges had ruled the 911 statement inadmissible before a third trial judge allowed it to come in. The Court of Appeals held that the law of the case doctrine did not prohibit the third judge from ruling on the admissibility of the statement, but the statement was inadmissible because there was no evidence the declarant observed the shooting: "The decision to admit hearsay as an excited utterance is an evidentiary decision, 'left to the sound judgment of the trial court'... , and thus may be reconsidered on retrial ... . There is no reason to apply a different rule to a successor judge within the same trial and we, therefore, have no basis to adopt a per se rule prohibiting a substitute judge from exercising independent discretion concerning an evidentiary trial ruling. * * * A 'spontaneous declaration or excited utterance — made contemporaneously or immediately after a startling event — which asserts the circumstances of that occasion as observed by the declarant' is an exception to the prohibition on hearsay ... . 'The admission of a hearsay statement under any exception deprives the defendant of the right to test the accuracy and trustworthiness of the statement by cross-examination' ... . Although hearsay, excited utterances may be admissible because, 'as the impulsive and unreflecting responses of the declarant to the injury or other startling event, they possess a high degree of trustworthiness, and, as thus expressing the real tenor of said declarant's belief as to the facts just observed by him, may be received as testimony of those facts'... . ... '[I]t must be inferable that the declarant had an opportunity to observe personally the event described in the [spontaneous] declaration' ... . Direct observation by the person making the excited utterance ensures that the declarant is in fact reacting to and 'assert[ing] the circumstances of' the event causing the excitement ...". ***People v. Cummings*, 2018 N.Y. Slip Op. 03306, CtApp 5-8-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

AFTER A SPECTATOR ALERTED THE COURT JURORS HAD BEEN OVERHEARD REFERRING TO THE DEFENDANT IN DEROGATORY TERMS THE TRIAL JUDGE QUESTIONED THE SPECTATOR BUT TOOK NO FURTHER ACTION, MATTER REMITTED TO THE APPELLATE DIVISION FOR A DETERMINATION WHETHER THE TRIAL JUDGE'S ASSESSMENT OF THE CREDIBILITY OF THE SPECTATOR WAS SUPPORTED BY THE WEIGHT OF THE EVIDENCE.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurring opinion and a dissenting opinion, reversed the Appellate Division and sent the matter back to the Appellate Division for a factual determination whether the trial judge's credibility assessment of a spectator who claimed to have overheard jurors speaking about the defendant in derogatory terms was supported by the weight of the evidence. After questioning the spectator the trial judge determined no further inquiry was required. The Appellate Division reversed defendant's conviction over a dissent: "... [W]e are asked to determine whether the trial court abused its discretion when it chose not to conduct an inquiry of two sworn jurors pursuant to People v. Buford (69 NY2d 290 [1987]). Alerted to a complaint by a courtroom spectator that during a break in the trial the spectator allegedly overheard the jurors refer to defendant by a derogatory term, the trial court immediately called the spectator to the stand and elicited sworn testimony regarding her allegation. At the conclusion of the examination, the judge determined that a Buford inquiry was not required based on the testimony provided. We conclude on this record that the trial court made an implied credibility finding that the spectator was not worthy of belief and therefore a Buford inquiry was not warranted. This determination by the trial court was not reviewed by the Appellate Division. It was error for the Appellate Division to opine as to what remedy was warranted in response to the content of the spectator's allegation, without determining whether the allegation was credible in the first instance. Accordingly, we reverse the Appellate Division order and remit the case to that Court to exercise its own fact-finding power to consider and determine whether the trial court's finding as to the spectator's credibility was supported by the weight of the evidence. * * * If, on remittal, the Appellate Division finds, upon its own factual review, that the record supports the trial court's determination that the spectator lacked credibility, no further action was required. If the Appellate Division finds that the credibility determination was not supported, it must determine whether the trial court abused its discretion in not taking further action ... . [A] credible allegation that a juror is grossly unqualified to serve or engaged in substantial misconduct within the meaning of

CPL 270.35 cannot be ignored by the trial court, and failure to appropriately remedy the matter is reversible error." ***People v. Kuzdzal*, 2018 N.Y. Slip Op. 03304, CtApp 5-8-18**

FIRST DEPARTMENT

CIVIL PROCEDURE.

ESSENTIAL EVIDENCE SUBMITTED IN REPLY PAPERS PROPERLY CONSIDERED BECAUSE A SURREPLY WAS ALLOWED.

The First Department noted that essential evidence in reply papers was properly considered by the court because a surreply was allowed: " ... [T]o support amending a personal injury complaint to add a cause of action for wrongful death, plaintiffs were required to submit 'competent medical proof of the causal connection between the alleged malpractice and the death of the original plaintiff' ... . The affirmation of plaintiffs' expert, which stated that to a reasonable degree of medical certainty the decedent's injury led to his death, was sufficient, for the purposes of CPLR 3025(b), to establish a causal connection between the decedent's death and the originally alleged negligence by defendants ... . Plaintiff's submission of the expert's affirmation on reply is not fatal to the motion, because defendant was permitted to submit a surreply." ***Frangiadakis v. 51 W. 81st St. Corp.*, 2018 N.Y. Slip Op. 03331, First Dept 5-8-18**

CIVIL PROCEDURE.

DEFENDANT'S MOTION FOR A CHANGE OF VENUE IN THIS TRAFFIC ACCIDENT CASE PROPERLY GRANTED BASED UPON CONVENIENCE OF WITNESSES.

The First Department determined the defendant's (Target's) motion to change venue in this traffic accident case was properly granted: "Supreme Court did not improvidently exercise its discretion in granting Target's motion to change venue to Suffolk County even though plaintiff properly placed venue in New York County based upon Target's principal place of business at the time the action was commenced (see CPLR 503[a], [c]). The motor vehicle accident happened in Suffolk County, plaintiffs and codefendants live in that county, the decedent received her medical treatment there ... . Target also submitted the affidavits of two Suffolk County police officers, who averred that they were involved in the investigation including interviewing witnesses at the accident location and that they would be inconvenienced by having to travel to New York County because it would cause them to be absent from their police duties for a full day ... . That the police officers signed affidavits in favor of the motion to change venue establishes that they were aware of the action and demonstrates that they are willing to testify at trial. It was proper for the motion court to consider the police officers' convenience, because their testimony regarding their investigation as to how the accident happened bears on liability... . Furthermore, the police officers' affidavits are not insufficient because they do not set forth their home addresses, since it is undisputed that they work in Suffolk County ...". ***Kochan v. Target Corp.*, 2018 N.Y. Slip Op. 03445, First Dept 5-10-18**

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE INSUFFICIENT, MOTION TO VACATE DEFAULT PROPERLY DENIED.

The First Department determined law office failure was not sufficient to justify granting plaintiffs' motion to vacate the default judgment: "... [P]laintiffs' counsel affirmed that he had timely prepared opposition papers, but due to law office failure, the nature of which counsel failed to describe in any detail, the papers were never filed. Counsel affirmed that he was under the impression the motion was still being considered by the court when he happened to discover the default order. He further affirmed that, despite defendants' sworn affidavits of service, he was never served with the notices of entry of the default order. Here, in addition to the untimeliness of this CPLR 5015 motion to vacate, the bare and unsubstantiated assertions of law office failure are insufficient to establish a reasonable excuse for the default ... . Moreover, the record shows that plaintiffs had a prior pattern of dilatory conduct, indicating that the default was not an excusable isolated event or inadvertent error ... Because plaintiffs failed to provide an acceptable excuse for the default, it is unnecessary to address whether they demonstrated a meritorious cause of action ...". ***Fernandez v. Santos*, 2018 N.Y. Slip Op. 03326, First Dept 5-8-18**

CIVIL PROCEDURE, CORPORATION LAW.

ALTHOUGH DEFENDANT FOREIGN CORPORATION DID NOT HAVE AN OFFICE IN NEW YORK COUNTY, IT HAD DESIGNATED NEW YORK COUNTY AS ITS PLACE OF BUSINESS IN ITS FILING WITH THE SECRETARY OF STATE, MOTION TO CHANGE VENUE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants' motion to change venue should not have been granted. Although defendant foreign corporation did not have a place of business in New York County, it had designated New York County as the location of its business in its filing with the Secretary of State: "Wakefern, a foreign corporation, submitted a copy of its application for authorization to conduct business filed with the Secretary of State, in which it identified New York County as '[t]he county within this state where its office is to be located' ... . Wakefern's designation of New

York County in its application is controlling for venue purposes, even if it does not actually have an office in New York County ...". ***Janis v. Janson Supermarkets LLC*, 2018 N.Y. Slip Op. 03333, First Dept 5-8-18**

CIVIL PROCEDURE, CORPORATION LAW, CONTRACT LAW, DEFAMATION.

ALTHOUGH THE DEFENDANT NEW YORK COMPANY IS A WHOLLY OWNED SUBSIDIARY OF AN ISRAELI COMPANY, THE TWO ENTITIES OPERATED INDEPENDENTLY SUCH THAT NEW YORK COULD NOT EXERCISE JURISDICTION OVER THE ISRAELI COMPANY; A QUALIFIED PRIVILEGE RE: DEFAMATORY REMARKS ALLEGEDLY MADE BY DEFENDANT DOES NOT INSULATE THE DEFENDANT FROM A CAUSE OF ACTION BASED UPON BREACH OF A CONTRACTUAL NON-DISPARAGEMENT CLAUSE.

The First Department found that a defendant company, IAI, which operates in Israel, was not subject to personal jurisdiction in New York under the theory that defendant IAINA, which operates in New York, was a department of IAI. The court explained the relevant criteria. The court further held that a common interest privilege (with respect to alleged defamatory remarks regarding the plaintiff, defendant IAINA's employee) does not insulate defendant from the alleged breach of a contractual non-disparagement clause: "Defendants established that IAI North America, Inc. (IAINA), which does business in the State of New York, is not a mere department of IAI, which operates primarily in Israel, and therefore that jurisdiction over IAINA is not jurisdiction over IAI ... . The key executive personnel of the subsidiary were not assigned to their positions by the foreign parent, the subsidiary trained its own personnel, the parent did not write and publish all of the sales literature used by the subsidiary, and the subsidiary prepared its own financial statements ... . While IAINA is a wholly owned subsidiary of IAI, common ownership is 'intrinsic to the parent-subsidiary relationship and, by [itself], not determinative'... . IAINA showed that it observed corporate formalities. Nothing in plaintiff's affirmation indicates that IAI interferes in the selection and assignment of IAINA's executive personnel, and the CEO of IAINA denied this. He also denied that IAI controlled IAINA's marketing and operational policies. Plaintiff claimed that IAI had control over the approval of IAINA's annual budget during the 11 years he worked at IAINA. However, this does not suffice ... . IAINA ... contends that the cause of action for breach of a non-disparagement clause should be dismissed because, even if it made disparaging remarks about plaintiff (its former employee), the remarks were privileged. However, the common interest privilege it relies on — which is part of the law of defamation — does not apply to a claim for breach of a non-disparagement clause ... ". ***Wolberg v. IAI N. Am., Inc.*, 2018 N.Y. Slip Op. 03321, First Dept 5-8-18**

CIVIL PROCEDURE, INSURANCE LAW.

DEFENDANT CANADIAN INSURANCE COMPANY'S TIES TO NEW YORK WERE NOT SUFFICIENT TO ALLOW THE EXERCISE OF LONG-ARM JURISDICTION OVER THE COMPANY.

The First Department determined defendant insurance company's connections to New York were insufficient to support long-arm jurisdiction: "[D]efendant ... is incorporated in Canada, has its principal place of business in Canada, and is not authorized to do business in New York. Defendant issued a $10 million life insurance policy to a trust, designated on the policy application as the policy owner and beneficiary, which the record shows has its situs in New Jersey. The policy application was signed in New Jersey, and the receipt reflecting delivery of the policy identifies New Jersey as the place of execution. While the trustee may be a New York resident, he is neither the designated owner nor a beneficiary of the policy. Plaintiff cites no authority to support its argument that New York courts may exercise jurisdiction over defendant because the policy insured the life of a New York resident. Nor do defendant's purported ties to New York suffice. Plaintiff points out that the medical portion of the application was signed in New York by the insured and the medical examiner and that, before it was delivered to the trustee, the policy passed through two New York intermediaries. These transactions are not only too fleeting to provide a jurisdictional foundation, but are also not the acts from which plaintiff's claims arise ... . Even assuming, as the record suggests, that defendant assured plaintiff (which acquired ownership of the policy) of the incontestability of the policy by a letter faxed to a New York number, this is not sufficient to establish New York jurisdiction over defendant ...". ***AMT Capital Holdings, S.A. v. Sun Life Assur. Co. of Can.*, 2018 N.Y. Slip Op. 03318, First Dept 5-8-18**

CRIMINAL LAW.

SUPREME COURT SHOULD HAVE PLACED DEFENDANT IN A JUDICIAL DIVERSION PROGRAM IN THIS COCAINE-SALE CASE, CRITERIA AND PURPOSE EXPLAINED.

The First Department determined Supreme Court should have placed defendant in a judicial diversion program in this cocaine-sale case. Defendant's need for money to support his marijuana use qualified him for diversion, despite his prior completion of a drug treatment program: "The court improvidently exercised its discretion in denying defendant's request to participate in the judicial diversion program. The court based this determination on the erroneous ground that defendant had failed to establish that his 'substance abuse or dependence [wa]s a contributing factor to [his] criminal behavior' (CPL 216.05[3][b][iii]). 'The statute does not require that a defendant's . . . substance abuse or dependence be the exclusive or primary cause of the defendant's criminal behavior,' but 'only requires that it be a contributing factor' ... . In this case, defendant pleaded guilty to selling cocaine to an undercover police officer for $300, and was found carrying that amount in

prerecorded buy money, an additional $880 in cash, and three cell phones. Defendant reported that his heavy use of marijuana cost him about $50 to $60 per day. In light of these facts and other particular circumstances of this case, defendant's need for enough money to fund that habit evidently contributed to his criminal behavior of selling cocaine. Accordingly, the court should order judicial diversion pursuant to CPL article 216, giving due recognition to the drug treatment program defendant has already completed. This result is consistent with one of the purposes of judicial diversion, which is to permit a defendant to achieve a disposition other than a felony conviction, where appropriate." ***People v. Alston*, 2018 N.Y. Slip Op. 03324, First Dept 5-8-18**

CRIMINAL LAW.

INDICTMENT COUNT CHARGING 20 INDIVIDUAL INSTANCES OF CONTEMPT WAS DUPLICITOUS, CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined the indictment which charged 20 individual crimes (contempt) in a single count was duplicitous: "The criminal contempt count was duplicitous because defendant's acts of violating an order of protection by regularly but briefly showing up at the victim's apartment, over the course of about a month and 20 days, constituted distinct crimes that were required to be alleged in separate counts ... . Defendant preserved this argument by moving to dismiss that count on the same ground in his omnibus motion, which the court denied ... and we find the People's arguments on the issue of preservation unavailing. The defect was in the language of the indictment itself, and it did not depend on the trial evidence or the court's charge." ***People v. Villalon*, 2018 N.Y. Slip Op. 03431, First Dept 5-10-18**

CRIMINAL LAW, APPEALS.

POLICE ENTRY INTO A SINGLE USE BATHROOM IN A COMMERCIAL ESTABLISHMENT CONSTITUTED A SEARCH, DEFENDANT'S SUPPRESSION MOTION SHOULD NOT HAVE BEEN DENIED BASED UPON THE CONCLUSION THE DEFENDANT DID NOT HAVE AN EXPECTATION OF PRIVACY, MATTER REMITTED FOR CONSIDERATION OF ANOTHER ISSUE WHICH SUPREME COURT DID NOT RULE ON.

The First Department, reversing Supreme Court, determined that the defendant had an expectation of privacy in a single-use bathroom in an adult bookstore, His suppression motion should not, therefore, have been denied on the ground the police entry into the bathroom was not a search. The matter was remitted for consideration of the issue raised by the People at the suppression hearing which was not ruled on by Supreme Court: "The court erred in denying defendant's suppression motion on the ground that the police entrance into a single-use restroom located in an adult film and novelty store was not a 'search' for purposes of the Fourth Amendment. We conclude that, once he closed the door, defendant had a reasonable expectation of privacy while using the small, single-use restroom because at that point he was 'entitled to assume that while inside he ... will not be viewed by others' ... . The closed door of the restroom was comparable to closed bathroom stalls in public restrooms, where a reasonable expectation of privacy exists ... . This expectation of privacy was not negated by the facts that the restroom was located in a commercial establishment and was unlocked ... . In the alternative, the People argue, as they did at the hearing, that the police entrance into the restroom was reasonable because it was based on probable cause to suspect that there was drug use occurring inside. However, because 'the hearing court did not rule on this issue in denying the suppression motion, and therefore did not rule adversely against defendant on this point, we may not reach it on this appeal' ... . Accordingly, we hold the appeal in abeyance and remand for determination, based on the hearing minutes, of the issue raised at the hearing, but not decided ...". ***People v. Vinson*, 2018 N.Y. Slip Op. 03437, First Dept 5-10-18**

EMPLOYMENT LAW, LABOR LAW.

PLAINTIFF PHYSICIAN SUFFICIENTLY ALLEGED HE WAS TERMINATED IN VIOLATION OF LABOR LAW § 741, PLAINTIFF EXPRESSED HIS DISAGREEMENT WITH DEFENDANT HOSPITAL CORPORATION'S POLICY THAT THE RESIDENTIAL DRINKING WATER OF PATIENTS DIAGNOSED WITH LEGIONNAIRE'S DISEASE SHOULD NOT BE TESTED.

The First Department, reversing Supreme Court, determined plaintiff physician's complaint alleging he was terminated in retaliation for his disagreement with defendant hospital corporation's policy concerning the testing of residential drinking water for patients diagnosed with Legionnaire's disease stated a cause of action pursuant to Labor Law § 741: "[Plaintiff] disagrees with the public position taken by the New York City Department of Health and Mental Hygiene that the bacteria was found only in cooling towers and not in residential drinking water, and reasonably believes that the practice of not testing the residential drinking water of the patients constituted 'improper quality of patient care.' Plaintiff has sufficiently pleaded the notice requirement set forth in Labor Law § 741(3). Under that provision, an employee may not bring an action 'unless the employee has brought the improper quality of patient care to the attention of a supervisor and has afforded the employer a reasonable opportunity to correct such activity, policy or practice'... . Although the statutory language expressly contemplates an affirmative act of objection to a policy or practice, strict compliance with the requirement here 'would not serve the purpose of the statute' ... . In view of the allegations that plaintiff's supervisors had directed him to stop testing

residential drinking water of the patients, and to not associate himself with the hospital if he insisted on continuing to do so, any express objections to the practice or policy would have been futile. Further, the fact that plaintiff insisted on testing the water despite directives to stop shows that his supervisors were aware, and therefore had notice, of his objection." ***Skelly v. New York City Health & Hosps. Corp.*, 2018 N.Y. Slip Op. 03329, First Dept 5-8-18**

MENTAL HYGIENE LAW, CONSTITUTIONAL LAW, APPEALS.

LETTER WRITTEN BY PETITIONER UPON INVOLUNTARY ADMISSION TO A HOSPITAL SHOULD HAVE BEEN SEEN AS A DEMAND FOR AN EXPEDITED CHALLENGE TO THE CONFINEMENT UNDER THE MENTAL HYGIENE LAW (HABEAS CORPUS), ALTHOUGH THE ISSUE IS MOOT IN THIS CASE, THE ISSUE WAS HEARD ON APPEAL BECAUSE IT IS LIKELY TO RECUR.

The First Department, as an exception to the mootness doctrine, determined a letter written by petitioner should have been interpreted as a demand to contest his involuntary confinement pursuant to the Mental Hygiene Law: "In light of petitioner's release from involuntary confinement pursuant to Mental Hygiene Law (MHL) article 9, this appeal is moot, as petitioner concedes. However, we reach the merits because the appeal raises a substantial and novel issue that is likely to recur yet typically evades review ... .We reject respondent's argument that the issue raised in this proceeding is unlikely to recur ... . As respondent now concedes, the letter submitted by petitioner on the day he was involuntary admitted to Lincoln Hospital reasonably conveyed that he sought a 'hearing on the question of need for involuntary care and treatment' (MHL § 9.31[a]), and should have been forwarded to the appropriate court 'forthwith'... . The handwritten letter says, 'I am falsely imprisoned and deprived of liberty,' in violation of certain United States Supreme Court decisions, 'I demand a jury trial immediately,' and 'I demand my lawyer.' To the extent the court found the request in this letter insufficiently clear or formal, because there were other, unrelated complaints raised in the letter or for any other reason, this was error. The letter should have been interpreted reasonably to effectuate the statute's purpose of allowing patients to challenge their involuntary confinement on an expedited basis, as required by MHL § 9.31." ***Matter of State of N.Y. ex rel. Giffen v. Hoffman*, 2018 N.Y. Slip Op. 03462, First Dept 5-10-18**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH DEFENDANT DID NOT, UNDER THE ADMINISTRATIVE CODE, HAVE A DUTY TO REMOVE ICE AND SNOW FROM THE AREA OF THE SLIP AND FALL, SINCE DEFENDANT UNDERTOOK TO DO SO IT MUST DEMONSTRATE IT DID NOT CREATE OR EXACERBATE THE DANGEROUS CONDITION TO BE ENTITLED TO SUMMARY JUDGMENT.

The First Department determined defendant's motion for summary judgment in this ice and snow slip and fall case was properly denied. Although the defendant, under the administrative code of NYC, did not have a duty to remove ice and snow from the site of the fall, it did undertake to do so. Therefore, to be entitled to summary judgment, the defendant must present proof it did not create or exacerbate the dangerous condition: "... [Defendant] failed to demonstrate, as a matter of law, that it did not cause, create, or exacerbate the icy condition after it undertook to clean the sidewalk during the winter storm. Neither the testimony of the property's caretaker nor the affidavit of the supervisor of caretakers's indicates that they inspected the location before the accident and saw that it was properly treated with salt or sand ...". ***Maynard-Keeler v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 03322, First Dept 5-8-18**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DRIVER ADMITTED IN THE ACCIDENT REPORT HE WAS AWARE THE ROADS WERE WET AND SLIPPERY AT THE TIME THE DEFENDANT'S BUS SKIDDED INTO PLAINTIFF'S BUS AFTER HITTING A PUDDLE, PLAINTIFF ALLEGED DEFENDANT DRIVER WAS GOING TOO FAST FOR CONDITIONS, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED, DESPITE DEFENDANT'S DENIAL OF HIS ADMISSION IN HIS AFFIDAVIT OPPOSING THE MOTION.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment in this traffic accident case should have been granted. The plaintiff's affidavit and the accident report indicated that, after traveling through a puddle of water, the defendant's bus slid, hit a wall and then rolled into the middle lane, striking plaintiff's bus. The complaint alleged the driver of defendant's bus was travelling too fast for the conditions. The court noted that a plaintiff no longer needs to demonstrate the absence of comparative negligence to be awarded summary judgment on liability. The court rejected the emergency defense because defendant driver had acknowledged in the accident report he was aware the roads were wet and slippery. The court further found that the defendant's affidavit, in which he stated he did not observe any wet or slippery conditions before the accident, "appears to have been submitted to avoid the consequences of his prior admission . . . and, thus, is insufficient to defeat plaintiff's motion for partial summary judgment": "... [P]laintiff submitted an affidavit in which he swore that the road was wet and slippery, that puddles had formed, and that the driver of defendants' bus was traveling at too fast a rate of speed under these circumstances, lost control, and struck plaintiff's bus in the neighboring lane. In defendants' accident report, relied on by plaintiff before the motion court and by defendants in their appellate brief, the driver of defendants' bus stated that, as he drove over a puddle of water, the back wheels 'beg[a]n to slide and the bus

hit the wall and rolled into the middle lane,' striking plaintiff's bus. Together, plaintiff's affidavit, and defendants' accident report, the authenticity and accuracy of which are not disputed, established plaintiff's prima facie entitlement to judgment as a matter of law on the issue of liability ... . In opposition, defendants failed to raise a triable issue of fact. Defendant driver submitted an affidavit in which he claimed that he was operating his bus at a reasonable speed 'considering the conditions then existing.' At the same time, he did not deny that the roads were wet and slippery, but claimed that he did not 'observe any accumulation of water or other slippery roadway condition,' even though in his accident report he admitted to having driven over a puddle." **Martinez v. WE Transp. Inc., 2018 N.Y. Slip Op. 03311, First Dept 5-8-18**

PERSONAL INJURY, EVIDENCE.

RES IPSA LOQUITUR DOCTRINE APPLIES IN THIS ELEVATOR-DOOR INJURY CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined that the defendant's motion for summary judgment in this elevator-door injury case should not have been granted. The doctrine of res ipsa loquitur applied and the plaintiff presented evidence the elevators doors had been malfunctioning for months: "... [P]laintiff was injured when the elevator door in defendant's building unexpectedly closed on him as he attempted to enter the elevator. Contrary to the finding of the motion court, the evidentiary doctrine of res ipsa loquitur is applicable under the circumstances presented since plaintiff testified that the elevator door, which was closed by electronic sensors and did not have rubber safety bumpers, suddenly and unexpectedly closed ... . In addition, plaintiff testified that the elevator door was malfunctioning for several months and proferred an affidavit by a tenant who averred to the elevator doors malfunctioning. This is sufficient evidence of constructive notice to defeat defendant's showing that the elevator was regularly maintained ...". ***Lilly v. City of New York*, 2018 N.Y. Slip Op. 03314, First Dept 5-8-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION TO EXTEND TIME TO SERVE DEFENDANT IN THIS MEDICAL MALPRACTICE ACTION PROPERLY GRANTED, EVEN THOUGH STATUTE OF LIMITATIONS HAD EXPIRED.

The Second Department determined plaintiff's motion to extend the time to serve defendant (Nayak) in this medical malpractice action was properly granted, even though the statute of limitations expired in the interim between filing the summons and complaint and the motion to extend. Plaintiff's attempt at timely service was found to be defective: "The plaintiff's cross motion pursuant to CPLR 306-b to extend the time to serve Nayak with the summons and complaint was properly granted in the interest of justice ... . When deciding whether to grant an extension of time to serve a summons and complaint in the interest of justice, 'the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the [potentially] meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant' ... Here, the record established that the plaintiff exercised diligence in timely filing, and in attempting to serve Nayak and notify Nayak and her insurance carrier of the summons and complaint within the 120-day period following the filing of the summons and complaint, although the attempt to serve Nayak was ultimately deemed defective ... . While the action was timely commenced, the statute of limitations had expired when the plaintiff cross-moved for relief, the plaintiff promptly cross-moved for an extension of time to serve Nayak, and there was no identifiable prejudice to Nayak attributable to the delay in service ...". ***Furze v. Stapen*, 2018 N.Y. Slip Op. 03338, Second Dept 5-9-18**

CIVIL PROCEDURE, TRUSTS AND ESTATES, FORECLOSURE.

COURT SHOULD NOT HAVE CONSIDERED AND RULED UPON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE PROCEEDING AFTER A DEFENDANT DIED.

The Second Department, reversing Supreme Court, determined the death of a defendant in this foreclosure action precluded the court from hearing and determining plaintiff's motion for summary judgment, even with respect to the other defendants: "As a general matter, 'the death of a party divests a court of jurisdiction to act, and automatically stays proceedings in the action pending the substitution of a legal representative for that decedent pursuant to CPLR 1015(a)' ... . '[A]ny determination rendered without such a substitution will generally be deemed a nullity'... . Here, the defendant Michael Costello died before the plaintiff's motion was made and before the orders appealed from were issued. Since a substitution had not been made, the Supreme Court should not have determined the merits of the plaintiff's motion, even to the extent that the plaintiff sought relief against the other defendants ... . Furthermore, although this Court has recognized, under certain limited circumstances, that 'where a party's demise does not affect the merits of a case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution' ... , those circumstances are not present here ...". ***American Airlines Fed. Credit Union v. Costello*, 2018 N.Y. Slip Op. 03335, Second Dept 5-9-18**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE MANSLAUGHTER AND NEGLIGENT HOMICIDE CONVICTIONS WERE SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE IN THIS TRAFFIC ACCIDENT CASE, THOSE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE, THE POLICE OFFICER WAS KILLED BY ANOTHER DRIVER WHO WAS PASSING BY THE ACCIDENT SCENE A SUBSTANTIAL AMOUNT OF TIME AFTER THE DEFENDANT'S ACCIDENT.

The Second Department, reversing the manslaughter and negligent homicide convictions, over a dissent, determined that those convictions, although supported by legally sufficient evidence, were against the weight of the evidence. Defendant, whose blood alcohol level was .12, caused a highway traffic accident. Several drivers stopped and a police officer was at the scene. Another driver, who was in traffic passing by the stopped cars and the police officer, struck a car and the police officer was killed. The Second Department found that the accident in which the officer was killed, which occurred a substantial amount of time after defendant's accident, was not "temporally proximate" to the defendant's conduct: "... [T]he People adduced legally sufficient evidence that the defendant's actions set in motion the events that led to the death of the police officer, and that the defendant's conduct was a sufficiently direct cause of that result. It was reasonably foreseeable that the defendant's conduct, including driving while intoxicated, causing the initial collision, failing to stop after the initial collision, and causing a second collision, would cause a dangerous condition on the roadway that would pose a danger to police or other first responders, particularly in the immediate aftermath of the incidents and prior to the securing of the accident scene... . The People adduced legally sufficient evidence of causation as to the counts of manslaughter in the second degree, vehicular manslaughter in the second degree, aggravated criminally negligent homicide, and criminally negligent homicide. ... However, the jury verdict as to the manslaughter and homicide counts was against the weight of the evidence. In fulfilling our responsibility to conduct an independent review of the weight of the evidence ... , we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor ... . Here, the verdict as to the manslaughter and homicide counts was against the weight of the evidence, particularly in light of the evidence that the driver of the SUV that struck the police officer failed to pay attention to conditions on the roadway, including the presence of multiple stopped vehicles and debris on the road, and approached the accident scene at a speed in excess of the speed at which other vehicles were traveling ...". ***People v. Ryan*, 2018 N.Y. Slip Op. 03380, Second Dept 5-9-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT WAS CHARGED WITH ENDANGERING THE WELFARE OF A CHILD BASED ON SEVERAL TYPES OF SEXUAL TOUCHING, BUT NOT KISSING, THE JURY WAS ALLOWED TO CONSIDER KISSING, CONVICTION REVERSED.

The Second Department, reversing defendant's conviction, determined defendant was convicted of endangering the welfare of a child based upon a theory that was not charged in the indictment. The endangering count of the indictment alleged defendant had subjected the victim to several types of sexual touching, but not kissing. The jury was allowed to consider the evidence of kissing. The defendant was acquitted of all counts except the endangering count: "In summation, the People argued, over objection, that the defendant's guilt of endangering the welfare of a child was established by the conduct of kissing the complainant. The Supreme Court then instructed the jury, over objection, that in order to find the defendant guilty of endangering the welfare of a child under the relevant count, the jurors were required to find that the defendant knowingly acted in a manner likely to be injurious to the physical, mental, or moral welfare of the complainant, a child less than 17 years old, by engaging in sexual contact with her, defined, under the general definition in the Penal Law, as 'any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party' ... . The jury returned a verdict of guilty on that count, and acquitted the defendant of the other counts submitted to it, which charged the defendant, inter alia, with engaging in vaginal and anal intercourse with the complainant. Where the prosecution is limited by the indictment or bill of particulars to a certain theory or theories, the court must hold the prosecution to such narrower theory or theories ... . Here, the defendant was convicted of endangering the welfare of a child under a count of the indictment that limited the People to a particular theory or theories of endangering the welfare of a child. Therefore, the Supreme Court erred when it permitted the jury to consider a theory not charged in the indictment—that kissing endangered the complainant's welfare ... . Since the defendant's conviction may have been based upon an uncharged theory, the judgment of conviction must be reversed and a new trial ordered." ***People v. Vasquez*, 2018 N.Y. Slip Op. 03382, Second Dept 5-9-18**

DISCIPLINARY HEARINGS (INMATES).

INMATE PETITIONER HAD THE RIGHT TO CALL A PRISON OFFICER AS A WITNESS TO DETERMINE THE BASIS OF THE OFFICER'S KNOWLEDGE THAT PETITIONER POSSESSED A WEAPON, DETERMINATION ANNULLED BASED UPON THE DENIAL OF THAT RIGHT.

The Second Department, annulling the disciplinary determination, held that the inmate-petitioner had the right to call a prison officer as a witness to ascertain the basis for the officer's knowledge that petitioner possessed a weapon. The petitioner alleged the weapon was placed in the petitioner's cell by someone else: "A prison inmate facing a disciplinary hearing is not entitled to the same level of due process as a criminal defendant ... , but there are minimum standards for disciplinary hearings. The rules of the Department of Corrections and Community Supervision expressly provide that inmates have

a conditional right to call witnesses: 'The inmate may call witnesses on his behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals. If permission to call a witness is denied, the hearing officer shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented' (7 NYCRR 253.5[a]). Here, the petitioner did not dispute that the item in question was found in his cell, but he contended that the item must have been placed by someone else, and he asked that the superior officer who provided the information upon which a sergeant authorized the search be called as a witness. The hearing officer incorrectly ruled that the superior officer's testimony was not needed simply because, as the sergeant testified, the superior officer had provided reliable information in the past. The hearing officer overlooked the fact that, absent any countervailing consideration, such as a specific threat to institutional safety or correctional goals, the petitioner was entitled to have the superior officer asked about the basis of his knowledge that contraband could be found in the petitioner's cell ... . Since the Department of Corrections and Community Supervision failed to adhere to its own rule in the conduct of the hearing ... , the determination must be annulled, all references to the determination must be expunged from the petitioner's institutional record, and the matter remitted to the respondent for further proceedings, if the respondent be so advised ...". ***Matter of Cumberland v. Annucci*, 2018 N.Y. Slip Op. 03357, Second Dept 5-9-18**

DEFAMATION, CIVIL PROCEDURE.

TWO STATEMENTS FOUND TO BE NONACTIONABLE EXPRESSIONS OF OPINION IN THIS DEFAMATION ACTION, PLAINTIFFS HAVE NO PROOF BURDEN ON A MOTION TO DISMISS, DEFENDANTS NOT SHIELDED BY THE COMMUNICATIONS DECENCY ACT.

The Second Department, modifying Supreme Court, determined two statements alleged by the plaintiffs to have been defamatory were nonactionable opinion (other defamatory statements alleged in the complaint properly survived the motion to dismiss). The court noted that plaintiffs have no burden to prove the allegations in a complaint in response to a motion to dismiss, and further found that the Communications Decency Act did not shield the defendants from liability: "Here, the allegedly defamatory statements set forth in paragraphs 53 and 55 of the complaint—which asserted, among other things, that [the defendant president of the cooperative] was 'attempting insult of American laws & freedom' and was attempting to 'destroy Trump Village 4 and sell our buildings to the highest bidder after we are bankrupt'—constituted nonactionable expressions of opinion. The statements ... were not easily understandable, were largely incapable of being proven true or false, and, in context, signaled to the average reader that the statements were opinion, not fact. ... We reject the defendants' contention that the allegations of defamation fail to state a cause of action because their statements were protected by qualified privileges, and insufficient facts were alleged to show that they spoke with malice necessary to defeat those privileges ... . Since 'the burden does not shift to the nonmoving party on a motion made pursuant to CPLR 3211(a)(7), a plaintiff has no obligation to show evidentiary facts to support [his or her] allegations of malice on [such] a motion' ... . Here, to the extent that the defendants' statements may be shielded by any qualified privileges, the allegations of malice that were set forth in the complaint and in an affidavit submitted by [the cooperative president] preclude dismissal of the complaint insofar as asserted against the defendants for failure to state a cause of action ,,, , We agree with the Supreme Court that the Communications Decency Act (47 USC § 230) did not warrant dismissal of the complaint at this juncture. … Here, the plaintiffs alleged that the defendants authored the defamatory statements, which would mean that the defendants were content providers within the meaning of the statute ...". ***Trump Vil. Section 4, Inc. v. Bezvoleva*, 2018 N.Y. Slip Op. 03389, Second Dept 5-9-18**

EDUCATION-SCHOOL LAW, MUNICIPAL LAW, PERSONAL INJURY.

LEAVE TO FILE LATE NOTICE OF CLAIM AGAINST THE SCHOOL DISTRICT IN THIS NEGLIGENT SUPERVISION ACTION PROPERLY GRANTED, EVEN IF THE EXCUSE FOR FAILURE TO TIMELY FILE WAS NOT REASONABLE, THE SCHOOL DISTRICT WAS NOT PREJUDICED BY THE DELAY.

The Second Department determined that the petition for leave to file a late notice of claim against the school (District) was properly granted. Petitioner had timely filed a notice of claim against the village, and the school was aware of the essential facts of the claim within the 90-day filing period. Petitioner alleged her son, who had broken his arm, was not supervised or assisted by the school at the time he tripped, fell and further injured his arm: "Here, the District had actual knowledge of the facts constituting the claim within the statutory period ... . Furthermore, the petitioners made an initial showing that the District would not suffer any substantial prejudice by the delay, and the District failed to rebut the petitioners' showing with particularized indicia of prejudice ... . Even if the petitioners' reason for failing to timely serve the District was not reasonable, the absence of a reasonable excuse is not fatal to the petition where, as here, there was actual notice and the absence of prejudice ...". ***Matter of D.D. v. Village of Great Neck*, 2018 N.Y. Slip Op. 03358, Second Dept 5-9-18**

EMPLOYMENT LAW, (NYC) HUMAN RIGHTS LAW, ADMINISTRATIVE LAW, CIVIL PROCEDURE.

BECAUSE PLAINTIFF HAD FILED HIS EMPLOYMENT DISCRIMINATION COMPLAINT WITH THE NYC DIVISION OF HUMAN RIGHTS, HE WAS PRECLUDED UNDER THE ELECTION OF REMEDIES DOCTRINE FROM BRINGING THIS COURT ACTION PURSUANT TO THE NYC HUMAN RIGHTS LAW.

The Second Department determined that because plaintiff had filed his employment discrimination complaint with the NYC Division of Human Rights (Division), he was precluded under the election of remedies doctrine from bringing a court action pursuant to the NYC Human Rights Law (NYCHRL): " 'Pursuant to the election of remedies doctrine, the filing of a complaint with [the Division] precludes the commencement of an action in the Supreme Court asserting the same discriminatory acts'... . The election of remedies doctrine does not implicate the subject matter jurisdiction of the court, but rather deprives a plaintiff of a cause of action ... . Here, the plaintiff's causes of action are based on the same allegedly discriminatory conduct asserted in the proceedings before the Division. Therefore, the plaintiff is barred from asserting those claims under the NYCHRL in this action ...". ***Luckie v. Northern Adult Day Health Care Ctr.*, 2018 N.Y. Slip Op. 03349, Second Dept 5-9-18**

EMPLOYMENT LAW, MUNICIPAL LAW, CIVIL SERVICE LAW, ARBITRATION.

CITY'S DECISION TO LAYOFF FIREFIGHTERS IS NOT ARBITRABLE UNDER A COLLECTIVE BARGAINING AGREEMENT, PUBLIC POLICY VESTS NONDELEGABLE DISCRETION TO HIRE AND FIRE IN THE PUBLIC CORPORATION.

The Second Department, modifying Supreme Court, determined the city's decision to layoff firefighters was not arbitrable under a collective bargaining agreement. The Civil Service Law vests nondelegable discretion to hire and fire in the public corporation: "... [A] dispute is nonarbitrable if a court can conclude, without engaging in any extended factfinding or legal analysis, that a law prohibits, in an absolute sense, the particular matters to be decided by arbitration ... . Put differently, a court must stay arbitration where it can conclude, upon the examination of the parties' contract and any implicated statute on their face, 'that the granting of any relief would violate public policy' ... . Addressing the union's claim regarding the layoffs of the firefighters, Civil Service Law § 80(1) provides that a public employer has the nondelegable discretion to determine—for reasons of economy, among others—what its staffing and budgetary needs are in order to effectively deliver uninterrupted services to the public ... . In the absence of bad faith, fraud, or collusion, that discretion 'is an undisputed management prerogative' for the public's benefit, and cannot be altered or modified by agreement or otherwise... . Thus, arbitration of the claim regarding the layoffs of the firefighters would violate public policy." ***Matter of City of Long Beach v. Long Beach Professional Fire Fighters Assn.*, Local 287, 2018 N.Y. Slip Op. 03356, Second Dept 5-9-18**

FAMILY LAW.

ISRAELI CUSTODY ORDER WAS REGISTERED IN NEW YORK, FATHER FAILED TO CONTEST THE REGISTRATION OF THE ISRAELI CUSTODY ORDER WITHIN 20 DAYS, FATHER'S PETITION TO REGISTER AND ENFORCE A CALIFORNIA CUSTODY ORDER, WHICH HAD BEEN MODIFIED BY THE ISRAELI ORDER, PROPERLY DENIED.

The Second Department determined Family Court properly denied father's petitions for registration and enforcement of a California custody order. Mother, who was living in Israel, had acquired an Israeli court order modifying the California order. The Israeli order was registered in New York and father was notified of the application for registration. Father had 20 days to contest and failed to do so: "Domestic Relations Law § 77-d provides for the registering, and contesting, of an out-of-state custody decree. Upon receipt of the child custody determination to be registered, the New York court is obligated to serve notice upon the affected persons and provide them with an opportunity to contest the registration (see Domestic Relations Law § 77-d[2][b]). The statute provides that '[a] person seeking to contest the validity of a registered order must request a hearing within twenty days after service of the notice' (Domestic Relations Law § 77-d[4]). At the hearing, the court 'shall confirm the registered order' unless the person contesting registration establishes that (a) the issuing court did not have jurisdiction, (b) the custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so, or (c) the person contesting registration was entitled to, but did not receive, notice in the underlying proceedings before the court that issued the order for which registration is sought (Domestic Relations Law § 77-d[4]). If no timely contest is made, 'the registration is confirmed as a matter of law' (Domestic Relations Law § 77-d[5]). 'Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration' ...". ***Matter of Worsoff v. Worsoff*, 2018 N.Y. Slip Op. 03373, Second Dept 5-9-18**

FAMILY LAW.

NO INDICATION MOTHER SUFFERED FROM MENTAL ILLNESS, PSYCHOLOGICAL EXAM SHOULD NOT HAVE BEEN ORDERED PRIOR TO A FACT-FINDING HEARING IN THIS NEGLECT PROCEEDING.

The Second Department, reversing Family Court, determined a psychological exam of mother should not have been ordered prior to a fact-finding hearing in this neglect proceeding. The court had no indication mother suffered from mental illness: "... [T]he Suffolk County Department of Social Services (hereinafter the petitioner) filed a neglect petition against the mother, alleging, among other things, that she failed to 'work cooperatively with the appropriate agencies' to ensure that the subject child, whom the mother reported to have been sexually abused, 'would receive appropriate counseling and services.' The petitioner also alleged that the mother failed 'to take any action to ensure that [the child] was being adequately and appropriately cared for by his father,' who was alleged to be abusive toward the child. The mother consented to the temporary removal of the child. Thereafter, prior to a fact-finding hearing, the petitioner requested that the mother be directed to submit to a psychological examination. ... The determination whether to direct a psychological examination is within the sound discretion of the Family Court ... . Under the circumstances of this case, it was an improvident exercise of discretion for the Family Court to direct the mother to submit to a psychological examination prior to a fact-finding hearing. The record is devoid of any indication that the mother may suffer from a mental illness. Nor did the petition contain any allegations which placed the mother's mental health at issue ...". ***Matter of Tyriek J. (Tamika J.)*, 2018 N.Y. Slip Op. 03361, Second Dept 5-9-18**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE MADE THE FINDINGS NECESSARY FOR PETITIONER MOTHER TO SEEK SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) FOR HER SON.

The Second Department, reversing Family Court, determined Family Court should have made the findings necessary to allow petitioner-mother to seek special immigrant juvenile status (SIJS) for her son: "Based upon our independent factual review, we find that the record establishes that the child meets the age and marital status requirements for special immigrant status, and the dependency requirement has been satisfied by the granting of the mother's guardianship petition ... Moreover, the child's father is deceased and, therefore, reunification is not possible ... . We further find that it would not be in the child's best interests to be returned to Honduras, given the hearing evidence establishing that there is no one there who is able to care for him, and that the child was threatened with violence if he returned." ***Matter of Denia M. E. C. v. Carlos R. M. O.*, 2018 N.Y. Slip Op. 03355, Second Dept 5-9-18**

MUNICIPAL LAW, NEGLIGENCE.

CITY WAS NOTIFIED OF THE ESSENTIAL FACTS OF PETITIONER'S CLAIM BY A TIMELY NOTICE OF CLAIM FILED BY THE OTHER PARTY IN THIS TRAFFIC ACCIDENT CASE, PETITIONER'S REQUEST TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined petitioner's request for leave to file a late notice of claim should have been granted. Petitioner's car collided with a car, driven by Cedeno, when Cedeno crossed into on-coming traffic after running over a half-open manhole and losing control. Cedeno had served a timely notice of claim upon the city. The Second Department determined the city had timely notice of the essential facts of the petitioner's claim: "While the presence or the absence of any one of the factors is not necessarily determinative ... , whether the public corporation had actual knowledge of the essential facts constituting the claim is of great importance ... . The public corporation must have 'knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim,' and not merely some general knowledge that a wrong has been committed ... . A petitioner's lack of a reasonable excuse for the delay in serving a timely notice of claim is not necessarily fatal when weighed against other relevant factors ... . The petitioner ... demonstrated that the City acquired timely, actual knowledge of the essential facts constituting her claim by way of the timely notice of claim served upon it by Cedeno ... . Cedeno's notice of claim specifically described the nature of the accident between Cedeno and the petitioner. Inasmuch as the City acquired timely, actual knowledge of the essential facts of the petitioner's claim, the petitioner made an initial showing that the City was not prejudiced by her delay in serving a notice of claim ...". ***Matter of Tejada v. City of New York*, 2018 N.Y. Slip Op. 03370, Second Dept 5-9-18**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE VILLAGE DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE ICE AND SNOW CONDITION IN THE AREA WHERE PLAINTIFF FELL, IT FAILED TO DEMONSTRATE IT DID NOT CREATE THE CONDITION BY PILING SNOW IN THE AREA, VILLAGE'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Second Department determined the defendant village's motion for summary judgment in this parking lot ice and snow slip and fall case was properly denied. The village demonstrated that it did not have written notice of the dangerous condition, but did not demonstrate it did not created the dangerous condition, which plaintiff alleged resulted from the piling

of snow in the area: "In the complaint and bill of particulars, the plaintiffs alleged that the Village created the ice condition on which Seegers fell by plowing snow into large piles directly adjacent to parking areas and walkways, thereby blocking drains and allowing the snow to thaw and refreeze, and by failing to properly salt or sand the area ... . Accordingly, the Village was required to demonstrate both that it did not have prior written notice of the ice condition in the subject parking lot and that it did not create that condition... . Although the Village demonstrated that it did not receive written notice of an ice condition in the subject parking lot prior to the accident, it failed to demonstrate, prima facie, that it did not create the ice condition that allegedly caused Seegers to fall ...". ***Seegers v. Village of Mineola*, 2018 N.Y. Slip Op. 03387, Second Dept 5-9-18**

REAL PROPERTY LAW.

1941 AND 1953 DEEDS CREATED THE POSSIBILITY OF REVERTER WHICH COULD BE ASSIGNED.

The Second Department determined the deeds in question included the possibility of reverter and that right was assignable: "... [T]he 1941 deed and the 1953 deed created possibilities of reverter. '[E]very instrument creating [or] transferring . . . an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law' ... . No precise language is necessary to create a possibility of reverter, but '[a] characteristic of the type of expression which works automatic expiration of the grantee's fee seems to be one in which time is an important factor,' such as use of the words 'until,' 'so long as,' or 'during' ... . Here, the 1941 deed and the 1953 deed unequivocally called for automatic forfeiture of the estate upon breach and thereby created for their respective grantors possibilities of reverter. ... Although no statute in effect in 1964 explicitly provided the grantor of the 1953 deed with a right to convey her possibility of reverter ... , under the applicable rules of the common law, 'a possibility of reverter could be freely assigned and alienated' ...". ***Njcb Spec-1, LLC v. Budnik*, 2018 N.Y. Slip Op. 03376, Second Dept 5-9-18**

THIRD DEPARTMENT

ATTORNEYS, CIVIL PROCEDURE, MEDICAL MALPRACTICE.

ALTHOUGH THE HOSPITAL'S POTENTIAL LIABILITY IN THIS MEDICAL MALPRACTICE ACTION WAS PURELY VICARIOUS, ATTORNEYS FOR BOTH THE HOSPITAL AND THE EMPLOYEE-PHYSICIAN WERE PROPERLY ALLOWED TO PARTICIPATE IN THE TRIAL; PLAINTIFFS' MID-TRIAL REQUEST TO CALL AN EXPERT WITNESS PROPERLY DENIED.

The Third Department determined the trial court in this medical malpractice action did not err in allowing the continued participation of the attorney for defendant hospital (AMH) after the action against the hospital had been dismissed. After the dismissal of the action against the hospital, the only liability the hospital faced was vicarious liability for the actions of its physician employee, who was represented by another attorney. The Second Department further found that the plaintiffs' request, made for the first time at trial, to call an expert to establish, by cell phone and tower information (GIS), the location of a physician who had been called to assist at the hospital was properly denied: "Following the dismissal of all claims of direct negligence asserted against AMH, plaintiffs renewed their motion to have the role of AMH's counsel limited. While the dismissal of the direct negligence claims rendered AMH's potential liability purely vicarious in nature, we are unable to conclude that Supreme Court's refusal to limit the role of AMH's counsel during the remainder of the trial to essentially that of a spectator was in error. Because AMH's liability would be determined by the jury's findings in relation to plaintiffs' claims of negligence against Olsen [its physician-employee], AMH was entitled to participate in the efforts to defeat those claims ... . * * * "... [P]laintiffs first notified defendants of their intention to call a GIS expert more than three years after defendants' respective demands for expert disclosure and during the midst of the trial. Notably, [the physcian's] cell phone number was provided to plaintiffs during a pretrial deposition more than a year and a half earlier and, thus, plaintiffs possessed the essential facts necessary to investigate the matter — and, if necessary, to retain an expert — long before trial. Plaintiffs' claim that they did not realize the significance of the calls, and thus the need to subpoena the phone records, until shortly before trial did not, as Supreme Court found, constitute good cause for the delay ... . Moreover, we agree with Supreme Court that, given the complex and technical issues presented by the proposed GIS testimony, the mid-trial disclosure of this expert would have prejudiced defendants ...". ***Lasher v. Albany Mem. Hosp.*, 2018 N.Y. Slip Op. 03402, Third Dept 5-10-18**

CONTRACT LAW, CIVIL PROCEDURE.

PARTIES' CONDUCT AFTER THE PURPORTED TERMINATION OF THE SHAREHOLDERS' AGREEMENT COULD INDICATE THE PARTIES INTENDED THE CONTRACT TO CONTINUE (IMPLIED CONTRACT), DEFENDANT'S MOTION TO DISMISS THIS BREACH OF CONTRACT ACTION SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined the parties' conduct after a purported termination of a shareholders' agreement could indicate the parties intended the contract to continue. Defendant's motion to dismiss this breach of contract action should not have been granted: " 'On a motion to dismiss pursuant to CPLR 3211, we construe the pleadings liberally, accept the allegations in the complaint to be true, give [the] plaintiff[] the benefit of any favorable inferences and 'determine only whether the facts as alleged fit within any cognizable legal theory'... . Supreme Court held that defendant could not have breached the shareholders' agreement in 2016, as the agreement explicitly terminated when he became the 'only . . . remaining [s]hareholder' of the dealerships in 2007. It is true that "[w]hen a contract is terminated, such as by expiration of its own terms, the rights and obligations thereunder cease" ... . Nevertheless, 'the conduct of parties to a contract following its termination may demonstrate that they intended to create an implied contract to be governed by the terms of the expired contract, and whether there was a 'meeting of the minds' required for formation of such an enforceable agreement is generally a question of fact' ... . It is undisputed that defendant continued to make monthly payments as required by the shareholders' agreement after the shares were conveyed, and this ongoing compliance with the agreement's terms required further inquiry into 'the conduct of the parties to determine whether the terms of the [shareholders' agreement] continue[d] to apply' ... . Supreme Court accordingly erred in concluding, as a matter of law, that defendant could not have breached the terms of the shareholders' agreement due to its termination." ***Harris v. Reagan*, 2018 N.Y. Slip Op. 03408, Third Dept 5-10-18**

FAMILY LAW, CRIMINAL LAW.

WIFE NOT ENTITLED TO UNSEAL RECORD OF HUSBAND'S ALLEGED ASSAULT AGAINST HER IN THESE DIVORCE PROCEEDINGS, HUSBAND WAS GRANTED AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL AND DID NOT PLACE THE CRIMINAL MATTER IN ISSUE, THE RECORD WAS SEALED BY OPERATION OF THE CRIMINAL PROCEDURE LAW.

The Third Department determined the wife's request, in this divorce proceeding, to unseal the record of her husband's criminal proceedings was properly denied. The husband had been charged with an assault against the wife, and the proceedings terminated favorably to the husband (he was granted an adjournment in contemplation of dismissal). The record was therefore sealed by operation of statute (Criminal Procedure Law (CPL) § 160.50): "By 'provid[ing] for the sealing of records in a criminal proceeding which terminates in favor of the accused' ... ,CPL 160.50 'serves the laudable goal of insuring that one who is charged but not convicted of an offense suffers no stigma as a result of his [or her] having once been the object of an unsustained accusation' ... . It is undisputed that the charges against the husband related to the December 2015 incident were 'deemed dismissed as a result of an adjournment in contemplation of dismissal and, therefore, the records of that criminal prosecution were sealed' ... . The wife does not claim that any statutory exception entitles her to the records. Her primary contention is instead that the husband, by denying the alleged behavior that led to the charges, waived the statutory bulwark against disclosure by 'commenc[ing] a civil action and affirmatively plac[ing] the information protected by CPL 160.50 into issue'... .. The wife's argument founders upon the fact that it was she, not the husband, who has 'place[d] in issue elements that are common or related to the prior criminal action' by alleging the husband's assaultive conduct ...". ***Prag v. Prag*, 2018 N.Y. Slip Op. 03414, Third Dept 5-1018**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER-INMATE, WHO WAS CONDUCTING A CLASS ON AFRICAN-AMERICAN HISTORY, DID NOT VIOLATE PRISON RULES PROHIBITING GANG ACTIVITY BY DISCUSSING THE BLACK PANTHER PARTY AND THE BLOODS.

The Third Department, annulling the disciplinary determination, held that petitioner-inmate, who was teaching a course on African-American history, did not violate prison rules prohibiting gang activity by describing the operating rules of the Black Panther Party or by commenting on the Bloods: "While discussing the history of the Black Panther Party and its apparent code of ethics, known as the 'Eight Points of Attention,' petitioner stated that the eighth point was '[i]f we ever have to take captives, do not ill treat them.' Later in the class while critiquing another group, known as 'Damu' or the Bloods gang, he stated, in relevant part, that 'they could be the biggest army across this country if they were to organize themselves.' * * * A review of the videotape of the class clearly reveals that petitioner made the statements at issue while discussing African-American organizations from an historical, cultural and political perspective and that such statements were consistent with the approved subject matter of the class. At no point did petitioner advocate that the class participants, none of whom were revealed to be gang members, engage in violent behavior by actually taking hostages or that they organize by banding together to become members of the Bloods gang. Rather, the videotape discloses that petitioner engaged in

a detailed discussion of various historical events during the 1½-hour class and recited facts regarding these organizations that he thought were relevant in an effort to engage the class participants. Viewing the statements in the proper context, the evidence does not establish that petitioner 'engage[d] in any violent conduct or conduct involving the threat of violence either individually or in a group' ... or that he 'l[ed], organize[d], participate[d], or urge[d] other inmates to participate, in a work-stoppage, sit-in, lock-in, or other actions which may be detrimental to the order of the facility' ... . Likewise, the evidence does not demonstrate that petitioner 'engage[d] in or encourage[d] others in gang activities or meetings' ...". ***Matter of Bottom v. Annucci*, 2018 N.Y. Slip Op. 03413, Third Dept 5-10-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER ALLOWING TANDEM RIDING AND SPINNING THE TUBES IN ICY CONDITIONS UNREASONABLY INCREASED THE RISK IN THIS SNOW-TUBING INJURY CASE.

The Third Department determined the defendant's motion for summary judgment, asserting assumption of the risk, was properly denied in this snow-tubing injury case. Apparently plaintiff went over a berm and collided with a padded pole. There was a triable issue of fact whether allowing plaintiff and her daughters to ride tandem and spinning their tubes, under icy conditions, unreasonably increased the risk. "… [P]laintiff primarily relied on the deposition testimony of her companion and the project manager to argue that the weather and the condition of the lanes and snow berms on the day in question were such that spinning and in tandem tubing were contraindicated and, therefore, should not have been allowed. In particular, plaintiff's companion testified that she walked from plaintiff's lane to the pole with which plaintiff collided and found the terrain to be '[i]cy' and 'hard.' Additionally, based on his examination of the glare and shadows in the photographs taken on the day of the accident, the project manager testified that the lanes and snow berms appeared 'icy' and that the lanes were 'probably getting a bit frozen over' and 'fast.' He stated that when the lanes 'iced up' and became too fast, the lane safety attendants at the bottom of the hill were supposed to either cut down the number of tubers that were permitted to ride together or prohibit tandem riding altogether. He further stated that he had previously observed snow tubers leave their lanes as a result of being spun. In our view, the foregoing proof, considered in the light most favorable to plaintiff ... , raises a factual issue as to whether the risk of injury was unreasonably increased by the actions of the lane attendants — namely, allowing plaintiff and her daughters to ride tandem and spinning their tubes prior to their descent — under the particular weather and terrain conditions at the time of plaintiff's injury ...". ***Thompson v. Windham Mtn. Partners, LLC*, 2018 N.Y. Slip Op. 03415, Third Dept 5-10-18**

SOCIAL SERVICES LAW.

PETITIONER, AN EMPLOYEE OF THE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, COMMITTED NEGLECT WITHIN THE MEANING OF THE SOCIAL SERVICES LAW WHEN SHE USED THE TERM 'RETARDED' IN A CONVERSATION OVERHEARD BY SERVICE RECIPIENTS.

The Third Department determined petitioner, an employee of the Office for People with Developmental Disabilities at the Brooklyn Developmental Disabilities Service Office, "committed acts of neglect [within the meaning of the Social Services Law] when [she] breached [her] duty towards multiple service recipients by failing to use appropriate and professional language in their presence." Petitioner had used the word "retarded" in conversations overheard by two service recipients: "... [N]eglect is defined as an action 'that breaches a custodian's duty and that results in or is likely to result in physical injury or serious or protracted impairment of the physical, mental or emotional condition of a service recipient' (Social Services Law § 488 [1] [h]). Here, it is undisputed that petitioner used the word 'retarded' while in a classroom when she was discussing mandated overtime work with the staff. Petitioner's statement was overheard by two of the service recipients, who were, not surprisingly, offended by the word as evidenced by one service recipient running away from the classroom to report the incident and the other still being upset several days after the incident. Both of these service recipients were diagnosed with mild developmental disabilities, as well as a legion of other diagnoses. Petitioner, who had worked at the Brooklyn Developmental Disabilities Service Office for 10 years, worked directly with the service recipients and was familiar with their emotional and psychological conditions. Further, petitioner is charged with caring for these service recipients, who of course develop trust for their aides. Given this context, it is foreseeable that the word used by the trusted caregiver would be likely to seriously impair the service recipients' already fragile emotional and psychological condition and there is no need for expert testimony to establish same ... . As such, substantial evidence supports respondent's final determination that petitioner committed a category three act of neglect ...". ***Matter of Kelly v. New York State Justice Ctr. for The Protection of People With Special Needs*, 2018 N.Y. Slip Op. 03407, Third Dept 5-10-18**

UNEMPLOYMENT INSURANCE, LABOR LAW.

CLAIMANT, A SUBSTITUTE TEACHER, RECEIVED REASONABLE ASSURANCE OF EMPLOYMENT IN THE FOLLOWING SCHOOL YEAR (LABOR LAW § 590), SHE WAS THEREFORE NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department, reversing the Unemployment Insurance Appeal Board, determined that the New York City Department of Education had demonstrated it had provided claimant, a substitute teacher, with reasonable assurance she would continue to be employed in the following school year. Her application for unemployment insurance benefits over the summer should, therefore, have been denied: "… [W]e find that the Board's decision is not supported by substantial evidence. Initially, in reaching its conclusion, the Board essentially imposed a requirement that a reasonable assurance be a guarantee of earnings during the following school year, an interpretation that finds no support in the statute or case law. ... Here, the 153 assignments that claimant obtained directly through school administrators during the 2015-2016 school year exceeded the 145 needed to satisfy the 90% threshold and should have been counted in determining whether she received a reasonable assurance of continued employment. In addition to the June 2016 letter setting forth the basic terms of claimant's continued employment during the 2016-2017 school year, the NYCDOE's witness testified that no changes were anticipated with respect to the budget, salary or number of students and paraprofessionals needed for the upcoming school year. He further stated that 14% of jobs go unfilled, providing ample opportunity for substitutes to find openings. In view of the foregoing, the record establishes that the NYCDOE provided claimant a reasonable assurance of continued employment under Labor Law § 590 (11), thereby precluding her from receiving benefits ...". ***Matter of Enman (New York City Dept. of Educ.--Commissioner of Labor),* 2018 N.Y. Slip Op. 03416, Third Dept 5-10-18**

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