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Editor: **Bruce Freeman**

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COURT OF APPEALS

CRIMINAL LAW.

DEFENDANT PROPERLY ACCUSED AND CONVICTED OF ATTEMPTED POSSESSION OF A SWITCHBLADE, EXTENSIVE DISSENTING OPINION.

The Court of Appeals, over an extensive dissenting opinion by Judge Rivera, affirmed defendant's conviction for attempted possession of a weapon, i.e., a switchblade. The dissent argued that the proof at the non-jury trial and the allegations in the accusatory instrument did not demonstrate the knife met the statutory definition of a switchblade: **From the dissent:** ... "[T]he narrow issue presented on this appeal is whether the knife described in the accusatory instrument and at trial meets the statutory description for a per se weapon, one which is outlawed regardless of the defendant's reasons for possession. The majority holds that the accusatory instrument is jurisdictionally sound because the knife as described meets the statutory definition of a switchblade... . I disagree. Moreover, even if the majority were correct, the evidence at trial established that the knife in question was not a switchblade within the meaning of the Penal Law." ***People v. Berrezueta*, 2018 N.Y. Slip Op. 04032, CtApp 6-7-18**

PERSONAL INJURY, COURT OF CLAIMS.

STATE'S FAILURE TO TAKE STEPS TO ADDRESS SAFETY PROBLEMS AT AN INTERSECTION WHICH WAS THE SITE OF FOURTEEN RIGHT-ANGLE COLLISIONS WAS THE PROXIMATE CAUSE OF THE FATAL COLLISION, STATE WAS 100% LIABLE DESPITE VEHICLE AND TRAFFIC LAW VIOLATION ON THE PART OF ONE OF THE DRIVERS.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the state was properly held 100% liable in this fatal motorcycle-truck collision case. The truck driver testified that he looked both ways and didn't see the motorcycle before pulling out into the motorcycle's lane of traffic. There had been 14 right-angle collisions at this intersection. The state started but never finished an investigation into whether safety measures should be implemented. The Court of Appeals held the plaintiff need not demonstrate the state could have timely made effective safety improvements, i.e., a four-way stop and/or a reduction of the speed limit. The fact that the truck driver violated the Vehicle and Traffic Law did not require the apportionment of some liability to the truck driver: "The State agrees it cannot invoke qualified immunity because it did not complete the safety study; therefore, ordinary rules of negligence apply ... . The State has a nondelegable duty to keep its roads reasonably safe ... , and the State breaches that duty 'when [it] is made aware of a dangerous highway condition and does not take action to remedy it'... . A breach proximately causes harm if it is a substantial factor in the plaintiff's injury ... . * * * We have never required accident victims to identify a specific remedy and prove it would have been timely implemented and prevented the accident. * * * Here, there is record support for the finding that the State's breach was a proximate cause of the accident. * * * Once on notice of the dangerous condition, it was the State's burden to take reasonable steps in a reasonable amount of time. Instead, it did nothing. That right-angle collisions would continue to occur absent the adoption of some safety measure is hardly surprising. '[T]he most significant inquiry in the proximate cause analysis is often that of foreseeability'... . Where, as here, the risk of harm created by the defendant corresponds to the harm that actually resulted, we cannot say that proximate cause is lacking as a matter of law." ***Brown v. State of New York*, 2018 N.Y. Slip Op. 04029, CtApp 6-7-18**

TAX LAW, INDIAN LAW.

REQUIREMENT THAT INDIAN RETAILERS COLLECT AND REMIT TAXES ON CIGARETTES SOLD TO NON-INDIAN CONSUMERS DOES NOT VIOLATE INDIAN LAW OR THE BUFFALO CREEK TREATY OF 1842.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, determined the requirement that retailers on Indian lands collect and remit taxes on cigarettes sold to non-Indian consumers did not violate the Indian Law or the Buffalo Creek Treaty of 1842: "Plaintiffs commenced this action seeking (1) a declaration that Tax Law § 471 is unconstitutional and invalid and (2) a permanent injunction enjoining defendants from enforcing the law against them. The complaint alleged that the tax law conflicts with the Buffalo Creek Treaty of 1842 and Indian Law § 6. * * * ... '[I]t is the legal burden of a tax—as opposed to its practical economic burden—that a state is categorically barred by federal law from imposing on tribes or tribal members' ... . The express language of New York's tax law provides that 'the ultimate incidence of and liability for the tax shall be

upon the consumer,' and mandates that the tax money advanced by any 'agent or dealer' be paid back by the consumer ... . * * * Tax Law § 471 does not constitute a tax on an Indian retailer, and therefore it does not run afoul of the plain language of the Treaty or Indian Law § 6." ***White v. Schneiderman*, 2018 N.Y. Slip Op. 04028, CtApp 6-7-18**

FIRST DEPARTMENT

CIVIL PROCEDURE, EVIDENCE, TRUSTS AND ESTATES.

EVIDENCE INCLUDED IN A SETTLEMENT LETTER PROPERLY ADMITTED AT TRIAL, MISSING WITNESS JURY INSTRUCTION RE A WITNESS LIVING IN FLORIDA WAS ERROR, EXPERT TESTIMONY WHICH RELIED IN PART ON INADMISSIBLE HEARSAY WAS PROPERLY ADMITTED.

The First Department, affirming the denial of summary judgment and the denial of the motion to set aside the verdict in this probate action, determined evidence included in a settlement letter and hearsay relied upon an expert witness were properly admitted. The court further found that the missing witness jury instruction for the decedent's treating doctors was proper, but the missing witness jury instruction for the attorney who drafted the will, who lives in Florida, was (harmless) error. The jury revoked preliminary letters: "Although CPLR 4547 precludes presentation of evidence of settlement negotiations, it expressly exempts exclusion of evidence, which is otherwise discoverable, solely because such evidence was presented during the course of settlement negotiations. The list of paintings that was signed by proponent as part of the settlement conference in Shanghai was admitted into evidence because it included a factual admission that proponent possessed a painting that he accused objectant of stealing. Thus, its use at trial was permissible, notwithstanding that the factual statement was contained in a settlement document ... . The court's missing witness charge with respect to the attorney, Jerome Kamerman, was in error. Mr. Kamerman was living in Florida at the time of trial and was unavailable to proponents ... . A psychiatrist's opinion may be received in evidence even though some of the information on which it is based is inadmissible hearsay, if the hearsay is 'of a kind accepted in the profession as reliable in forming a professional opinion, or if it comes from a witness subject to full cross-examination on [] trial' ... . The court properly permitted the expert to testify, despite his conversations with objectant, since she was subject to full cross-examination at trial." ***Matter of Chi-Chuan Wang*, 2018 N.Y. Slip Op. 04090, First Dept 6-7-18**

CONTRACT LAW.

PLAINTIFF'S FAILURE TO SATISFY A NON-MATERIAL CONDITION PRECEDENT DID NOT JUSTIFY THE AWARD OF SUMMARY JUDGMENT TO DEFENDANT.

The First Department, reversing Supreme Court, determined the failure to satisfy a non-material condition precedent, which did not prejudice the defendant, did not justify summary judgment in favor of defendant: "It is undisputed that plaintiff failed to satisfy a condition precedent to recovering disputed costs for extra work on which defendant forced price reductions. Although plaintiff gave detailed written statements contesting defendant's determinations of the fair and reasonable value of the extra work pursuant to section 8.01(B), it failed to give verified statements pursuant to section 11.03(A) of the contractual General Conditions. Nevertheless, we conclude that plaintiff should be excused from the non-occurrence of that condition, because otherwise it would suffer a disproportionate forfeiture, and the occurrence of the condition was not a material part of the agreed exchange ... . Defendant does not argue that plaintiff failed to document the costs of the claimed extra work, to provide timely notice of its claims for extra work, or to provide timely notice of its objections to defendant's rejections of and price reductions on the claimed extra work. Nor does it contend other than in conclusory terms that plaintiff's failure to submit verified written statements was prejudicial to it. Moreover, the cases on which defendant relies did not consider whether the failure to strictly comply with a condition precedent should be excused to avoid a disproportionate forfeiture under the circumstances of a case such as this, where the noncompliance is de minimis and defendant has shown no prejudice whatsoever ...". ***Danco Elec. Contrs., Inc. v. Dormitory Auth. of the State of N.Y.*, 2018 N.Y. Slip Op. 03935, First Dept 6-5-18**

CRIMINAL LAW.

FAILURE TO EXPLAIN TO THE JURY THAT ACQUITTAL OF ATTEMPTED MURDER BASED ON THE JUSTIFICATION DEFENSE REQUIRED ACQUITTAL OF ASSAULT FIRST WAS REVERSIBLE ERROR, NEW TRIAL ON ASSAULT FIRST ORDERED.

The First Department, reversing defendant's assault first conviction, over an extensive dissent, determined it was reversible error to fail to instruct the jury that acquittal of the top count (attempted murder) based on the justification defense would require acquittal on the assault first count: " 'While the jury may have acquitted on the top charge without relying on defendant's justification defense . . . it is nevertheless impossible to discern whether acquittal of the top count . . . was based on the jurors' finding of justification so as to mandate acquittal on the two lesser counts' ...". ***People v. Breckenridge*, 2018 N.Y. Slip Op. 04074, First Dept 6-7-18**

CRIMINAL LAW.

PETTY SLAPS DO NOT CONSTITUTE SUBSTANTIAL PAIN, ROBBERY SECOND REDUCED TO ROBBERY THIRD.

The First Dept, reducing the robbery second conviction to robbery third, determined the proof of substantial pain was insufficient: "... [W]e agree with the defendant that the evidence was insufficient to establish 'substantial pain' beyond a reasonable doubt to sustain his conviction of robbery in the second degree Penal Law § 160.10 [2] [a]). The People's evidence, presented through photographs and police testimony, was insufficient to establish that plaintiff suffered more than 'petty slaps' and, therefore, failed to establish 'substantial pain' beyond a reasonable doubt ...". ***People v. Ramos*, 2018 N.Y. Slip Op. 04097, First Dept 6-7-18**

CRIMINAL LAW, ATTORNEYS, IMMIGRATION LAW.

DEFENDANT WAS ERRONEOUSLY TOLD BY HIS ATTORNEY A CERTIFICATE OF RELIEF FROM CIVIL DISABILITIES WOULD PROTECT DEFENDANT FROM DEPORTATION, MOTION TO VACATE DEFENDANT'S CONVICTION BY GUILTY PLEA SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant's motion to vacate his conviction by guilty plea should have been granted. Defendant's attorney erroneously told defendant a certificate of relief from civil liabilities would protect defendant from deportation: "Defendant pleaded guilty to a felony relating to the sale of drugs in return for a promised sentence of five years' probation with a certificate of relief from civil disabilities. The record establishes that defense counsel advised defendant that even though this type of conviction would be likely to result in deportation, the certificate of relief would protect him from that consequence. Counsel's advice about the effect of the certificate was clearly erroneous because defendant's conviction was a deportable offense, from which a certificate of relief provides no shield. The plea and sentencing minutes, including statements made by counsel, corroborate defendant's claim that he was misadvised about the certificate. Defendant has demonstrated a reasonable probability that he would not have pleaded guilty and would have gone to trial had he known that the plea would have rendered him deportable despite the certificate... . Statements he made during the plea proceeding and the hearing support his claims that he pled guilty because the plea offer involved no jail time and because he was misled as to the immigration consequences." ***People v. Rosario*, 2018 N.Y. Slip Op. 04114, First Dept 6-7-18**

FAMILY LAW, CONTRACT LAW.

HUSBAND ENTITLED TO REVOKE HIS CONSENT TO USE OF A FROZEN EMBRYO, EMBRYO AWARDED TO HUSBAND FOR SOLE PURPOSE OF DISPOSAL IN THIS DIVORCE ACTION.

The First Department, reversing Supreme Court, determined plaintiff husband, in this divorce action, was entitled to the frozen embryo for the sole purpose of disposal: "... [Husband and wife] engaged the services of [New Hope Fertility Center, NHF] in the hope of conceiving a child via implantation of cryopreserved embryos in the wife's uterus. ... [T]hey signed an agreement with NHF entitled 'Consent for the Cryopreservation of Human Embryo(s)' (the Consent Agreement). ... Paragraph 7 of the Consent Agreement is entitled 'Voluntary Participation' and provides 'I/We may withdraw my/our consent and discontinue participation at any time . . . .' Paragraph 16, entitled 'Authorization,' provides, 'This consent will remain in effect until such time as I notify NHF in writing of my/our wish to revoke such consent.' ... In Kass v. Kass (91 NY2d 554 [1998]), the Court of Appeals determined that agreements between donors participating in IVF [in vitro fertilization] should be enforced pursuant to general rules of contract interpretation. ... The Consent Agreement specifies that participation in the procedures involving cryopreservation of embryos is voluntary and that either party may withdraw consent at any time. ... The provisions permitting either party to revoke consent are not limited to cryopreservation, but permit either party to withdraw consent to participation in the entire IVF process. ... [T]he Consent Agreement does not indicate that the court has plenary authority to determine ownership of the embryo in the event of divorce ...". ***Finkelstein v. Finkelstein*, 2018 N.Y. Slip Op. 03926, First Dept 6-5-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

INJURY FROM SIX INCH FALL OF 500 POUND BEAM COVERED BY LABOR LAW § 240(1), POWER TO STOP WORK FOR SAFETY REASONS INSUFFICIENT BASIS FOR LIABILITY UNDER LABOR LAW § 200.

The First Department, modifying Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action and the construction manager (Structure Tone), although it had the power to stop work for safety reasons, was entitled to summary judgment on the Labor Law § 200 cause of action: "Plaintiff was injured ... when he and three other workers were attempting to load a 500-pound steel I-beam into an internal freight elevator at a construction site in order to transport it from the 18th floor to the ground floor. The elevator was four feet wide and five feet deep, with an eight foot ceiling, while the beam was 12 feet long. The workers opened a hatch on top of the elevator, and were attempting to stand the beam on its end, with the high end extending through the open hatch, when the beam fell down half a foot onto plaintiff's shoulder. ... Plaintiff submitted evidence showing that he was engaged in an activity covered by the statute, that defendants failed to provide an adequate safety device to protect him, and that such violation was a proximate

cause of the accident ... . The half foot that the steel I-beam dropped onto plaintiff's shoulder is not de minimis, given the I-beam's weight and since the hazard was one directly flowing from the application of the force of gravity to a person ... . * * * Although Structure Tone had the authority to stop work at the construction site for safety reasons, this is 'insufficient to raise a triable issue of fact with respect to whether [Structure Tone] exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence' ...". ***Villanueva v. 114 Fifth Ave. Assoc. LLC*, 2018 N.Y. Slip Op. 03928, First Dept 6-5-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

TWO TO THREE FOOT FALL OF HEAVY STEEL PLATE WHICH WAS BEING HOISTED IS COVERED UNDER LABOR LAW § 240(1), HEIGHT DIFFERENTIAL NOT DE MINIMUS.

The First Department determined the two to three foot fall of a heavy steal plate that was being hoisted was covered by Labor Law § 240(1): "Plaintiff was injured when the nylon sling attaching a one-to-two ton steel plate to an excavator snapped, causing the heavy plate to fall to the ground, bounce, and sever the pole of a nearby street sign. The impact caused the sign to be propelled toward plaintiff, hitting his right forearm and causing him serious personal injuries. ... [T]he photographs taken immediately before the accident show that the steel plate was about two or three feet above the ground. This elevation differential cannot be viewed as de minimis, given the weight of the steel plate and the amount of force it generated over the course of its relatively short descent ...". ***Makkieh v. Judlau Contr. Inc.*, 2018 N.Y. Slip Op. 04112, First Dept 6-7-18**

PERSONAL INJURY.

BICYCLIST STRUCK BY SIDE OF TRUCK MAKING A LEFT TURN ENTITLED TO SUMMARY JUDGMENT, PLAINTIFF NEED NOT SHOW FREEDOM FROM COMPARATIVE FAULT.

The First Department determined plaintiff bicyclist was entitled to summary judgment in this traffic accident case. Plaintiff was struck by the passenger side door of a truck making a left turn: "While traveling on a bicycle, plaintiff collided with the passenger side of defendants' northbound truck as it turned left into plaintiff's path at the intersection of St. Nicholas Avenue and 155th Street in New York County. Plaintiff submitted evidence showing that defendant was negligent by making a left turn without ensuring that it was safe to do so (see Vehicle and Traffic Law § 1141 ...). Moreover, plaintiff is not required to demonstrate the absence of his own comparative fault to obtain partial summary judgment on defendant's liability ...". ***Bermeo v. Time Warner Entertainment Co.*, 2018 N.Y. Slip Op. 03927, First Dept 6-5-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

PLAINTIFF JUDICIALLY ESTOPPED FROM IMPOSING A CONSTRUCTIVE TRUST ON REAL PROPERTY, PLAINTIFF STATED HE HAD NO INTEREST IN THE PROPERTY IN PRIOR BANKRUPTCY PROCEEDINGS.

The Second Department determined plaintiff was judicially estopped from imposing a constructive trust on real property because he stated he had no interest in the property in prior bankruptcy proceedings: "Under the doctrine of judicial estoppel, also known as estoppel against inconsistent positions, a party may not take a position in a legal proceeding that is contrary to a position he or she took in a prior proceeding, simply because his or her interests have changed ... . The doctrine applies only where the party secured a judgment in his or her favor in the prior proceeding ... . This doctrine 'rests upon the principle that a litigant should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise' ... . 'The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this playing fast and loose with the courts'... . Here, the plaintiff's contention that he had an interest in the ... property based on promises that [defendant] made to the plaintiff ... is contrary to his representation to the United States Bankruptcy Court ... that he had no interest in real property. Based upon the plaintiff's representations to the Bankruptcy Court, his debts were discharged. Therefore, we agree with the Supreme Court that this action is barred by the doctrine of judicial estoppel ...". ***Bihn v. Connelly*, 2018 N.Y. Slip Op. 03956, Second Dept 6-6-18**

CIVIL PROCEDURE, MUNICIPAL LAW.

DECLARATORY JUDGMENT ACTION ATTACKING THE PROCEDURE USED TO ENACT LEGISLATION IS SUBJECT TO THE FOUR-MONTH ARTICLE 78 STATUTE OF LIMITATIONS, DECLARATORY JUDGMENT ACTION CHALLENGING THE LEGISLATION ITSELF IS SUBJECT TO THE SIX-YEAR STATUTE OF LIMITATIONS.

The Second Department, in a lawsuit brought by plaintiff village alleging the county did not have the power to issue parking tickets in the village, explained how to determine the appropriate statute of limitations in actions seeking a declaratory judgment: "While no period of limitation is specifically prescribed for a declaratory judgment action, the six-year catch-all limitation period of CPLR 213(1) does not necessarily apply to all such actions. Rather, in order to determine the statute of

limitations applicable to an action for a declaratory judgment, a court must examine the substance of the action. Where it is determined that the parties' dispute can be, or could have been, resolved in an action or proceeding for which a specific limitation period is statutorily required, that limitation period governs ... . A proceeding pursuant to CPLR article 78 is unavailable to challenge the validity of a legislative act ... . However, when a challenge is directed to the procedure followed in enacting, rather than the substance of, legislation, a proceeding pursuant to CPLR article 78 may be maintained ... . [T]he plaintiff's third cause of action alleged that the actions taken by the defendants in the formation of the agency were void, invalid, and illegal due to the failure of the defendants to comply with the requirements of the State Environmental Quality Review Act ... . "SEQRA challenges must be commenced within four months after the determination becomes final and binding upon the petitioner ... . [T]he plaintiff's ... causes of action ... for declaratory relief ... challenging the substantive validity of the defendants' formation of the [county parking ticket] agency and the defendants' continuing actions with respect to the adjudication of tickets issued for violations occurring in the Village, either could not have been maintained in a proceeding pursuant to CPLR article 78 ... , or related to ongoing actions of the defendants, and, thus, were not barred by the four-month limitation period under CPLR 217(1). Accordingly, since the six-year statute of limitations of CPLR 213(1) applies ...". ***Village of Islandia v. County of Suffolk*, 2018 N.Y. Slip Op. 04025, Second Dept 6-6-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT FIRED INTO THE CAR AHEAD DURING A HIGH SPEED CHASE, DEPRAVED INDIFFERENCE MURDER AND ASSAULT CONVICTIONS AFFIRMED, TESTIMONY FROM THE FIRST TRIAL BY A WITNESS WHO HAD SINCE BEEN DEPORTED PROPERLY ADMITTED.

The Second Department affirmed defendant's conviction of depraved indifference murder and assault. During a high speed chase defendant fired a bullet into the car he was following. The driver, Singh, lost control and struck a trestle. One person, Arena, was killed, and Singh and another person, Weiner, were seriously injured. Defendant fled the scene. Defendant had been convicted of these crimes in 2003 and they were affirmed on appeal. But he obtained federal habeas corpus relief in 2013 and was retried in 2015.The sentencing court properly imposed a consecutive sentence for criminal possession of a weapon, which was not an inclusory concurrent count. One of the witnesses in the first trial had been deported and the court properly admitted his testimony at the second trial: "[T]he evidence proved beyond a reasonable doubt that the defendant recklessly engaged in conduct which created a grave risk of death to another person. The defendant engaged in a high-speed chase, in the course of which he fired a gun at the fleeing car, causing Singh, the driver, to lose control of that car. Following the crash, the defendant exhibited no signs of remorse for the results of his recklessness, and even went so far as to express his disappointment that Weiner had survived the crash. The direct and circumstantial evidence proved that the defendant deliberately engaged in a high-speed chase and shot at Singh's car with an utter disregard for the value of human life, and thus, was legally sufficient to support the jury's determination that the defendant acted with depraved indifference with respect to the death of Arena and the serious injuries sustained by Singh and Weiner ... . The defendant's contention that the County Court erred in admitting the testimony of Jose Vanderlinde from the first trial is without merit. Vanderlinde had testified at the defendant's first trial but was deported before the second trial commenced, and was barred from re-entering the United States. Under these circumstances, the court properly admitted Vanderlinde's testimony from the defendant's first trial, as the prosecutor's failure to produce the witness 'was not due to indifference or a strategic preference for presenting [the witness's] testimony in the more sheltered form of [trial] minutes rather than in the confrontational setting of a personal appearance on the stand' ...". ***People v. Williams*, 2018 N.Y. Slip Op. 04015, Second Dept 6-6-18**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

DEFENDANTS SCHOOL BUS COMPANY AND BOARD OF EDUCATION DID NOT HAVE NOTICE CHILDREN WHO INJURED INFANT PLAINTIFF ON THE SCHOOL BUS WERE CAPABLE OF DANGEROUS CONDUCT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant school bus company and board of education did not have notice that two children who allegedly injured infant plaintiff on the bus were capable of dangerous conduct: "Schools are under a duty to adequately supervise children in their charge, and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision ... . Schools are not, however, 'insurers of [the] safety [of students] . . . for they cannot reasonably be expected to continuously supervise and control all movements and activities of students'... . A school bus operator owes the 'very same duty to the students entrusted to its care and custody'... . In cases involving injury caused by the acts of fellow students, to establish a breach of the duty to provide adequate supervision, plaintiffs must show that school authorities had 'sufficiently specific knowledge or notice of the [alleged] dangerous conduct' ... . Here, the defendants established their prima facie entitlement to judgment as a matter of law by producing evidence that they had no knowledge or notice of the infant perpetrators' dangerous conduct, as there was no record of any inappropriate conduct by them, sexual or otherwise, prior to the incident ...". ***Champagne v. Lonero Tr., Inc.*, 2018 N.Y. Slip Op. 03959, Second Dept 6-6-18**

EMPLOYMENT LAW, LABOR LAW, ATTORNEYS.

ALTHOUGH PLAINTIFF LOST HER LABOR LAW § 740 WRONGFUL TERMINATION TRIAL, SUPREME COURT SHOULD NOT HAVE AWARDED ATTORNEY'S FEES TO DEFENDANT, PLAINTIFF'S CLAIM WAS NOT BASELESS.

The Second Department, modifying Supreme Court, determined the court should not have awarded attorney's fees to the defendant in this Labor Law § 740 action. Plaintiff had alleged ongoing sterility problems in defendant's operating room. Plaintiff lost the trial, in which she claimed she had been wrongfully terminated because of her complaints. The Second Department found that her claims were not without basis and, therefore, the award of attorney's fees to defendant was an abuse of discretion: "Labor Law § 740(6) provides that a court, in its discretion, may award an employer attorneys' fees and costs if it determines that the employee's action is 'without basis in law or in fact' ... . Here, the trial record included testimonial and documentary evidence of the plaintiff's numerous complaints about ongoing sterility problems in the operating room, which problems arguably constituted a violation of applicable regulations and posed a present, substantial, and specific danger to patient health. The plaintiff and other witnesses testified that these issues arose hundreds of times over the relevant time period and were not seriously addressed until after the plaintiff finally complained to her supervisor's supervisor. The plaintiff's annual performance evaluations demonstrate that she met or exceeded expectations throughout her tenure as a nurse manager and, despite identifying areas for improvement, did not indicate a risk of dismissal until after she complained to upper management. While ultimately unpersuasive in light of the defendant's evidence, the plaintiff's action 'cannot reasonably be characterized as being without basis in law or in fact' ... . The Supreme Court therefore improvidently exercised its discretion in awarding the defendant attorneys' fees and costs pursuant to Labor Law § 740(6)." ***Berde v. North Shore- Long Is. Jewish Health Sys., Inc.*, 2018 N.Y. Slip Op. 03955, Second Dept 6-5-18**

MUNICIPAL LAW, IMMUNITY, PERSONAL INJURY.

CITY LIABLE FOR STABBING DEATH OF PLAINTIFF'S DECEDENT IN PARKING GARAGE, SECURITY INADEQUATE, HISTORY OF CRIMINAL ACTIVITY, BUT CITY SHOULD NOT HAVE BEEN HELD 100% LIABLE.

The Second Department determined the city was properly found liable for the stabbing death of plaintiff's decedent in a parking garage, but found that the city should not have been held 100% liable. Operating a parking garage is a proprietary function to which governmental immunity does not apply: "Contrary to the City's contention, it was not entitled to governmental immunity for these claims, which arose out of the performance of proprietary functions. In that respect, the plaintiffs offered proof that the City failed in its capacity as a commercial owner of a public parking garage to meet the basic proprietary obligation of providing minimal security for its garage property ... . … [T]he plaintiffs made out a prima facie case of negligence at trial, and the jury's finding in this regard was not against the weight of the evidence. Under the circumstances of this case, in which the plaintiffs established that the City employed almost no security measures in the parking garage where the decedent was murdered, no expert testimony was necessary for the plaintiffs to establish that the City breached its duty to provide minimal security precautions to protect the patrons of the parking garage where the decedent was murdered ... . Additionally, in light of the history of criminal activity in the parking garage, which included people being ambushed as they walked to their cars, as was the decedent in this case, the City should have been aware of the 'likelihood of conduct on the part of third [parties]' that would 'endanger the safety' of visitors to the garage ... ... [T]he apportionment of 100% of the fault in the happening of the attack to the City was not supported by a fair interpretation of the evidence ... . An apportionment of 65% of the fault to the defendant and 35% of the fault to the nonparty tortfeasor better reflects a fair interpretation of the evidence ...". ***Granata v. City of White Plains*, 2018 N.Y. Slip Op. 03964, Second Dept 6-6-18**

MUNICIPAL LAW, REAL PROPERTY TAX LAW.

PROPERTY USED BY THE TOWN AS A PUBLIC PARK WAS NOT SUBJECT TO COUNTY TAX.

The Second Department, reversing Supreme Court, determined the town had used land as a public park and, therefore, the land was not subject to taxation by the county: "The New York State Legislature has declared that '[a]ll real property within the state shall be subject to real property taxation . . . unless exempt therefrom by law'... . 'Tax exclusions are never presumed or preferred and before [a party] may have the benefit of them, the burden rests on it to establish that the item comes within the language of the exclusion' ... . Here, the Town relies upon section 406 of the Real Property Tax Law. That section provides, with limited exceptions not applicable to this appeal, that '[r]eal property owned by a municipal corporation within its corporate limits held for a public use shall be exempt from taxation and exempt from special ad valorem levies and special assessments' ... . 'Although what comprises a public use' within the meaning of the statute has never been defined with exactitude' and must necessarily depend upon the peculiar circumstances of each case', it has been said . . . that [h]eld for a public use, in this connection, means that the property should be occupied, employed, or availed of, by and for the benefit of the community at large, and implies a possession, occupation and enjoyment by the public, or by public agencies' ... . The Town's submissions demonstrated that the subject property was exempt from taxation from the time of its conveyance to the Town in 2005, and that the subsequent tax liens issued by the County were therefore 'void ab initio' ...". ***Town of N. Hempstead v. County of Nassau*, 2018 N.Y. Slip Op. 04021, Second Dept 6-6-18**

THIRD DEPARTMENT

ADMINISTRATIVE LAW.

COMMISSIONER OF HEALTH'S DENIAL OF AN APPLICATION TO THE NYS MEDICAL INDEMNITY FUND FOR $12,000 TO PAY FOR A LIFT FOR A DISABLED CHILD WAS ARBITRARY AND CAPRICIOUS.

The Third Department determined the Commissioner of Health's denial of petitioner's application to the NYS Medical Indemnity Fund for about $12,000 for a lift which would allow a disabled child to use a pool was arbitrary and capricious: "... [T]he Commissioner determined that the pool lift did not qualify, reasoning that "[a] pool is not deemed an exterior modification of a residence because it is typically outside the confines of the [home]." This reasoning mischaracterizes the proposal. By definition, Emods [environmental home modifications] include exterior physical adaptations to a residence, including ramps. As demonstrated in the home evaluation, the backyard deck is attached to and directly accessed from the house through two back doors ... . We readily recognize the attached deck as part of the residence, and the proposed modification here is to install two deck sockets that extend below the deck, i.e., the physical modification would be to the deck, not the pool. The pool lift is not directly attached to either the deck or the pool, but positioned in either socket depending on the intended use of either the pool or hot tub. As such, we find that the pool lift qualifies as an Emod and that the Commissioner's contrary finding was arbitrary and capricious." ***Matter of Anson v. Zucker*, 2018 N.Y. Slip Op. 04063, Third Dept 6-7-18**

CIVIL PROCEDURE, EVIDENCE.

PLAINTIFFS' MOTION FOR A CONTINUANCE TO ALLOW THEIR EXPERT TO COMPLETE HIS TESTIMONY IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined plaintiffs' motion for a continuance to allow their expert to testify in this medical malpractice action should have been granted. "When the expert ... arrived in the late morning of December 1, 2016, he did not have his original file with him. According to the expert, he left the original file in his hotel and it was his belief that it was not necessary for him to have it in order to testify. Defendant objected to having the expert testify until the original file was with him. Supreme Court directed the expert to have his office make arrangements to immediately bring the original file to the courthouse with the hope that it would arrive in the afternoon. According to the court, the expert could then testify that afternoon and finish the next day, on Friday, December 2, 2016. Plaintiffs' counsel, however, advised the court that the expert had scheduled appointments with patients on December 2, 2016 and was unavailable to testify that day or on December 5, 2016. The next available day for the expert was Tuesday, December 6, 2016. The court, however, instructed the expert to reschedule his appointments. The expert testified in the afternoon of December 1, 2016, but by the completion of direct examination by plaintiffs' counsel, the original file had not arrived. ... On December 2, 2016, plaintiffs' expert did not appear. ... We conclude that plaintiffs' motion for a continuance should have been granted ... . The record does not support Supreme Court's finding that the failure of plaintiffs' expert to appear and complete his testimony on December 2, 2016 stemmed from a lack of due diligence by plaintiffs ...". ***Normandin v. Bell*, 2018 N.Y. Slip Op. 04053, Third Dept 6-7-18**

CIVIL PROCEDURE, MEDICAL MALPRACTICE.

ANNOUNCING A NEW RULE GOVERNING THE DISCLOSURE OF PROSPECTIVE EXPERT WITNESS'S QUALIFICATIONS IN MEDICAL MALPRACTICE ACTIONS, THE THIRD DEPARTMENT REQUIRES COMPLETE DISCLOSURE OF THE QUALIFICATIONS, EVEN IF SUCH DISCLOSURE FACILITATES THE IDENTIFICATION OF THE WITNESS.

The Third Department, announcing a new Third-Department rule governing expert witness disclosure in medical malpractice actions, in a full-fledged opinion by Justice McCarthy, determined plaintiffs are obligated to provide full disclosure of a prospective expert witness's qualifications, even if the disclosure will identify the witness. Defendants may be entitled to a protective order prohibiting the intimidation or harassment of a witness whose identity has effectively been revealed by his or her qualifications: "Inasmuch as this state's expert disclosure statute is already the most restrictive in the nation, there is no reason for this Court to continue to interpret the statute in a way that permits parties to severely limit the amount of information they provide regarding their expert witnesses. Like the Second Department held in Thomas v. Alleyne [302 AD2d 36], we conclude that our current standard is not only impractical, but contrary to the statutory language and 'the salutary policy of encouraging full pretrial disclosure so as to advance the fundamental purpose of litigation, which is to ascertain the truth' … . Accordingly, we adopt that Court's rule that parties in medical malpractice cases 'will ordinarily be entitled to full disclosure of the qualifications of [an opponent's] expert, [except for the expert's name,] notwithstanding that such disclosure may permit such expert's identification,' but a party may obtain a protective order under CPLR 3103 (a) by making a factual showing that there exists a reasonable probability, 'under the special circumstances of a particular case, that a prospective expert medical witness would be subjected to intimidation or threats if his or her name were revealed before trial' ...". ***Kanaly v. DeMartino*, 2018 N.Y. Slip Op. 04060, Third Dept 6-7-18**

CONTRACT LAW.

QUESTION OF FACT WHETHER AN ORAL CONTRACT WAS FORMED.

The Third Department, modifying Supreme Court, determined plaintiff had raised a question of fact whether there was an oral contract for dock space for and storage of plaintiff's boat at defendant marina: "... [P]laintiff submitted a copy of an invoice from defendant that itemized the charges for winter storage and spring launch and showed that no balance was due in April 2008. The invoice also acknowledged receipt of a $500 payment from plaintiff on April 14, 2008 for a monthly slip charge. Plaintiff also submitted an affidavit in which he averred that the $500 payment accepted by defendant is evidence that the parties entered into an oral agreement for rental of dock space for the 2008 boating season. The facts alleged in plaintiff's affidavit are consistent with his deposition testimony, which was submitted by defendant, in which he claimed that he made an oral agreement with defendant's employee. Plaintiff's argument that the oral agreement was consistent with the parties' prior dealings because he had entered into a written agreement for only one season during his long period of occupancy is corroborated by [defendant's] allegation that "[o]ver the years[, plaintiff] refused to sign any license agreement." When viewed in the light most favorable to plaintiff, as the nonmoving party ... , plaintiff's submissions are sufficient to establish the existence of a triable issue of fact regarding formation of an oral contract." ***Carroll v. Rondout Yacht Basin, Inc.*, 2018 N.Y. Slip Op. 04051, Third Dept 6-7-18**

CRIMINAL LAW.

BECAUSE A MATERIAL INDUCEMENT TO DEFENDANT'S GUILTY PLEA WAS NULLIFIED THE PLEA MUST BE VACATED.

The Third Department, reversing defendant's conviction by guilty plea, determined the complicated facts of this case nullified a benefit that was expressly promised as inducement to a guilty plea. Defendant had pled guilty to burglaries in two counties (Schenectady and Albany) as a persistent felony offender. Both persistent felony offender guilty pleas were overturned. His subsequent plea was reversed in this case: "Defendant pleaded guilty here upon the understanding that the imposed sentence would run concurrently to the aggregate prison sentence of 16½ years to life imposed in Albany County. He was also aware that a higher aggregate sentence would be imposed in Albany County if he successfully challenged his status as a persistent violent felony offender, and Supreme Court promised that any resentence in this case would run concurrently to that increased sentence. During the pendency of this appeal, this Court reversed the judgment of conviction in Albany County, vacated defendant's guilty plea and remitted for further proceedings ... . The sentencing exposure that prompted defendant's concern about concurrent sentencing here accordingly dissolved and, indeed, he entered into a new plea arrangement in Albany County where he received, among other things, a much shorter prison term of six years. In short, the 'reduction of the preexisting sentence [in Albany County] nullified a benefit that was expressly promised and was a material inducement to the guilty plea' here ... . Inasmuch as 'we cannot say that defendant would have foregone pretrial and trial rights and pleaded guilty' had he known that his guilty plea in Albany County would be vacated, his plea must also be vacated here ...". ***People v. Brewington*, 2018 N.Y. Slip Op. 04035, Third Dept 6-7-18**

CRIMINAL LAW.

COUNTY COURT SHOULD HAVE INQUIRED INTO THE REASON FOR DEFENDANT'S FAILURE TO APPEAR AT SENTENCING, SENTENCE VACATED.

The Third Department determined the court should have inquired into the reasons for defendant's failure to appear at sentencing before sentencing him in absentia: "When defendant did not appear for sentencing on April 2, 2015, the court noted that defendant had been present for 'each and every other occasion,' before issuing a bench warrant and adjourning sentencing to April 9, 2015. When defendant again failed to appear, his counsel represented that the only contact he had had with defendant was a conversation on April 1, 2015, when defendant informed counsel that he had additional doctors' appointments to attend, and counsel advised him to appear in court for sentencing on April 2, 2015. There is no indication in the record that defendant was advised that sentencing was adjourned to April 9, 2015. The court was aware of defendant's medical condition, which had required hospitalization in October 2014 and was the reason that sentencing was first adjourned from January 2015 to April 2, 2015. The court specifically observed that no explanation for defendant's absence had been provided by defendant or his counsel but, nonetheless, made no inquiry on the record into the status of any efforts to locate defendant since April 2, when it had issued the bench warrant, before it proceeded to sentence him in absentia. In light of its failure to make any inquiry whatsoever into the reason for defendant's absence, County Court erred when it sentenced defendant in absentia ...". ***People v. Sassenscheid*, 2018 N.Y. Slip Op. 04037, Third Dept 6-7-18**

CRIMINAL LAW.

COURT DID NOT MAKE SURE DEFENDANT WAS AWARE OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, PLEA VACATED.

The Third Department, vacating defendant's guilty plea, determined the court did not adequately explain the rights defendant was giving up by pleading guilty: "During the plea proceedings, County Court engaged in an abbreviated colloquy during which it made only a passing reference to the rights that defendant was giving up by pleading guilty. Notably, the

court did not mention the privilege against self-incrimination or advise defendant of his right to a jury trial. Nor did the court ascertain whether defendant had conferred with counsel regarding the trial-related rights that he was waiving or the constitutional consequences of his guilty plea. With no affirmative showing on the record that defendant understood and voluntarily waived his constitutional rights when he entered his guilty plea, the plea was invalid and must be vacated ...". ***People v. Holmes*, 2018 N.Y. Slip Op. 04039, Third Dept 6-7-18**

CRIMINAL LAW.

DEFENSE COUNSEL'S FOR CAUSE CHALLENGE TO A JUROR SHOULD HAVE BEEN GRANTED.

The Third Department, reversing defendant's conviction, determined defense counsel's for cause challenge to a juror should have been granted: "Turning first to defendant's contention regarding prospective juror No. 4 from round three, she indicated that she knew Ruth Crepet, a physician that the People intended to call as a witness, as Crepet was her primary care physician of 15 years. Although the juror stated that she had a preconceived notion that Crepet would be truthful, she indicated that she could be impartial and fair at trial in that regard. This juror also stated that her husband was the victim of a robbery and, because the person 'got off,' she was 'a little cynical' about the criminal justice system, but 'would try' to be impartial and thought 'that [she] could be.' When asked if she could find defendant guilty, this juror stated 'yes, you bet.' ... While it is not necessarily an issue that Crepet was the prospective juror's doctor ... , her general equivocality is problematic. 'Equivocal, uncertain responses, including statements that a prospective juror will 'try' or 'hope' to be impartial, are insufficient in the absence of [other] 'express and unequivocal' declarations that the juror will put any preconceptions aside and render an impartial verdict based solely on the evidence' ... . Here, while some of the prospective juror's responses were unequivocal, many were not, and, as such, her responses as a whole do not demonstrate that her opinion would not influence her verdict ... . Therefore, further inquiry was needed and, in the absence of said inquiry, it was error for Supreme Court to deny defendant's challenge for cause ...". ***People v. Horton*, 2018 N.Y. Slip Op. 04040, Third Dept 6-7-18**

CRIMINAL LAW, ATTORNEYS.

WHEN DEFENDANT TOLD THE COURT AT HIS FIRST TWO APPEARANCES THAT HE WISHED TO TESTIFY AT THE GRAND JURY, THE COURT SHOULD HAVE RECOGNIZED THAT DEFENDANT WAS ATTEMPTING TO REPRESENT HIMSELF AND CONDUCTED A SEARCHING INQUIRY TO MAKE SURE DEFENDANT UNDERSTOOD THE RISKS.

The Third Department, reversing defendant's conviction by guilty plea and dismissing the indictment, determined the court should have conducted a searching inquiry into defendant's representing himself when he indicated he wished to testify at the grand jury at his first and second appearances in court: "... [D]efendant appeared in City Court for arraignment on a felony complaint and a misdemeanor information charging him with the offenses for which he was later indicted. Defendant, as is relevant here, stated that he wished to represent himself and testify before the grand jury. He remained unrepresented at a second appearance three days later and reiterated his desire to appear before the grand jury. The indictment was handed up shortly thereafter, and it appears that the People disregarded defendant's desire to testify before the grand jury because he failed to make a written demand as required ... . '[D]efendant's indelible right to counsel . . . attached when the felony complaint against him was first filed' ... and, while he could waive that right and proceed pro se, the waiver would be invalid absent a 'searching inquiry' by City Court to discern whether defendant understood and 'appreciated the 'dangers and disadvantages' of' self-representation... . There was no inquiry conducted here, leaving the record silent as to whether 'defendant 'acted with full knowledge and appreciation of the panoply of constitutional protections that would be adversely affected by counsel's inability to participate' so as to constitute a valid waiver ... . Defendant should therefore not have been permitted to proceed pro se ... . It follows that defendant was deprived of an opportunity to consult with counsel — who could have assisted defendant in deciding whether to appear before the grand jury and made an effective demand to appear in the event he chose to do so — and this 'deprivation of defendant's constitutional right to counsel requires the dismissal of the indictment' ...". ***People v. Trapani*, 2018 N.Y. Slip Op. 04041, Third Dept 6-7-18**

CRIMINAL LAW, EVIDENCE.

UNDER A WEIGHT OF THE EVIDENCE ANALYSIS, THE MAJORITY DETERMINED THE EVIDENCE OF SERIOUS PHYSICAL INJURY IN THIS ASSAULT FIRST PROSECUTION WAS INSUFFICIENT.

The Third Department, over a partial two-justice dissent, determined the evidence did not support the serious physical injury element of assault first and reduced the conviction to attempted assault first. The victim was shot in the leg. The dissenters argued the serious physical injury element had been proven. The majority focused on weaknesses of the evidence of serious physical injury and found it deficient under a weight of the evidence analysis: "... [T]he weight of the evidence does not support a finding that the victim sustained a serious physical injury. Serious physical injury is defined as a 'physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ' ... . As to whether the victim sustained a physical injury that created a substantial risk of death, the victim testified that, following the shooting, he was in 'miraculous pain,' he underwent two surgeries, his tibia bone was 'shattered' and pins were inserted to hold the bones in place. The pins, however, were removed four months after their insertion, at which point the pain subsided. The victim

then wore a cast on his leg for 1½ months. Although the victim's injuries are by no means trivial, they fall short of constituting injuries that create a substantial risk of death. There was no evidence that the victim lost consciousness after being shot or that a vital organ was damaged. Nor was there any proof, lay or medical, indicating that the victim's injuries caused a substantial risk of death or were life threatening ... . * * * ... [A]lthough the victim's testimony and the photographs show a significant injury immediately following the shooting, there was no corresponding proof regarding its long-term effects ... . As to whether the victim sustained a serious and protracted disfigurement, we note that the victim showed his scar to the jury. There was, however, no contemporaneous description of what the jury saw to demonstrate the extent of such scarring, nor can such extent be discerned from the photographs entered into evidence ...". ***People v. Marshall*, 2018 N.Y. Slip Op. 04038, Third Dept 6-7-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

DECISION WITHHELD AND PEOPLE DIRECTED TO PROVIDE DEFENSE APPELLATE COUNSEL WITH TRIAL EXHIBITS COUNSEL WAS UNABLE TO ACCESS.

The Third Department withheld decision and directed the People to provide defense counsel with certain trial exhibits counsel was unable to access prior to perfecting the appeal: "Defendant contends, among other things, that the People deprived him of an opportunity to develop an effective argument on appeal by failing to provide him with certain video and photographic exhibits that were introduced into evidence at trial in a format that he could readily view ... . Specifically, defendant avers that, although the People provided him with copies of 14 DVDs introduced as exhibits at trial, he was unable to view the contents of exhibit Nos. 9, 10, 11, 12, 13, 14, 18 and 108. Defendant has a 'fundamental right to appellate review of a criminal conviction' ... and, to that end, it is well-settled that the People 'must provide a record of trial sufficient to enable a defendant to present reviewable issues on appeal' ... . Here, there is no dispute that the subject exhibits were admitted into evidence, were viewed by the juries at both of defendant's trials and are now a part of the record from which defendant may prepare his appellate arguments and this Court may conduct meaningful appellate review. Based upon our own efforts to view these exhibits, we find defendant's observation to have merit." ***People v. Haggray*, 2018 N.Y. Slip Op. 04036, Third Dept 6-7-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

DEFENDANT DID NOT MOVE TO SUPPRESS INFORMATION OBTAINED FROM HIS CELL PHONE, COUNTY COURT ERRED IN SUPPRESSING THAT EVIDENCE, SUPPRESSION MOTION SHOULD HAVE BEEN DENIED.

The Third Department, in an appeal by the People of a suppression ruling, determined the suppression motion should have been denied in its entirety. Defendant never made a motion to suppress information taken from his cell phone. Yet County Court apparently speculated that the police must have searched defendant's cell phone before the Miranda warnings were given: "... [T]he detectives approached defendant outside his place of employment and asked him to accompany them to the police station. Defendant voluntarily agreed and they drove him to the station without placing him in handcuffs. The videotaped statement indicates that, during the ride and before entering the interview room, they engaged in general conversation regarding defendant's background, education, employment and family life, but did not discuss the criminal investigation. Inside the interview room, defendant was initially not restrained. The detectives asked if he would like water and provided him a drink. Later, they obtained a cigarette and allowed him to smoke it, and permitted him to make a phone call. At the beginning of the conversation in the interview room, a detective administered Miranda warnings and defendant stated that he was willing to talk to them and answer questions. Defendant was not threatened or coerced during the interview. County Court did not rely on these facts, but instead focused on what it deemed 'the troubling and unavoidable issue that, prior to entering the interview room and prior to Miranda warnings, . . . defendant's phone had already been seized by the police.' The court highlighted the People's failure at the hearing to address this seizure of the phone even though, as discussed above, the People were not on notice that anything related to the phone was being challenged by defendant. The court chastised the People for failing to acknowledge or explain 'the circumstances under which . . . defendant's phone was seized and potentially searched, pre-Miranda.' The record contains no factual support for, and actually belies, the court's speculative assertion that the phone was searched before Miranda warnings were administered, because the video shows that, when the detective eventually brought the phone into the interview room and obtained defendant's consent to look at some of its features, defendant had to unlock the phone with either a password or swiping pattern." ***People v. Moore*, 2018 N.Y. Slip Op. 04042, Third Dept 6-7-18**

DEFAMATION, MALICIOUS PROSECUTION.

DEFAMATION AND MALICIOUS PROSECUTION CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED, ELEMENTS EXPLAINED.

The Third Department, reversing Supreme Court, determined plaintiff had stated causes of action for malicious prosecution and defamation Defendant, Goyer, was the town deputy clerk and plaintiff was the town supervisor. Goyer had filed a harassment complaint against plaintiff alleging he physically prevented her from entering a conference room at the town hall.

Plaintiff was acquitted and then brought this lawsuit: "Accepting plaintiff's allegations as true, as we must, the complaint adequately alleges that Goyer 'knowingly provided false information to the police' and such allegations are 'sufficient to state that the complainant initiated the proceeding by playing an active role in the other party's arrest and prosecution' ... . The incident report — which was attached to and incorporated into the complaint — indicates that, on the evening in question, Goyer attempted to enter a conference room at the Town Hall when plaintiff stepped to the side and blocked her from entering. Goyer indicated that, when she attempted to then go around him, plaintiff 'put his arm up in front of [her] to block [her]' and 'reached in front of [her,] grabbed [certain office supplies and] tried to pull them out of [her] hand' while screaming '[g]et out' and '[y]ou can't come in here.' The statements contained in the information, supporting deposition and incident report were thereafter 'published and/or republished to the press.' Inasmuch as these statements provide allegations of fact indicating that plaintiff subjected Goyer to unwanted physical contact while at the Town Hall, on the night of a Town Board meeting, at a time when plaintiff was acting in his official capacity as Town Supervisor, they provide 'more than a general reflection upon [plaintiff]'s character or qualities' ...". ***Higgins v. Goyer*, 2018 N.Y. Slip Op. 04067, Third Dept 6-7-18**

EDUCATION-SCHOOL LAW, CONTRACT LAW, CONSTITUTIONAL LAW.

PROVISION OF THE EDUCATION LAW WHICH ALLOWS THE APPOINTMENT OF A RECEIVER TO TAKE OVER ALLEGEDLY FAILING SCHOOLS DOES NOT VIOLATE THE CONTRACT CLAUSE OF THE US CONSTITUTION.

The Third Department, in a complex decision not fully summarized here, determined the provision of the Education Law which allows the appointment of a receiver to take over allegedly failing schools does not violate the Contract Clause of the US Constitution: "... [W]here a statute or regulation impairs a private contract, courts will defer to a legislature's rationale with regard to its necessity ... . Less deference is warranted where the statute or regulation 'is self-serving and impairs the obligations of [the state's] own contracts' because 'a [s]tate is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives' ... . Less deference may be warranted even where, as here, the state is not a party to an impaired public contract ... . '[F]or an impairment to be reasonable and necessary under less deference scrutiny, it must be shown that the state did not (1) consider impairing the contracts on par with other policy alternatives or (2) impose a drastic impairment when an evident and more moderate course would serve its purpose equally well nor (3) act unreasonably in light of the surrounding circumstances' ... . Assuming without deciding that the less deferential standard applies, we find that Education Law § 211-f (8) is reasonable and necessary both on its face and as applied. In context, the receivership agreement was necessary in order to implement available methods to address the immediate issues that were facing the struggling or persistent struggling schools. The statute provides that the Superintendent must act in accordance with the existing CBA [collective bargaining agreement], and, where, as here, a receivership agreement is requested, the statute limits the scope of the agreement — and impairment. No modification or impairment can be unilaterally imposed but instead must be negotiated. As applied, although an agreement was not reached with regard to all issues, the modifications imposed were applicable to the affected schools only for the time limited by the statute. In sum, because the statute and the agreements apply prospectively and limit the scope, application and duration of any modifications to existing agreements, while prohibiting any adverse financial impact, we find that it was reasonably designed and necessary to further the goal of helping students to succeed ...". ***Matter of Buffalo Teachers Fedn., Inc. v. Elia*, 2018 N.Y. Slip Op. 04061, Third Dept 6-7-18**

FAMILY LAW.

DURATION OF ORDERS OF PROTECTION FOR A BIOLOGICAL GRANDFATHER AND A STEPGRANDFATHER EXPLAINED.

The Third Department discussed the allowed duration of orders of protection for a biological grandfather and a stepgrandfather: "Family Ct Act § 1056 (4) provides that '[t]he court may enter an order of protection[,] independently of any other order made under this part, against a person who was a member of the child's household or a person legally responsible . . . and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household. [Such] order of protection . . . may be for any period of time up to the child's eighteenth birthday.' Because Harold J. is the biological grandfather of Annabella and Caleb J., the orders of protection as to these children must be modified to reflect an expiration date ... one year from disposition of the matter ... . The familial relationship between Makayla and Harold J. warrants slightly more analysis as Harold J. is not Makayla's biological grandfather, but rather is related to her through his son's marriage to Makayla's mother. This raises the issue of whether a stepgrandparent is related to a stepgrandchild by marriage for the purposes of Family Ct Act § 1056 (4). We conclude that they are not. … [B]ecause Harold J.'s relationship to Makayla is not established by his own marriage, but rather through his son's marriage, it was statutorily permissible, in this regard, for Family Court to issue an order of protection until Makayla's eighteenth birthday. Our analysis does not end here, however, as Family Ct Act § 1056 (4) prohibits orders of protection until a child's eighteenth birthday if the order is against someone who is related by blood or marriage to a member of the child's household. Therefore, if, at the time of disposition, Makayla resided in the same household as Annabella and Caleb J., the order of protection as to Makayla could not exceed one year ... . Inasmuch as we cannot discern from the record whether

this is the case, the matter must be remitted for the purpose of making this determination." ***Matter of Makayla I. (Caleb K.),* 2018 N.Y. Slip Op. 04047, Third Dept 6-7-18**

FAMILY LAW.

SUSPENDED JUDGMENT COMMITTING RESPONDENT TO JAIL FOR FAILURE TO MAKE CHILD SUPPORT PAYMENTS SHOULD NOT HAVE BEEN REVOKED WITHOUT A HEARING.

The Third Department, reversing Family Court, determined a suspended judgment should not have been revoked without a hearing: "... [R]espondent consented to an order confirming the Support Magistrate's finding that he willfully violated his child support obligation. Family Court suspended judgment on the condition that respondent make certain minimum payments. After respondent failed to make the requisite payments, petitioner, in November 2015, filed a violation petition against him. Following an appearance in April 2016, it was revealed that respondent had been recently employed and the child support payments had been made. As a consequence, Family Court continued to suspend judgment and the matter was adjourned. At a November 2016 appearance, petitioner advised Family Court that, although it had been receiving payments directly from respondent's employer, such payments had ceased in early October 2016. Inasmuch as respondent failed to personally appear in November 2016, a warrant was issued for his arrest. At an appearance on January 4, 2017, respondent's counsel requested a hearing to call respondent's employer as a witness to determine why payments were not being made to petitioner. Respondent's counsel inquired whether he should subpoena the employer and, although Family Court did not explicitly respond to this inquiry, the court noted that a hearing 'could at least start.' At the January 17, 2017 appearance, Family Court refused to let respondent call the subpoenaed witness. Family Court noted that a hearing was unnecessary because respondent did not dispute that payments had not been made and, therefore, good cause existed to revoke the suspended judgment. Family Court sentenced respondent to a 90-day jail term and imposed a purge amount of $3,507.50. ... Family Court erred in revoking the suspended judgment without first conducting an evidentiary hearing ... . Given respondent's liberty interest at stake ... , he was entitled to present witnesses on the issue of whether good cause existed to revoke the suspended judgment ...". ***Matter of Madison County Support Collection Unit v. Campbell*, 2018 N.Y. Slip Op. 04049, Third Dept 6-7-18**

FAMILY LAW, ATTORNEYS.

MOTHER DEMONSTRATED FATHER WILLFULLY VIOLATED THE SEPARATION AGREEMENT AND WAS THEREFORE ENTITLED TO ATTORNEY'S FEES.

The Third Department, reversing Family Court, determined mother had demonstrated that father's violation of the separation agreement was willful, entitling mother to attorney's fees: "Family Court's determination that the mother failed to prove a willful violation is not supported by the record or the law. The mother's testimonial and documentary submissions were amply sufficient to make a prima facie showing that the father's delays and failures to satisfy his obligations were willful violations, thus shifting the burden to him to demonstrate his inability to pay ... . In response, the father made no effort to show that he could not meet his obligations; indeed, he admitted that he did not make the orthodontic payment or turn over the tax information until he was ordered to do so. Accordingly, he failed to satisfy his burden... . Family Court thus erred in dismissing the mother's objections. Contrary to the court's determination, the fact that the father had paid his obligations by the time of the hearing — at least in part, because he was ordered to do so — does not negate the evidence that he repeatedly delayed in fulfilling some of his responsibilities and completely avoided others, forcing the mother to make repeated efforts to obtain his compliance and, finally, to commence this proceeding." ***Matter of Shkaf v. Shkaf*, 2018 N.Y. Slip Op. 04052, Third Dept 6-7-18**

FAMILY LAW, EVIDENCE.

CHILD'S OUT OF COURT STATEMENTS ABOUT ABUSE BY STEPFATHER SUFFICIENTLY CORROBORATED.

The Third Department, in a custody proceeding, determined out of court statements by a child about abuse by the stepfather were properly deemed admissible because they were sufficiently corroborated: "Proof of the abuse of another child can also provide the requisite corroboration ... . The sufficiency and 'reliability of the corroboration, as well as issues of credibility, are matters entrusted to the sound discretion of Family Court and will not be disturbed unless clearly unsupported by the record' ... . The maternal aunt testified that, while babysitting the children … , the older child disclosed that the stepfather comes into her room in the middle of the night and 'touches in [her] butt.' The child also revealed the sexual abuse to the father, specifically stating that, while she was locked in her room, the stepfather would pull back the covers and reach into her underwear. The maternal aunt described changes in the older child's behavior that coincided with the time frame in which the alleged sexual abuse occurred, explaining that the child, who used to be happy and playful, became 'unsociable' and 'scared,' as if something was bothering her. A therapist whom the older child began seeing following the disclosures testified that the child was 'very distant,' 'detached' and 'withdrawn' during their interactions and opined that

the child exhibited behavior that was consistent with that of a four-year-old who may have experienced trauma. Further, a woman whose father had previously lived with the stepfather provided detailed and graphic testimony of her own sexual abuse at the hands of the stepfather when she was a young girl. During interviews with the State Police, both this woman as well as her sister confirmed that they had been sexually abused by the stepfather when they were younger. In view of this proof, and according due deference to Family Court's factual findings and credibility assessments, we conclude that the older child's statements were adequately corroborated ...". ***Matter of Cory O. v. Katie P.*, 2018 N.Y. Slip Op. 04046, Third Dept 6-7-18**

INSURANCE LAW, CONTRACT LAW.

DATE OF LOSS DEEMED TO BE DATE THE CLAIM FOR A STOLEN CAR WAS DENIED, NOT THE DATE THE CAR WAS STOLEN.

The Third Department, reversing Supreme Court, determined that the term "date of loss" in the policy referred to the date the insurer disclaimed coverage, not the date the car was stolen. Therefore plaintiff's action for breach of contract was timely. The contract properly shortened the applicable statute of limitations to one year: "In our view, the generic 'date of loss' language employed here, in the context of the policy as a whole, does not evince an unmistakable intention that the one-year limitations period be measured from the occurrence of the underlying event ... . Significantly, in shortening the limitations period, the insurance policy did not use the term of art 'inception of loss' or other similarly specific language indicating that the limitations period was to be measured from the event giving rise to the claim ... . Moreover, although 'date of loss' could be reasonably interpreted to mean the date of theft, as defendant contends, ambiguities in an insurance policy must be construed against the insurer ... . In view of the foregoing, we hold that the one-year limitations period set forth in the insurance policy began to run on the date that defendant denied the claim for coverage ...". ***Mercedes-Benz Fin. Servs. USA, LLC v. Allstate Ins. Co.*, 2018 N.Y. Slip Op. 04064, Third Dept 6-7-18**

MUNICIPAL LAW, IMMUNITY.

PLAINTIFFS DID NOT DEMONSTRATE A SPECIAL RELATIONSHIP WITH THE TOWN, TOWN WAS NOT LIABLE FOR FLOODING CAUSED BY LANDSLIDE.

The Third Department, reversing Supreme Court, determined there was no special relationship between the town and the plaintiffs. The town had allowed fill to be dumped near a stream (Normanskill) by issuing a permit to the property owner, 165 Salisbury Road LLC. A landslide occurred which caused flooding on plaintiffs' property: "To establish that a municipality created a special relationship by voluntarily assuming a duty, a plaintiff must show: '(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking'... . Plaintiffs failed to allege any assumption by the Town to act on their behalf, any direct contact between them and any agent of the Town or any justifiable reliance by plaintiffs ... . As for the third way of forming a special relationship, the municipality must not only assume positive direction or control when a known, blatant and dangerous safety violation exists, but must 'affirmatively act to place the plaintiff in harm's way,' through words or conduct that 'induc[e] the plaintiff to embark on a dangerous course he or she would otherwise have avoided' ... . Although we recently held that Normanskill and 165 Salisbury Road alleged a special relationship with the Town on this basis ... , the alleged safety violation existed on property owned or leased by those parties. They were in a markedly different position than plaintiffs. Plaintiffs are removed from the Normanskill property that was directly affected by the fill and permit activities, and the complaint contains no allegations that plaintiffs were even aware of, or had contact with any of the parties involved in, those activities. The allegations provide no indication of how plaintiffs could have been induced by the Town to embark on any course of action, let alone a dangerous one that they would otherwise have avoided ...". ***Szydlowski v. Town of Bethlehem*, 2018 N.Y. Slip Op. 04066, Third Dept 6-7-18**

MUNICIPAL LAW, CIVIL PROCEDURE.

STATUTE OF LIMITATIONS FOR COMMENCING AN ACTION AGAINST THE MUNICIPALITY TOLLED WHEN PLAINTIFF MOVED FOR LEAVE TO FILE A LATE NOTICE OF CLAIM.

The Third Department, reversing Supreme Court, determined plaintiff's action against the municipality was timely commenced. The one-year-and-ninety-day statute of limitations was tolled when plaintiff filed a successful motion for leave to file a late notice of claim: "Pursuant to General Municipal Law, a plaintiff must first serve a notice of claim against a municipality within 90 days after the claim arises ... and commence any subsequent tort action against the municipality within one year and 90 days after the claim arises (see General Municipal Law § 50-i). Because plaintiff's claims against defendants, if any, arise from the fire that occurred on February 18, 2014, he was therefore required to file and serve a notice of claim by

May 19, 2014 and commence any subsequent tort action by May 19, 2015. Having failed to file and serve his notice of claim by May 19, 2014, plaintiff was permitted to, and did, commence a special proceeding seeking leave to file a late notice of claim. While the applicable one year and 90-day statute of limitations began to run on February 18, 2014, upon plaintiff's commencement of the proceeding, the provisions of CPLR 204 (a) operated to toll the remainder of the statute of limitations until the date that the court granted the requested relief, at which point the statute began to run once again ... . To put it in mathematical terms, when plaintiff commenced the proceeding seeking leave to serve a late notice of claim on November 14, 2014, he had 186 days remaining in order to timely commence this action within the applicable statute of limitations. As of that date, the statute of limitations stopped running and did not resume until May 27, 2015, when Supreme Court issued its order granting plaintiff's application. Thus, plaintiff had 186 days running from May 27, 2015 or until November 29, 2015 to timely commence this action. Since plaintiff commenced this action on October 20, 2015, it was timely commenced and may now proceed to a determination as to whether it has any merit." ***Kulon v. Liberty Fire Dist.*, 2018 N.Y. Slip Op. 04062, Third Dept 6-7-18**

PERSONAL INJURY.

QUESTIONS OF FACT ABOUT THE APPLICABILITY OF THE EMERGENCY DOCTRINE IN THIS TRAFFIC ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined defendant's motion for summary judgment should not have been granted in this traffic accident case. Plaintiff's decedent apparently backed into defendant's lane of traffic from the median. There was conflicting evidence about defendant's speed and the distance between decedent's car and defendant (i.e., there was conflicting evidence about the applicability of the emergency doctrine): "Given the conflicting accounts about the distance and the elapsed time between when decedent's vehicle moved into defendant's lane and the collision and defendant's speed prior to the accident, we conclude that triable issues of fact exist as to whether defendant's actions, when confronted with an emergency situation, were reasonable and whether he could have taken evasive action to avoid decedent's vehicle ... . We further conclude that there are issues of fact as to whether decedent's actions, under the circumstances of this case, were not the sole proximate cause of the accident. Accordingly, viewing the evidence in the light most favorable to plaintiff, Supreme Court should have denied defendant's motion for summary judgment ...". ***Brust v. McDaniel*, 2018 N.Y. Slip Op. 04069, Third Dept 6-7-18**

WORKERS' COMPENSATION LAW, EVIDENCE.

BOARD CONSIDERED MEDICAL FILE FROM A PRIOR INJURY WITHOUT NOTICE TO CLAIMANT, DENIAL OF CLAIM REVERSED.

The Third Department, reversing the Workers' Compensation Board, determined the claimant (wife of the decedent worker who died of cardiac arrest) was not notified the board would consider a medical file relating to a prior injury: "Here, the Board relied on medical records apparently contained in the case file for a separate claim filed by decedent based on a November 2014 fall at work. ... The employer did not request that the Board rely on those 2014 records, nor did it adhere to the procedure for introducing additional evidence into the administrative appeal that was not before the Workers' Compensation Law Judge... . The Board's rule provides that, if that procedure is not followed, the Board 'will not' consider such new evidence... . Claimant was prejudiced because she was not on notice — until she received the Board decision — that the Board would rely on documents from another case file. The employer argues that the referenced medical reports cannot be objectionable because they accurately reflect the treatment rendered, but we cannot verify that without reviewing those reports. The employer further argues that no response to the medical records would change the strength of either side's argument, but that proposition is mere speculation. Either party may have chosen to submit additional medical records reflecting on decedent's medical treatment from November 2014 until his death in July 2015 had the parties been on notice that this period of treatment would be at issue." ***Matter of Kaplan v. New York City Tr. Auth.*, 2018 N.Y. Slip Op. 04068, Third Dept 6-7-18**

FOURTH DEPARTMENT

ARBITRATION, EMPLOYMENT LAW, EDUCATION-SCHOOL LAW.

ARBITRATION AWARD WAS INDEFINITE AND NONFINAL.

The Fourth Department determined the arbitrator's award concerning the transfer of employees was indefinite and nonfinal: "The arbitration proceeding arose from respondent's plan to transfer certain employees previously assigned to work at a single location to new positions requiring them to alternate between two different work locations. The arbitrator's opinion and award, among other things, found that respondent involuntarily transferred the grievants in violation of the collective bargaining agreement between the parties, and directed respondent to compensate the grievants 'for work per-

formed at more than one location from November 30, 2013 until the end of the 2016 Budget Year.' We agree with respondent that Supreme Court erred in granting the petition and in denying the cross petition. An arbitration award 'shall be vacated' where the arbitrator 'so imperfectly executed [the award] that a final and definite award upon the subject matter submitted was not made'... . 'An award is indefinite or nonfinal within the meaning of the statute only if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy' ... . Vacatur is appropriate where the award failed to set forth the manner of computing monetary damages... . ... The award does not explain the basis for the compensation allegedly owed to the grievants, nor does it detail how that compensation should be calculated." ***Matter of The Professional, Clerical, Tech. Empls. Assn. (Board of Educ. for Buffalo City Sch. Dist.),* 2018 N.Y. Slip Op. 04128, Fourth Dept 6-8-18**

CIVIL PROCEDURE.

STRIKING THE ANSWER WAS TOO SEVERE A SANCTION FOR A DISCOVERY VIOLATION, THERE WAS NO SPOLIATION OF EVIDENCE, RATHER THERE WAS A DELAY IN PRODUCING THE EVIDENCE.

The Fourth Department determined a discovery violation had occurred, but it did not involve spoliation of evidence and striking defendant's (the Clinic's) answer was too severe a sanction. This is a medical malpractice action alleging a failure to diagnose breast cancer. The plaintiff sought reports generated by software (CAD) used to detect breast cancer: "... [J]ust prior to the scheduled date for trial, plaintiff issued a subpoena duces tecum on defendants requesting CAD structured reports. Defendants objected to the subpoena and ... plaintiff moved to strike defendants' answers or for other sanctions for defendants' discovery violation. In response, defendants were eventually able to generate the CAD structured reports and provided them to plaintiff. ... [A]lthough we agree with the court that plaintiff established that a discovery violation occurred, we conclude that the sanction of striking the answer of the Clinic was too severe under the circumstances of this case ... . This case is not similar to a spoliation case because the CAD structured reports were never destroyed but, rather, were not generated and produced in a timely manner . We conclude that the Clinic should be sanctioned by imposing costs upon it for any additional expenses plaintiff incurred as a result of the delay in disclosure ...". ***Woloszuk v. Logan-Young,* 2018 N.Y. Slip Op. 04176, Fourth Dept 6-8-18**

CORPORATION LAW, DEBTOR-CREDITOR LAW.

PLAINTIFF DID NOT DEMONSTRATE THE CONTINUITY OF OWNERSHIP ELEMENT OF THE DE FACTO MERGER DOCTRINE SUCH THAT THE ASSETS OF ONE DEFENDANT SHOULD BE USED TO SATISFY THE DEBT OF ANOTHER.

The Fourth Department, modifying Supreme Court, determined plaintiff did not show that there was a continuity of ownership such that, pursuant to the de facto merger doctrine, the assets of defendant NYP Ag should be used to satisfy a judgment against NYP Management: " 'Traditionally, courts have considered several factors in determining whether a de facto merger has occurred: (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation' ... . '[C]ourts have flexibility in determining whether a transaction constitutes a de facto merger. While factors such as shareholder and management continuity will be evidence that a de facto merger has occurred . . . , those factors alone should not be determinative' ... . '[I]n non-tort actions, continuity of ownership is the essence of a merger' ... , and is a necessary predicate to finding a de facto merger... Here, inasmuch as [plaintiff] failed to establish continuity of ownership, it failed to establish that there was a de facto merger between the two corporations ...". ***R&D Electronics, Inc. v. NYP Mgt., Co., Inc.*, 2018 N.Y. Slip Op. 04151, Fourth Dept 6-8-18**

CRIMINAL LAW.

DEFENDANT WAS NOT IN CUSTODY WHEN HIS STATEMENTS WERE MADE, SUPPRESSION MOTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant's motion to suppress his statements should not have been granted. The People demonstrated defendant was not in custody when the statements were made: " 'In determining whether a defendant was in custody for Miranda purposes, [t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' ... . We reject defendant's contention that the People failed to meet their 'burden of showing that [he] voluntarily went to the [detectives' office] where he allegedly made the inculpatory statements'... . Indeed, the People 'properly demonstrated by unchallenged hearsay testimony' that defendant voluntarily accompanied the officers to the detectives' office for questioning and, inasmuch as defendant did not dispute that fact in either his motion papers or his arguments on the motion, that testimony was sufficient to sustain the People's burden ... . We further conclude that defendant was not in custody when he

made the statements because he was informed that he was not under arrest and that he would be going home that day, he was not handcuffed, he was permitted to leave the interview room several times, he never asked to leave the office nor was he told that he could not leave, and he was not arrested that day ...". ***People v. Bell-Scott*, 2018 N.Y. Slip Op. 04192, Fourth Dept 6-8-18**

CRIMINAL LAW, ATTORNEYS, APPEALS.

DEFENDANT ENTITLED TO A HEARING ON HIS INEFFECTIVE ASSISTANCE ALLEGATIONS IN HIS MOTIONS TO VACATE HIS CONVICTIONS, EVEN THOSE ALLEGATIONS THAT COULD HAVE BEEN RAISED ON APPEAL.

The Fourth Department, reversing County Court, determined defendant was entitled to a hearing on his motions to vacate his convictions on ineffective assistance grounds. The Fourth Department noted that, where some of the allegations of ineffective assistance are outside the record, a hearing on a motion to vacate can encompass all allegations of ineffective assistance, even those which could have been raised on appeal: "Where, as here, 'an ineffective assistance of counsel claim involves . . . mixed claims' relating to both record-based and nonrecord-based issues . . . [, such] claim may be brought in a collateral proceeding, whether or not the [defendant] could have raised the claim on direct appeal' ... . In such situations, i.e., where the 'claim of ineffective assistance of counsel cannot be resolved without reference to matter outside of the record, a CPL 440.10 proceeding is the appropriate forum for reviewing the claim in its entirety' ... . That is because 'each alleged shortcoming or failure by defense counsel should not be viewed as a separate ground or issue raised upon the motion' . . . Rather, a defendant's claim of ineffective assistance of counsel constitutes a single ground or issue upon which relief is requested' .. . In other words, 'such a claim constitutes a single, unified claim that must be assessed in totality' ... . '[D]efendant established that there were sufficient questions of fact . . . whether [trial counsel] had an adequate explanation' for [her] failure to pursue certain lines of defense on cross-examination or for [her] failure to call an expert on defendant's behalf, and defendant is therefore entitled to an opportunity to establish that [he] was deprived of meaningful legal representation' ... . For example, defense counsel failed to address at trial evidence in the medical records that tended to disprove allegations of penetration. We also note that defendant presented sworn allegations supporting his contention that DNA buccal swabs were taken from him by the use of excessive force. Such an allegation, if true, would support suppression of the damaging DNA evidence had such a motion been made ... . No such motion was made, and '[s]uch a failure, in the absence of a reasonable explanation for it, is hard to reconcile with a defendant's constitutional right to . . . effective assistance of counsel' ...". ***People v. Wilson*, 2018 N.Y. Slip Op. 04233, Fourth Dept 6-8-18**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF CONSTRUCTIVE POSSESSION OF DRUGS IN AN APARTMENT LEGALLY INSUFFICIENT, CONVICTION REVERSED.

The Fourth Department, reversing defendant's conviction for possession of a controlled substance, determined the circumstantial evidence of constructive possession of the drugs found in an apartment was legally insufficient: "Although defendant was present in the apartment at the time when the police executed the search warrant, 'no evidence was presented to establish that defendant was an occupant of the apartment or that [she] regularly frequented it'... . The People relied primarily on the trial testimony of a police investigator, who testified that defendant was listed in the records management system of the Utica Police Department (UPD) as living at the apartment. The investigator acknowledged on cross-examination, however, that he did not know how the UPD obtained that information and that the information in the records management system is not always current or even accurate. The investigator also testified that he surveilled the building in which the apartment was located 'hundreds' of times over the course of a three-week investigation, and that he observed defendant 'at that location' only twice. Although the investigator testified that 'typical women's clothing' was found in the apartment, he failed to offer specifics except for three pairs of footwear, which he believed might fit defendant. By contrast, he testified in detail about men's underwear and men's deodorant found in a dresser drawer, men's work boots piled near the dresser, and men's sweatshirts hanging over a couch. Photographs of the clothing were received in evidence, and those photographs did not depict any 'typical women's clothing,' with the possible exception of one or two pairs of footwear." ***People v. Williams*, 2018 N.Y. Slip Op. 04173, Fourth Dept 6-8-18**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S PRE-MIRANDA STATEMENT SHOULD HAVE BEEN SUPPRESSED, DEFENDANT DEMONSTRATED HE WAS NOT COMPETENT TO TESTIFY AT THE GRAND JURY, HIS GRAND JURY TESTIMONY SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE.

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined the portion of defendant's videotaped statement that was allowed in evidence should have been suppressed, and the jury should not have heard defendant's grand jury testimony because he was not competent to testify at the time: "... [T]he court erred in suppressing

only a portion of his videotaped statement to police investigators inasmuch as the portion of the statement that the court refused to suppress was also obtained prior to the administration of Miranda warnings. Although the court properly determined that defendant was in custody from the outset of the interview, we conclude that the court erred in determining that Miranda warnings were not required before defendant admitted to having a foot fetish inasmuch as 'the facts indicated that an interrogational environment existed' from the outset of the interview ... . Although a defendant is presumed to be competent to testify before the grand jury ... , here, we conclude that defendant rebutted that presumption. Indeed, defendant's grand jury testimony, a rambling, delusional and bizarre narrative of government conspiracy, prompted one grand juror to inquire of defendant whether he had any psychiatric diagnoses. Within days of his testimony at the grand jury, the arraigning court referred defendant for a CPL article 730 psychiatric examination based upon what the court described as "confused, or bizarre behavior" and the inability "to understand charges or court processes." Shortly thereafter, two psychiatric examiners found that defendant lacked capacity to understand the proceedings against him or to assist in his defense based upon a diagnosis of Delusional Disorder, Paranoid Type. As a result, defendant was involuntarily committed to a psychiatric facility under the auspices of the Office of Mental Health. We thus conclude that defendant rebutted the presumption of competence, and that the court abused its discretion in denying the motion to preclude the grand jury testimony ...". ***People v. Perri*, 2018 N.Y. Slip Op. 04134, Fourth Dept 6-8-18**

FAMILY LAW.

FAMILY COURT SHOULD HAVE SET A SPECIFIC AND DEFINITIVE VISITATION SCHEDULE, MATTER REMITTED.

The Fourth Department, modifying Family Court, determined Family Court should have set a specific and definitive visitation schedule: "Respondent mother appeals from an amended order that, inter alia, granted petitioner father's petition to modify a prior custody order by awarding him primary physical custody of their daughter. We agree with the mother that Family Court erred in failing to set a specific and definitive visitation schedule ... . We therefore modify the amended order by striking from the first ordering paragraph the words 'and subject to periods of visitation with the Mother and the Father shall encourage [the child] to visit with her Mother,' and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation between the mother and daughter." ***Matter of Montes v. Johnson*, 2018 N.Y. Slip Op. 04194, Fourth Dept 6-8-18**

FAMILY LAW, APPEALS.

FOURTEEN YEAR OLD CHILD HAD THE STATUTORY RIGHT TO WAIVE HIS PRESENCE AT THE PERMANENCY HEARING AND SHOULD NOT HAVE BEEN ORDERED TO APPEAR, APPEAL HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Fourth Department, reversing Family Court, in a full-fledged opinion by Justice Troutman, determined the 14-year-old child had the statutory right to waive his presence at the permanency hearing and the judge should not have ordered his presence. Although the hearing had been held, the appeal was heard under as an exception to the mootness doctrine because the issue was likely to recur: "The child was freed for adoption in 2014. A permanency hearing was scheduled for March 30, 2017, and notice of the hearing was provided to the child, who was then 14 years old. One week before the scheduled hearing date, the Attorney for the Child (AFC) filed a form indicating that the child, after consultation with the AFC, waived his right to participate in the hearing. The AFC appeared at the hearing on the child's behalf and reiterated that the child had waived his right to participate in the hearing. The court stated, however, that it was 'required by law to have some communication' with the child, and that the child would therefore be required to appear at the next scheduled hearing date. ... Here, the statutory language is clear and unambiguous. Although the permanency hearing must include 'an age appropriate consultation with the child' (Family Ct Act § 1090-a [a] [1]), that requirement may not 'be construed to compel a child who does not wish to participate in his or her permanency hearing to do so' ... . The choice belongs to the child. Indeed, '[a] child age fourteen and older shall be permitted to participate in person in all or any portion of his or her permanency hearing in which he or she chooses to participate' ... . Moreover, 'a child who has chosen to participate in his or her permanency hearing shall choose the manner in which he or she shall participate, which may include participation in person, by telephone or available electronic means, or the issuance of a written statement to the court' ... . Although the court may limit the participation of a child under the age of 14 based on the best interests of the child... , the court lacks the authority to compel the participation of a child who has waived his or her right to participate in a permanency hearing after consultation with his or her attorney ...". ***Matter of Shawn S.*, 2018 N.Y. Slip Op. 04208, Fourth Dept 6-8-18**

INSURANCE LAW, CIVIL PROCEDURE.

BAD FAITH DISCLAIMER ACTION BROUGHT AFTER INJURED PLAINTIFFS WERE ASSIGNED THE INSURED'S RIGHTS UNDER THE POLICY NOT BARRED BY RES JUDICATA, PLAINTIFFS DID NOT HAVE STANDING TO BRING THE BAD FAITH ACTION UNTIL THE RIGHTS WERE ASSIGNED.

The Fourth Department determined plaintiffs' bad faith action against the insurer was not barred by res judicata. Plaintiffs successfully sued the insured in this accidental shooting case and recovered the policy limits. Plaintiffs then were assigned the insured's rights against the insurer and sued for the insurer for disclaiming coverage in bad faith. Because plaintiffs could not have brought the bad faith action until the assignment of rights, plaintiffs had standing to bring the current action. The Fourth Department noted that the First Department had come to the opposite conclusion under similar facts: "... [U]nder Insurance Law § 3420 (a) (2) and (b) (1), an injured party's standing to bring an action against an insurer is limited to recovering only the policy limits of the insured's insurance policy. ... [I]f an injured party/judgment creditor seeks to recover from the insurer an amount above the insured's policy limits on a theory of liability beyond that created by Insurance Law § 3420 (a) (2), the statute does not confer standing to do so. However, if the insured assigns his or her rights under the insurance contract to the injured party/judgment creditor, then the injured party/judgment creditor may simultaneously bring a direct action against the insurer pursuant to Insurance Law § 3420 (a) (2) along with any other appropriate claim, including a bad faith claim, seeking a judgment in a total amount beyond the insured's policy limits. Here, when [plaintiffs] commenced the prior action pursuant to Insurance Law § 3420 (a) (2) ... , the [insured] had not yet assigned their rights under the insurance contract ... . As a result, [plaintiffs] did not have standing to bring a bad faith claim against defendant ... . Thus, because [plaintiffs] lacked standing to bring a bad faith claim against defendant at the time [they] brought the Insurance Law § 3420 (a) (2) action, we conclude that the doctrine of res judicata does not bar this action ...". ***Corle v. Allstate Ins. Co.*, 2018 N.Y. Slip Op. 04135, Fourth Dept 6-8-18**

LABOR LAW-CONSTRUCTIVE LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER SAFETY DEVICES FOR LIFTING HEAVY MOTOR WERE AVAILABLE, PLAINTIFFS' MOTION OF SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department determined there was a question of fact whether safety devices were available precluded granting plaintiffs' motion for summary judgment on the Labor Law § 240(1) cause of action. Plaintiff was injured lifting a heavy motor onto a scissor lift. Defendant's foreman testified he had never manually lifted a motor onto a scissors lift and safety devices for lifting the motor must have been available: "In support of the motion, plaintiffs submitted the deposition testimony of plaintiff set forth above, as well as that of his coworker and a foreman. Plaintiff's coworker testified that he had performed work on 30 or 40 such doors and had manually lifted the motor onto a scissor lift every time. Conversely, the foreman, who was not on location on the date of the injury, testified that he had performed work on 'over a thousand' such doors and had 'never lifted a motor manually onto a scissor lift.' The foreman found it 'hard to believe' that hoists, blocks, pulleys, ropes, or other safety devices were not available on site. We conclude that plaintiffs failed to meet their initial burden on their motion inasmuch as their evidentiary submissions created issues of fact whether plaintiff's 'injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' ...". ***Smiley v. Allgaier Constr. Corp.*, 2018 N.Y. Slip Op. 04130, Fourth Dept 6-8-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 241(6) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED, DEFENDANT DEMONSTRATED IT WAS NOT AN AGENT OF THE OWNER OR GENERAL CONTRACTOR.

The Fourth Department determined defendant's (Pumpcrete's) motion for summary judgment on the Labor Law § 241(6) cause of action should have been granted, but a question of fact precluded summary judgment in favor of Pumpcrete on the Labor Law § 200 cause of action: "Plaintiff was injured while guiding a concrete pump hose that was attached to a truck owned and operated by defendant Pumpcrete Corporation (Pumpcrete). An obstruction formed in the pump hose, causing wet concrete to suddenly be ejected from the hose and knocking plaintiff off of the scaffolding upon which he was standing. At the time of the accident, plaintiff was working for the general contractor, which had hired Pumpcrete to supply the concrete pumping equipment. ... With respect to the Labor Law § 241 (6) cause of action ... , we note that, 'while under that statute owners and general contractors are generally absolutely liable for statutory violations . . . , other parties may be liable under th[at] statute[ ] only if they are acting as the agents of the owner or general contractor by virtue of the fact that they had been given the authority to supervise and control the work being performed at the time of the injury' ... . Pumpcrete satisfied its initial burden of establishing as a matter of law that it was not an agent of the owner or general contractor by submitting deposition testimony from plaintiff and the Pumpcrete pump operator that Pumpcrete lacked authority to

supervise or control plaintiff's work, and plaintiff failed to raise a triable issue of fact in response ...". ***Rohr v. Dewald*, 2018 N.Y. Slip Op. 04160, Fourth Dept 6-8-18**

MEDICAL MALPRACTICE, EVIDENCE, PERSONAL INJURY.

CROSS EXAMINATION OF PLAINTIFF ABOUT HIS CRIMINAL HISTORY PROPERLY PRECLUDED IN THIS MEDICAL MALPRACTICE ACTION, EXPERT OPINION PROPERLY RELIED UPON HEARSAY STATEMENTS BY PLAINTIFF'S TREATING PHYSICIAN.

The Fourth Department determined the trial court properly prohibited cross examination of the plaintiff about his criminal history and plaintiff's expert properly relied upon hearsay statements by plaintiff's treating physician: "... [W]hile a civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness, the nature and extent of cross-examination, including with respect to criminal convictions, remains firmly within the discretion of the trial court ... . It is well settled that ' opinion evidence must be based on facts in the record or personally known to the witness' ... . It is equally well settled, however, that an expert is permitted to offer opinion testimony based upon facts not in evidence where the material is ' of a kind accepted in the profession as reliable in forming a professional opinion' ... . 'The professional reliability exception to the hearsay rule enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession' ... , and 'provided that it does not constitute the sole or principal basis for the expert's opinion' ...". ***Tornatore v. Cohen*, 2018 N.Y. Slip Op. 04145, Fourth Dept 6-8-18**

MUNICIPAL LAW, EMPLOYMENT LAW.

CITY'S DETERMINATION IT WOULD NOT DEFEND A POLICE OFFICER IN A CIVIL ACTION STEMMING FROM THE OFFICER'S STRIKING A CIVILIAN WAS ARBITRARY AND CAPRICIOUS.

The Fourth Department. over a two-justice dissent, determined the city's refusal to defend and indemnify a police officer who was sued civilly for striking a civilian was arbitrary and capricious: "We respectfully disagree with the view of our dissenting colleagues that a 30-second-long video recording of a portion of the incident, considered in conjunction with the indictment, provides a factual basis for respondent's implicit determination that petitioner was not acting within the scope of his employment and duties as a police officer. First, it is well settled that "[a]n indictment is a mere accusation and raises no presumption of guilt" ... . Thus, the filing of an indictment against petitioner does not provide a factual basis to support the denial of a defense to petitioner in the civil action. Second, the video recording captured only part of the encounter between petitioner and the complainant, and did not capture the beginning or the end of the encounter. As a result, the recorded images of petitioner striking the complainant in the area of his legs and feet with a baton are unaccompanied by contextual factual information that would be essential to support a determination that petitioner's actions fell outside the scope of his employment and duties as a police officer. Notably, the brief video clip shows a loud and chaotic intersection with a heavy police presence, and petitioner appeared to be dressed in police uniform and wearing a jacket with the word 'POLICE' printed in bold letters. Three of the officers in the video appeared to be carrying batons, like petitioner, and one other officer appeared to have been engaged in a physical struggle with a civilian on the sidewalk. That struggle appeared to continue into the roadway before the other officer and the civilian disengaged, at which point the camera panned over to a parking lot where petitioner was already engaged with the complainant. Although it is well settled that an employee's conduct does not fall within the scope of his or her employment where his or her actions are taken for wholly personal reasons not related to the employee's job ... , we conclude that the video recording does not establish that petitioner's actions were taken for wholly personal reasons unrelated to his job as a police officer." ***Matter of Krug v. City of Buffalo*, 2018 N.Y. Slip Op. 04118, Fourth Dept 6-8-18**

MUNICIPAL LAW, EMPLOYMENT LAW.

LOCAL LAWS CONCERNING HEALTH BENEFITS FOR RETIRED TOWN EMPLOYEES WHICH WERE NOT ENACTED BY REFERENDUM ARE ENTIRELY INVALID.

The Fourth Department, in a full-fledged opinion by Justice Troutman, determined local laws concerning health benefits for retired town employees were invalid because they were not enacted by referendum: "Plaintiffs correctly acknowledge that the modification clauses in the 2009 Law and the 2014 Law run afoul of Municipal Home Rule Law § 23 (2) (f) because those laws were not enacted by referendum. '[A] local law shall be subject to mandatory referendum if it . . . [a]bolishes, transfers or curtails any power of an elective officer' (id.). Therefore, a local legislative body lacks the power to enact legislation curtailing the voting powers of its own members; such legislation cannot be enacted except by referendum. Here, the modification clauses in the 2009 Law and the 2014 Law curtailed the voting powers of the elected members of the Town Board by requiring a supermajority vote to enact certain kinds of legislation. The 2009 Law and 2014 Law are thus invalid inasmuch as they were not enacted by referendum. ... Where, as here, a local law is subject to a mandatory referendum, the

failure to enact it by referendum renders the entire law invalid ...". ***Parker v. Town of Alexandria*, 2018 N.Y. Slip Op. 04126, Fourth Dept 6-8-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF ASSUMED THE RISK OF FALLING FROM A CLIMBING WALL.

The Fourth Department determined defendant did not demonstrate plaintiff assumed the risk that his harness would become detached causing him to fall from defendant's climbing wall: "The climbing wall amusement attraction included a safety harness worn by the patron and a belay cable system that attached to the harness by use of a carabiner. There is no dispute that the carabiner detached from the safety harness worn by plaintiff, and that plaintiff fell approximately 18 feet to the ground below. The doctrine of assumption of the risk operates 'as a defense to tort recovery in cases involving certain types of athletic or recreational activities' ... . A person who engages in such an activity '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' ... . However, 'participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced' ... . Here, we conclude that the court properly denied that part of defendant's motion based on assumption of the risk inasmuch as it failed to meet its initial burden of establishing that the risk of falling from the climbing wall is a risk inherent in the use and enjoyment thereof ...". ***Stillman v. Mobile Mtn., Inc.*, 2018 N.Y. Slip Op. 04149, Fourth Dept 6-8-18**

PERSONAL INJURY.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS VEHICLE-PEDESTRIAN ACCIDENT CASE SHOULD HAVE BEEN GRANTED, PLAINTIFFS NEED NOT SHOW THE ABSENCE OF COMPARATIVE NEGLIGENCE.

The Fourth Department determined plaintiffs' summary judgment motion in this vehicle-pedestrian accident case should have been granted. Plaintiff demonstrated the driver's (Gorman's) negligence and was not required to show the absence of comparative negligence: "Plaintiffs commenced this action seeking damages for injuries sustained by Michael Edwards (plaintiff) when he was struck by an ambulance driven by defendant Francine M. Gorman. At the time of the collision, plaintiff, a parking attendant, was tasked with instructing vehicles traveling in a two-lane, one-way 'pass-through' road of the entrance loop of Strong Memorial Hospital on how to reach an alternate entrance for a nearby parking garage. Plaintiff was standing in the center of the pass-through road between the two lanes of travel, and Gorman struck him as she was slowing down for a stop sign at the end of the pass-through road. ... [P]laintiffs were required to establish only that Gorman was negligent and that her negligence was a proximate cause of the accident. We conclude that plaintiffs met that burden by providing photographs, video footage and Gorman's deposition testimony in which she admitted that she executed a wide turn through multiple lanes of the pass-through road, which constitutes a violation of Vehicle and Traffic Law § 1128 (a) ... . In opposition, defendants failed to raise a triable issue of fact ... . Although defendants successfully raised triable issues of fact with respect to plaintiff's negligence, that is of no moment in the context of plaintiffs' appeal. 'To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault' ...". ***Edwards v. Gorman*, 2018 N.Y. Slip Op. 04129, Fourth Dept 6-8-18**

PERSONAL INJURY, COURT OF CLAIMS.

DEFECT WHICH CAUSED CLAIMANT TO SLIP AND FALL WAS NOT TRIVIAL AS A MATTER OF LAW, QUESTION OF FACT WHETHER DEFENDANT HAD ACTUAL AND CONSTRUCTIVE NOTICE OF THE DEFECT, DEFENDANT'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing the Court of Claims, determined that the defect which caused the claimant's slip and fall was not trivial as a matter of law and there were questions of fact about the defendant's constructive and actual notice of the defect. Claimant is incarcerated and the slip and fall occurred in a walkway at a correctional facility: "In claimant's deposition testimony, which defendant submitted in support of the motion, claimant testified that he was proceeding along a walkway from the housing area to the commissary. It had rained, and a large puddle of water had accumulated on the walkway. Claimant attempted to step over the flooded portion of the walkway, but his foot came down on a portion of the walkway that was cracked and damaged. The concrete shifted under his foot, causing him to lose his balance, and he fell. ... We also agree with claimant that defendant failed to meet its burden of establishing that it lacked actual or constructive notice of the allegedly dangerous condition ... . In support of the motion, defendant submitted the affidavit of a correction officer who had worked at the prison for the prior 27 years. The correction officer averred that he was familiar with the walkway and its condition before claimant fell, that the concrete was broken and uneven, and that water can gather there after it rains, but he did not consider the condition to be dangerous. Furthermore, the correction officer averred that he periodically walked the premises to look for anything in need of repair, and claimant testified at his deposition that the walkway

was cracked prior to his arrival at the prison and that it flooded every time it rained." ***Bennett v. State of New York*, 2018 N.Y. Slip Op. 04212, Fourth Dept 6-8-18**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW.

QUESTION OF FACT WHETHER SNOW PLOW DRIVER ACTED WITH RECKLESS DISREGARD IN THIS TRAFFIC ACCIDENT CASE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendants' motion for summary judgment in this snow plow traffic accident case should not have been granted. The snow plow driver was backing up below the crest of a hill and plaintiff was unable to brake in time when he crested the hill. The Fourth Department held that there was a question of fact whether the snow plow driver acted in reckless disregard of the safety of others in violation of Vehicle and Traffic Law § 1103: "Defendants failed to meet their initial burden of establishing that Marsh did not operate the snowplow with reckless disregard for the safety of others, and defendants thus were not entitled to summary judgment dismissing the complaint against them. Vehicle and Traffic Law § 1103 (b) 'exempts from the rules of the road all vehicles actually engaged in work on a highway'... . However, the statute does not protect snowplow drivers 'from the consequences of their reckless disregard for the safety of others' (§ 1103 [b]). The operator of a snowplow acts with such 'reckless disregard' when he or she 'acts in conscious disregard of a known or obvious risk that is so great as to make it highly probable that harm will follow' ... . The reckless disregard standard 'requires a showing of more than a momentary judgment lapse' ... . Here, defendants' submissions in support of the motion establish that Marsh had been a driver of the snowplow route for 15 years and was aware that an intersection where he could safely turn around was less than a quarter of a mile away. Despite that knowledge, Marsh drove the snowplow in reverse, in front of a hill that obscured his view of approaching traffic on a narrow, two-lane country road with a speed limit of 55 miles per hour, without first sounding his horn in warning. Marsh's deposition testimony that he did not realize that he had collided with plaintiff's vehicle until several seconds after the collision raises a question of fact whether he was utilizing his rear view mirrors while traveling in reverse." ***Chase v. Marsh*, 2018 N.Y. Slip Op. 04231, Fourth Dept 6-8-18**

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