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COURT OF APPEALS

ADMINISTRATIVE LAW, MUNICIPAL LAW.

NYC DEPARTMENT OF HEALTH AND BOARD OF HEALTH DID NOT VIOLATE THE SEPARATION OF POWERS BY PROMULGATING HEALTH CODE PROVISIONS REQUIRING YOUNG CHILDREN IN CITY REGULATED PROGRAMS TO RECEIVE FLU VACCINATIONS, NOR ARE THE CODE PROVISIONS PREEMPTED BY STATE LAW.

The Court of Appeals, in a full-fledged opinion by Judge Stein, reversing the Appellate Division, determined that the NYC Department of Health and Mental Hygiene and the NYC Board of Health properly amended the health code to provide that children between the ages of 6 and 59 months who attended city regulated child care or school programs must receive annual flu vaccinations. The court went through all the Boreali (71 NY2d 11-14) factors, as well as all the preemption theories: "Separation of powers challenges often involve the question of whether a regulatory body has exceeded the scope of its delegated powers and encroached upon the legislative domain of policymaking ... . * * * In Boreali and subsequent cases, we have clarified the 'difficult-to-define line between administrative rule-making and legislative policy-making' by articulating four 'coalescing circumstances' relevant to rendering such a determination (71 NY2d at 11 ...). These circumstances are: whether (1) the regulatory agency 'balanc[ed] costs and benefits according to preexisting guidelines,' or instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems'... ; (2) the agency 'merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance' ... ; (3) the legislature had unsuccessfully attempted to enact laws pertaining to the issue... ; and (4) the agency used special technical expertise in the applicable field ... . * * * Public Health Law §§ 2164 and 2165 set forth mandatory vaccinations that are preconditions to enrollment in school and in institutions of higher education. Those statutes include exemptions, incorporate an appeal process, and explain the procedures to be followed when a student is unable to afford the necessary vaccinations. Taking each of the aforementioned statutes into consideration, the Appellate Division correctly determined that the flu vaccine rules are not preempted by state law." ***Garcia v. New York City Dept. of Health & Mental Hygiene*, 2018 N.Y. Slip Op. 04778, CtApp 6-28-18**

ADMINISTRATIVE LAW, SOCIAL SERVICES LAW.

NEGLECT ALLEGATION AGAINST NURSING HOME FOR SYSTEMIC FAILURE PROPERLY FOUND TO BE SUBSTANTIATED, EVEN THOUGH THE RELATED ALLEGATIONS AGAINST TWO EMPLOYEES WERE DEEMED TO BE UNSUBSTANTIATED.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a dissent, reversing the Appellate Division, determined that the Justice Center for the Protection of People with Special Needs had the statutory authority to find that a neglect allegation against a nursing home was substantiated, even though the neglect allegations against two employees of the nursing home where deemed unsubstantiated. A female resident had, for the third time, been sexually assaulted by another resident in the common room while the common room was unattended. The employees were not required to be in the common room at all times. But the nursing home, the administrative law judge (ALJ) found, should have increased the level of required supervision because of the prior assaults: "Petitioner's narrow construction of the statute would paradoxically leave the Justice Center powerless to address many systemic issues, defeating the purpose of the Act and preventing the Justice Center from protecting vulnerable persons where it is most critical to do so. As noted throughout the text and legislative history, the statutory overhaul embodied in the Act was necessary not only to address isolated incidents of abuse and neglect, but also to resolve systemic problems, such as inadequate staffing, training, and supervision, which often cause or contribute to incidents of abuse and neglect ... . Indeed, systemic deficiencies may present a greater hazard to vulnerable residents than do discrete instances of employee misconduct, since employee-related incidents can often be remedied through targeted disciplinary action. Latent systemic problems, by contrast, are often more challenging to identify and more complicated to rectify—and therefore more likely to recur." ***Matter of Anonymous v. Molik*, 2018 N.Y. Slip Op. 04779, CtApp 6-28-18**

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW.

PLAIN LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT LIMITED THE RIGHT TO DEMAND ARBITRATION TO THE UNION, NOT THE FIRED EMPLOYEE.

The Court of Appeals, in a brief memorandum, over a three-judge dissenting opinion, determined that the plain language of the collective bargaining agreement (CBA) limited the right to demand arbitration to the union and not the fired employee: **From the dissent:** "The language of CBA clearly grants the employee the right to elect arbitration. Even were the agreement ambiguous in that regard, it must be construed in favor of the employee's right to demand arbitration. New York has established a policy favoring arbitration ... , and the CBA itself provides that 'in order to establish a more harmonious and cooperative relationship between the County. . . and its [p]ublic [e]mployees. . . [t]he provisions of this resolution shall be liberally construed.' The majority's contrary interpretation — that the CBA gives the right to proceed to arbitration only to the union — would mean that the employee could 'elect' to exercise 'his/her rights' only where the union agrees to arbitrate — a restriction that does not appear in the agreement. The employee may not know at the time of election whether the union will pursue arbitration, and therefore could not know the scope of 'his/her rights' until it is too late. Further, the rights-granting language in the CBA treats the arbitration right and the [Civil Service Law] 75 right in parallel, emphasizing the employee's right to choose." ***Matter of Widrick (Carpinelli)*, 2018 N.Y. Slip Op. 04780, CtApp 6-28-18**

CRIMINAL LAW.

DEFENDANT'S SIGNING A WRITTEN WAIVER OF THE RIGHT TO AN INDICTMENT BY GRAND JURY MET CONSTITUTIONAL REQUIREMENTS, ALTHOUGH BETTER PRACTICE WOULD INCLUDE ELICITING DEFENDANT'S UNDERSTANDING OF THE RIGHT BEING WAIVED.

The Court of Appeals, in a full-fledged opinion by Judge Wilson, over a two-judge dissent, determined that the defendant's waiver of his right to indictment by grand jury followed proper procedure and was therefore valid. However the court noted that it would be better practice to elicit defendant's understanding of the right being waived in accordance with a model colloquy (see Waiver of Indictment; Superior Court Information Procedure & Colloquy, https://www.nycourts.gov/judges/cji/8-Colloquies/ [accessed June 22, 2018]): "Mr. Myers [the defendant] signed a waiver, under oath, in open court, after consulting counsel, and with counsel present at the signing. In that statement, Mr. Myers affirmed that he was aware our Constitution guaranteed him the right to be prosecuted by a grand jury indictment and that he would have the right to testify before that grand jury; that he waived those rights in favor of prosecution by Superior Court Information, and that he did so voluntarily after discussing the facts of his case 'as well as the meaning of this waiver' with his attorney. The waiver also set forth the offense with which the Superior Court information would charge him. In addition, Mr. Myers' counsel signed an affirmation that he had discussed the case and the meaning of the waiver with Mr. Myers, and that counsel was satisfied that Mr. Myers understood 'the waiver and its consequences.' Those steps satisfied the constitutional requirements." ***People v. Myers*, 2018 N.Y. Slip Op. 04685, CtApp 6-27-18**

CRIMINAL LAW.

STRICT REQUIREMENTS FOR NOTIFICATION OF COUNSEL OF THE CONTENTS OF JURY NOTES AND THE CREATION OF A COMPLETE RECORD OF HOW THE NOTES WERE HANDLED REAFFIRMED.

The Court of Appeals, in a memorandum decision with an extensive three-judge dissent, determined that the trial judge's failure to comply with the notice requirements for jury notes pursuant to Criminal Procedure Law § 310.30 and O'Rama mandated reversal: " '[M]eaningful notice means notice of the actual specific content of the jurors' request' ... . Although the record demonstrates that 'defense counsel was made aware of the existence of the note, there is no indication that the entire contents of the note were shared with counsel'... . We therefore reject the People's argument that defense counsel's awareness of the existence and the 'gist' of the note satisfied the court's meaningful notice obligation, or that preservation was required. 'Where the record fails to show that defense counsel was apprised of the specific, substantive contents of the note—as it is in this case—preservation is not required' ... . Moreover, '[w]here a trial transcript does not show compliance with O'Rama's procedure as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to' … . In other words, '[i]n the absence of record proof that the trial court complied with its [meaningful notice obligation] under CPL 310.30, a mode of proceedings error occurred requiring reversal'... . We again decline 'to disavow our holding in Walston [23 NY3d 986] . . . that imposes an affirmative obligation on a trial court to create a record of compliance under CPL 310.30 and O'Rama' ...". ***People v. Morrison*, 2018 N.Y. Slip Op. 04777, CtApp 6-28-18**

CRIMINAL LAW, APPEALS, ATTORNEYS.

BENCH TRIAL JUDGE'S RESCINDING OF THE RULING DEFENSE COUNSEL COULD GIVE A SUMMATION IN THIS MISDEMEANOR CASE VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL, RULING IS APPEALABLE BECAUSE DEFENSE COUNSEL DID NOT HAVE THE MEANINGFUL ABILITY TO OBJECT.

The Court of Appeals, reversing the Appellate Term, determined the bench trial judge had deprived defendant of his Sixth Amendment right to counsel in this misdemeanor case by first ruling defense counsel could give a summation and then rescinding that ruling. The court further determined the judge's action was appealable because defense counsel did not have an opportunity to object: "We conclude that defendant's claim is reviewable on appeal. The trial court, in specifically ruling that defendant's permission to deliver a summation was rescinded and concomitantly rendering a verdict, deprived defense counsel of a practical ability to timely and meaningfully object to the court's ruling of law ... . Turning to the merits, the United States Supreme Court has held that New York's former CPL 320.20 (3) (c) violated a defendant's Sixth Amendment right to counsel by allowing the trial court the discretion whether to grant defense counsel the opportunity to give a summation in nonjury trials on indictments ... . In this single judge trial on a class B misdemeanor, the trial court's imposition of a sentence of 90 days in jail required that defendant be afforded the right to counsel at the trial under the Sixth Amendment... . That right was violated when the court denied defense counsel the opportunity to present summation ...". ***People v. Harris*, 2018 N.Y. Slip Op. 04667, CtApp 6-26-18**

CRIMINAL LAW, APPEALS, CIVIL PROCEDURE.

NO APPEAL LIES FROM THE DENIAL OF A REPORTER'S MOTION TO QUASH SUBPOENAS ISSUED IN A CRIMINAL ACTION BECAUSE THERE IS NO STATUTORY AUTHORITY IN THE CRIMINAL PROCEDURE LAW FOR SUCH AN APPEAL, THE SUBPOENAS SOUGHT THE REPORTER'S APPEARANCE AT TRIAL AND NOTES OF THE REPORTER'S POST-ARREST INTERVIEW WITH THE DEFENDANT; IN CONTRAST, HAD THE SUBPOENAS BEEN ISSUED PRIOR TO THE COMMENCEMENT OF CRIMINAL PROCEEDINGS, THE MOTION TO QUASH WOULD HAVE BEEN CIVIL IN NATURE AND THE DENIAL APPEALABLE.

The Court of Appeals, in a memorandum decision which sparked two dissenting opinions involving three judges, determined no appeal lies from the denial of a nonparty's motion to quash a subpoena issued in a criminal action because there is no statutory authority for such an appeal. In contrast, the same motion brought prior to the commencement of a criminal action is civil in nature and is appealable. Here a reporter interviewed the defendant who had confessed in 2013 to the murder of a four-year-old girl in 1991. The reporter wrote a story stating that the defendant alleged his confession was not truthful. The subpoenas sought the appearance of the reporter at trial and the notes of the interview. The trial court for the most part denied the motions to quash. The Appellate Division reversed without addressing the jurisdictional issue: "The critical distinction between orders addressing subpoenas that precede, as opposed to follow, the commencement of a criminal action is grounded in the plain language of the CPL, which governs '[a]ll criminal actions and proceedings' ... . Specifically, a 'criminal action commences . . . with the filing of an accusatory instrument against a defendant in a criminal court' ... , and a 'criminal proceeding' includes 'any proceeding which (a) constitutes a part of a criminal action or (b) occurs in a criminal court and is related to a . . . criminal action . . . or involves a criminal investigation' ... . Definitionally, an order resolving a motion to quash a subpoena that is issued prior to the filing of an accusatory instrument does not arise within the context of a 'criminal action.' Moreover, while such an order may relate to a criminal investigation, when issued in a court of general jurisdiction prior to the commencement of a criminal action, it "arises . . . on the civil side of the court"... . Therefore, an order resolving a motion to quash a subpoena falls outside of the ambit of the CPL—and its concomitant limitations upon appellate review—when the order is issued before a criminal action begins. Review of an order issued in the investigatory stage does not undermine the legislative aim of 'limit[ing] appellate proliferation in criminal matters'... insofar as appellate practice at this stage cannot be said to intrude significantly upon a criminal action that may never be commenced. The order here, however, issued after the accusatory instrument was filed, plainly arose in a 'criminal action' within the meaning of that term as prescribed by the CPL". ***Matter of People v. Juarez*, 2018 N.Y. Slip Op. 04684, CtApp 6-27-18**

CRIMINAL LAW, APPEALS, EVIDENCE.

VALIDITY OF STREET STOPS PRESENTS A MIXED QUESTION OF LAW AND FACT WHICH THE COURT OF APPEALS CAN REVIEW ONLY TO THE EXTENT OF WHETHER THE LOWER COURT RULING HAS SUPPORT IN THE RECORD, HERE THE RECORD SUPPORTED THE VALIDITY OF THE STOPS UNDER DEBOUR, TRIAL COURT'S FAILURE TO CREATE A RECORD CONCERNING TWO JURY NOTES REQUIRED REVERSAL HOWEVER.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over two dissents, reversing the Appellate Division, determined that the street stops and searches of the defendants were valid under the DeBour criteria. The police had received a report of a robbery at the location, the defendants were the only persons seen when the police arrived, and both ran or walked away when asked to stop. The court noted that justification for street stops presents a mixed question of law and fact which can be reviewed by the Court of Appeals only to the extent of determining whether the lower court rulings have support in the record. The Court of Appeals reversed, however, because the record did not allow review of two jury notes

received by the judge but not specifically addressed by the trial judge or counsel. . ***People v. Parker*, 2018 N.Y. Slip Op. 04776, CtApp 6-28-18**

DEFAMATION, PRIVILEGE.

QUALIFIED, NOT ABSOLUTE, PRIVILEGE APPLIES WHEN THE SUBJECT OF THE ALLEGED DEFAMATION HAS NO OPPORTUNITY TO REBUT THE ALLEGEDLY DEFAMATORY STATEMENTS.

The Court of Appeals, in a full-fledged opinion by Judge Fahey, over a two-judge dissent, determined that qualified privilege, rather than absolute privilege, applied to allegations made to a Federal Drug Administration (FAD) investigator about plaintiff doctor's involvement in a cancer-drug trial. The controlling issue was whether the statements were made in a proceeding which would allow the plaintiff to counter them: "Was plaintiff entitled to participate, by way of a hearing or otherwise, in the FDA's review of the IRB [Institutional Review Board] and thereby challenge the accusations against her ...? On this point, there is little disagreement. She was not. Plaintiff insists that she did not receive notice of any stage in the FDA's investigation of the IRB. Nothing in the FDA regulations gives a third party, even one 'with a direct interest' ... in the matter, the right to notice of an FDA report concerning IRB noncompliance... or the right to attend a 'regulatory hearing' at which the IRB, as the subject of the investigation, would challenge disqualification by the FDA ... . Moreover, while the regulatory scheme provides for judicial review... , defendants do not dispute plaintiff's contention that she lacks standing to seek such review … because the proceeding was not adversarial to her. Nor do defendants allege any alternative avenues available to plaintiff to contest, before the FDA, the alleged harm to her reputation. ... [Defendants'] theory ... flies in the face of the policy rationale for insisting on an adversarial procedure, namely to prevent the absolute privilege from shielding statements published in a setting in which the defamed party may never know of the statements and, even if he or she did, would have no way to rebut them ...". ***Stega v. New York Downtown Hosp.*, 2018 N.Y. Slip Op. 04687, CtApp 6-27-18**

INSURANCE LAW, FRAUD, CONTRACT LAW, SECURITIES.

IN THIS ACTION STEMMING FROM PLAINTIFF'S INSURING OF RESIDENTIAL MORTGAGE BACKED SECURITIES ISSUED BY DEFENDANT, PLAINTIFF WAS REQUIRED TO SHOW JUSTIFIABLE RELIANCE AND LOSS CAUSATION FOR ITS FRAUDULENT INDUCEMENT CAUSE OF ACTION, PLAINTIFF'S RECOVERY WAS LIMITED TO THAT DESCRIBED IN THE SOLE REMEDY PROVISION, AND PLAINTIFF WAS NOT ENTITLED TO ATTORNEY'S FEES.

The Court of Appeals, in a full-fledged opinion by Judge Garcia, over a partial dissent, determined certain aspects of defendant Countrywide's motion for summary judgment against plaintiff insurer, Ambac, stemming from residential mortgage backed securities issued by Countrywide, were properly granted. Ambac's argument that it need not demonstrate justifiable reliance or loss causation in support of its fraudulent inducement cause of action was rejected, as was Ambac's argument that it was entitled to relief over and above that specified in the sole remedy clause, as well as attorney's fees: "Public policy reasons support the justifiable reliance requirement. Where a 'sophisticated business person or entity . . . claims to have been taken in,' the justifiable reliance rule 'serves to rid the court of cases in which the claim of reliance is likely to be hypocritical' ... . Excusing a sophisticated party such as a monoline financial guaranty insurer from demonstrating justifiable reliance would not further the policy underlying this 'venerable rule.' Likewise, there is no merit to Ambac's argument that it need not show loss causation. Loss causation is a well-established requirement of a common law fraudulent inducement claim for damages. * * * Ambac's complaint fails to include breach of contract allegations beyond those that fall under the sole remedy provision ... , and accordingly Ambac is limited to the repurchase protocol as the potential remedy for those claims. * * * In New York, 'the prevailing litigant ordinarily cannot collect . . . attorneys' fees from its unsuccessful opponents. . . . Attorneys' fees are treated as incidents of litigation, rather than damages. . . . The exception is when an award is authorized by agreement between the parties or by statute or court rule' ... . [T]his Court [has] held that a court "should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise ...". ***Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 2018 N.Y. Slip Op. 04686, CtApp 6-27-18**

MEDICAID. ADMINISTRATIVE LAW.

OFFICE OF THE MEDICAID INSPECTOR GENERAL (OMIG) WAS ENTITLED TO THE FULL AMOUNT OF OVERPAYMENT MADE BY MEDICAID TO A METHADONE CLINIC, DESPITE THE INCLUSION OF A LOWER SETTLEMENT AMOUNT IN TWO NOTICES.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, reversing the Appellate Division, determined that the Office of the Medicaid Inspector General (OMIG) had properly notified the operator of a methadone clinic of the amount of overpayment by Medicaid that the OMIG was seeking. The OMIG had notified the clinic it was seeking about 1.8 million but was willing to settle for about 1.4 million. The clinic did not take any of the administrative steps or appeals that were available to it and did not agree to settle. The clinic argued that because two notices included only the 1.4 million settlement amount, the lower amount is what the clinic owed. The Court of Appeals rejected that argument: "The pertinent regulations provide that, if an audit report is challenged, '[a]n extrapolation based upon an audit utilizing a statistical sampling method certified as valid will be presumed, in the absence of expert testimony and evidence to the contrary, to be an accurate deter-

mination of the total overpayments made or the penalty to be imposed' ... . By contrast, the $1,460,914 figure, as explained in ... the cover letter, merely represented, with 95% accuracy, a lower bound on the true amount overpaid. The [final audit report] and cover letter sufficiently notified [the clinic] ... of OMIG's $1,857,401 overpayment assessment which OMIG would be entitled to withhold ...". ***West Midtown Mgt. Group, Inc. v. State of New York*, 2018 N.Y. Slip Op. 04666, CtApp 6-26-18**

MUNICIPAL LAW.

TOWN PROPERLY DISSOLVED THE EXISTING FIRE PROTECTION DISTRICT AND CREATED TWO NEW FIRE PROTECTION DISTRICTS.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, over a dissenting opinion, determined the Town of Champion had properly dissolved the existing fire protection district (FPD) and replaced it with two new FPD's. The dissent argued the existing FPD had not been properly dissolved, but rather was merely divided: "... [P]etitioners claim that respondent failed to accomplish and complete the dissolution of the Town of Champion Fire Protection District as required by the General Municipal Law. On the facts of this case, we conclude that respondent's actions are not affected by an error of law because it prepared, approved, and implemented a dissolution plan in compliance with the applicable statutory requirements, and lawfully created two legally distinct fire protection districts to deliver fire protection services to the Town of Champion residents, in accordance with Town Law section 170." ***Matter of Waite v. Town of Champion*, 2018 N.Y. Slip Op. 04688, CtApp 6-27-18**

FIRST DEPARTMENT

ATTORNEYS.

CONTINGENCY FEE RETAINER VIOLATED FEDERAL LAW AND WAS VOID, UNJUST ENRICHMENT THEORY NOT AVAILABLE ON EQUITABLE AND EVIDENTIARY GROUNDS.

The First Department determined plaintiff attorney's contingency fee retainer violated 22 U.S.C. § 1623(f) (which prohibits contingency fees in excess of 10% in actions governed by the federal statute) and was therefore unlawful and void under federal law. The unjust enrichment theory was not available to the plaintiff on equitable and evidentiary grounds: "Plaintiff is not entitled to any compensation for services rendered under the subject contingency fee retainer. It is undisputed that the terms of the retainer violated 22 USC § 1623(f), and, thus, the retainer was 'unlawful and void' under federal law. Under these circumstances, plaintiff's argument that the void retainer allowed him to pursue a quasi-contract theory of recovery is unavailing. In light of the illegality of the retainer, the court properly found that plaintiff had 'unclean hands' to foreclose any claim of unjust enrichment ... . Furthermore, plaintiff failed to plead a relationship with defendant that could have caused reliance or inducement on plaintiff's part sufficient to sustain an unjust enrichment claim ...". ***Sorenson v. Winston & Strawn, LLP*, 2018 N.Y. Slip Op. 04828, First Dept 6-28-18**

ATTORNEYS, LEGAL MALPRACTICE, NEGLIGENCE, EDUCATION-SCHOOL LAW.

MOTIONS TO DISMISS LEGAL MALPRACTICE CAUSES OF ACTION AGAINST ORIGINAL COUNSEL FOR FAILING TO FILE A NOTICE OF CLAIM AND AGAINST SUCCESSOR COUNSEL FOR FAILURE TO SEEK LEAVE TO FILE A LATE NOTICE OF CLAIM PROPERLY DENIED.

The First Department determined the motions to dismiss the legal malpractice causes of action against original (Neimark defendants) and successor counsel (Budin defendants) were properly denied. Original counsel did not file a notice of claim and successor counsel did not seek leave to file a late notice of claim: "The Budin defendants, as successor counsel, had an opportunity to protect plaintiff's rights by seeking discretionary leave, pursuant to General Municipal Law § 50-e(5), to serve a late notice of claim. Whether the Budin defendants would have prevailed on such motion will have to be determined by the trier of fact ... . We do not find this determination to be speculative given that Supreme Court will weigh established factors in exercising its General Municipal Law § 50-e(5) discretion ... . We agree with plaintiff's argument that the Neimark defendants' failure to serve a timely notice of claim, as of right, on the New York City Department of Education in the underlying personal injury action remains a potential proximate cause of his alleged damages. Plaintiff has a viable claim against the Neimark defendants despite the fact that the Budin defendants were substituted as counsel before the expiration of time to move to serve a late notice of claim. Thus, the Budin defendants' substitution can only be deemed a superseding and intervening act that severed any potential liability for legal malpractice on the part of the Neimark defendants if a determination is made that a motion for leave to serve a late notice of claim would have been successful in the underlying personal injury action ... ". ***Liporace v. Neimark & Neimark, LLP*, 2018 N.Y. Slip Op. 04668, First Dept 6-26-18**

CRIMINAL LAW, APPEALS.

DEFENDANT ABSCONDED DURING TRIAL, WAS INVOLUNTARILY RETURNED ON A WARRANT 20 YEARS LATER, AND FILED HIS APPELLATE BRIEF 30 YEARS AFTER CONVICTION, APPEAL DISMISSED FOR FAILURE TO PROSECUTE.

The First Department dismissed the appeal of the defendant who had absconded during trial, was subsequently returned on a warrant 20 years later, and filed his brief 30 years after conviction: "The People seek to dismiss defendant's appeal based on the 'failure of timely prosecution or perfection thereof,' pursuant to CPL 470.60(1). Where a defendant's appeal remained pending for a long time while he or she was a fugitive, whether the appeal should be permitted to proceed once the defendant is returned to custody is 'subject to the broad discretion of the Appellate Division'... . In exercising its discretion, the Appellate Division may consider factors including whether defendant's flight caused 'a significant interference with the operation of [the] appellate process'; whether defendant's absence 'so delayed the administration of justice that the People would be prejudiced in locating witnesses and presenting evidence at any retrial should the defendant be successful on appeal'; the length of the defendant's absence; whether the defendant 'voluntarily surrendered'; and the merits of the appeal ... . Applying these standards, we exercise our discretion to dismiss the appeal. There was an extensive delay — more than 27 years — from June 12, 1987, when counsel, on defendant's behalf, filed a notice of appeal, until September 2014, when defendant sought poor person relief and assignment of counsel, and defendant finally filed his appellate brief in June 2017, 30 years after his conviction. The delay was caused entirely by defendant's own conduct in absconding from trial, and remaining a fugitive for close to 20 years. Defendant did not surrender voluntarily; rather, he was returned involuntarily on the warrant after being arrested and convicted under another name in Massachusetts. An important transcript and the court file, each of which has a bearing on issues defendant seeks to raise on appeal, have been lost, and it is unreasonable to expect a court to preserve such materials forever. The delay of over 30 years would severely prejudice the People if required to retry the case after appeal. Thus, these factors demonstrate that dismissal is appropriate ... . We also note that this Court has fully complied with the requirement ... that this determination be made after appellate counsel has been assigned and permitted to review the record." ***People v. Perez*, 2018 N.Y. Slip Op. 04669, First Dept 6-25-18**

CRIMINAL LAW, EVIDENCE.

RECORDING OF DEFENDANT'S PHONE CALL MADE WHILE DETAINED PROPERLY SUBPOENAED BY THE PROSECUTION, MOTION COURT PROPERLY DENIED DEFENDANT'S MOTION TO PRECLUDE THE RECORDING.

The First Department determined the recording of a phone call made by defendant while he was detained was properly subpoenaed by the prosecution and defendant's motion to preclude the recording was properly denied: "The motion court correctly declined to preclude a recorded telephone call that defendant made while detained before trial. Defendant's challenge to the admissibility of the call, made primarily on Fourth Amendment grounds, is unavailing. Defendant impliedly consented to the recording of the call based on his receipt of multiple forms of notice that his calls would be recorded, and he was not entitled to separate notice that the calls might be subpoenaed by prosecutors... . Recordings of detainees' calls are made for security purposes, and not for the purpose of gathering evidence. However, like any other nonprivileged evidence that is possessed by a nonparty and is relevant to a litigation, it may be subject to a lawful subpoena. Accordingly, once defendant consented to the recording of his phone calls, and chose nevertheless to make a call containing a damaging statement, he had no reasonable expectation that the call would be immune from being subpoenaed by the prosecution." ***People v. Holmes*, 2018 N.Y. Slip Op. 04821, First Dept 6-28-18**

CRIMINAL LAW, EVIDENCE.

SEIZURE OF CREDIT CARDS FROM UNDER THE HOOD OF DEFENDANT'S CAR WAS NOT THE RESULT OF AN ILLEGAL SEARCH, POLICE WERE FOLLOWING A PROCEDURE TO SAFEGUARD THE CAR FROM THEFT.

The First Department determined the seizure of credit cards from under the hood of defendant's car was not the result of an illegal search. The police had validly impounded the car and were following a procedure which required that the car be disabled to thwart theft: "Police entry into the car and under its hood was reasonable because it was done in compliance with the Police Department Patrol Guide's safeguarding procedure, requiring police to disable all vehicles being safeguarded, in order to prevent theft. The limited entry into the car was done to protect the owner's property, and was not an attempt to search for incriminating evidence, as shown by the fact that, upon discovering the credit cards in the hood, the police did not search any other part of the vehicle ... . The officers' failure to perform this safeguarding procedure within the 48-hour period allowed by the Patrol Guide, after which a vehicle is to be moved from the precinct to the Property Clerk's storage facility, was a minor deviation from procedure, and did not undermine the reasonableness of the limited search, where the remainder of the procedure was followed and, as noted, there was no indication that the police were using the procedure as a pretext to search for incriminating evidence ...". ***People v. Keita*, 2018 N.Y. Slip Op. 04847, First Dept 6-28-18**

FAMILY LAW.

AN ADOPTIVE PARENT MAY BE EQUITABLY ESTOPPED FROM DENYING THAT HER FORMER SAME-SEX PARTNER, WITH WHOM SHE HAD AN AGREEMENT TO ADOPT A CHILD, HAS STANDING TO SEEK JOINT CUSTODY, MATTER REMITTED FOR PRESENTING EVIDENCE ON AND CONSIDERATION OF THAT ISSUE.

The First Department, in a full-fledged, comprehensive opinion by Justice Gische, determined the issue of whether KG, on equitable estoppel grounds, had standing to seek custody of a child adopted by her former same-sex partner, CH, required remittal because the issue was not considered by Supreme Court. The couple had an agreement to raise an adopted child. The First Department found ample support in the record for Supreme Court's factual finding that the agreement was terminated when the couple's relationship dissolved before the child was adopted. The fact that the agreement was deemed terminated did not, however, prohibit the court from considering whether CH was equitably estopped from denying that KG had standing to seek custody: "Although prior to Brooke [28 NY3d 1] the doctrine of equitable estoppel was not available to establish standing on behalf of nonbiological, nonadoptive parents, it has been relied upon by New York courts in resolving many family disputes involving children. … Recently, it was successfully invoked to prevent a sperm donor from asserting paternity to a child born in an intact marriage ... . A unifying characteristic of these cases is the protection of 'the status interests of a child in an already recognized and operative parent-child relationship' ... . * * * We recognize that not every loving relationship that a child has with an adult will confer standing under Domestic Relations Law § 70, no matter how close or committed. It requires a relationship that demonstrates the relevant adult's permanent, unequivocal, committed and responsible parental role in the child's life. The underpinning of an equitable estoppel inquiry is whether the actual relationship between the child and relevant adult rises to the level of parenthood. Anything less would interfere with the biological or adoptive parent's right to decide with whom his or her child may associate ... . Consent, whether express or implied, is an important consideration that bears upon the issue. It may be that in this case the issue of CH's consent becomes a predominant consideration in the ultimate determination of whether equitable estoppel can be established. We only hold that the record developed at trial does not permit us to make the full consideration necessary to finally determine the issue of equitable estoppel at this point. Because the record on equitable estoppel is incomplete, we remand this matter for further proceedings consistent with this decision." ***Matter of K.G. v. C.H.*, 2018 N.Y. Slip Op. 04683, First Dept 6-26-18**

FRAUD, CONTRACT LAW, LANDLORD-TENANT.

FRAUDULENT INDUCEMENT CAUSE OF ACTION MUST BE BASED UPON MATTERS COLLATERAL TO THE CONTRACT, NOT THE BREACH OF PROVISIONS OF THE CONTRACT ITSELF.

The First Department noted that contract provisions cannot be the bases for a fraudulent inducement cause of action. Only matters collateral to the contract will support fraudulent inducement: "Plaintiffs alleged six different bases for the fraudulent inducement claim. The alleged misrepresentations regarding assistance operating the preschool, the working fire alarm, and use of the stroller area, area near the kitchen, and upstairs gym, are all 'directly related to a specific provision of the contract,' not collateral to the lease, and cannot be used to sustain a fraudulent inducement claim ... . Plaintiffs properly pled a fraudulent inducement claim with respect to defendants materially misrepresenting that a 2004 letter of no objection was all plaintiffs would need, failing to disclose to plaintiffs that defendant intended to remove oversight over homeless individuals on the property, and fraudulently misrepresenting that homeless individuals were living on the property legally, when they were doing so illegally ... . Plaintiffs properly pled that, as a result of these statements, which plaintiffs allege were made with the intention to deceive them, they signed the lease and developed the property ...". ***Iken v. Bohemian Brethren Presbyt. Church*, 2018 N.Y. Slip Op. 04830, First Dept 6-28-18**

MUNICIPAL LAW, PERSONAL INJURY.

CITY HAD ASSIGNED A CROSSING GUARD TO THE CROSSWALK WHERE INFANT PLAINTIFF WAS STRUCK BY A SCHOOL BUS, THE GUARD HAD CALLED IN SICK THAT DAY, NO SPECIAL RELATIONSHIP BETWEEN THE CITY AND THE PLAINTIFFS, CITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined the defendant city's motion for summary judgment in this crosswalk pedestrian accident case should have been granted. The city had assigned a school crossing guard for the crosswalk where infant plaintiff was struck by a school bus, but the guard had called in sick that day. The First Department held the plaintiffs did not demonstrate a special relationship with the city: "In order to establish that the City voluntarily assumed a duty, plaintiffs have the burden of showing: (1) an assumption by the City's agents, through promises or action, of an affirmative duty to act on behalf of plaintiffs; (2) knowledge on the part of the City's agents that inaction could lead to harm; (3) some form of direct contact between the City's agents and plaintiffs; and (4) justifiable reliance by plaintiffs... . Here, the record shows that no special duty existed between the City and plaintiffs before the accident. There was no direct contact between the City's agents and plaintiffs, and the facts that the school crossing guard greeted infant plaintiffs and the children relied upon the crossing guard's instructions when the guard was at the intersection before the accident is insufficient to create a special duty." ***Ivan D. v. Little Richie Bus Serv. Inc.*, 2018 N.Y. Slip Op. 04823, First Dept 6-28-18**

PERSONAL INJURY, DAMAGES, EMPLOYMENT LAW, CIVIL PROCEDURE.

DEFENDANT GENERAL CONTRACTOR NOT ENTITLED TO DISMISSAL OF THE PUNITIVE DAMAGES CLAIM STEMMING FROM A HIGH RISE FIRE, QUESTION OF FACT WHETHER GENERAL CONTRACTOR LIABLE FOR PUNITIVE DAMAGES STEMMING FROM THE ACTS AND OMISSIONS OF ITS SAFETY ENGINEER, NEW MOTION PAPERS SUBMITTED BY PLAINTIFFS BEFORE DEFENDANT'S REPLY PAPERS WERE DUE PROPERLY CONSIDERED.

The First Department determined defendant general contractor was not entitled to dismissal of the punitive damages claim in connection with a high rise fire during demolition. 42 feet of the water standpipe had been removed, stairways were blocked and a no smoking policy was not enforced. One hundred firefighters were injured and two were killed fighting the blaze. The court found that the general contractor (Bovis) could be held liable for punitive damages based upon the acts and omissions of its safety manager, Melofchik. The court further found that the motion court properly considered plaintiffs' new motion papers which were submitted before Bovis's reply papers were due and which did not change the substance of the prior papers or prejudice Bovis: "Conduct justifying punitive damages 'must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton' ... . Although issues of fact exist as to whether Bovis's site safety manger, Jeff Melofchik, was present shortly after the subcontractor removed the 42-foot section of the pipe in November 2006, and whether Melofchik became aware at that point that the segment was part of the standpipe, it is undisputed that Melofchik did not test the standpipe system to ensure that it was operational during the 16-month period from March 2006 (when Bovis became the general contractor on the project) to August 2007 (when the fire occurred). ... An employer may be assessed punitive damages for an employee's conduct 'only where management has authorized, participated in, consented to or ratified the conduct giving rise to such damages, or deliberately retained the unfit servant,' such that it is complicit in that conduct ... . Complicity is evident when 'a superior officer in the course of employment orders, participates in, or ratifies outrageous conduct' ... . Although Melofchik was not a 'superior officer' and nothing suggests that Bovis management authorized or ratified Melofchik's conduct, an issue of fact exists as to whether management was aware of Melofchik's incompetence but still 'deliberately retained the unfit servant ...'". ***Borst v. Lower Manhattan Dev. Corp.*, 2018 N.Y. Slip Op. 04679, First Dept 6-26-18**

RETIREMENT AND SOCIAL SECURITY LAW, MUNICIPAL LAW.

TIER 3 POLICE OFFICERS NOT ENTITLED TO SERVICE CREDIT FOR PERIODS OF UNPAID CHILD CARE LEAVE.

The First Department, reversing Supreme Court, determined tier 3 police officers were not entitled to service credit for periods of unpaid child care leave: "In recognizing that Administrative Code § 13-107(k) did not apply to tier 3 correction officers and that RSSL [Retirement and Social Security Law] § 513 had to be amended to define a service credit for unpaid child care leave, the legislature also evinced its understanding that extending the benefit to tier 3 police officers would require another amendment to RSSL § 513. However, it declined to extend the benefit to tier 3 police officers. In 2012, the legislature amended Administrative Code § 13-218(h), not to make the unpaid child care leave service credit benefit available to tier 3 police officers but 'to make new NYC Tier 3 uniformed correction members ineligible to obtain service credit for child care leave in order to equate their benefits with Tier 3 police/fire benefits' ... . This legislation is consistent with the legislative intent in the creation of tier 3, 'a comprehensive retirement program designed to provid[e] uniform benefits for all public employees and eliminat[e] the costly special treatment of selected groups . . . inherent in the previous program' ...". ***Lynch v. City of New York*, 2018 N.Y. Slip Op. 04826, First Dept 6-28-18**

TAX LAW. CONSTITUTIONAL LAW.

NEW YORK'S TAX SCHEME DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BY DOUBLE TAXATION OF INTANGIBLE INCOME RE PLAINTIFFS WHO ARE STATUTORY RESIDENTS OF NEW YORK AND DOMICILED IN CONNECTICUT.

The First Department determined that New York's tax scheme did not violate the dormant Commerce Clause. Plaintiffs argued New York permitted double taxation of their intangible income by both New York, where they were "statutory residents," and Connecticut, where they domiciled. The First Department rejected plaintiffs' contentions "that this taxation burdens interstate commerce, particularly by inhibiting their free movement into New York State to work and their ability to buy or lease a home in New York due to the risk of being deemed a resident and subject to double taxation of intangible income... [and] that New York's tax scheme fails the 'internal consistency' test, which requires fair apportionment of income between states and nondiscrimination against interstate commerce ...". The First Department found that the controlling New York case, *Matter of Tamagni v. Tax Appeals Trib. of State of N.Y.* (91 NY2d 530 [1998]...), had not been abrogated by the US Supreme Court's decision in *Comptroller of the Treasury of Maryland v. Wynne* (___ US ___, 135 S Ct 1787 [2015]): "... [T]he income at issue ... in the instant case ... was not 'out-of-state income' but intangible investment income, which 'has no identifiable situs,' 'cannot be traced to any jurisdiction outside New York,' and is 'subject to taxation by New York as the State of residence' ...". ***Edelman v. New York State Dept. of Taxation & Fin.*, 2018 N.Y. Slip Op. 04672, First Dept (6-26-18)**

SECOND DEPARTMENT

ARBITRATION, CONTRACT LAW, FRAUD.

PLAINTIFFS' CONCLUSORY ALLEGATION OF FRAUD DID NOT DEFEAT THE AGREEMENT TO ARBITRATE.

The Second Department determined the arbitration clause of the contract between plaintiffs and defendant was enforceable, despite the plaintiffs' allegation of fraud in connection with the contract: "A party may not be compelled to arbitrate a dispute unless there is evidence which affirmatively establishes that the parties clearly, explicitly, and unequivocally agreed to arbitrate the dispute… . Under both federal and New York law, unless it can be established that there was a grand scheme to defraud which permeated the entire agreement, including the arbitration provision, a broadly worded arbitration provision will be deemed separate from the substantive contractual provisions, and the agreement to arbitrate may be valid despite the underlying allegation of fraud … . The broad arbitration clause in the 2014 agreement, together with the other provisions of the 2014 agreement, demonstrate that the plaintiffs explicitly and unequivocally agreed to arbitrate the matters that are the subject of this action. In addition, the plaintiffs' bare conclusory assertions of fraud failed to establish that any alleged fraud was part of a grand scheme that permeated the entire agreement, including the arbitration clause …". ***Zafar v. Fast Track Leasing, LLC*, 2018 N.Y. Slip Op. 04774, Second Dept 6-27-18**

CIVIL PROCEDURE.

WHERE THERE IS NO PREJUDICE TO A DEFENDANT, PLAINTIFF'S MOTION FOR A VOLUNTARY DISCONTINUANCE WITHOUT PREJUDICE SHOULD BE GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiff's motion for a voluntary discontinuance without prejudice should have been granted: "CPLR 3217(b) permits a voluntary discontinuance of a claim by court order 'upon terms and conditions, as the court deems proper' (CPLR 3217[b]...). In general, absent a showing of special circumstances, including prejudice to a substantial right of the defendant or other improper consequences, a motion for a voluntary discontinuance should be granted without prejudice ... . Here, there was no evidence that the defendant would be prejudiced by a discontinuance without prejudice ...". ***Kondaur Capital Corp. v. Reilly*, 2018 N.Y. Slip Op. 04707, Second Dept 6-27-18**

COURT OF CLAIMS, MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

FAILURE TO PLEAD A JURISDICTIONAL DEFECT AS A DEFENSE WAIVED THE DEFECT; WITHOUT EXPERT OPINION EVIDENCE, THE MEDICAL MALPRACTICE CAUSE OF ACTION WAS NOT PROVED.

The Second Department noted that the defendant's (NYS's) failure to plead a jurisdictional defect as a defense (defendant had not timely filed and served notice of claim) waived the defect. The claimant did not present expert evidence to support the medical malpractice claim and therefore did not demonstrate that any alleged deviation from the accepted standard of care was the proximate case of his injury. The claimant alleged a negligent failure to diagnose a urinary tract infection (UTI): "'To establish a prima facie case of medical malpractice, a plaintiff must set forth (1) the standard of care in the locality where the treatment occurred, (2) that the defendant breached that standard of care, and (3) that the breach was the proximate cause of his or her injuries'… . Further, where, as here, the subject matter (UTIs) and treatment thereof are 'not within the ordinary experience and knowledge of laypersons'… , the claimant must establish a prima facie case of medical malpractice through expert medical opinion …". ***Whitfield v. State of New York*, 2018 N.Y. Slip Op. 04773, Second Dept 6-27-18**

CRIMINAL LAW.

FAILURE TO PROVIDE NOTICE TO COUNSEL OF THE CONTENTS OF JURY NOTES AND FAILURE TO MAKE A RECORD DEMONSTRATING MEANINGFUL NOTICE REQUIRED REVERSAL AND A NEW TRIAL.

The Second Department reversed defendant's convictions and ordered a new trial because the trial judge failed to comply with the strict requirements surrounding providing notice to counsel of the contents of notes sent out by the jury: "Here, on the morning of the first day of deliberations, the Supreme Court received three notes from the jury requesting, among other things, 'Judge's reading of charges of 1st degree & the 4 things we must prove to reach a guilty [verdict] . . . Same thing for 2nd Degree . . . Definition of unreasonable doubt.' The jury also requested the transcript of the testifying accomplice's testimony. The court did not read the contents of these notes into the record, and there is no indication in the record that the entire contents of the notes otherwise were shared with counsel. Rather, after receiving the notes, the court explained its intended responses to defense counsel and the prosecutor, and then, in the presence of the jury, provided a readback of the requested charges. * * * Meaningful notice of the content of a jury note 'means notice of the actual specific content of the jurors' request' (People v. O'Rama, 78 NY2d at 277...). Where the record fails to establish that the trial court provided counsel with 'meaningful notice of the precise content of a substantive juror inquiry, a mode of proceedings error occurs, and reversal is therefore required even in the absence of an objection' ... . Because the record here fails to establish that the Supreme Court provided counsel with meaningful notice of the precise content of the subject jury notes, we must reverse the defendant's convictions and order a new trial." ***People v. Gedeon*, 2018 N.Y. Slip Op. 04751, Second Dept 6-27-18**

CRIMINAL LAW, APPEALS.

TAXI LICENSES ARE NOT PROPERTY WITHIN THE MEANING OF THE GRAND LARCENY STATUTE, ALTHOUGH THE LEGAL INSUFFICIENCY ARGUMENT WAS NOT PRESERVED, DEFENDANT'S GRAND LARCENY CONVICTION WAS VACATED IN THE INTEREST OF JUSTICE.

The Second Department vacated defendant's grand larceny conviction in the interest of justice because the licenses from the NYC Taxi and Limousine Commission (TLC) do not constitute "property" within the meaning of the grand larceny statute: "The defendant's conviction of grand larceny in the third degree (Penal Law § 155.35[1]) was based on the alleged theft of licenses from the TLC. 'A person is guilty of grand larceny in the third degree when he or she steals property and . . . when the value of the property exceeds three thousand dollars' ... .. The licenses from the TLC are not considered 'property' within the meaning of the statute ... . Accordingly, although the defendant's legal insufficiency claim is unpreserved for appellate review, we vacate his conviction of grand larceny in the third degree and the sentence imposed thereon, and dismiss that count of the indictment as a matter of discretion in the interest of justice ...". ***People v. Ishtiaq*, 2018 N.Y. Slip Op. 04752,, Second Dept 6-27-18**

CRIMINAL LAW, APPEALS.

DEFENDANT'S WAIVER OF HIS RIGHT TO APPEAL DEEMED INVALID, CRITERIA EXPLAINED.

The Second Department determined defendant's waiver of his right to appeal was invalid: "The Supreme Court did not provide the defendant with an explanation of the nature of the right to appeal or explain the consequences of waiving that right. In addition, nothing in the record shows that the defendant understood the distinction between the right to appeal and other trial rights forfeited incident to his plea of guilty... . While the defendant was represented by counsel during the plea proceedings, counsel did not participate during the proceedings other than to acknowledge to the court that he was the defendant's attorney, and counsel did not sign the defendant's written appeal waiver form. Furthermore, although the record on appeal reflects that the defendant signed the written appeal waiver form, a written waiver 'is not a complete substitute for an on-the-record explanation of the nature of the right to appeal' ... . The court's colloquy amounted to nothing more than a simple confirmation that the defendant signed the waiver and a conclusory statement that the defendant understood the waiver or was executing it knowingly and voluntarily ... . Under the circumstances here, we conclude that the defendant did not knowingly, voluntarily, and intelligently waive his right to appeal ...". ***People v. Latham*, 2018 N.Y. Slip Op. 04753, Second Dept 6-27-18**

CRIMINAL LAW, APPEALS, EVIDENCE.

CHILD PORNOGRAPHY CONVICTIONS REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE, DEFENDANT DID NOT WAIVE HIS RIGHT TO CHALLENGE THE VOLUNTARINESS OF THE STATEMENT AT TRIAL BY WAIVING A PRE-TRIAL HUNTLEY HEARING.

The Second Department, reversing defendant's child pornography convictions and dismissing the indictment, determined the convictions were against the weight of the evidence. The defendant, who speaks Spanish, gave a written statement in English acknowledging he had downloaded child pornography. However, it was revealed at trial that the police provided information that was in the statement and made changes to the statement without defendant's permission. The defendant had waived a pre-trial Huntley hearing on the voluntariness of the statement, informing the judge he intended to challenge the voluntariness of the statement at trial. The judge, in this bench trial, erroneously ruled defendant had waived his right to challenge the statement a trial. The defendant testified that he did not download the child pornography and that he gave the statement to protect a family member. A family member testified and admitted "unintentionally" downloading the files. Defendant produced evidence he was at work when at least two of the files were downloaded: "The convictions were based on the defendant's alleged acts of downloading and/or sharing 15 video files and 2 still images, on multiple dates. The People introduced into evidence, inter alia, a written statement in English that the defendant made to law enforcement officials. In that statement, the defendant acknowledged having downloaded approximately 5 videos containing child pornography; he did not specify the names or descriptions of the materials, or the dates of the actions. The defendant's written statement included the name of the program used to download contraband materials to this computer, as well as a term allegedly used in titles of child pornography files, but a police investigator acknowledged that he had supplied those terms. Apart from the defendant's statement to the police, the prosecution adduced no other evidence showing that it was the defendant who had downloaded and/or shared the subject materials, consisting of 15 video files and 2 still photographs, on specific dates and times. … Although we ordinarily accord great deference to the factfinder's opportunity to view the witnesses, hear the testimony, and observe demeanor…, under the circumstances of this case, we give no deference to the County Court's assessment of the defendant's credibility on the issue of the voluntariness of his statements to law enforcement officials, as the court erroneously precluded the defendant from contesting the voluntariness of the written statement during the trial, contrary to his statutory and constitutional right to do so …". ***People v. Vasquez*, 2018 N.Y. Slip Op. 04761, Second Dept 6-27-18**

ENVIRONMENTAL LAW, MUNICIPAL LAW.

LOCAL LAW REQUIRING A PERMIT FOR THE TRANSPORT OF WASTE WITHIN THE COUNTY WAS NOT PREEMPTED BY STATE LAW (WHICH ALSO REQUIRED A PERMIT) AND DID NOT VIOLATE THE COMMERCE CLAUSE, PETITIONER PROPERLY FINED FOR FAILURE TO OBTAIN A COUNTY PERMIT.

The Second Department determined that the Westchester County Solid Waste Commission properly found that petitioner had not obtained a permit to allow the transport of waste within Westchester County and imposed a $15,000 fine. Petitioner had obtained a permit from the state Department of Environmental Conservation (DEC) and argued that the Westchester County law was preempted by the state law and violated the Commerce Clause. The Second Department rejected those arguments: " 'The constitutional home rule provision confers broad police power upon local government relating to the welfare of its citizens'... . In instances where the State has demonstrated its intent to preempt an entire field and preclude any further local regulation, a local law that regulates the same subject matter is considered inconsistent and will not be given effect. 'It is . . . well settled that, if a town or other local government is otherwise authorized to legislate, it is not forbidden to do so unless the State, expressly or impliedly, has evinced an unmistakable desire to avoid the possibility that the local legislation will not be on all fours with that of the State' ... . The legislature's intent to preempt a particular area can be inferred from a declaration of policy or from a comprehensive and detailed scheme in a particular area… . However, the fact that State and local laws touch upon the same area is insufficient to support a determination that the State law has preempted the entire field of regulation in a given area ... . In Monroe-Livingston Sanitary Landfill v. Town of Caledonia (51 NY2d 679, 683-684), the Court of Appeals held that the State had not preempted the field of waste management through the solid waste disposal provisions that then existed in the Environmental Conservation Law. Eight years after the decision in Monroe-Livingston, the Legislature added the Solid Waste Management Act of 1988 (hereinafter the Act) to the Environmental Conservation Law. Had the Legislature intended to preempt the local regulation of solid waste management, it could have expressly said so in the Act." ***Matter of MVM Constr., LLC v. Westchester County Solid Waste Commn.*, 2018 N.Y. Slip Op. 04731, Second Dept 6-27-18**

FAMILY LAW, CIVIL PROCEDURE.

COURT ATTORNEY REFEREE WAS NOT AUTHORIZED TO DETERMINE A CONTESTED FAMILY OFFENSE PETITION OR CUSTODY AND VISITATION ISSUES.

The Second Department determined the court attorney referee was not authorized to determine a contested family offense petition or custody and visitation issues: "A referee derives authority from an order of reference by the court (see CPLR 4311, 4317...). Here, as correctly asserted by the mother, the order of reference did not authorize the Court Attorney Referee to hear and report or to hear and determine a contested family offense petition. The Court Attorney Referee therefore lacked jurisdiction to dismiss the mother's family offense petition in this instance... . Accordingly, the family offense matter must be remitted to a judge of the Family Court for a new determination. With respect to the determination of custody, the order of reference recited that, upon the parties' stipulation, a court attorney referee is authorized to hear and determine the parties' rights to custody of and visitation with the child, including the determination of motions and temporary orders of custody. Upon our review of the record, however, we find no indication that the parties stipulated to the reference in the manner prescribed by CPLR 2104, and, absent such stipulation, the Court Attorney Referee had the power only to hear and report her findings ... . We further find that the mother did not consent to the reference merely by participating in the proceeding without expressing her desire to have the matter tried before a judge ... . The order of reference must therefore be deemed an order to hear and report. Thus, the Court Attorney Referee had no jurisdiction to determine, but only to hear and report, with respect to the parties' respective rights of custody and visitation ...". ***Matter of Rose v. Simon*, 2018 N.Y. Slip Op. 04736, Second Dept 6-27-18**

PERSONAL INJURY, MUNICIPAL LAW.

UTILITY BOX RECESSED IN CITY SIDEWALK WAS OPEN AND OBVIOUS AND NOT INHERENTLY DANGEROUS, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE PROPERLY GRANTED.

The Second Department determined the utility box recessed into a city sidewalk was open and obvious and was not inherently dangerous. Defendants were therefore entitled to summary judgment in this slip and fall case: "There is 'no duty to protect against an open and obvious condition provided that, as a matter of law, the condition is not inherently dangerous' ... . 'While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion, and may do so on the basis of clear and undisputed evidence' ... . 'Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances' ... .Similarly, the determination of whether 'a condition is not inherently dangerous . . . depends on the totality of the specific facts of each case'... . Here, contrary to the plaintiff's contention, each of the defendants established, prima facie, that the complained-of condition 'was open and obvious, as it was not only readily observable by those employing the reasonable use of their senses, but was known to [the decedent] prior to the accident and, as a matter of law, was not inherently dangerous' ...". ***Graffino v. City of New York*, 2018 N.Y. Slip Op. 04702, Second Dept 6-27-18**

PERSONAL INJURY, MUNICIPAL LAW, CIVIL PROCEDURE.

SUMMARY JUDGMENT SHOULD NOT HAVE BEEN AWARDED TO PLAINTIFF IN THIS SIDEWALK SLIP AND FALL CASE ON A THEORY RAISED IN REPLY PAPERS, CITY DEFENDANTS DID NOT DEMONSTRATE THEY HAD NO NOTICE OF THE CONDITION OR DID NOT CREATE THE CONDITION, EVIDENCE SUBMITTED BY THE CITY DEFENDANTS IN REPLY PAPERS COULD NOT BE CONSIDERED

The Second Department, modifying Supreme Court, determined (1) the court should not have searched the record and awarded summary judgment to the plaintiff in this sidewalk slip and fall case based upon a theory raised for the first time in reply papers, (2) the city defendants did not demonstrate that they did not have written notice of the condition or that they did not create the condition, and (3) evidence submitted by the city defendants for the first time in reply papers could not be considered with respect to a prima facie showing of entitlement to summary judgment: "The plaintiff alleged, for the first time in opposition to the motion and cross motion for summary judgment, that the defendants were strictly liable under an absolute nuisance theory. However, a plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting, for the first time in opposition to the motion, a new theory of liability that was not pleaded in the complaint or bill of particulars … . … [T]he City defendants' … 'failed to demonstrate their prima facie entitlement to judgment as a matter of law on the ground that they had no prior written notice as they failed to submit proof of such lack of notice from the proper municipal official'…, or that they did not create the alleged dangerous condition through an affirmative act of negligence… . The evidence submitted by the City defendants for the first time in their reply papers cannot be considered for the purpose of determining whether they met their prima facie burden …". ***Troia v. City of New York*, 2018 N.Y. Slip Op. 04770, Second Dept 6-27-18**

THIRD DEPARTMENT

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DEFENDANT DID NOT HAVE NOTICE OF OR A CHANCE TO OBJECT TO A 20 POINT ASSESSMENT MADE BY THE JUDGE SUA SPONTE, NEW HEARING ORDERED.

The Third Department, ordering a new SORA hearing, determined defendant did not have notice of or an opportunity to object to a 20 point assessment made by the judge sua sponte: " 'A defendant has both a statutory and constitutional right to notice of points sought to be assigned to him or her so as to be afforded a meaningful opportunity to respond to that assessment' … . To that end, SORA requires the People to provide defendant with written notice, at least 10 days prior to the hearing, if they intend to seek a presumptive risk level classification that differs from the Board's recommendation along with their reasons for doing so… . Similarly, 'a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to be respond' …". ***People v. Maus*, 2018 N.Y. Slip Op. 04796, Third Dept 6-28-18**

PERSONAL INJURY.

DEFECT IN ROADWAY WHICH ALLEGEDLY CAUSED PLAINTIFF TO FALL OFF HER BICYCLE OVER THE HANDLEBARS WAS PROPERLY DEEMED TRIVIAL AND NOT ACTIONABLE.

The Third Department determined the road defect which allegedly caused plaintiff to fall off her bicycle over the handlebars was properly found to be trivial and summary judgment was properly awarded to the defendant: "Although a landowner has a duty to maintain its property in a reasonably safe condition…, trivial defects are not actionable… . '[T]here is no predetermined height differential that renders a defect trivial'… . Instead, courts must consider 'the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury'… . Thus, 'a small difference in height or other physically insignificant defect is actionable if its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it unreasonably imperil[s] the safety of a pedestrian' … The record includes photographs that confirm the size and location of the defect, relative to the roadway and crosswalk, and evinces that plaintiff previously traversed this area on bicycle several times prior to the accident, without incident. The photographs also reveal that the crosswalk against which the defect is located, made of bricks and demarcated from the asphalt with a granite boarder, would be visible to a bicyclist well before his or her tires made contact with the defect…". ***Gami v. Cornell Univ.*, 2018 N.Y. Slip Op. 04812, Third Dept 6-28-18**

RETIREMENT AND SOCIAL SECURITY LAW.

POLICE OFFICER'S INJURY WHEN HELPING LIFT A HEAVY DECEASED PERSON WAS NOT THE RESULT OF AN ACCIDENT WITHIN THE MEANING OF THE RETIREMENT AND SOCIAL SECURITY LAW.

The Third Department, over a partial dissent, determined the injury to petitioner police officer's hand was not caused by an "accident" within the meaning of the Retirement and Social Security Law. The injury occurred when officer was helping to lift a heavy deceased person: "With regard to accidental disability retirement benefits, '[p]etitioner bears the burden of demonstrating that his disability arose out of an accident as defined by the Retirement and Social Security Law, and respondent's determination in that regard will be upheld if supported by substantial evidence'… . To qualify as an accident, the underlying incident 'must be a sudden, fortuitous, out of the ordinary and unexpected event that does not result from an activity undertaken in the performance of regular or routine employment duties'… . '[A]n injury which occurs without an unexpected event as the result of activity undertaken in the performance of ordinary employment duties, considered in view of the particular employment in question, is not an accidental injury'… . Here, petitioner responded to a call and sustained an injury to his fingers while assisting the medical examiner in carrying a large, deceased male to a transport vehicle. Petitioner acknowledged that this work was within the scope of his job duties, regardless of the heft of the body to be carried." ***Matter of Iovino v. DiNapoli*, 2018 N.Y. Slip Op. 04814, Third Dept 6-28-18**

WORKERS' COMPENSATION LAW.

NEW LAW THAT WENT INTO EFFECT WHEN THE CLAIM WAS BEING RECONSIDERED SHOULD HAVE BEEN APPLIED, CLAIMS MAY NO LONGER BE DENIED ON THE FACTUAL FINDING THAT THE STRESS EXPERIENCED BY CLAIMANT IS NOT GREATER THAN THAT WHICH USUALLY OCCURS IN THE WORK ENVIRONMENT, POLICE OFFICER CLAIMED ANXIETY AND PHOBIAS RELATED TO THE SIGHT OF BLOOD.

The Third Department, reversing the Workers' Compensation Board, determined that a new provision of the Workers' Compensation Law, which directly related to claimant police officer's disability claim (anxiety and phobias related to the sight of blood), was intended to take effect immediately and should have been applied by the Board. The Board had denied the claim finding that the sight of blood is a usual occurrence in police work: "In September 2016, claimant applied for reconsideration and/or full Board review, which the carrier opposed. On April 10, 2017, while that application was pending, Workers' Compensation Law § 10 (3) (b) was materially amended, effective immediately. The amendment provided that, as relevant here, '[w]here a police officer . . . files a claim for mental injury premised upon extraordinary work-related stress incurred in a work-related emergency, the [B]oard may not disallow the claim, upon a factual finding that the stress was not greater than that which usually occurs in the normal work environment' … . … In our view, by directing that the apparent substantive change in the law was to take effect immediately, 'the Legislature clearly indicated that th[is] amendment[is] to be viewed as remedial, designed to correct imperfections in prior law, by giving relief to [an] aggrieved party'… . Moreover, as a general rule, 'the law as it exists at the time a decision is rendered on appeal is controlling'… . Consequently, we find that, under these circumstances, the Board was bound to apply the law as it existed at the time it was considering and determining the reconsideration and/or review application, notwithstanding the parties' apparent failure to make supplemental arguments in submissions to the Board addressing this change in the law." ***Matter of McMillan v. Town of New Castle*, 2018 N.Y. Slip Op. 04801, Third Dept 6-28-18**

FOURTH DEPARTMENT

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW.

ELIMINATION OF A POSITION WAS ALLEGED TO CONSTITUTE AN IMPROPER DISMISSAL UNDER THE GUISE OF RETRENCHMENT, ALTHOUGH RETRENCHMENT IS NOT ARBITRABLE UNDER THE TERMS OF THE COLLECTIVE BARGAINING AGREEMENT, THE CLAIM THAT THE EMPLOYEE WAS IMPROPERLY DISMISSED UNDER THE GUISE OF RETRENCHMENT WAS DEEMED ARBITRABLE.

The Fourth Department, reversing Supreme Court, determined the petition seeking a permanent stay of arbitration of an employment dispute should not have been granted. The Fourth Department found that the dispute concerned whether an employee of a community college was improperly dismissed (by eliminating the position). The matter was deemed arbitrable based upon the language of the collective bargaining agreement (CBA) and the grievance. Under the CBA, if a position is "retrenched" the action is not arbitrable. Although the term "retrenched" was used in eliminating the position, the grievance alleged the employee was improperly dismissed under the guise of "retrenchment:" "We ... agree with respondent that the grievance, as properly construed, should be submitted to arbitration. The CBA defines 'grievance,' in relevant part, as 'a claimed violation, misinterpretation or inequitable application of this agreement, except as excluded herein.' Pursuant to the CBA, a grievance may be submitted to arbitration if it remains unresolved after the second stage of the grievance

procedure. Although the CBA specifies several exclusions from the definition of a 'grievance' that are therefore not subject to arbitration, including a decision by petitioner to retrench a position, all other grievances remain subject to arbitration. Contrary to the court's determination, we conclude that the arbitration clause at issue here is broad, despite the existence of such exclusions ... . Where, as here, 'there is a broad arbitration clause and a reasonable relationship between the subject matter of the dispute and the general subject matter of the parties' [CBA], the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the [CBA], and whether the subject matter of the dispute fits within them'... . The grievance at issue concerns whether the member was improperly dismissed without just cause under the guise of retrenchment, and a reasonable relationship exists between the subject matter of the grievance and the general subject matter of the CBA ... . Thus, 'it is for the arbitrator to determine whether the subject matter of the dispute falls within the scope of the arbitration provisions of the [CBA]' ...". ***Matter of Onondaga Community Coll. (Professional Adm'rs of Onondaga Community Coll. Fedn. of Teachers & Adm'rs)*, 2018 N.Y. Slip Op. 04878, Fourth Dept 6-29-18**

CRIMINAL LAW.

JUROR MISCONDUCT, INCLUDING COMMUNICATIONS WITH THIRD PARTIES AND WEB BROWSING IN VIOLATION OF THE JUDGE'S ADMONITIONS, WARRANTED A NEW TRIAL IN THIS MURDER CASE.

The Fourth Department, over a two-justice dissent, determined that juror misconduct warranted a new trial in this murder case: "We begin by noting that, at the hearing on the CPL 330.30 motion, defendant established that during the trial juror number 12 engaged in text messaging with third parties about the trial. Indeed, after being selected to serve on the jury, juror number 12 received a text message from her father that stated: 'Make sure he's guilty!' During the trial, juror number 12 received a text message from a friend asking if she had seen the 'scary person' yet. Juror number 12 responded: 'I've seen him since day 1.' ... * * * Forensic examination of her cell phone revealed that juror number 12 had selectively deleted scores of messages or parts thereof and that she had deleted her entire web browsing history. At the hearing, juror number 12 was unable to provide any explanation for why she had done that. * * * We observe that, had this juror's misconduct been discovered during voir dire or during the trial, rather than after the verdict, the weight of authority under CPL 270.35 would have compelled her discharge on the ground that she was grossly unqualified and/or had engaged in misconduct of a substantial nature ... . Here, due to juror number 12's flagrant failure to follow the court's instructions and her concealment of that substantial misconduct, defendant, through no fault of his own, was denied the opportunity to seek her discharge during trial on the ground that she was grossly unqualified and/or had engaged in substantial misconduct." ***People v. Neulander*, 2018 N.Y. Slip Op. 04925, Fourth Dept 6-29-18**

CRIMINAL LAW.

NUMEROUS FAILURES BY THE JUDGE TO FOLLOW THE PROTOCOL FOR BATSON CHALLENGES TO THE PROSECUTION'S ELIMINATION OF JURORS REQUIRED A NEW TRIAL, THE FOURTH DEPARTMENT NOTED THAT BATSON CHALLENGES MAY BE BASED UPON COLOR AS OPPOSED TO ETHNICITY, AND THE ETHNICITY OF THE DEFENDANT IS NOT A RELEVANT FACTOR IN A BATSON CHALLENGE.

The Fourth Department, reversing County Court, determined that the County Court judge did not follow the required steps and procedures for addressing defendant's Batson challenges to the prosecution's exercise of peremptory challenges. In one instance the judge indicated the prospective juror was "Carribean," not "African American." The Fourth Department noted that a Batson challenge may be based on color alone, as opposed to ethnicity. The County Court judge questioned another Batson challenge to an African-American prospective juror on the ground that the defendant was Caucasian. The Fourth Department pointed out that the race or ethnicity of a defendant is not relevant. Among the many problems cited by the Fourth Department: "When the prosecutor struck prospective juror number 13, defense counsel raised a Batson claim, asserting that the prospective juror had never been involved in the criminal justice system in any way and that she unequivocally stated that she could be fair and impartial. In response, the prosecutor explained that he struck prospective juror number 13 because she was in nursing school and stated on her juror questionnaire that she was going to school because she wanted to help people, which in the prosecutor's view indicated that she may be sympathetic to defendant. Instead of determining whether the race-neutral explanation offered by the prosecutor was pretextual, the court engaged defense counsel in an extended colloquy during which the court asked how defendant, as a Caucasian, could assert a Batson claim with respect to an African-American prospective juror. Defense counsel answered, correctly, that a defendant need not be the same race as the stricken prospective juror ... … We ... conclude that, based on the court's wholesale failure to comply with the Batson protocol with respect to multiple African-American prospective jurors who were the subject of peremptory challenges by the People, defendant is entitled to a new trial ...". ***People v. Pescara*, 2018 N.Y. Slip Op. 04927, Fourth Dept 6-29-18**

CRIMINAL LAW.

THE PROPONENT OF A MISSING WITNESS CHARGE MUST FIRST DEMONSTRATE THE TESTIMONY OF THE MISSING WITNESS WOULD NOT MERELY BE CUMULATIVE.

The Fourth Department, over a two-justice dissent, determined that the proponent of a missing witness jury instruction must first demonstrate the testimony of the witness would not have been cumulative: "In the First, Second, and Third Departments, it is well established that the proponent of such a charge has the 'initial burden of proving,' inter alia, that the missing witness has 'noncumulative' testimony to offer on behalf of the opposing party ... . That rule has been explicitly and consistently reiterated by our sister appellate courts ... . We have never held otherwise. * * * Here, defendant—as the proponent of the missing witness charge—failed to meet his initial burden of proving, prima facie, that the missing witness had noncumulative testimony to offer on the People's behalf... . Neither defendant nor the dissent claim otherwise; instead, they argue only that defendant had no such initial burden and, as discussed above, we reject that view of the law. Further, although our holding does not rest on this point, we note our disagreement with the dissent that defendant met his initial burden of demonstrating that the uncalled witness would have testified favorably to the People." ***People v. Smith*, 2018 N.Y. Slip Op. 04863, Fourth Dept 6-29-18**

CRIMINAL LAW, APPEALS, EVIDENCE.

INSUFFICIENT EVIDENCE DEFENDANT INTENDED TO DESTROY A MOTORCYCLE WHEN SHE STARTED A FIRE IN A GARAGE, CRIMINAL MISCHIEF CONVICTION REVERSED UNDER A WEIGHT OF THE EVIDENCE ANALYSIS.

The Fourth Department, reversing defendant's conviction under a weight of the evidence analysis, determined there was insufficient proof that defendant intended to destroy a motorcycle that was in the garage in which she started a fire. She testified she started the fire because she was angry with her husband and she expected he would put the fire out. The fire was started in an area of the garage which was not near the motorcycle: "We agree with defendant, however, that the verdict finding her guilty of criminal mischief in the third degree is against the weight of the evidence. County Court instructed the jurors that defendant was guilty of that crime if they found that she intentionally 'damage[d] property of another person in an amount exceeding $250,' specifically 'a Suzuki motorcycle.' The People presented evidence that a motorcycle belonging to defendant's husband was completely destroyed by the fire that defendant allegedly set, a loss valued at over $4,000. No evidence was offered of the value of any damage caused by defendant prior to the fire, and the only evidence of how and why the fire started came from defendant's statements to law enforcement, wherein she stated that she did not know why she started the fire, but that she was angry at her husband with whom she had been fighting and thought that he would return to the garage to put out the fire. Moreover, defendant told law enforcement that she started the fire by igniting a fleece blanket in a part of the garage different from where the motorcycle was located. Defendant's statements are consistent with the testimony of the fire protection inspector regarding the origin of the fire and are not contradicted by any other evidence in the record. Thus, viewing the evidence in light of the elements of the crime of criminal mischief in the third degree as charged to the jury ..., we conclude that the jury's determination that defendant set the fire with the intention of damaging her husband's motorcycle is against the weight of the evidence ...". ***People v. Colbert*, 2018 N.Y. Slip Op. 04879, Fourth Dept 6-29-18**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL DID NOT OBJECT TO THE COURT'S FAILURE TO INSTRUCT THE JURY DEFENDANT'S PRIOR CONVICTIONS COULD NOT BE CONSIDERED AS EVIDENCE OF GUILT OF THE OFFENSE ON TRIAL, DEFENSE COUNSEL TOLD THE JURY THEIR JOB WAS TO SEARCH FOR THE TRUTH THEREBY DIMINISHING THE PEOPLE'S BURDEN OF PROOF, AND DEFENSE COUNSEL INDICATED TO THE JURY DEFENDANT HAD TEN PRIOR CONVICTIONS, DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE.

The Fourth Department, reversing defendant's conviction, determined the defendant did not receive effective assistance of counsel: "Defense counsel repeatedly stated to the jury during voir dire that the trial was to be 'a search for the truth.' It is settled that a 'prosecutor's characterization of [a] trial as a search for the truth' [is] indeed improper' ... , inasmuch as it is a way of 'proposing that the jury might convict even in the absence of proof beyond a reasonable doubt so long as the jury concluded that its verdict represented the truth' ... . Here, by making that statement to the jury during voir dire then repeating it at least three times during summation, defense counsel improperly diminished the People's burden of proof. Furthermore, it is also well settled that, when a defendant testifies and is cross-examined regarding his prior convictions, he or she is entitled to have the court 'charge the jury that such prior convictions could only be used in evaluating defendant's credibility, and that they could not be used as evidence of defendant's guilt'... . Here, counsel requested such a charge, the prosecutor conceded that the charge should be given, and the court agreed to give it. Nevertheless, the court's instructions indicated that the jury may rely upon evidence of a previous conviction in evaluating the credibility of the witnesses, including defendant, but the court did not instruct the jury that they may not consider the prior conviction as evidence of

defendant's guilt. Defense counsel did not object or otherwise bring the omission to the court's attention. ... Furthermore, defense counsel exacerbated the harmful impact of defendant's prior convictions during the cross-examination of the People's fingerprint expert by eliciting evidence that gave the impression that defendant had 10 or more prior arrests and/or convictions." ***People v. McCallum*, 2018 N.Y. Slip Op. 04898, Fourth Dept 6-29-18**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL PROVIDED DEFENDANT WITH ERRONEOUS INFORMATION ABOUT THE LENGTH OF HIS SENTENCE SHOULD HE BE CONVICTED AFTER TRIAL AND ERRONEOUSLY TOLD THE DEFENDANT HIS PLEA TO SEX TRAFFICKING WOULD NOT MAKE HIM SUBJECT TO THE SEX OFFENDER REGISTRATION ACT (SORA), DEFENDANT DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL. CONVICTION BY GUILTY PLEA REVERSED.

The Fourth Department, reversing defendant's conviction by guilty plea, determined defendant did not receive effective assistance of counsel. Defense counsel told the defendant he could receive a 75-year sentence if convicted on the charged offenses, when the most the defendant could receive was 15 to 30 years. Defense counsel also erroneously told the defendant the sex trafficking offense to which he pled guilty would not make him subject to the Sex Offender Registration Act (SORA): "The evidence, including a letter from defense counsel to the prosecutor during plea negotiations and the testimony of defendant and defense counsel at the hearing on defendant's motion to vacate the judgment, established that defendant and defense counsel perceived a viable defense to the sex trafficking charges and were leaning toward going to trial, but defendant—under the misapprehension that he risked the possibility of an aggregate maximum term of imprisonment that would be the equivalent of a life sentence for him—relied upon defense counsel's erroneous advice in accepting a plea that addressed his primary concerns by providing the ostensible benefit of greatly reducing his sentencing exposure while also avoiding any SORA implications. We thus conclude on this record that defendant was denied meaningful representation inasmuch as defense counsel's erroneous advice compromised the fairness of the process as a whole by depriving defendant of the ability to make an intelligent choice between pleading guilty or proceeding to trial ...". ***People v. Oliver*, 2018 N.Y. Slip Op. 04885, Fourth Dept 6-29-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH THE DEFENDANT HOMEOWNERS ACTED AS A GENERAL CONTRACTOR, THEY DID NOT SUPERVISE OR CONTROL ANY OF THE WORK, HOMEOWNERS' MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW §§ 240(1), 241(6) AND 200 CAUSES OF ACTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the homeowners' motion for summary judgment dismissing the Labor Law §§ 240(1), 241(6) and 200 causes of action should have been granted. Although the homeowners acted as a general contractor, they did not supervise or control any of the work: "As the owners of a one-family dwelling who contracted for but did not direct or control the work, defendants are exempt from liability under Labor Law §§ 240 and 241 ... . 'Whether an owner's conduct amounts to directing or controlling the work depends upon the degree of supervision exercised over the method and manner in which the work is performed' ... . Here, although defendants acted as general contractors on the construction of their home by obtaining the necessary permits, purchasing roofing materials, and hiring contractors to perform the construction work, defendants met their initial burden of demonstrating that they did not supervise or control the method or manner of plaintiff's work ... . 'Where[, as here,] the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200' ...". ***Bund v. Higgins*, 2018 N.Y. Slip Op. 04897, Fourth Dept 6-29-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

THE PLACEMENT OF THE LADDER WAS DEEMED THE CAUSE OF PLAINTIFF'S FALL AND PLAINTIFF HAD PLACED THE LADDER, THEREFORE PLAINTIFF'S ACTIONS WERE DEEMED THE SOLE PROXIMATE CAUSE OF HIS INJURY PRECLUDING RECOVERY IN THIS LABOR LAW § 240(1) CASE.

The Fourth Department, over a dissent, determined that plaintiff's actions were the sole proximate cause of his fall from a ladder in this Labor Law § 240(1) case. The court determined it was the placement of the ladder which was the cause of the accident and defendant had placed the ladder: "Plaintiff alleged in his second amended complaint that he fell due to the placement of the ladder, and he admitted in his deposition testimony that he had placed the ladder himself. Plaintiff's theory of liability is that the ladder was not an adequate safety device because it could not be placed directly below his work site. Defendants, however, submitted photographs and a video recording from their safety expert that depicted the expert placing the ladder directly under the work site and standing on it. Furthermore, plaintiff conceded in his deposition testimony that other safety devices were available at the site, and that he asked if they were available before using the lad-

der. Thus, we conclude that defendants established as a matter of law that the ladder was an adequate safety device and that plaintiff's own conduct was the sole proximate cause of his injuries." ***Kipp v. Marinus Homes, Inc.*, 2018 N.Y. Slip Op. 04859, Fourth Dept 6-29-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER STAIRWAY WHICH COLLAPSED WAS TEMPORARY OR PERMANENT, ONLY TEMPORARY STAIRWAYS ARE COVERED UNDER LABOR LAW § 240(1), QUESTIONS OF FACT WHETHER PROJECT MANAGER HAD SUFFICIENT SUPERVISORY CONTROL TO BE LIABLE UNDER LABOR LAW §§ 240(1), 241 (6) AND 200.

The Fourth Department determined there was a question of fact whether the stairs which collapsed were temporary or permanent. If the stairs were temporary they would be considered the functional equivalent of a ladder and would be covered under Labor Law § 240(1). There was also a question of fact whether a project manager could be deemed a general contractor or agent of the owner with supervisory control and therefore potentially liable under Labor Law §§ 240(1) and 241(6). There were also questions of fact whether the project manage was liable under Labor Law 200, depending on whether it had control over the work site or whether it had actual or constructive notice of the dangerous condition: " 'A temporary staircase that is used for access to and from the upper levels of a house under construction is the functional equivalent of a ladder' and falls within the designation of other devices' within the meaning of Labor Law § 240 (1)' ... . '[I]t has repeatedly been held that a stairway which is, or is intended to be, permanent—even one that has not yet been anchored or secured in its designated location . . . , or completely constructed . . . —cannot be considered the functional equivalent of a ladder or other device as contemplated by section 240 (1)' ... . ' An entity is a contractor within the meaning of Labor Law § 240 (1) and § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors . . . , and an entity is a general contractor if, in addition thereto, it was responsible for coordinating and supervising the . . . project' ... . While a construction manager 'is generally not considered a contractor' or owner' within the meaning of section 240 (1) or section 241' ... , a construction manager may nevertheless be 'vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury' ... . 'The label given a defendant, whether construction manager' or general contractor,' is not determinative . . . [inasmuch as] the core inquiry is whether the defendant had the authority to supervise or control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition' ...". ***Stiegman v. Barden & Robeson Corp.*, 2018 N.Y. Slip Op. 04865, Fourth Dept 6-29-18**

MEDICAID, ADMINISTRATIVE LAW, APPEALS.

PETITION SEEKING MEDICAL ASSISTANCE SHOULD NOT HAVE BEEN DENIED BASED UPON THE INABILITY TO DETERMINE THE FINANCIAL RESOURCES AVAILABLE TO THE NURSING HOME RESIDENT'S ESTRANGED WIFE, COURT MAY NOT CONSIDER THEORY NOT RAISED BEFORE THE AGENCY.

The Fourth Department, annulling the determination of the Erie County Department of Social Services, held that petitioner's application for medical assistance should not have been denied on the ground that the financial resources available to the nursing home resident's estranged wife could not be determined. The court noted that it may not consider any theories argued on appeal that were not raised before the agency: "[18 NYCRR] Section 360-2.3 (a) (2) provides that a medical assistance 'applicant/recipient will not have eligibility denied or discontinued solely because he/she does not possess and cannot obtain information about the income or resources of a nonapplying legally responsible relative who is not living with him/her.' Although denial of an application may nonetheless be appropriate under section 360-2.3 (a) (3) if an applicant/recipient refuses to grant permission for the examination of non-public records, here the parties do not dispute that petitioner and the resident cooperated with all efforts to obtain information from the resident's estranged wife. We reject respondent's contention that the determination should be confirmed because, in the absence of a showing that denial would subject the resident to undue hardship, denial of petitioner's application was permissible pursuant to 18 NYCRR 360-4.10. Regardless of the merits of that contention, we note that '[i]t is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency' ". ***Matter of Waterfront Ctr. for Rehabilitation & Healthcare v. New York State Dept. of Health*, 2018 N.Y. Slip Op. 04881, Fourth Dept 6-29-18**

MEDICAL MALPRACTICE, PERSONAL INJURY, BATTERY.

COMPLAINT ALLEGING A MEDICAL PROCEDURE WAS PERFORMED TO WHICH PLAINTIFF DID NOT CONSENT STATED A CAUSE OF ACTION FOR BATTERY.

The Fourth Department, reversing Supreme Court, determined plaintiff had stated a cause of action for battery alleging a medical procedure was performed without her consent: " 'It is well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided no consent at all' ... . Here, in moving under CPLR 3211 (a) (7), defendants attached all of the pleadings, which

alleged, inter alia, that defendants 'performed a procedure upon the Plaintiff while she was under general anesthesia without informing her or obtaining any consent, which conduct constituted a battery upon her.' Defendants also referenced and provided to the court the informed consent form executed by plaintiff that explicitly authorized the performance of a flexible sigmoidoscopy, but not a colonoscopy. The form further noted in relevant part that, '[i]f any unforeseen condition arises during the procedure calling for, in the physician's judgment, additional procedures, treatments, or operations, [defendant is] authorize[d] . . . to do whatever he . . . deems advisable.' We conclude that plaintiff has sufficiently asserted a cause of action sounding in battery by alleging that she provided no consent to the performance of a colonoscopy ... , and that the evidentiary submissions considered by the court, including the consent form, do not 'establish conclusively that plaintiff has no cause of action' sounding in battery ...". ***McCarthy v. Shah*, 2018 N.Y. Slip Op. 04887, Fourth Dept 6-29-18**

MUNICIPAL LAW, CONTRACT LAW, EMPLOYMENT LAW.

THE COLLECTIVE BARGAINING AGREEMENTS ARE AMBIGUOUS ON THE ISSUE WHETHER COUNTY RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE ENTITLED TO THE FULL MEDICAL BENEFITS AFFORDED THEM AT RETIREMENT, EXTRINSIC EVIDENCE, I.E., WHAT HAD BEEN DONE IN THE PAST, SUPPORTS THE DETERMINATION THAT RETIREES WHO BECOME ELIGIBLE FOR MEDICARE ARE NOT ENTITLED TO FULL BENEFITS.

The Fourth Department determined retired Monroe County employees who become eligible for Medicare are not entitled to the full medical insurance benefits which were afforded them at retirement. The collective bargaining agreements (CBAs) were deemed ambiguous on the issue and the court looked to what had been done in the past as controlling extrinsic evidence: "Inasmuch as the contract language is reasonably susceptible of more than one interpretation, we conclude that the CBAs are ambiguous with respect to whether retirees who are eligible for or enrolled in Medicare are entitled to fully-paid health insurance coverage that is equivalent to the insurance coverage in effect at the time they retired. Thus, we turn to extrinsic evidence to determine the parties' intent with respect to the health insurance coverage to be provided to those retirees who are eligible for or enrolled in Medicare. Where, as here, 'a contract is ambiguous, its interpretation remains the exclusive function of the court unless determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence' ... . For decades, defendants provided retirees who were not yet eligible for Medicare with health insurance benefits, but provided retirees enrolled in Medicare with only Medicare supplement plans. No objection was made and, until recently, the union representing plaintiffs never sought to negotiate any additional benefits for retirees eligible for or enrolled in Medicare." ***Ames v. County of Monroe*, 2018 N.Y. Slip Op. 04886, Fourth Dept 6-29-18**

PARTNERSHIP LAW, CORPORATION LAW.

A PARTNERSHIP CANNOT OPERATE THROUGH AN EXISTING CORPORATE STRUCTURE.

The Fourth Department, reversing Supreme Court, noted that a partnership cannot operate through an existing corporate structure: "Plaintiffs operated a court reporting partnership from 1975 to 1999. Upon dissolution of the partnership, they agreed to consolidate their business with defendant, an existing court reporting corporation ... . * * * ... [A] party 'cannot recover on a claim that he [or she] and [another individual] entered into a joint venture to be set up and run through the corporate . . . structure' ... . '[A]s a general rule, a partnership may not exist where the business is conducted in a corporate form, as each is governed by a separate body of law . . . Parties may not be partners between themselves while using the corporate shield to protect themselves against personal liability' ... . Although that rule has been qualified 'so as not to preclude members of a preexisting joint venture from acting as partners between themselves and as a corporation to the rest of the world,' that qualification is inapplicable here because defendant [corporation] was formed before the partnership was allegedly created by an oral agreement ... . In other words, 'there was no preexisting joint venture that later spawned the creation of a corporation in which aspects of the joint venture could survive' ...". ***Bianchi v. Midtown Reporting Serv., Inc.*, 2018 N.Y. Slip Op. 04895, Fourth Dept 6-29-18**

PERSONAL INJURY, COURT OF CLAIMS.

SKATER DID NOT ASSUME THE RISK CREATED BY A NEGLIGENTLY MAINTAINED ICE SURFACE AND SKATER'S AWARENESS OF THE CONDITION RELATES ONLY TO COMPARATIVE NEGLIGENCE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing the Court of Claims, determined defendant's motion for summary judgment in this ice-skating slip and fall case should not have been granted. The claimant could not assume the risk created by a negligently maintained ice surface, and claimant's awareness of the dangerous condition relates only to the issue of comparative fault (which does not preclude summary judgment): "We ... agree with claimant that her claim is not barred by the doctrine of assumption of the risk. It is well settled that '[a claimant] will not be held to have assumed those risks that are not inherent

. . . , i.e., not ordinary and necessary in the sport' ... . Although the risk of falling while ice skating is 'inherent in and arise[s] out of the nature of the sport generally' ... , we conclude that skating on a negligently maintained ice surface is not a risk that is inherent in the sport. Contrary to defendant's contention, under the circumstances presented here, claimant's awareness of the poor ice conditions and her decision to continue skating for some period of time, apparently to have a photograph taken, relate only to the issue of her comparative fault, if any ...". ***Wyzykowski v. State of New York*, 2018 N.Y. Slip Op. 04875, Fourth Dept 6-29-18**

TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE. EMPLOYMENT LAW, CIVIL PROCEDURE.

THE PATTERN JURY INSTRUCTIONS FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE ARE WRONG, THE INDEPENDENT CRIME OR TORT ELEMENT IS A FACTUAL QUESTION FOR THE JURY AND SHOULD NOT BE DECIDED AS A MATTER OF LAW BY THE COURT, MOTION TO SET ASIDE THE $5 MILLION VERDICT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined defendant's motion to set aside the verdict based upon flawed jury instructions should have been granted. Plaintiff was awarded a $5 million verdict based upon complaints made by the defendant, who taught at the school, which led to plaintiff's firing from her position as superintendent of the NYS School for the Deaf. The Fourth Department determined the pattern jury instructions, which the trial court followed, do not state the correct way to instruct a jury on the elements of tortious interference with prospective economic advantage. One of the elements is the commission of an independent crime or tort. The pattern jury instructions indicate that whether an independent crime or tort has been committed should be determined by the court as a matter of law. The Fourth Department disagreed and held that whether defendant committed an independent crime or tort is a factual question for the jury: "To state a cause of action for tortious interference with prospective economic advantage, 'a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means or acted for the sole purpose of inflicting intentional harm on plaintiff[]' ... . The term '[w]rongful means' has been defined by the Court of Appeals as conduct amounting 'to a crime or an independent tort' ... . This definition was a refinement to the ... previous description of the standard, which required 'more culpable conduct on the part of the defendant' for the interference when there is no breach of an existing contract. ...' [M]ore culpable' conduct' [haw been defined] as including the 'wrongful means' ... . Wrongful means include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract ... . [T]he determination whether particular facts constitute the independent tort is almost always a factual determination best left to the jury. Thus, while the court should evaluate the evidence to decide which independent tort(s) fits the fact pattern presented, the disputed underlying elements of the independent tort should still be charged to the jury." ***Ray v. Stockton*, 2018 N.Y. Slip Op. 04861, Fourth Dept 6-29-18**

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