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FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE, APPEALS.

UPON REMITTITUR FROM THE COURT OF APPEALS, DEFENDANT'S IDENTITY THEFT CONVICTION AFFIRMED, DEFENDANT ATTEMPTED TO PURCHASE ITEMS USING A CREDIT CARD AND DRIVER'S LICENSE WITH A FICTITIOUS NAME.

The First Department, upon remittitur from the Court of Appeals, determined defendant's conviction for identity theft was not against the weight of the evidence. The defendant had tried to purchase items from a store using a credit card and driver's license with a fictitious name. The First Department had reversed the conviction finding that, because the name was fictitious, defendant had not assumed the identity of another. The Court of Appeals held that using a fictitious name was prohibited by the identity theft statute: "On appeal, we modified to the extent of vacating the conviction for identity theft, and otherwise affirmed ... . We reasoned that in order to establish the crime, a defendant had to both use the victim's personal identifying information and assume the victim's identity. We reasoned that while defendant had used the victim's personal identifying information, he had not assumed her identity, but rather, that of a fictitious person." The Court of Appeals reversed, reasoning that defendant had assumed the identity of the victim within the meaning of the statute. The Court rejected defendant's argument that "the requirement that a defendant assumes the identity of another is not a separate element of the crime," explaining that the statutory language 'simply summarizes and introduces the three categories of conduct through which an identity may be assumed' ...". ***People v. Roberts*, 2018 N.Y. Slip Op. 05220, First Dept 7-12-18**

CRIMINAL LAW, IMMIGRATION LAW, ATTORNEYS.

MOTION TO VACATE CONVICTION SHOULD NOT HAVE BEEN SUMMARILY GRANTED WITHOUT A HEARING, THREE CRITERIA FOR VACATING A CONVICTION EXPLAINED, HERE DEFENDANT ALLEGED HE WOULD NOT HAVE PLED GUILTY HAD HE BEEN CORRECTLY INFORMED BY COUNSEL OF THE DEPORTATION CONSEQUENCES OF HIS PLEA.

The First Department, reversing Supreme Court, determined defendant's motion to vacate his conviction should not have been summarily granted and remanded the matter for a hearing. The defendant alleged defense counsel was ineffective for failure to correctly inform him of the deportation consequences of his guilty plea. The First Department offered a detailed explanation of the three criteria for granting a motion to vacate in this context on ineffective assistance of counsel grounds. "CPL 440.30 authorizes the summary granting of a motion to vacate a judgment of conviction where the moving papers allege a ground constituting a legal basis for the motion (CPL 440.30[3][a]); where that ground, if factually based, is supported by sworn allegations of fact essential to support the motion (CPL 440.30[3][b]); and where the sworn allegations of essential fact are either conceded by the People to be true or are conclusively substantiated by unquestionable documentary proof (CPL 440.30[3][c]). If all three of these statutory criteria are not met, the court may not grant a CPL 440.10 motion without first conducting a hearing (CPL 440.30[5]). ... [T]he People did not concede the essential factual allegations on the issue of prejudice. Indeed, they expressly noted that defendant's allegations of longstanding ties to the United States and lack of any connection to Haiti were entirely unsubstantiated. Neither did defendant proffer documentary proof conclusively substantiating his sworn factual allegations in support of his claim that 'but for [his plea] counsel's errors, he would not have pleaded guilty and would have insisted on going to trial' ... .Thus, defendant's CPL 440.10 motion failed to satisfy the third criterion of CPL 440.30(3), and for that reason, the motion court abused its discretion in granting defendant's CPL 440.10 motion without first conducting a hearing and making findings of fact ...". ***People v. Gaston*, 2018 N.Y. Slip Op. 05122, First Dept 7-10-18**

PERSONAL INJURY, CONTRACT LAW.

QUESTION OF FACT WHETHER GENERAL CONTRACTOR'S REMOVAL OF A TANK EXPOSING AN OPENING LAUNCHED AN INSTRUMENT OF HARM IMPOSING CONTRACT-BASED LIABILITY, FACT THAT OPENING WAS

OBVIOUS AND KNOWN TO PLAINTIFF SPEAKS TO COMPARATIVE NEGLIGENCE AND DID NOT WARRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS.

The First Department, over a two-justice dissent, determined that the general contractor's (Harbour's) motion for summary judgment in this slip and fall case was properly denied. Plaintiff alleged that Harbour removed a tank and exposed a dangerous opening in a metal plate. Plaintiff alleged, while working at the site, he stepped backwards into the opening and fell, hitting his head on the concrete floor. The First Department held there was a question of fact whether Harbour launched an instrument of harm by not taking remedial measures to make the area safe after removing the tank. The fact that the opening was obvious and plaintiff knew about it did not warrant summary judgment in favor of the defendants: Although both defendants argue that the exposed opening in the metal plate was open, obvious, readily observable and known to plaintiff, a property owner has a nondelegable duty to maintain its premises in a reasonably safe condition, taking into account the forseeability of injury to others ... . Moreover, although a defect or hazard may be discernable, this does not end the analysis, or compel a determination in favor of the property owner ... . Plaintiff's awareness of a dangerous condition does not negate a duty to warn of the hazard, but only goes to the issue of comparative negligence ... . Given the exposed opening's proximity to equipment that required service, the circumstances of plaintiff's accident present an issue of fact of not only whether the condition was open and obvious, but also whether it was inherently dangerous... . Some hazards, although discernable, may be hazardous because of their nature and location ... . Defendants did not establish that the exposed opening - given its location in the floor near other mechanical equipment in the pump room - was not only open and obvious, but that there was no duty to warn, and that the condition was not inherently dangerous ... . A contractual obligation, standing alone, will not give rise to tort liability in favor of a noncontracting third party (Espinal 98 NY2d at 138]). One exception to this broad rule is where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm' (Espinal at 140). We depart from the dissent in finding that Harbour failed to make a prima facie showing that it did not owe plaintiff a duty of care and that it did not negligently cause, create or exacerbate a dangerous condition." ***Farrugia v. 1440 Broadway Assoc.*, 2018 N.Y. Slip Op. 05222, First Dept 7-12-18**

REAL PROPERTY LAW, ASSOCIATIONS, UNINCORPORATED ASSOCIATIONS.

COMMUNITY GARDEN ASSOCIATION STATED A CAUSE OF ACTION FOR ADVERSE POSSESSION OF A LOT IN THE LOWER EAST SIDE OF MANHATTAN, THE PERIOD OF TIME THE LAND WAS USED BY THE ASSOCIATION BEFORE IT WAS INCORPORATED IN 2012 WAS PROPERLY TACKED ON.

The First Department, in a full-fledged opinion by Justice Tom, over a concurring opinion, determined plaintiff (Garden) had stated a cause of action for adverse possession of a lot in lower Manhattan used since 1985 as the site of a community garden by an unincorporated association (which was later incorporated in 2012): "In order to establish a claim of adverse possession, a plaintiff must prove that the possession was: (1) hostile and under a claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous throughout the 10-year statutory period... . In addition, where, as here, the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish that the land was 'usually cultivated or improved' or that the land 'has been protected by a substantial enclosure' (see former RPAPL 522...). The only elements in dispute here are the 'claim of right' and 'continuous' elements. Defendants argue that plaintiff failed to plead sufficient facts evidencing continuous possession by its predecessor members for the statutory period, through an unbroken chain of privity, by tacking periods between anonymous possessors who are not alleged to have intended to transfer title to the incorporating members. This argument is based on the fact that plaintiff was incorporated in 2012 and defendants' contention that there is no allegation that plaintiff had the necessary privity with Garden members prior to incorporation. This argument fails, particularly at the pleading stage of this litigation. It is well settled that an unincorporated association may adversely possess property and later incorporate and take title to it because "[a]lthough the unincorporated society could not acquire title by adverse possession, its officers could for its benefit, and when the corporation is duly organized the prior possession may be tacked to its own to establish its title under the statute of limitations" ... . ***Children's Magical Garden, Inc. v. Norfolk St. Dev., LLC*, 2018 N.Y. Slip Op. 05223, First Dept 7-12-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

THE FACT THAT DEFENDANT'S REPRESENTATIVE'S SIGNATURE AND THE JURAT APPEARED ON AN OTHERWISE BLANK PAGE SEPARATE FROM THE AFFIDAVIT WAS NOT A GROUND FOR DENIAL OF DEFENDANT'S UNOPPOSED MOTION FOR SUMMARY JUDGMENT.

The Second Department, reversing Supreme Court, determined defendant's unopposed motion for summary judgment should not have been denied on the ground that defendant's representative's signature and the jurat appeared on a page separate from the rest of defendant's affidavit: "The Supreme Court denied the motion on the ground that, in an affidavit of Charles Dunne, an authorized representative of the defendant, on which the defendant primarily relied in support of

its motion, Dunne's signature and the jurat appeared on a separate, otherwise blank page. The defendant appeals. The Supreme Court erred in denying the defendant's unopposed motion on the ground that Dunne's affidavit was not properly signed. The fact that Dunne's signature and the jurat appeared on a page separate from the rest of the affidavit did not render it inadmissible. If anything, the separate signature page amounted to an irregularity that the court should have disregarded, as doing so did not prejudice the plaintiff (see CPLR 2001...), which was deemed to have waived the issue by failing to timely raise it after service of the defendant's motion papers ...". ***Status Gen. Dev., Inc. v. 501 Broadway Partners, LLC*, 2018 N.Y. Slip Op. 05217, Second Dept 7-11-18**

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW.

CPLR 311-A REQUIREMENTS FOR SERVICE OF PROCESS ON A LIMITED LIABILITY COMPANY NOT MET, COURT DID NOT OBTAIN JURISDICTION OVER DEFENDANT.

The Second Department, reversing Supreme Court, determined the plaintiff did not comply with the CPLR requirements for service of a summons and complaint upon a limited liability company and the court did not obtain jurisdiction over the defendant: "Here, the plaintiff commenced the action by the filing of a summons and verified complaint on September 20, 2016. The affirmation of personal service executed by the plaintiff's counsel stated that on September 24, 2016, at the defendant's store located in Hicksville, he personally served the defendant with a copy of the summons and complaint by delivering it to 'JANE DOE, A PERSON WHO REFUSED TO PROVIDE NAME.' Although this attempt at service occurred within 120 days after the commencement of the action, the defendant correctly contends that the manner of service failed to comply with the requirements of CPLR 311-a, which provides, as relevant here, that personal service upon a limited liability company shall be made by delivering a copy personally to any member or manager of the company, any agent authorized to receive process, or any other person designated by the company to receive process. The defendant, by its evidentiary submissions, demonstrated that the individual purportedly served was not authorized to receive process on behalf of the defendant, and thus, jurisdiction over the defendant was not obtained ...". ***Pinzon v. IKEA N.Y., LLC*, 2018 N.Y. Slip Op. 05213, Second Dept 7-11-18**

CIVIL PROCEDURE, NEGLIGENCE, MEDICAL MALPRACTICE.

PROPERTY DEFENDANTS' MOTION TO JOIN THE SLIP-AND-FALL ACTION WITH A MEDICAL MALPRACTICE ACTION STEMMING FROM THE SLIP-AND-FALL INJURY PROPERLY DENIED.

The Second Department determined the property defendants' motion to join the slip-and-fall action with a medical malpractice action stemming from the slip-and-fall injury was properly denied. Plaintiff had stepped in a rodent hole and subsequently sued hospitals for malpractice in the treatment of her foot injury: " 'When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue' (CPLR 602[a]...). The determination of such a motion is addressed to the sound discretion of the trial court... . Denial of the motion may be warranted where common questions of law or fact are lacking ... , where the actions involve dissimilar issues or disparate legal theories ... , or where a joint trial would substantially prejudice an opposing party ... or pose a risk of confusing the jury or rendering the litigation unwieldy ... . Here, the Supreme Court providently exercised its discretion in denying the property defendants' motion for a joint trial given the limited commonality between the two actions, the disparate legal theories and dissimilar issues they involve, the very different procedural stages of the two actions at the time the motion was made, and the potential prejudice to the opposing parties as well as the risks of juror confusion and unwieldy litigation if a joint trial was granted ...". ***Cromwell v. CRP 482 Riverdale Ave., LLC*, 2018 N.Y. Slip Op. 05137, Second Dept 7-11-18**

CIVIL PROCEDURE, PERSONAL INJURY, INSURANCE LAW.

RECORDS PERTAINING TO PLAINTIFF'S RECEIPT OF NO-FAULT BENEFITS ARE DISCOVERABLE AND MUST BE TURNED OVER TO THE DEFENDANT, EVEN IF PLAINTIFF IS NOT SEEKING RECOVERY OF UNREIMBURSED SPECIAL DAMAGES.

The Second Department, reversing Supreme Court, determined that plaintiff was required to turn over to defendant records pertaining to no-fault benefits in this car accident case. Plaintiff had argued the records were not discoverable because plaintiff was not seeking to recover unreimbursed special damages: "CPLR 3101(a) provides, in relevant part, that '[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.' 'The words, material and necessary,' are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity'... . In an action relating to a motor vehicle accident, a plaintiff's medical records relating to treatment following the accident are material and necessary to the defense of a plaintiff's claim to having sustained a serious injury within the meaning of Insurance Law § 5102, in addition to any claim to recover damages for loss of enjoyment of life ... . Accordingly, since the plaintiff's no-fault records are material and necessary to the defense of this action, the Supreme Court should have denied the plaintiff's motion for a protective order ... . The plaintiff improperly relies upon CPLR 4545(a) to support his contention that collateral source records are not discoverable where a plaintiff is not seeking to recover unreimbursed special damages.

CPLR 4545(a) governs the admissibilityof evidence to establish that damages have been or will be covered in whole or part by a collateral source. By contrast, in the context of discovery, '[a]ny matter which may lead to the discovery of admissible proof is discoverable, as is any matter which bears upon a defense, even if the facts themselves are not admissible' ... . Moreover, whether any of the plaintiff's no-fault records are admissible for purposes other than for showing collateral source payment is not before us at this stage of the action." ***Cajamarca v. Osatuk*, 2018 N.Y. Slip Op. 05133, Second Dept 7-11-18**

CRIMINAL LAW, ATTORNEYS, APPEALS.

IMPROPER CROSS-EXAMINATION OF THE SOLE DEFENSE WITNESS DEPRIVED DEFENDANT OF A FAIR TRIAL, REVERSED IN THE INTEREST OF JUSTICE.

The Second Department, reversing defendant's conviction in the interest of justice, determined the prosecutor deprived defendant of a fair trial by improper cross-examination of the sole defense witness: "The prosecutor repeatedly injected her own credibility into the trial while cross-examining the complainant's grandmother, who was the sole witness for the defense other than the defendant, about pretrial out-of-court statements the grandmother made to the prosecutor concerning the complainant's outcry ... . Given the importance of the grandmother's testimony to the defense, this conduct deprived the defendant of his right to a fair trial ...". ***People v. Moulton*, 2018 N.Y. Slip Op. 05203, Second Dept 7-11-18**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE SEARCH OF DEFENDANT'S PERSON INCIDENT TO ARREST WAS PROPER, THE SEARCH INSIDE DEFENDANT'S WALLET WAS NOT, CREDIT CARDS SHOULD HAVE BEEN SUPPRESSED.

The Second Department determined defendant's motion to suppress credit cards taken from his wallet after he was placed under arrest after a traffic stop should have been granted. The defendant was arrested after a police officer saw what looked like marijuana in a plastic bag on the floor of the car. Defendant was charged with possessing forged credit cards: "While the police officer's search of the defendant's pockets was justified since it arose from a search incident to a lawful arrest... , the subsequent search of the defendant's wallet was akin to searching a small bag or change purse and was unlawful. 'The protections embodied in article I, § 12 of the New York State Constitution serve to shield citizens from warrantless intrusions on their privacy interests, including their personal effects'... . '[E]ven a bag within the immediate control or grabbable area' of a suspect at the time of his [or her] arrest may not be subjected to a warrantless search incident to the arrest, unless the circumstances leading to the arrest support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag'... . The proof adduced at the suppression hearing failed to establish the presence of such circumstances ...". ***People v. Geddes-Kelly*, 2018 N.Y. Slip Op. 05195, Second Dept 7-11-18**

CRIMINAL LAW, EVIDENCE, ATTORNEYS.

PROSECUTOR'S IMPROPER REMARKS DESIGNED TO ELICIT THE JURY'S SYMPATHY FOR THE VICTIM DID NOT DEPRIVE DEFENDANT OF A FAIR TRIAL, HOWEVER A NEW TRIAL ON THE MURDER CHARGE IS REQUIRED BECAUSE THE TRIAL JUDGE ERRONEOUSLY DENIED DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF MANSLAUGHTER.

The Second Department, reversing defendant's murder conviction, determined the trial judge should have instructed the jury on the lesser included offense of manslaughter. Although the defendant told the police he went to the victim's house intending to kill him, there was evidence the gun went off when the victim grabbed the gun. The Second Department also noted the prosecutor improperly tried to elicit the jury's sympathy for the victim: "... [T]he prosecutor's comments in his opening statement about the grand jury's indictment were improper. The prosecutor's comments in his opening statement about the victim and his family, which could only have been intended to evoke the jury's sympathy, were also improper... . Further, the prosecutor elicited certain testimony from the medical examiner and the victim's father about the victim's personal background and the victim's family that was irrelevant to the issues at trial, and was likewise intended to evoke the jury's sympathy ... . Nonetheless, under the circumstances of this case, the prosecutor's improprieties did not deprive the defendant of a fair trial, and any other error in this regard was harmless, as there was overwhelming evidence of the defendant's guilt and no significant probability that any error contributed to his convictions ... . Here, the court should have granted the defendant's request to charge manslaughter in the second degree (reckless manslaughter) as a lesser included offense of murder in the second degree (intentional murder). Reckless manslaughter is a lesser included offense of intentional murder in the second degree ... . Moreover, there is a reasonable view of the evidence that the defendant did not intentionally pull the trigger at the time the gun was fired ... ". ***People v. Cherry*, 2018 N.Y. Slip Op. 05190, Second Dept 7-11-18**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

INSUFFICIENT EVIDENCE TO SUPPORT ASSESSMENT OF POINTS FOR SUBSTANCE ABUSE.

The Second Department, reversing Supreme Court, determined that the SORA court assessment of points for substance abuse was not supported by the evidence: "Assessment of points under risk factor 11 may be appropriate if the offender has a 'history' of substance abuse or if the offender 'was abusing drugs and or alcohol at the time of the offense' ... . Here,

the People did not meet their burden of proving the facts underlying the disputed point assessment by clear and convincing evidence ... . The presentence report contained only ambiguous information about the extent of the defendant's use of alcohol and marijuana between the ages of 16 and 20, at least 7 years before the sex offense at issue in this proceeding, and no information about the defendant's use of those substances in the 7 years before the sex offense. Moreover, the evidence at the hearing did not establish that the defendant abused or was under the influence of alcohol or marijuana at the time of the offense ...". ***People v. Trotter*, 2018 N.Y. Slip Op. 05211, Second Dept 7-11-18**

FAMILY LAW, CIVIL PROCEDURE.

CHILD'S REQUEST FOR AN ADJOURNMENT WHEN MOTHER FAILED TO APPEAR AT AN EQUITABLE ESTOPPEL HEARING IN THIS PATERNITY AND CUSTODY PROCEEDING SHOULD HAVE BEEN GRANTED.

The Second Department determined Family Court abused its discretion when it dismissed an equitable estoppel hearing in a paternity and custody proceeding when mother failed to appear and the child requested an adjournment: "Despite the fact that the mother had appeared on all prior court dates, and was in the middle of her testimony at the hearing, the Family Court denied the child's request for an adjournment, and instead directed dismissal of the petition for failure to prosecute. The child, Malachi S., appeals. ... Here, as the child and the mother correctly contend, the request for an adjournment was reasonable and there was no indication of intentional default or willful abandonment. Under these circumstances, the Family Court improvidently exercised its discretion in directing the dismissal of the petition for failure to prosecute rather than granting the child's request for an adjournment ...". ***Matter of Simmons v. Ford*, 2018 N.Y. Slip Op. 05176, Second Dept 7-11-18**

MUNICIPAL LAW, PERSONAL INJURY, MEDICAL MALPRACTICE.

LEAVE TO FILE A LATE NOTICE OF CLAIM WAS PROPERLY GRANTED IN THIS CANCER TREATMENT MALPRACTICE ACTION, WHERE THE ALLEGED MALPRACTICE IS APPARENT FROM THE MEDICAL RECORDS, THE RECORDS CONSTITUTE ACTUAL KNOWLEDGE OF THE CLAIM.

The Second Department determined petitioner's motion seeking leave to file a late notice of claim for medical malpractice against the NYC Health & Hospitals Corporation was properly granted. Plaintiff alleged malpractice in the treatment of a cancerous lesion: " 'Where the alleged malpractice is apparent from an independent review of the medical records, those records constitute actual knowledge of the facts constituting the claim' ... . Here, in support of her petition, the petitioner submitted medical records and an affirmation of a physician who reviewed the medical records and concluded, inter alia, that there had been a departure from accepted medical practice. Inasmuch as the medical records show that the hospital failed to confirm that the plaintiff's tumor had been completely removed, they provided the appellant with actual knowledge of the essential facts constituting the claim ... . Furthermore, the petitioner made an initial showing that the appellant would not suffer any prejudice by the delay in serving a notice of claim, and the appellant failed to rebut the petitioner's showing with particularized indicia of prejudice ... . Finally, the lack of a reasonable excuse is not dispositive where there is actual notice and absence of prejudice ... . In any event, the petitioner demonstrated that her extensive medical treatment during the time period at issue constitutes a reasonable excuse for the delay ...". ***Matter of Leon v. New York City Health & Hosps. Corp.*, 2018 N.Y. Slip Op. 05165, Second Dept 7-11-18**

PERSONAL INJURY.

PLAINTIFFS DID NOT ALLEGE THAT DEFENDANT CREATED THE DANGEROUS CONDITION AND DEFENDANT DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CONDITION, THEREFORE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ICE AND SNOW SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this ice and snow slip and fall case should have been granted. Plaintiffs did not alleged defendant created the dangerous condition and defendant demonstrated it did not have actual or constructive notice of the condition: "Here, the plaintiffs did not allege that the defendant created the ice condition. By submitting the deposition testimony of the director of the preschool and the injured plaintiff, the defendant established, prima facie, that it did not have actual or constructive notice of the alleged ice that caused the plaintiff to fall ... . The preschool director testified that she entered the building through the rear entrance about 90 minutes prior to the incident, and she did not see any ice on the ground. The injured plaintiff testified that she did not see the ice before she fell. In opposition, the plaintiffs failed to raise a triable issue of fact. General awareness that snow or ice may be present during winter months was legally insufficient to constitute notice of the particular condition that caused the injured plaintiff's fall ...". ***Bombino-Munroe v. Church of St. Bernard*, 2018 N.Y. Slip Op. 05131, Second Dept 7-11-18**

PERSONAL INJURY.

$1.5 MILLION VERDICT AFFIRMED, PLAINTIFF, A 72-YEAR-OLD WOMAN, WAS INJURED WHEN THE BUS SHE HAD JUST BOARDED ACCELERATED QUICKLY CAUSING HER TO FALL, INJURING HER HEAD, BACK, NERVES AND KNEE.

The Second Department upheld the $1.5 million verdict in favor of plaintiff, a 72-year-old woman who alleged the bus driver accelerated quickly just after plaintiff got on the bus causing her to fall and sustain disk, nerve, knee and head injuries: "We ... agree with the Supreme Court's determination to deny that branch of the defendant's motion which was for summary judgment dismissing the complaint on the ground that it was not liable for the plaintiff's injuries. The evidence submitted by the defendant in support of that branch of the motion failed to eliminate triable issues of fact as to whether the movement of the bus at issue was unusual and violent ... . Since the defendant did not sustain its prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact ... . The award of damages for past and future pain and suffering did not deviate materially from what would be reasonable compensation (see CPLR 5501[c]...)." ***Castillo v. MTA Bus Co.*. 2018 N.Y. Slip Op. 05134. Second Dept 7-11-18**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE NYC ADMINISTRATIVE CODE IMPOSES A DUTY TO KEEP SIDEWALKS SAFE ON ABUTTING PROPERTY OWNERS, IT DOES NOT IMPOSE STRICT LIABILITY, DEFENDANT FAILED TO DEMONSTRATE IT DID NOT CREATE OR HAVE NOTICE OF THE ALLEGED DANGEROUS CONDITION IN THIS SIDEWALK ICE AND SNOW SLIP AND FALL CASE, DEFENDANT'S SUMMARY JUDGMENT MOTION PROPERLY DENIED.

The Second Department determined defendant property owner did not demonstrate that it did not create or have notice of the dangerous condition in this sidewalk snow and ice slip and fall case. The NYC administrative code imposes a duty on abutting property owners to keep sidewalks safe, but it does not impose strict liability: "Administrative Code of the City of New York § 7-210(a) and (b) imposes a duty upon property owners to maintain the sidewalk adjacent to their property, and shifts tort liability to such owners for the failure to maintain the sidewalk in a reasonably safe condition, including the negligent failure to remove snow and ice ... . However, Administrative Code of the City of New York § 7-210 does not impose strict liability upon the property owner, and the injured party has the obligation to prove the elements of negligence to demonstrate that an owner is liable... . Thus, to prevail on its summary judgment motion, the defendant was required to establish that it neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it ... . Here, in support of the motion, the defendant submitted, inter alia, the deposition testimony of its custodian, who had no specific recollection as to when it last snowed prior to the incident, what snow and ice removal efforts he undertook prior to the incident, or what the sidewalk at issue looked like within a reasonable time prior to the incident. The custodian's deposition testimony, along with the defendant's other submissions, including its expert evidence, were insufficient to demonstrate, prima facie, that the defendant did not create the alleged ice condition through its snow removal efforts or that it did not have actual or constructive notice of the existence of the condition for a sufficient length of time to discover and remedy it ...". ***Muhammad v. St. Rose of Limas R.C. Church*, 2018 N.Y. Slip Op. 05181, Second Dept 7-11-18**

REAL ESTATE.

PLAINTIFF, WHO LOST HIS JOB AFTER HIS MORTGAGE HAD BEEN APPROVED AND THE MORTGAGE CONTINGENCY IN THE PURCHASE CONTRACT WAS SATISFIED, WAS ENTITLED TO THE RETURN OF THE DEPOSIT, THE REVOCATION OF THE MORTGAGE COMMITMENT WAS NOT DUE TO BAD FAITH ON PLAINTIFF'S PART.

The Second Department determined plaintiff was entitled to return of his deposit in this real estate transaction. The contract allowed the return of the deposit if plaintiff did not qualify for a mortgage within a specified period of time. Plaintiff did qualify within the allowed time. However, he subsequently lost his job and could not obtain the mortgage. Plaintiff asked for the deposit but defendant refused: " 'A mortgage contingency clause is construed to create a condition precedent to the contract of sale' ... . 'The purchaser is entitled to return of the down payment where the mortgage contingency clause unequivocally provides for its return upon the purchaser's inability to obtain a mortgage commitment within the contingency period'... . 'However, when the lender revokes the mortgage commitment after the contingency period has elapsed, the contractual provision relating to failure to obtain an initial commitment is inoperable, and the question becomes whether the lender's revocation was attributable to any bad faith on the part of the purchaser'... . Here, the plaintiff established his prima facie entitlement to judgment as a matter of law for the return of his down payment. He submitted evidence that he acted in good faith in obtaining a mortgage commitment, that the commitment was subject to re-verification of employment, and that the subsequent revocation of the commitment was not attributable to any bad faith on his part ...". ***Chahalis v. Roberta Ebert Irrevocable Trust*, 2018 N.Y. Slip Op. 05135, Second Dept 7-11-18**

THIRD DEPARTMENT

ATTORNEYS, PRIVILEGE.

MEDICAL JOURNAL KEPT BY PLAINTIFF'S DECEDENT AFTER SHE WAS INJURED AT THE DIRECTION OF HER ATTORNEY PROTECTED BY ATTORNEY-CLIENT PRIVILEGE, MEDICATION LOG IS NOT PROTECTED.

The Third Department determined that a medical journal kept by plaintiff's decedent after an injury at the direction of her attorney was protected by attorney-client privilege, where as a record of her medications were not: "Upon examination of the notes turned over to Supreme Court for an in camera review, we conclude that they are a mixed collection, some of which are shielded by the attorney-client privilege and some of which are not. The three-page portion labeled 'injury journal' is, as described by decedent's attorney, a seamless report of the incident at the health club and the medical care that decedent received shortly thereafter. The medication log is on a separate page and includes other notes of a personal nature. We agree with Supreme Court that the medication log was made for the purpose of keeping a medical record rather than as a confidential communication made for the purpose of legal services. Accordingly, in the absence of evidence that the medication log constituted a communication of legal character between decedent and [her attorney], plaintiff may not invoke the attorney-client privilege to shield its disclosure ...". ***Wrubleski v. Mary Imogene Bassett Hosp.*, 2018 N.Y. Slip Op. 05256, Third Dept 7-12-18**

CIVIL PROCEDURE, CRIMINAL LAW, APPEALS.

NEW YORK CITY DEPARTMENT OF CORRECTIONS WAS A NECESSARY PARTY TO THIS JAIL TIME CALCULATION PROCEEDING, ISSUE CAN BE RAISED FOR THE FIRST TIME ON APPEAL, MATTER REVERSED AND REMITTED.

The Third Department, reversing Supreme Court, determined the New York City Department of Corrections (NYCDOC) was a necessary party in this proceeding contesting a jail time credit calculation. Although the issue was not raised below, a necessary-party issue can be raised for the first time on appeal but may not be corrected by an appellate court.: "NYCDOC is a necessary party to this proceeding 'because petitioner is seeking additional credit for jail time spent in correctional facilities in New York City [under NYCDOC] and, if petitioner is successful, [NYCDOC's] commissioner will be required, pursuant to . . . Correction Law [§ 600-a], to recompute petitioner's jail time and deliver a certified transcript of the record of petitioner's jail time'... . While respondent did not raise this issue in Supreme Court, it is well-established that /a court may always consider whether there has been a failure to join a necessary party', including on its own motion, and for the first time on appeal' ... . As this Court 'may not, on its own initiative, add or direct the addition of a party[,] . . . the matter must be remitted to Supreme Court to order [NYCDOC] to be joined if [it] is subject to the jurisdiction of the court and, if not, to permit [its] joinder by stipulation, motion or otherwise and, if joinder cannot be effectuated, the court must then determine whether the proceeding should be permitted to proceed in the absence of [a] necessary part[y]' ...". ***Matter of Velez v. New York State*, Dept. of Corr. & Community Supervision, 2018 N.Y. Slip Op. 05243, Third Dept 7-11-18**

CRIMINAL LAW.

IT IS NOT REVERSIBLE ERROR FOR DEFENDANT TO NOT BE PRESENT AT A SIDEBAR WHICH RESULTS IN GRANTING A PEREMPTORY OR FOR CAUSE CHALLENGE TO A JUROR, AN ORDER OF PROTECTION SHOULD NOT HAVE BEEN ISSUED FOR A FACT WITNESS WHO DID NOT ACTUALLY SEE THE SHOOTING.

The Third Department affirmed defendant's conviction and noted (1) it is not reversible error if defendant is not present at a sidebar which results in the grant of a peremptory or for cause challenge to a juror, and (2) an order of protection cannot be issued on behalf of someone who did not actually witness the crime (here a shooting): "Even if defendant was erroneously excluded from the sidebar conferences, 'the error is not reversible if that potential juror has been excused for cause by the court or as a result of a peremptory challenge by the People'... . Because the record makes clear that juror Nos. 104 and 220 were dismissed for cause, remittal for a reconstruction hearing ... or reversal for a new trial is not necessary ... . * * * A court may enter an order of protection for the benefit of a witness 'who actually witnessed the offense for which defendant was convicted' (...see generally CPL 530.13 [4] [a]). Although Galaska testified that, on the date in question, he saw people screaming and arguing outside his apartment and the victim taking pictures, he further stated that he did not see who shot the victim and also admitted that he did not recognize any of the individuals who were arguing. Because Galaska did not witness the shooting, the order of protection issued in his favor must be vacated." ***People v. Myers*, 2018 N.Y. Slip Op. 05225, Third Dept 7-12-18**

CRIMINAL LAW.

WAIVER OF INDICTMENT AND SUPERIOR COURT INFORMATION (SCI) WERE JURISDICTIONALLY DEFECTIVE, THE SCI DID NOT CONTAIN A CHARGE HELD FOR THE ACTION OF A GRAND JURY OR A LESSER INCLUDED OFFENSE.

The Third Department, reversing defendant's plea to a superior court information (SCI), determined the SCI did not contain a charge held for the action of a grand jury or a lesser included offense. Therefore the SCI was jurisdictionally defective:

"... [T]he waiver of indictment and SCI were jurisdictionally defective because the crime charged in the SCI was not 'an[] offense for which . . . defendant was held for action of a grand jury' ... , nor was it a lesser included offense of the crimes charged in the felony complaints. On this latter point, 'a defendant may waive indictment and plead guilty to an SCI that names a different offense from that charged in the felony complaint only when the crime named in the SCI is a lesser included offense of the original charge'... . 'A crime is a lesser included offense of a charge of a higher degree only when in all circumstances, not only in those presented in the particular case, it is impossible to commit the greater crime without concomitantly, by the very same conduct, committing the lesser offense'... . Reckless endangerment in the first degree is not a lesser included offense of either menacing a police officer or criminal possession of a weapon in the second degree because it would be entirely possible to possess or display the weapons required to commit either of the greater crimes, i.e., menacing a police officer (see Penal Law § 120.18) or criminal possession of a weapon in the second degree ... , without concomitantly 'recklessly engag[ing] in conduct [that] creates a grave risk of death to another person' — a required element of reckless endangerment in the first degree ...". ***People v. Hulstrunk*, 2018 N.Y. Slip Op. 05234, Third Dept 7-12-18**

DISCIPLINARY HEARINGS (INMATES), EVIDENCE.

HEARSAY NOT DEMONSTRATED TO BE RELIABLE, DISCIPLINARY DETERMINATION ANNULLED AND EXPUNGED.

The Third Department, annulling the disciplinary determination and expunging it, determined the hearsay upon which the determination was based was not demonstrated to be sufficiently reliable: " 'While hearsay evidence in the form of confidential information may provide substantial evidence to support a determination of guilt, the information must be sufficiently detailed to allow the Hearing Officer to make an independent assessment to determine its reliability and credibility' ... . The only witness called to testify at the hearing was the lieutenant who oversaw the investigation. The lieutenant relied upon information provided by other officers, who reported receiving information from unspecified informants that petitioner was involved in this fight. During his confidential and hearing testimony, the lieutenant recounted that the officers informed him that they had received information from informants, whom they had used in the past and found reliable, that petitioner had engaged in this fight. The lieutenant deemed the reports to be 'consistent' and 'credible,' but provided no details of their accounts. Moreover, the lieutenant had not interviewed any of the informants and did not know if any of them had actually witnessed the fight. The questioning of the lieutenant about the officers' and informants' accounts was cursory, rather than 'thorough and specific' as required to provide the Hearing Officer with a basis to gauge the informants' 'knowledge and reliability' ... . While the lieutenant relied upon a to/from memorandum from the sergeant who apparently interviewed some of the informants, that memorandum contains no details regarding the basis for their knowledge or any specificity about their accounts, and does not assert that they had witnessed the fight or any information regarding their past reliability. Under these circumstances, the record is devoid of any basis upon which to conclude that the informants ever provided 'detailed and specific' accounts, or that the Hearing Officer had information from which to 'gauge the basis for the informant[s'] knowledge of the [fight] and [their] reliability' ...". ***Matter of Maisonett v. Venettozzi*, 2018 N.Y. Slip Op. 05257, Third Dept 7-12-18**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW. EVIDENCE.

DETERMINATION PETITIONER VIOLATED THE COLLEGE'S SEXUAL ASSAULT POLICY AND THE ADMINISTRATIVE PROCEDURE USED BY THE COLLEGE DEEMED PROPER.

The Third Department determined the petitioner was properly disciplined for violation of a college's sexual assault policy and the procedure followed by the college was proper: " 'Where, as here, no hearing is required by law, a court reviewing a private university's disciplinary determination must determine 'whether the university substantially adhered to its own published rules and guidelines for disciplinary proceedings so as to ascertain whether its actions were arbitrary or capricious' ... . A university's determination will be annulled only where it has failed to substantially comply with its procedures or where its determination lacks a rational basis ... . With respect to hearing submissions, respondent's procedure permits each party to submit proposed questions or topics for individuals who might testify during the hearing. The procedure specifically grants the chair of the Hearing Panel discretion to 'determine which of the parties' requested questions will be asked or topics covered,' and permits the chair to disregard questions that are irrelevant, prohibited by applicable procedures or law, unduly prejudicial or cumulative. While the Hearing Panel declined to ask the complainant all of the questions that petitioner proposed prior to the hearing, many of the topics of such questions were addressed elsewhere in the record and were thus available for the Hearing Panel's review. Moreover, as Supreme Court correctly pointed out, the right of confrontation or cross-examination is not directed or guaranteed under respondent's procedures, nor is it required by the Enough is Enough Law ... . Indeed, '[a] student subject to disciplinary action at a private educational institution is not entitled to the full panoply of due process rights,' and '[s]uch an institution need only ensure that its published rules are substantially observed' ...". ***Matter of Doe v. Cornell Univ.*, 2018 N.Y. Slip Op. 05255, Third Dept 7-12-18**

EMINENT DOMAIN, CONDEMNATION, MUNICIPAL LAW, ENVIRONMENTAL LAW.

CITY DID NOT VIOLATE THE PUBLIC USE DOCTRINE AND COMPLIED WITH THE EMINENT DOMAIN PROCEDURE LAW AND THE STATE ENVIRONMENTAL QUALITY REVIEW ACT (SEQRA) IN APPROVING THE TAKING OF LAND FOR A BICYCLE-PEDESTRIAN TRAIL.

The Third Department, in a comprehensive decision describing the relevant law and procedures, determined the city had complied with the State Environmental Quality Review Act (SEQRA), the Eminent Domain Procedure Law and the prior public use doctrine in determining the taking of a strip of land for a bicycle-pedestrian trial would not have a significant adverse impact on the environment: "... [P]etitioners have failed to demonstrate how the City's condemnation of the Village's property would 'interfere with or destroy the public use' ... . Accordingly, the prior public use doctrine will not prevent the City from condemning the Village's property. * * * ... [T]he City ... performed the steps required in the SEQRA review process and considered areas of potential environmental concern, but failed to provide an adequate written explanation for its negative declaration. Upon realizing its mistake (albeit after receiving communications from petitioners complaining about the negative declaration), and before approving the condemnation of property in relation to the project, the City held a public meeting and formally adopted the supplemental resolution to remedy the defects in the July 2017 negative declaration ... . Under the circumstances, remittal to the City for further environmental review or explanation of its determination would be redundant ... . The City did not abuse its discretion in determining the scope of the proposed taking. Although a municipality cannot use the power of eminent domain to take 'property not necessary to fulfill [a] public purpose, it is generally accepted that the condemnor has broad discretion in deciding what land is necessary to fulfill that purpose' ...". ***Matter of Village of Ballston Spa v. City of Saratoga Springs*, 2018 N.Y. Slip Op. 05248, Third Dept 7-12-18**

MUNICIPAL LAW, LANDLORD-TENANT, CONSTITUTIONAL LAW.

CITY ORDINANCE PROVISIONS REQUIRING A RENTAL PERMIT AND LIMITING OCCUPANCY OF RENTAL UNITS TO A "FAMILY" AS DEFINED IN THE ORDINANCE ARE NOT UNCONSTITUTIONAL.

The Third Department determined that municipal code provisions requiring a rental permit and limiting the occupancy of rental units to a "family" as defined in the code were not unconstitutionally vague: "The record therefore reflects that the rental occupancy restriction was enacted to, among other things, serve a legitimate governmental interest in diminishing public nuisances created from the overcrowding of dwelling units occupied by transient residents ... . Because the ordinance does not favor certain types of families over others, or restrict the size of unrelated persons living as a functionally equivalent family without also restricting the size of a traditional family, it does not suffer from the same constitutional infirmities as the ordinances in McMinn v. Town of Oyster Bay (66 NY2d at 549) or Baer v. Town of Brookhaven (73 NY2d 942, 943 [1989]). Moreover, the ordinance here contains objective criteria for rebutting the presumption that four or more persons living together in a single dwelling unit who are unrelated by blood, marriage or legal adoption do not constitute the functional equivalent of a traditional family ... , and the occupancy restriction bears a reasonable relationship to the goals sought to be achieved by the ordinance. In light of the foregoing, plaintiffs have not established that the challenged provisions of the ordinance are unconstitutional ... ". ***Grodinsky v. City of Cortland*, 2018 N.Y. Slip Op. 05236, Third Dept 7-12-18**

PERSONAL INJURY.

QUESTIONS OF FACT WHETHER THE PLACEMENT OF A PROPANE HEATER IN DEFENDANT'S STORE CREATED A DANGEROUS CONDITION AND WAS A PROXIMATE CAUSE OF PLAINTIFF'S CLOTHING CATCHING FIRE.

The Third Department determined the defendant lessee's motion for summary judgment in this negligence action based upon the placement of a propane heater in defendant's store was properly denied. Plaintiff's clothing caught fire when she stood near the stove: "... [P]laintiff relied upon a section of the then-applicable version of the Fuel Gas Code of New York State providing that an unvented room heater must be installed as directed by the manufacturer (see Fuel Gas Code of NY St § 621.1 [2007]). In turn, the manual for the heater at issue here provided, in accordance with standards established by the American National Standards Institute, that '[d]ue to high temperatures, [the] heater should be kept out of traffic' and should never be installed 'in high-traffic areas.' The manual further stated that the heater was intended for supplemental use and should never be installed as a primary heat source. Plaintiff submitted defendant's deposition testimony that he chose not to read or refer to the manual, although he was aware that it contained instructions about the safe placement of the heater. Significantly, he acknowledged that the heater was the store's only source of heat. As for whether the heater was kept out of traffic, defendant stated that customers often spent several hours in the store during regularly-conducted gaming tournaments, that customers moving between the bathroom and certain tables and chairs used during these events would 'pass right in front of the heater,' and that he had seen people walk past the heater to reach the bathroom and stand in front of it to warm themselves. While violations of rules such as the Fuel Gas Code do not establish negligence per se, they 'do[] provide some evidence of negligence' ... . Defendant's testimony thus gave rise to triable issues of fact as to whether the heater's placement violated the manufacturer's instructions and whether defendant was negligent in placing it for use in the store. ... Viewing the facts in the light most favorable to plaintiff, as we must, we find that she demonstrated the existence of a triable issue of fact as to whether defendant's negligence was a proximate cause of her injuries ...". ***Palmatier v. Mr. Heater Corp.*, 2018 N.Y. Slip Op. 05250, Second Dept 7-12-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER PLAINTIFF, A YOUTH HOCKEY PLAYER INJURED BY A TIPPING BENCH IN THE LOCKER ROOM, WAS IN THE CUSTODY OF THE COACH OR HIS FATHER IN THIS NEGLIGENT SUPERVISION ACTION.

The Third Department determined there was a question of fact whether plaintiff, a youth hockey player (Beninati), was in the custody and control of the coach or plaintiff's father at the time he was injured falling off a tipping bench in the locker room: "Where a child participates in an athletic activity, such as the youth hockey program involved here, we recognize that the team and its coach owe a duty of care to adequately supervise the child while participating in the event ... . That custodial duty, however, ceases once the child is returned to the care and control of his or her parent ... . 'A plaintiff claiming negligent supervision must demonstrate both that the defendant breached its duty to provide adequate supervision [as would a reasonably prudent parent placed in comparable circumstances], and that this failure was the proximate cause of the plaintiff's injuries'... . The pivotal question presented is whether Beninati was in the custody of his father or the coach at the time that he was injured." ***Beninati v. City of Troy*, 2018 N.Y. Slip Op. 05254, Third Dept 7-12-18**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH PROOF OF THE STAIRWAY FALL CASE WAS ENTIRELY CIRCUMSTANTIAL BECAUSE OF PLAINTIFF'S DECEDENT'S DEATH, THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE PLAINTIFF'S VERDICT AND THE JURY WAS PROPERLY GIVEN THE NOSEWORTHY INSTRUCTION.

The Third Department determined defendant's motion to set aside the verdict in this stairway-fall case was properly denied. Plaintiff's decedent was found at the bottom of a deteriorating concrete exterior staircase and later died from his injuries. Although plaintiff's decedent made some remarks to emergency personnel about the fall, he died before he could be deposed. The Third Department described the evidentiary standards in such a case and found that the "Noseworthy" jury instruction was properly given: "... [P]laintiff had to rely entirely on circumstantial evidence to establish that defendant's negligence was the proximate cause of decedent's fall. In doing so, plaintiff was not 'required to rule out all plausible variables and factors that could have caused or contributed to the accident' ... . Rather, plaintiff had to prove that defendant's negligence was the more likely cause of decedent's fall than any other potential cause... . Plaintiff's proof had to 'render other causes sufficiently remote such that the jury [could] base its verdict on logical inferences drawn from the evidence, not merely on speculation' ... . We are also unpersuaded by defendant's contention that Supreme Court erred in giving a jury charge based upon Noseworthy v. City of New York (298 NY 76 [1948]), which — in cases where the alleged negligent act or omission resulted in death — imposes a lighter burden of persuasion on the plaintiff by allowing the jury 'greater latitude in evaluating such factual issues as the decedent might have testified to had [he or she] lived' ... . The theory behind the Noseworthy charge is 'that it is unfair to permit a defendant who has knowledge of the facts to benefit by remaining mute in a wrongful death action where the decedent is unavailable to describe the occurrence' ... . The charge, however, is inapplicable 'where the plaintiff and the defendant have equal access to the facts surrounding the decedent's death' ... . ***Tyrell v. Pollak*, 2018 N.Y. Slip Op. 05251, Third Dept 7-12-18**

PRODUCTS LIABILITY, PERSONAL INJURY.

FAILURE TO WARN CAUSE OF ACTION IN THIS PRODUCTS LIABILITY CASE PROPERLY SURVIVED SUMMARY JUDGMENT, PLAINTIFF'S CLOTHES CAUGHT FIRE WHEN SHE STOOD NEAR A PROPANE HEATER, QUESTIONS OF FACT WHETHER THE WARNING WAS ADEQUATE AND WHETHER FAILURE TO WARN WAS A PROXIMATE CAUSE.

The Third Department determined defendants' motion for summary judgment on the "failure to warn" cause of action in this products liability case was properly denied. Plaintiff's clothing caught fire when she stood near a propane heater manufactured and sold by defendants: "Plaintiff submitted the pertinent ANSI standard for warning labels on unvented propane heaters, which specifies certain language to be used in such warnings and establishes minimum heights for the warning's lettering and a minimum distance at which the warnings must be legible. Plaintiff further submitted photographs of the warning label on an exemplar heater matching the one at issue here, supported by an affidavit from the professional photographer who took the pictures.... Plaintiff's counsel asserted in his affirmation that these letter heights are significantly smaller than the ANSI standard's minimum requirements and are therefore too small and inconspicuous to comply with that standard or to constitute an adequate warning label. * * * .. .[P]laintiff's testimony that she did not look at the heater immediately before the accident does not establish as a matter of law that she would not have seen and read sufficiently conspicuous warnings on prior occasions and heeded them at the time of the accident." ***Palmatier v. Mr. Heater Corp.*, 2018 N.Y. Slip Op. 05238, Third Dept 7-12-18**

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