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FIRST DEPARTMENT

ARBITRATION.

COURT'S LIMITED POWER OF REVIEW OF AN ARBITRATION AWARD EXPLAINED IN DEPTH, VACATION OF AWARD REVERSED.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Friedman, determined that Supreme Court did not have the power to order reconsideration of certain portions of the arbitration award (of over $100 million). The opinion is too detailed and comprehensive to fairly summarize here. The importance of the opinion is its detailed explanation of a court's limited power to review an arbitration award, even where the arbitrators got the law wrong: "The order vacating the award in part cannot be justified under the 'emphatic federal policy in favor of arbitral dispute resolution' embodied in the FAA [Federal Arbitration Act], a policy that 'applies with special force in the field of international commerce' ... . Under the FAA, even if an arbitral tribunal's legal and procedural rulings might reasonably be criticized on the merits, an award is not subject to vacatur for ordinary errors of the kind the court identified in this case, as opposed to manifest disregard of the law, a concept that ... means 'more than a simple error in law'... . 'The potential for . . . mistakes [by the arbitrators] is the price for agreeing to arbitration' ... , and, 'however disappointing [an award] may be,' parties that have bargained for arbitration 'must abide by it' (,,, ['Errors, mistakes, departures from strict legal rules, are all included in the arbitration risk']). Accordingly, we reverse, grant the petition to confirm the award, and deny the cross motion to vacate it." ***Matter of Daesang Corp. v. NutraSweet Co.*, 2018 N.Y. Slip Op. 06331, First Dept 9-27-18**

ATTORNEYS, EVIDENCE.

PLAINTIFF CAN PRESENT EXPERT TESTIMONY ABOUT THE AMOUNT OF PLAINTIFF'S LEGAL COSTS ATTRIBUTABLE TO DEFENDANT-ATTORNEY'S ALLEGED USE OF AN ALLEGEDLY FORGED DOCUMENT IN LITIGATION IN VIOLATION OF JUDICIARY LAW § 487.

The First Department, reversing Supreme Court, determined plaintiff (Melcher) can present expert testimony (by Lupkin) about the amount of Melcher's legal costs attributable to defendant-attorney's (Corwin's) alleged use of an allegedly forged document in violation of Judiciary Law § 487: "... [W]e are cognizant of the 'evident intent [of Judiciary Law § 487] to enforce an attorney's special obligation to protect the integrity of the courts and foster their truth-seeking function' ... . Accordingly, we exercise our discretion to modify Supreme Court's order to permit Melcher to call Lupkin to testify as an expert witness on damages at trial, with the proviso that his testimony be limited to the assessment of the excess legal costs that Melcher was required to incur, during the period beginning February 17, 2004, and ending May 11, 2009, as the proximate result of any violation of Judiciary Law § 487 by Corwin that the factfinder may find to have occurred, as discussed above." ***Melcher v. Greenberg Traurig LLP*, 2018 N.Y. Slip Op. 06310, First Dept 9-27-18**

CRIMINAL LAW.

HABEAS CORPUS PETITIONS STEMMING FROM THE DENIAL OF BAIL IN AN ATTEMPTED MURDER CASE PROPERLY DENIED.

The First Department, in a full-fledged opinion by Justice Tom, determined the two habeas corpus petitions, stemming from the denial of bail in an attempted murder case, were properly denied. The petitioner was charged with the attempted murder of her husband. It was petitioner's cousin who actually attacked petitioner's husband. The cousin had been convicted after trial before the judge who twice denied petitioner's bail applications, resulting in the two habeas corpus petitions before the First Department: "... [W]e find that the habeas court in the first proceeding correctly found that Justice Farber did not abuse his discretion in denying petitioner's initial bail application. The denial of bail was amply supported by the seriousness of the charges including attempted murder, the potential sentence of at least 5 years and up to 25 years in prison for the class B violent felonies of attempted murder in the second degree or first-degree burglary ... , as well as the strength of the evidence. Notably, Justice Farber had just presided over Nolan's trial for carrying out the plot allegedly orchestrated by petitioner ... . To the extent [petitioner] argues that the court improperly focused on the seriousness of the charges and the sentencing exposure to the exclusion of other factors, the court's failure to explicitly address each statutory factor or every specific argument raised by the parties on the record does not establish that the court abused its discretion. The court

implicitly based its ruling on all of the parties' arguments ... . * * * 'Petitioner's position, if accepted, would mandate that bail be granted in every case in which the accused has the financial resources to offer private security and monitoring, thereby depriving the court of its discretion to grant or deny bail on consideration of the factors enumerated in CPL 510.30(2)(a). While petitioner claims that her security package is foolproof and trumps all other factors, the fact remains that no ad hoc arrangement based on keeping a defendant in her private home under the watch of a security firm that she hired could be as secure as remand' ...". ***Matter of State of NY ex rel. Fischetti v. Brann*, 2018 N.Y. Slip Op. 06220, First Dept 9-25-18**

CRIMINAL LAW, APPEALS.

2015 MOTION TO REINSTATE THE APPEAL OF A 1986 CONVICTION DENIED.

The First Department determined defendant's appeal should be dismissed because more than 30 had passed between his conviction and the motion to reinstate the appeal. The defendant had absconded from his 1986 trial and then served a long sentence in North Carolina: "In 1984 defendant absconded during trial, and was tried and convicted in absentia. His attorney filed a notice of appeal, but defendant did nothing to perfect his appeal, which was dismissed in 1998, on the People's motion, for failure to prosecute. Meanwhile, in 1986, defendant was convicted of serious charges in North Carolina, and he served a lengthy sentence there. Commencing in 2003, nearly 20 years after his conviction, when the New York Department of Correctional Services lodged a detainer in North Carolina based on the instant conviction, defendant filed various pro se motions in connection with his New York conviction. However, defendant did not move to reinstate his appeal until 2015, more than 30 years after his 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 an absconding defendant's appeal remains pending for a long time, whether the appeal should be ultimately be permitted to proceed is 'subject to the broad discretion of the Appellate Division' ... . In exercising its discretion, this Court 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 ...". ***People v. Williams*, 2018 N.Y. Slip Op. 06182, First Dept 9-25-18**

EDUCATION-SCHOOL LAW.

COLLEGE ADEQUATELY ADDRESSED PH.D STUDENT'S LEARNING DISABILITY, STUDENT WAS PROPERLY TERMINATED FROM THE PROGRAM UPON FAILURE OF AN EXAM.

The First Department determined the college adequately addressed petitioner-Ph.D-student's learning disability and petitioner was properly terminated from the program after failing an exam: "The record establishes that respondents reasonably accommodated the known aspects of petitioner's learning disability by granting him, among other accommodations, double the amount of time (six hours) for a certification exam, with an additional hour for lunch to be used at his discretion. There is no record that respondents were ever apprised, until months after petitioner had twice unsuccessfully sat for the exam, that the resulting length of the test could exacerbate petitioner's disability through fatigue. Petitioner thus failed to meet his burden, under the Americans with Disabilities Act (ADA), of showing that the additional accommodations he sought (i.e., to take the exam home or split the six hours over two days) were facially reasonable... . Moreover, the record establishes that respondents met their duty, in advance of both administrations of the exam, to engage in an interactive dialogue with petitioner ... . Petitioner's claim for breach of implied contract also fails, as respondents' determination that petitioner did not pass the exam (and the resulting termination from the program) was rationally based in the record and, as an academic evaluation, is beyond further review ...". ***Matter of De Jesus v. Teachers Coll.*, 2018 N.Y. Slip Op. 06186, First Dept 9-25-18**

FAMILY LAW.

OFFICE OF CHILDREN AND FAMILY SERVICES' CHILD-MALTREATMENT FINDING NOT SUPPORTED BY THE EVIDENCE.

The First Department found that the child maltreatment determination by the NYS Office of Children and Family Services (OCFS) was not indicated: "OCFS's determination that child maltreatment by petitioners was "indicated" is not supported by substantial evidence... . Petitioners were in compliance with the recommendations of the child's pediatrician during the period in question, and there is no evidence that their failure to seek regular visits with a hematologist or to administer a daily dose of penicillin to the child as a prophylaxis either impaired or risked imminently impairing the child's physical condition... . Medical records show that the child's hospitalizations in 2014 and a year later in 2015 were the result of a viral infection, which would not have been prevented by his seeing a hematologist regularly or taking penicillin, an antibiotic. After the 2015 hospitalization, the child's treating physician ratified a course of treatment that did not include a daily antibiotic. Further, petitioners' decision not to further vaccinate the child did not violate the pediatrician's directive ...". ***Matter of Charles v. Poole*, 2018 N.Y. Slip Op. 06185, First Dept 9-25-18**

FAMILY LAW.

VISITATION SHOULD NOT HAVE BEEN CONDITIONED ON CHILDREN'S CONSENT.

The First Department, modifying Family Court, determined visitation should not have been conditioned on the children's consent: "... [V]isitation should not have been conditioned on the children's (ages 9 and 11) consent and the parties' agreement. Visitation is a joint right of the noncustodial parent, here the adoptive mother, and of the children ... . Although the children have a fractured relationship with their adoptive mother, a reasonable visitation schedule should have been set with her. At a minimum, supervised visitation would have alleviated the children's concerns. Not only is it untenable for these parties to set up their own visitation schedule, there is an insufficient showing that visitation would be detrimental to the children. 'A court may not delegate its authority to determine visitation to either a parent or a child' ... . Consequently, we remand this matter so that Family Court can, at a minimum, establish an appropriate supervised access schedule for the great-grandmother with the children and for the allocation of any other suitable resources to restore their relationship." ***Matter of Cornell S.J. v. Altemease R.J.*, 2018 N.Y. Slip Op. 06320, First Dept 9-27-18**

LABOR LAW-CONSTRUCTION LAW, EVIDENCE.

PLAINTIFF'S TESTIMONY THAT THE STEP LADDER WOBBLED CAUSING HIM TO FALL WAS SUFFICIENT TO SUPPORT SUMMARY JUDGMENT IN PLAINTIFF'S FAVOR IN THIS LABOR LAW § 240(1) ACTION, DESPITE THE LACK OF WITNESSES TO THE FALL, HEARSAY EVIDENCE IN THE ACCIDENT REPORT, AND A CONCLUSORY EXPERT AFFIDAVIT FROM THE DEFENSE.

The First Department determined plaintiff was properly granted summary judgment in this Labor Law § 240(1) action. Plaintiff alleged the step ladder he was using wobbled causing him to fall. The fact that there were no witnesses to the incident did not preclude summary judgment: "Plaintiff's testimony that, as he was climbing down a six-foot scaffold, the scaffold wobbled, causing him to fall to the floor, establishes prima facie defendants' liability under Labor Law § 240(1) ... . Plaintiff satisfied his burden of demonstrating that defendants failed to provide adequate safety devices to prevent him from falling when the scaffold moved ... . The fact that plaintiff was the only witness to his accident does not preclude summary judgment in his favor, since nothing in the record controverts his account of the accident or calls his credibility into question... . Defendants failed to raise an issue of fact in opposition, relying solely on hearsay statements in the accident report and the speculative opinion of their expert... . For the same reason, defendants failed to establish prima facie their freedom from liability." ***Rroku v. West Rac Contr. Corp.*, 2018 N.Y. Slip Op. 06312, First Dept 9-27-18**

PARTNERSHIP LAW, CONTRACT LAW.

NOTICE PURPORTING TO DISSOLVE A PARTNERSHIP WAS A NULLITY BECAUSE IT DID NOT COMPORT WITH THE RELEVANT PROVISIONS OF THE PARTNERSHIP AGREEMENT.

The First Department determined the notice issued by two partners purporting to dissolve the partnership was a nullity because the notice did not comport with the relevant provisions of the partnership agreement: "On October 15, 2015, two of the partners issued a notice purporting to withdraw from and dissolve the partnerships, pursuant to New York Partnership Law § 62(1)(b), 'which,' the notice said, 'provides that a partnership is terminable at will on notice.' * * * 'New York's Partnership Law creates default provisions that fill gaps in partnership agreements, but where the agreement clearly states the means by which a partnership will dissolve, or other aspects of partnership dissolution, it is the agreement that governs the change in relations between partners and the future of the business' ... . Where, as here, a partnership agreement contains provisions governing the dissolution of the partnership by the will of the partners, ordinary contract principles apply ... , and a notice by a partner or partners to dissolve a partnership in contravention of the partnership agreement's dissolution provisions is a legal nullity and does not effect a dissolution of the partnership." ***Wiener v. Weissman*, 2018 N.Y. Slip Op. 06205, First Dept 9-25-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER ICE WAS PRESENT ON THE SIDEWALK IN THIS SLIP AND FALL CASE, SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined there were questions of fact whether ice was present on the sidewalk in this slip and fall case: "Moreover, the parties sharply dispute whether there was an accumulation of old ice in the area of the accident. Defendants presented testimony from their superintendent that he did not see anything out of the ordinary regarding the condition of the sidewalk, and testimony from an expert meteorologist that the ground was bare of snow and that ice could not have formed naturally from the meteorological conditions. In addition, defendants submitted photographs, however they do not clearly show whether or not there was ice in the sidewalk crack. In contrast, plaintiff testified that there was 'dirty' ice on the sidewalk which caused her to fall, and submitted public meteorological records showing that there had been a significant snowfall 12 days before and intermittent freezing temperatures since that date. In light of this factual dispute, summary judgment is inappropriate. Furthermore, defendants failed to make a prima facie showing that they did not have constructive notice of the allegedly dangerous condition. Defendants' superintendent testi-

fied that building porters inspected the sidewalk each morning, but failed to provide any specific testimony regarding the inspection on the accident date. Defendants' superintendent also could not recall whether there was ice on the ground, even though he examined the area after the incident. Plaintiff's testimony about 'dirty' ice creates a triable issue of fact because it indicates that the icy condition had existed for some time ... . The storm in progress doctrine has no application to this case because plaintiff does not allege that the storm on the accident date caused the dangerous condition ...". ***Adario-Caine v. 69th Tenants Corp.*, 2018 N.Y. Slip Op. 06180, First Dept 9-25-18**

PERSONAL INJURY, EVIDENCE.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE WAS PROPERLY DENIED, DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WAS LAST INSPECTED OR CLEANED AND DID NOT DEMONSTRATE A LACK OF CONSTRUCTIVE NOTICE OF WATER ON THE FLOOR.

The First Department determined that defendant's motion for summary judgment in this slip and fall case was properly denied. Defendant did not demonstrate when the area of the fall was last inspected or cleaned and did not demonstrate a lack of constructive notice of water on the floor: "Defendant failed to establish its entitlement to judgment as a matter of law in this action where plaintiff slipped and fell on water in the vestibule of defendant's building. Defendant failed to make a prima facie showing that it lacked constructive notice because the superintendent failed to testify or aver that his assistant adhered to a janitorial schedule on the day of the accident or when the area was last inspected prior to plaintiff's fall ... . Since defendant failed to meet its initial burden to establish that it lacked constructive notice of the alleged defect as a matter of law, the burden never shifted to plaintiff to establish how long the condition existed ... . Defendant also failed to establish that it lacked constructive notice on the basis that the water was not present in the vestibule for a sufficient period to afford defendant an opportunity to discover and remedy the condition ... . Whether the water was present for that sufficient period presents an outstanding factual issue, as the time it took plaintiff and her friend to return to the premises from the store is unclear, and defendant failed to clarify the issue at the deposition." ***Hill v. Manhattan N. Mgt.*, 2018 N.Y. Slip Op. 06323, First Dept 9-27-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

AFFIDAVIT AND ATTORNEY AFFIRMATION CONSTITUTED THE FUNCTIONAL EQUIVALENT OF A VERIFIED PETITION IN THIS ARTICLE 78 PROCEEDING, THEREFORE THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing Supreme Court, determined that petitioner's affidavit and attorney affirmation constituted the equivalent of a verified petition. The motion to dismiss the Article 78 actions should not have been granted: "A verified petition is required to establish a jurisdictional predicate for a special proceeding (see CPLR 304[a]; 7804[c], [d] ...). CPLR 304(a) provides that '[a] special proceeding is commenced by filing a petition.' CPLR 7804(c) provides that 'a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard.' However, a document that is not denominated a verified petition may satisfy CPLR 304 and 7804 if it is the functional equivalent of a verified petition ... . Here, none of the papers filed and served by the petitioner was denominated a verified petition. However, the petitioner's papers, particularly her affidavit and the affirmation of her attorney, gave notice as to what administrative action was being challenged, the events upon which the action was taken, the basis of the challenge, and the relief sought ... . Therefore, the papers fulfilled the purposes of a verified petition and were the functional equivalent of a verified petition ...". ***Matter of Levine v. Suffolk County Dept. of Social Servs.*, 2018 N.Y. Slip Op. 06242, Second Dept 9-26-18**

CIVIL PROCEDURE, ATTORNEYS, PRIVILEGE, IMMUNITY, INSURANCE LAW.

LEGAL DOCUMENTS, BILLS FOR LEGAL SERVICES AND AN INSURER'S FILE PROTECTED BY ATTORNEY-CLIENT PRIVILEGE OR CONDITIONAL IMMUNITY, SUPREME COURT SHOULD NOT HAVE ORDERED DISCLOSURE.

The Second Department, reversing Supreme Court, determined that legal documents, bills for legal services, and an insurance carrier's file were not subject to disclosure. All the documents were protected by attorney-client privilege or conditional immunity. The underlying medical malpractice action was against defendant Louis Lasky Memorial Medical and Dental Center and defendant Frederick Ast. The documents were requested by Ast in a proceeding to determine the amount of the settlement to be attributed to Louis Lasky and Ast: "With respect to the files maintained by Louis Lasky's attorneys, the only documents contained therein that have not already been disclosed are absolutely protected by CPLR 3101(b) and (c), as they are 'primarily and predominately legal in nature and, in their full content and context, were made to render legal advice or services' to Louis Lasky ... . Regarding the legal bills, it was improper for the court to order Louis Lasky to produce unredacted copies because such disclosure would reveal factual investigation and legal work done by counsel,

which is privileged material ... . As for the insurance carrier's file, the court correctly concluded that this file is protected by a conditional immunity, as it contained material prepared for litigation ... . However, the court erred in finding that Ast met his burden of demonstrating that he had a 'substantial need' for the materials in the carrier's file, and that he could not obtain their "substantial equivalent" by other means 'without undue hardship' (CPLR 3101[d] ...)". ***Teran v. Ast*, 2018 N.Y. Slip Op. 06288, Second Dept 9-26-18**

CIVIL PROCEDURE, MEDICAL MALPRACTICE, NEGLIGENCE, INSURANCE LAW.

MEDICAL MALPRACTICE ACTION SHOULD NOT HAVE BEEN CONSOLIDATED WITH AN ACTION TO DETERMINE WHETHER THE MALPRACTICE WAS COVERED BY INSURANCE.

The Second Department, reversing Supreme Court, determined that the medical malpractice action should not have been consolidated with an contract action to determine an insurance-coverage obligation in the malpractice action "... Salvatore Leone and Santa Leone (hereinafter together the Leones) commenced an action to recover damages for medical malpractice against Alvin Hershfeld and Medical Office of Howard Beach, P.C. (hereinafter together Hershfeld; hereinafter the malpractice action). ... Hershfeld commenced the instant action against JM Woodworth Risk Retention Group, Inc. (hereinafter JM Woodworth), seeking a declaration that JM Woodworth was obligated to defend and/or indemnify Hershfeld in the malpractice action, and to recover damages for breach of contract, and also named the Leones as defendants. * * * The Supreme Court improvidently exercised its discretion in consolidating the two actions for the purpose of a joint trial and in amending the caption accordingly. In the malpractice action, the issues involve, inter alia, the alleged negligence of Hershfeld and the alleged damages suffered by the Leones. In the instant action, the issue to be resolved is JM Woodworth's alleged contractual obligation to provide insurance coverage to Hershfeld in the malpractice action. The two actions do not involve common questions of law or fact (see CPLR 602[a]...). Moreover, a joint trial of the two actions could result in substantial prejudice to JM Woodworth. Indeed, it has long been recognized that it is inherently prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims, even where common questions of law and fact exist ...". ***Hershfeld v. JM Woodworth Risk Retention Group, Inc.*, 2018 N.Y. Slip Op. 06229, Second Dept 9-26-18**

CONTRACT LAW.

BREACH OF DUTY CAUSE OF ACTION WAS DUPLICATIVE OF THE BREACH OF CONTRACT CAUSE OF ACTION AND WAS PROPERLY DISMISSED, CRITERIA EXPLAINED.

The Second Department noted that a breach of duty cause of action was duplicative of the breach of contract action and was properly dismissed: "The cause of action alleging breach of duty was duplicative of the breach of contract cause of action. '[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated' ...". ***Junger v. John V. Dinan Assoc., Inc.*, 2018 N.Y. Slip Op. 06232, Second Dept 9-26-18**

COURT OF CLAIMS, CIVIL PROCEDURE.

SERVICE OF CLAIM BY REGULAR MAIL VIOLATED COURT OF CLAIMS ACT SECTION 11, CLAIM PROPERLY DISMISSED.

The Second Department determined the claim in this traffic accident case was properly dismissed because it was served by regular mail: "On March 16, 2011, the claimant was driving on Sunrise Highway and, after missing his exit, attempted to cut across the strip of land separating Sunrise Highway from the exit ramp, losing control of his vehicle and sustaining injuries. After being granted permission to file a late notice of claim, the claimant served the claim on the State of New York by regular mail. The State moved for summary judgment dismissing the claim on the ground that service was improper, as it was not made in accordance with Court of Claims Act § 11. The claimant cross-moved for the court to deem its notice of claim timely served nunc pro tunc. The Court of Claims granted the motion and denied the cross motion. The claimant appeals, and we affirm. We agree with the Court of Claims' determination to grant the State's motion for summary judgment dismissing the claim, as the claim was improperly served upon the State by regular mail rather than by personal service or certified mail as required by Court of Claims Act § 11 ...". ***Costello v. State of New York*, 2018 N.Y. Slip Op. 06227, Second Dept 9-26-18**

CRIMINAL LAW.

INDICTMENT CHARGING CRIMINAL POSSESSION OF A WEAPON WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT ALLEGE THE POSSESSION WAS OUTSIDE DEFENDANT'S HOME OR BUSINESS.

The Second Department, reversing defendant's conviction, determined the indictment was jurisdictionally defective. The indictment charged criminal possession of a weapon but did not allege the possession was outside the defendant's home or business: "The defendant's conviction of criminal possession of a weapon in the second degree under Penal Law § 265.03 must be vacated. Penal Law § 265.03(3) exempts from criminal liability under that subdivision a person's possession of a loaded firearm when such possession takes place in the person's home or place of business. In this case, the indictment charging a violation of Penal Law § 265.03(3) failed to allege that the defendant's possession of the subject weapon was

outside of his home or place of business... . As correctly conceded by the People, this omission rendered that count of the indictment jurisdictionally defective, which is a type of defect that is not waivable ...". ***People v. Tromp*, 2018 N.Y. Slip Op. 06275, Second Dept 9-26-18**

CRIMINAL LAW, APPEALS.

TRIAL JUDGE'S HANDLING OF JURY NOTES CONSTITUTED A MODE OF PROCEEDINGS ERROR, REVERSAL REQUIRED DESPITE FAILURE TO PRESERVE THE ERROR.

The Second Department, reversing defendant's conviction, determined the trial judge committed a mode of proceedings error in dealing with jury notes. Therefore reversal was required despite the failure to preserve the error: "The defendant correctly contends that the Supreme Court's handling of two jury notes failed to comply with CPL 310.30, in accordance with the procedure outlined in *People v. O'Rama* (78 NY2d 270). '[W]henever a substantive written jury communication is received by the Judge, it should be marked as a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel'... . 'After the contents of the inquiry are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses. The court should then ordinarily apprise counsel of the substance of the responsive instruction it intends to give so that counsel can seek whatever modifications are deemed appropriate before the jury is exposed to any potentially harmful information. Once the jury is returned to the courtroom, the communication should be read in open court' ... . 'Where a trial court fails to provide 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' ... . Here, the subject jury notes requested 'material evidence' and 'Ms. Bernard Testimony read back.' The Supreme Court did not read the contents of either note into the record, but rather apprised counsel of the contents of the notes in general terms. The court then convened the jury, and the testimony of the specified witness was read back. Although the defendant failed to object to the manner in which the Supreme Court handled these notes, under the circumstances of this case, the court violated *People v. O'Rama* and committed a mode of proceedings error, obviating the need for preservation, by failing to provide the defendant with notice of the 'precise contents' of the notes prior to giving its responses ... . The jury's requests for 'material evidence' and a readback of witness testimony were not mere ministerial inquiries, but rather substantive jury notes, the precise contents of which the court was required to disclose ... . Accordingly, the court's failure to provide counsel with meaningful notice of either of these substantive jury notes requires reversal of the judgment and a new trial." ***People v. Wood*, 2018 N.Y. Slip Op. 06277, Second Dept 9-26-18**

DISCIPLINARY HEARINGS (INMATES).

INMATE'S 'THREAT' TO BRING A LAWSUIT WAS NOT AN ACTIONABLE RULE VIOLATION.

The Fourth Department, annulling the "threats" charge, determined that the "threat" to file a lawsuit was not a proper basis for the charge: "... [R]espondent's determination of guilt on the threats charge under inmate rule 102.10 must be annulled. Although respondent correctly notes that 'an inmate need not threaten violence in order to be found guilty of [making threats under rule 102.10]' ... , a statement cannot be a 'threat' within the meaning of inmate rule 102.10 unless, at the very minimum, it conveys an intent to do something illegal, improper, or otherwise prohibited ... . Here, petitioner did not convey an intent to do anything illegal, improper, or otherwise prohibited. To the contrary, petitioner merely conveyed his intent to exercise his constitutional right to access the courts ... , and he cannot be penalized for 'threatening' to do something, i.e., file a lawsuit, that he has every legal right to do. As the United States Supreme Court has explained, '[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional' (*Bordenkircher v. Hayes*, 434 US 357, 363 [1978], *reh denied* 435 US 918 [1978], quoting *Chaffin v. Stynchcombe*, 412 US 17, 32 n 20 [1973]). Moreover, respondent's interpretation of the word 'threat' in this context would effectively nullify the protections afforded by Correction Law § 138 (4), which bars an inmate from being 'disciplined for making written or oral statements, demands, or requests involving a change of institutional conditions, policies, rules, regulations, or laws affecting an institution." ***Matter of Gourdine v. Annucci*, 2018 N.Y. Slip Op. 06391, Fourth Dept 9-29-18**

EDUCATION-SCHOOL LAW, NEGLIGENCE, MUNICIPAL LAW.

SCHOOL HAD ACTUAL KNOWLEDGE OF THE FACTS OF THE SLIP AND FALL CLAIM WITHIN 90 DAYS AND WAS NOT PREJUDICED BY THE DELAY IN FILING A NOTICE OF CLAIM, PETITION FOR LEAVE TO FILE A LATE NOTICE SHOULD HAVE BEEN GRANTED, DESPITE AN INADEQUATE EXCUSE.

The Second Department, reversing Supreme Court, determined the petition for leave to file a late notice of claim in this slip and fall case should have been granted. Petitioner alleged she tripped and fell over unsecured floor mats as she was leaving the school after her grandson's basketball game. The Second Department noted that the school had done an investigation and thereby had timely notice of the facts of the claim: " … [A]lthough the petitioner's notice of claim was not served within 90 days of the accident, the respondent acquired actual knowledge of the essential facts constituting the claim within 90 days of the accident ... . In fact, the respondent conducted an investigation into whether it was a proper defendant in a personal injury action. In addition, the petitioner made an initial showing that the respondent was not substantially prej-

udiced by the delay, since the respondent acquired timely, actual knowledge of the essential facts constituting the claim within the 90-day period, conducted an investigation, and notified its insurance carrier of the accident ... . In opposition, the respondent failed to make a particularized evidentiary showing that it would be substantially prejudiced if the late notice was allowed ... . The respondent's contention that it was prejudiced because the particular mats over which the petitioner tripped had been replaced after the accident is without merit. The record shows that the respondent's Director of Facilities sent an email on the morning following the petitioner's accident in which he indicated that he was aware of the fact that the petitioner tripped over the mats in the vestibule. Contrary to the respondent's contention, any prejudice resulting from the replacement of the subject mats was due to the respondent's practice of changing the mats on a weekly basis rather than from the petitioner's delay in serving a notice of claim. Under these circumstances, the failure of the respondent to inspect the mats that were on the ground on the date of the petitioner's accident was not caused by the delay in serving a notice of claim ... . [W]hile the excuses proffered by the petitioner for her failure to file a timely notice of claim were not reasonable, the absence of a reasonable excuse is not in and of itself fatal to the petition where, as here, there was actual notice and an absence of prejudice ...". ***Matter of Messick v. Greenwood Lake Union Free Sch. Dist.*, 2018 N.Y. Slip Op. 06244, Second Dept 9-26-18**

INSURANCE LAW, ATTORNEYS.

PROPERTY OWNER'S MOTION FOR SUMMARY JUDGMENT DECLARING THAT THE INSURER WAS OBLIGATED TO REIMBURSE THE PROPERTY OWNER FOR COSTS AND ATTORNEY'S FEES INCURRED IN DEFENDING THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing (modifying) Supreme Court in this slip and fall case, determined the defendant property owner's (Medford's) motion for summary judgment declaring that the insurer (NGM) was obligated to reimburse the property owner's costs incurred in defending the action should have been granted: "... [T]he plaintiff allegedly was injured when she slipped and fell on ice in a parking lot on property owned by Medford Landing, L.P. (hereinafter Medford). The plaintiff commenced this action against Medford to recover damages for personal injuries. Thereafter, Medford commenced a third-party action against the third-party defendants, which provided snow removal services at the premises pursuant to a contract with Medford. … Medford also commenced a second third-party action against NGM Insurance Company (hereinafter NGM), which issued a general liability insurance policy to the third-party defendants. * * * ... [T]he Supreme Court should have granted that branch of Medford's motion which was for summary judgment declaring that NGM is obligated to reimburse Medford for costs, disbursements, and attorneys' fees incurred in defending the main action. 'An insurer's duty to defend is broader than the duty to indemnify and arises whenever the allegations of the complaint against the insured, liberally construed, potentially fall within the scope of the risks undertaken by the insurer' ... . 'If any of the claims against an insured arguably arise from covered events, the insurer is required to defend the entire action'... . 'An additional insured is entitled to the same coverage as if it were a named insured' ... . Here, Medford established, prima facie, that the allegations in the complaint suggested a reasonable possibility of coverage ... . In opposition, NGM failed to raise a triable issue of fact as to whether the accident arose from Medford's independent acts so as to preclude coverage under the NGM policy, since there is no requirement that liability must be determined before an additional insured is entitled to a defense ... . Further, there is no merit to NGM's contention that the subject policy provided only excess insurance coverage to Medford. The NGM policy was written as primary coverage for the third-party defendants and added Medford as an additional insured, which entitles Medford to the same coverage rights as the primary insured ...". ***McCoy v. Medford Landing, L.P.*, 2018 N.Y. Slip Op. 06236, Second Dept 9-26-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

DEFENDANT PROPERTY OWNERS BORROWED A LIFT FROM DEFENDANT MIS, PLAINTIFF WAS INJURED USING THE LIFT, THE LABOR LAW § 200 CAUSE OF ACTION AGAINST MIS WAS PROPERLY DISMISSED AS INAPPLICABLE, BUT THE NEGLIGENCE ACTION AGAINST MIS SHOULD NOT HAVE BEEN DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined that summary judgment was properly granted for the Labor Law § 200 cause of action, but should not have been granted on the negligence cause of action. Plaintiff was injured using a telescoping lift. The lift belonged to MIS and defendant property owners had borrowed it. The Labor Law § 200 action against MIS was dismissed because Labor Law § 200 applies only to owners, contractors and their agents. The negligence action against MIS should not have been dismissed because MIS did not demonstrate the lift was not in a defective or dangerous condition: "We agree with the Supreme Court's determination granting that branch of MIS's motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 200 insofar as asserted against it. 'Labor Law § 200 is a codification of the common-law duty imposed on owners, contractors, and their agents to provide workers with a safe place to work'... . The evidence MIS submitted in support of its motion established, prima facie, that MIS was not an owner, contractor, or agent with regard to the plaintiff's work ... . In opposition, the plaintiff failed to raise a triable issue of fact. The Supreme Court should have denied that branch of MIS's motion which was for summary judgment dismissing the cause of action alleging common-law negligence insofar as asserted against it. Contrary to its sole

contention regarding this cause of action, MIS failed to establish, prima facie, that the lift was not in a defective or dangerous condition." ***Hill v. Mid Is. Steel Corp.*, 2018 N.Y. Slip Op. 06230, Second Dept 9-26-18**

PERSONAL INJURY.

THE DEFENDANT IN THIS REAR-END COLLISION CASE DID NOT RAISE A QUESTION OF FACT ABOUT WHETHER THERE WAS A NONNEGLIGENT EXPLANATION FOR STRIKING PLAINTIFF'S VEHICLE.

The Second Department determined defendant in this rear-end collision case did not raise a question of fact about whether there was a nonnegligent explanation for striking plaintiff's vehicle: "... [T]he defendants submitted the affidavit of the defendant driver, which failed to provide a nonnegligent excuse for striking the rear of the plaintiff's vehicle. The defendant driver averred that the plaintiff's vehicle struck a vehicle in front of it and came to a short stop. According to the defendant driver, there was heavy, stop-and-go traffic at the time, and the vehicle he was operating was traveling approximately 5 to 10 miles per hour and was approximately 20 feet behind the plaintiff's vehicle when the plaintiff's vehicle stopped short. The defendant driver asserted that he could not stop his vehicle in time to avoid the impact. 'While a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead' ... . Given the traffic conditions as related by the defendant driver, his assertion that the plaintiff's vehicle came to a sudden stop was insufficient to raise a triable issue of fact as to whether there was a nonnegligent explanation for the collision between the plaintiff's vehicle and the defendants' vehicle ...?". ***Arslan v. Costello*, 2018 N.Y. Slip Op. 06221, Second Dept 9-26-18**

PERSONAL INJURY, LABOR LAW-CONSTRUCTION LAW, LABOR LAW, TOXIC TORTS, ENVIRONMENTAL LAW.

ACTION ALLEGING LEAD POISONING IN UTERO FROM FATHER'S CLOTHES WHICH WERE SATURATED WITH LEAD AND OTHER HAZARDOUS MATERIALS AT WORK DISMISSED.

The Second Department determined the action based upon exposure to lead in utero was properly dismissed. Plaintiff alleged his father's clothes were saturated with lead at work: "At common law, employers have a duty to provide a safe workplace, but this duty has been limited to employees (see Labor Law § 200...). It has not, as the plaintiff contends, been extended to encompass individuals who were not employed at the worksite such as the plaintiff or his mother during her pregnancy ... . While '[a] landowner generally must exercise reasonable care, with regard to any activities which he carries on, for the protection of those outside of his premises' ... , the facts alleged in this case differ from those to which a landowner's duty to exercise reasonable care for the protection of individuals off site has been held to extend ... . Contrary to the plaintiff's contention, the alleged violations of Occupational Safety and Health Administration (hereinafter OSHA) regulations ... , the Occupational Health and Safety Act of 1970 , specifically 29 USC § 654(a), and Labor Law § 27-a do not constitute negligence per se. The violation of OSHA regulations provides only evidence of negligence ... . Moreover, neither the plaintiff nor his mother during her pregnancy belonged to the class intended to be protected by OSHA or its implementing regulations, 29 USC § 654(a), or Labor Law § 27-a, namely employees ...". ***Campanelli v. Long Is. Light. Co.*, 2018 N.Y. Slip Op. 06225, Second Dept 9-26-18**

PERSONAL INJURY, MUNICIPAL LAW.

EXPOSED TREE ROOT IN TOWN PARK WAS AN OPEN AND OBVIOUS CONDITION, SLIP AND FALL ACTION PROPERLY DISMISSED.

The Second Department determined that an exposed root in a town park, over which plaintiff tripped and fell, was an open and obvious condition that was not actionable: " 'A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property' ... . A landowner, however has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that the exposed tree root was an open and obvious condition which was inherent or incidental to the nature of the property, and known to [plaintiff] prior to the subject accident ... . Moreover, the location of the exposed tree root in relation to the picnic table was both open and obvious and, as a matter of law, not inherently dangerous ...". ***Ibragimov v. Town of N. Hempstead*, 2018 N.Y. Slip Op. 06231, Second Dept 9-26-18**

PERSONAL INJURY, MUNICIPAL LAW.

MOTION TO AMEND NOTICE OF CLAIM TO ADD THE ADDRESS OF PLAINTIFF'S SLIP AND FALL SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiff's motion for leave to amend her notice of claim in this slip and fall case should have been granted. " '[I]n making a determination on the sufficiency of a notice of claim, a

court's inquiry is not limited to the four corners of the notice of claim' ... . 'A court may consider the testimony provided during an examination conducted pursuant to General Municipal Law § 50-h and any other evidence properly before it to correct a good faith and nonprejudicial technical mistake, omission, irregularity, or defect in the notice of claim' ... . Where the defendant is provided with such evidence correcting the notice of claim within a reasonable time after the accident, there is no prejudice... . Here, the defendant did not demonstrate, prima facie, that the notice of claim was insufficient. The information contained in the notice of claim, supplemented by the testimony of the plaintiff given a few months thereafter at the General Municipal Law § 50-h hearing, was sufficient to allow the defendant to conduct a meaningful investigation into the plaintiff's claim ... . Moreover, the defendant did not demonstrate, prima facie, that it would be prejudiced by the plaintiff's proposed amendment to the notice of claim, which was to state the address of the accident. The plaintiff had testified that there were witnesses to the accident. As such, the defendant could have ascertained the location of the accident 'with a modicum of effort' ... . Moreover, the defendant did not submit any evidence demonstrating that it was misled by the error, or that it conducted an investigation at the wrong location ... . Finally, even if the original notice of claim had contained the address of the defect, the plaintiff testified that the road was resurfaced approximately three weeks after her fall, which was prior to service of the notice of claim ...". ***Ruark v. City of Glen Cove*, 2018 N.Y. Slip Op. 06286, Second Dept 9-26-18**

FOURTH DEPARTMENT

ARBITRATION.

ARBITRATOR'S AWARD WAS NOT IRRATIONAL, SUPREME COURT SHOULD NOT HAVE VACATED THE AWARD IN THIS REAR-END COLLISION CASE.

The Fourth Department, reversing Supreme Court, determined the arbitrator's award in this rear-end collision case should not have been vacated: " 'It is well settled that judicial review of arbitration awards is extremely limited' ... . As relevant here, a court may vacate an arbitration award if it finds that the rights of a party were prejudiced when 'an arbitrator . . . exceeded his [or her] power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made' (CPLR 7511 [b] [1] [iii]). ... An arbitrator exceeds his or her power where, inter alia, the award is 'irrational'... , i.e., 'there is no proof whatever to justify the award'... . Where, however, 'an arbitrator offers even a barely colorable justification for the outcome reached, the arbitration award must be upheld' ... . Here, the arbitrator's determination is not irrational inasmuch as defendant submitted evidence establishing that plaintiff's injuries were not serious or were not caused by the accident ... . Plaintiff correctly concedes that the arbitrator did not 'imperfectly execute[]' his power (CPLR 7511 [b] [1] [iii]), inasmuch as the arbitration award did not ' leave[] the parties unable to determine their rights and obligations,' fail to 'resolve the controversy submitted or . . . create[] a new controversy' ... . Additionally, 'it is well established that an arbitrator's failure to set forth his [or her] findings or reasoning does not constitute a basis to vacate an award' ...". ***Whitney v. Perrotti*, 2018 N.Y. Slip Op. 06343, Fourth Dept 9-28-18**

CIVIL PROCEDURE, INSURANCE LAW, PRIVILEGE, EVIDENCE.

ALTHOUGH DISCLOSURE OF INSURER'S SUPPLEMENTAL UNDERINSURED MOTORIST (SUM) FILE IS NOT LIMITED TO THE TIME BEFORE THE COMMENCEMENT OF THE ACTION, THE ORDER TO DISCLOSE THE WHOLE FILE WAS IMPROPER, A PRIVILEGE LOG SHOULD BE CREATED FOLLOWED BY AN IN CAMERA REVIEW.

The Fourth Department, reversing Supreme Court, determined that complete disclosure of a supplemental underinsured motorist (SUM) file should not have been ordered in this traffic accident case. The court noted that *Lalka v. ACA Ins.Co.*, 128 A.D.3d 1508 (4th Dep't 2015), to the extent that it held that disclosure is allowed only up to the date of commencement of an action, should no longer be followed. However, the proper procedure is the creation of a privilege log followed by in camera review: "... [D]efendant's motion for a protective order was based upon the assertion that any documents contained in the claim file after the date of commencement were materials protected from discovery. Thus, the sole issue on appeal is whether defendant met its burden of establishing that those parts of the claim file withheld from discovery contain material that is protected from discovery. We conclude that defendant did not meet that burden. To the extent that Lalka ... holds that any documents in a claim file created after commencement of an action in a SUM case in which there has been no denial or disclaimer of coverage are per se protected from discovery, it should not be followed. Rather, a party seeking a protective order under any of the categories of protected materials in CPLR 3101 bears 'the burden of establishing any right to protection' ... . ' [A] court is not required to accept a party's characterization of material as privileged or confidential' ... . Ultimately, 'resolution of the issue whether a particular document is . . . protected is necessarily a fact-specific determination . . . , most often requiring in camera review' ... . Here, we conclude that defendant failed to meet its burden inasmuch as it relied solely upon the conclusory characterizations of its counsel that those parts of the claim file withheld from discovery contain protected material. We nonetheless further conclude that, under the circumstances of this case, the court abused its discretion by ordering the production of allegedly protected documents and instead should have granted the alternative relief requested by defendant, i.e., allowing it to create a privilege log pursuant to CPLR 3122 (b) followed by an in camera review of the subject documents by the court ...". ***Rickard v. New York Cent. Mut. Fire Ins. Co.*, 2018 N.Y. Slip Op. 06333, Fourth Dept 9-28-18**

CRIMINAL LAW.

FOR CAUSE CHALLENGE TO JUROR, BASED UPON IMPLIED BIAS, SHOULD HAVE BEEN GRANTED, JUROR'S LIFE WAS SAVED BY THE TRAUMA SURGEON WHO TESTIFIED ABOUT THE VICTIM'S WOUNDS, MULTIPLE STAB WOUNDS DID NOT SUPPORT LESSER INCLUDED OFFENSE OF RECKLESS ASSAULT.

The Fourth Department reversed defendant's conviction finding that the for cause challenge to a juror should have been granted. The trauma surgeon who testified about the wounds suffered by the victim had been the trauma surgeon who saved the juror's life. Because there will be a new trial, the Fourth Department ruled the evidence (multiple stab wounds) did not support charging the jury with the lesser included offense of reckless assault: "A prospective juror may be challenged for cause on, inter alia, the ground that he or she has some relationship to a prospective witness at trial of a nature that 'is likely to preclude [the prospective juror] from rendering an impartial verdict'... . Such a relationship gives rise to what is known as 'an implied bias' . . . that requires automatic exclusion from jury service regardless of whether the prospective juror declares that the relationship will not affect her ability to be fair and impartial"... , and 'cannot be cured with an expurgatory oath' ... . Not every potential juror-witness relationship necessitates disqualification, but courts are 'advised . . . to exercise caution in these situations by leaning toward disqualifying a prospective juror of dubious impartiality' ... . Relevant factors for the court to consider in determining whether disqualification is necessary include the nature of the relationship and the frequency of contact ... . The denial of a challenge for cause has been upheld where the relationship at issue arose in a professional context and 'was distant in time and limited in nature' ... . Conversely, the Court of Appeals has required disqualification where the relationship was 'essentially professional' but 'also somewhat intimate' . We conclude that the juror's testimony indicated a likelihood that her relationship to the surgeon was of a nature that would preclude her from rendering an impartial verdict. The juror was in the hospital for an extended period of time suffering from an unspecified trauma. During that time, the surgeon was primarily responsible for the juror's care, and they had contact on at least a daily basis. Most significantly, the juror was convinced that the surgeon had saved her life. Thus, although the relationship arose in a professional context, it was, at least from the juror's perspective, something more than a mere professional relationship." ***People v. Farley*, 2018 N.Y. Slip Op. 06380, Fourth Dept 9028-18**

CRIMINAL LAW.

SENTENCING JUDGE INDICATED HE WAS BOUND BY AN AGREEMENT WITH THE PEOPLE CONCERNING DEFENDANT'S SENTENCE, HOWEVER, A SENTENCING JUDGE HAS DISCRETION IN SENTENCING, MATTER REMITTED FOR RESENTENCING.

The Fourth Department, vacating defendant's sentence, determined it appeared the sentencing judge mistakenly believed he was bound by his agreement with the People to impose a particular sentence: "County Court initially imposed a one-year term of interim probation. The court informed defendant that, if he complied with the terms of interim probation, the court would impose a five-year term of probation. Defendant, however, repeatedly violated those terms. At sentencing, the court stated that 'the only way' it could secure defendant a plea bargain involving probation was to help negotiate a plea agreement with 'specific terms,' including a 'severe sanction' in the event that he violated the terms of interim probation. The court then stated that it had to 'keep [its] word,' presumably to the People, because otherwise it would be unable to secure the 'same opportunity for another defendant who is in a similar situation.' The court further stated that it was 'compelled' to impose an indeterminate term of incarceration of 2½ to 7 years, which is the maximum legal sentence (see Penal Law § 70.00 [2] [d]; [3] [b]). Defendant contends that the court failed to exercise its discretion at sentencing. We agree. '[T]he sentencing decision is a matter committed to the exercise of the court's discretion . . . made only after careful consideration of all facts available at the time of sentencing'... . 'The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence' ... . Here, the court indicated that it was bound by its agreement with the People to impose a particular sentence ...". ***People v. Dupont*, 2018 N.Y. Slip Op. 06392, Fourth Dept 9-28-18**

PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT ACTED RECKLESSLY IN THIS SKIING ACCIDENT CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined defendant's motion for summary judgment in this skiing accident case should not have been granted. Plaintiff was injured in a collision with defendant. The assumption of the risk doctrine did not preclude the suit because a question of fact had been raised about whether defendant acted recklessly: "... [P]laintiffs submitted, inter alia, an affidavit from an emergency room physician who was also an 11-year veteran of the National Ski Patrol. Based on his review of the depositions and other records related to the case, the expert opined that, given the nature and extent of plaintiff's injuries, 'there [was] no question [that] the force with which [defendant] impacted [plaintiff's] left side and back was immense' and that plaintiff's injuries were 'not consistent with [defendant's] deposition

testimony' that he had come to or nearly come to a complete stop. The expert further opined that, '[g]iven that [plaintiff] was skiing slowly at the time of the collision, the severe injuries sustained by [both] men, and their unanimous testimony that the collision was severe, it [was] clear [that defendant] was snowboarding at an extremely high rate of speed at the time of the collision.' The expert thus concluded that defendant had 'unreasonably increased the risk of harm' to plaintiff by cutting across the beginner trail 'at an extremely high rate of speed . . . knowing that there would be skiers and snowboarders traveling down [the beginner trail]' and that defendant's conduct constituted 'an egregious breach of good and accepted snowboarding practices.' * * * .. [T]the record establishes that the collision was exceedingly violent and, inasmuch as we must accept as true plaintiff's testimony that he was the one who was skiing slowly ... , there is 'at least a question of fact . . . whether . . . defendant's speed in the vicinity and overall conduct was reckless' ... . Contrary to defendant's contention, the affidavit of plaintiffs' expert was neither conclusory nor speculative ...". ***Sopkovich v. Smith*, 2018 N.Y. Slip Op. 06342, Fourth Dept 9-28-18**

PERSONAL INJURY.

DEFENDANT OFFERED A NONNEGLIGENT EXPLANATION OF THE REAR-END COLLISION, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiffs' motion for summary judgment in this rear-end collision case should not have been granted. Defendant offered a nonnegligent explanation of the accident: " 'It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle . . . In order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision . . . One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle . . . , and such an explanation is sufficient to overcome the inference of negligence and preclude an award of summary judgment' ... . Here, defendant averred that he was traveling behind the vehicle in which plaintiff was a passenger when it stopped suddenly at a green light and that, despite his efforts, he could not stop in time to avoid a collision. Plaintiff offered a contrary account in her affidavit. Thus, there is an issue of fact sufficient to defeat plaintiffs' motion with respect to the issue of negligence ...". ***Macri v. Kotrys*, 2018 N.Y. Slip Op. 06387, Fourth Dept 9-28-18**

PERSONAL INJURY, MUNICIPAL LAW.

DEFENDANT MUNICIPALITY DEMONSTRATED IT DID NOT RECEIVE WRITTEN NOTICE OF THE SIDEWALK DEFECT IN THIS SLIP AND FALL CASE, MUNICIPALITY'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the municipality demonstrated it did not receive written notice of the sidewalk defect in this slip and fall case: "Defendant met its initial burden on the motion by establishing that it did not receive prior written notice of the allegedly defective sidewalk as required by Syracuse City Charter § 8-115 ... . Contrary to plaintiff's contention, 'it is well established that [a] verbal or telephonic communication to a municipal body that is reduced to writing [does not] satisfy a prior written notice requirement' ... , and 'it is not this Court's prerogative to overrule or disregard a precedent of the Court of Appeals' ... . Contrary to the court's determination, 'constructive notice of the allegedly dangerous condition is not an exception to the requirement of prior written notice contained in the [Syracuse] City Charter'... . In opposition, plaintiff failed to raise a triable issue of fact concerning whether defendant 'affirmatively created the defect through an act of negligence . . . that immediately result[ed] in the existence of a dangerous condition' ... , and mere 'speculation that [defendant] created the allegedly dangerous condition is insufficient to defeat the motion' ...". ***Hernandez v. City of Syracuse*, 2018 N.Y. Slip Op. 06351, Fourth Dept 9-28-18**

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