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Editor: **Bruce Freeman**

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COURT OF APPEALS

CRIMINAL LAW.

ACCUSATORY INSTRUMENT CHARGING DEFENDANT WITH PATRONIZING A PROSTITUTE WAS NOT JURISDICTIONALLY DEFECTIVE BECAUSE A CLINICAL PHRASE WAS USED TO DESCRIBE SEXUAL ACTIVITY.

The Court of Appeals, reversing the appellate term, determined that the accusatory instrument charging defendant with patronizing a prostitute was not jurisdictionally defective: "Giving the allegations 'a fair and not overly restrictive or technical reading' ... , and 'drawing reasonable inferences from all the facts set forth in the accusatory instrument' ... , the accusatory instrument contains sufficient facts to demonstrate 'reasonable cause' to believe (CPL 100.40[4][b]) that defendant was guilty of patronizing a prostitute in the third degree (see Penal Law § 130.00[10]). The factual allegations that defendant requested 'manual stimulation' from a woman on a street corner, for a specific sum of money, at 2:25 a.m., supplied 'defendant with sufficient notice of the charged crime to satisfy the demands of due process and double jeopardy'... . Defendant's argument that 'manual stimulation' could be indicative of nonsexual conduct ignores the inferences of sexual activity to be drawn from the factual context in which the statement was alleged to have been made—a late night solicitation of a physical personal service from an individual on a public street, in exchange for a sum of money. Any assertion that defendant was referring to a nonsexual activity 'was a matter to be raised as an evidentiary defense not by insistence that this information was jurisdictionally defective' ... . The fact that the instrument used a clinical phrase for the sexual activity alleged does not render the instrument jurisdictionally defective." ***People v. Drelich*, 2018 N.Y. Slip Op. 06785, CtApp 10-11-18**

FIRST DEPARTMENT

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTIONS OF FACT WHETHER THE GENERAL CONTRACTOR AND A STATUTORY AGENT OF THE PROJECT OWNER ARE LIABLE FOR THE INJURIES TO AN EMPLOYEE OF A SUBCONTRACTOR IN THIS LABOR LAW § 240(1) LADDER CASE.

The First Department reversing (modifying) Supreme Court, determined that several causes of action in this Labor Law § 240(1) ladder-fall case should not have been dismissed. Plaintiff's employer (nonparty Capitol) was hired as a subcontractor by Ruggles, which had a contract for signage and awnings with the operator of the retail store for which the work was done (Express). Express had hired Russco to act as the general contractor for the renovation work. Russco had the authority to hire all subcontractors with the exception of the signage and awning work: "Russco's [the general contractor's] motion for summary judgment dismissing the Labor Law § 240(1) claim as against it on the ground that it is not a proper defendant under the Labor Law was correctly denied as there is an issue of fact as to whether its obligations as the general contractor on the project extended to the work performed by plaintiff. ... ... [T]he contract ... provides that Russco is responsible for 'taking all reasonable safety precautions to prevent injury or death to persons or damage to property' and that such responsibility extends 'to the protection of all employees on the Project and all other persons who may be affected by the Work in any way' ... . * * * Ruggles is a proper Labor Law § 240(1) defendant because it was a statutory agent of Express, the owner of the project. It is undisputed that Express hired Ruggles as the sole contractor responsible for the manufacture and installation of all signage and awning work on the project, which was the work that plaintiff was performing when he sustained his injuries. Although Russco may be found liable based on its site safety obligations with regard to the signage and awning work, there is no question that, pursuant to the contract between Ruggles and Express, Ruggles was delegated the supervision and control over such work. Moreover, Ruggles may not escape liability under Labor Law § 240(1) based on its delegation of the signage and awning work to Capitol, plaintiff's employer." ***White v. 31-01 Steinway, LLC*, 2018 N.Y. Slip Op. 06685, First Dept 10-9-18**

PERSONAL INJURY.

PLAINTIFF ALLEGED SHE SLIPPED ON LIQUID AND FELL AFTER REACHING FOR THE HANDRAIL, WHICH WAS LOOSE, DEFENDANTS DEMONSTRATED THEY DID NOT HAVE NOTICE OF THE LIQUID BUT DID NOT MEET THEIR BURDEN ON THE ALLEGEDLY LOOSE HANDRAIL.

The First Department determined that defendants demonstrated they did not have notice of liquid on the stairs in this slip and fall case. But they did not meet their burden with respect to whether the handrail was loose: "Plaintiff alleges that she slipped and fell on a slippery liquid on the interior stairs of an apartment building ... . Plaintiff testified that when she began to slip, she reached for the stairs' handrail, but it was loose, and she fell. Defendants met their prima facie burden of showing that they neither created, nor had actual or constructive notice of, the alleged liquid on the stairway ... . However, they failed to meet their burden with respect to plaintiff's alternative theory of liability, the allegedly defective handrail, given the superintendent's deposition testimony that he had previously repaired the handrail in the area where plaintiff fell by securing it with a clamp, but that one of the four screws needed to install the clamp was broken ...". ***DeSuero v. 1386 Assoc., LLC*, 2018 N.Y. Slip Op. 06810, First Dept 10-11-18**

PERSONAL INJURY.

QUESTIONS OF FACT ABOUT ASSUMPTION OF THE RISK AND THE LOCATION OF AN UNPADDED SNOW MACHINE POLE PRECLUDED SUMMARY JUDGMENT IN THIS SKIING ACCIDENT CASE.

The First Department, reversing Supreme Court, determined the ski resort defendants were not entitled to summary judgment in this skiing accident case. Infant plaintiff allegedly ran into a metal snow machine pole that was not padded: "The motion court dismissed the complaint on the ground that plaintiff assumed the risks associated with the sport of skiing. Such risks include the risk of injury resulting from 'other persons using the facilities' and from 'man-made objects that are incidental to the provision or maintenance of a ski facility,' such as snowmaking equipment (General Obligations Law § 18-101; see also id. § 18-106). However, an individual 'will not be deemed to have assumed ... unreasonably increased risks'... . If, as plaintiffs maintain, the unpadded pole was located on the ski trail or in an area where skiing was permitted, then defendants could be found to have failed to maintain their property in a reasonably safe condition. General Obligations Law § 18-107 provides that, '[u]nless otherwise specifically provided in this article, the duties of skiers, passengers, and ski operators shall be governed by common law' ... . The common law applies where, as here, plaintiffs are alleging inadequate padding of defendant's snowmaking pole, a condition not specifically addressed by the statute (id.). On the record before us, we cannot conclude, as a matter of law, that the pole was off-trail and that the pole did not need to be padded. Thus, defendants are not entitled to summary judgment. Nor are defendants entitled to summary judgment on the ground that the failure to pad the pole did not cause the subject collision, because that failure may have caused or enhanced the infant's injuries ...". ***Madsen v. Catamount Ski Resort*, 2018 N.Y. Slip Op. 06794, First Dept 10-11-18**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH THERE IS EVIDENCE THE STORM IN PROGRESS DOCTRINE MAY APPLY IN THIS SLIP AND FALL CASE, DEFENDANT DID NOT DEMONSTRATE THE CONDITION OF THE WALKWAY BEFORE THE STORM, ALTHOUGH PLAINTIFF'S DECEDENT'S TESTIMONY STRAINED CREDULITY, IT WAS NOT INCREDIBLE AS A MATTER OF LAW.

The First Department determined that defendant's motion for summary judgment in this walkway slip and fall case was properly denied. Although there was evidence suggesting the storm-in-progress doctrine applied, defendants did not demonstrate the condition of the walkway before the storm. The court noted the plaintiff's decedent's testimony was contradictory and strained credulity: "Defendant established, through an expert report and meteorological records, that on January 5, 2014, a freezing rain storm occurred before the decedent's alleged accident and ended after or shortly before the accident, implicating the storm-in-progress doctrine ... . However, defendant failed to establish the condition of the walkway on which the decedent fell before the storm began. The meteorological records show that a snow storm had occurred on January 2 and 3, causing between six and seven inches of snow to fall. They also show that the snow melted and re-froze on January 4. Thus, defendant failed to eliminate the issues of fact whether there was ice on the walkway before the freezing rain storm began and whether it had been there long enough for defendant to discover and remedy the situation... . We agree with defendant that the decedent's own testimony appears to contradict itself on numerous occasions, and strains credulity on others. However, we do not find the testimony incredible as a matter of law, and leave it to the trier of fact to evaluate." ***Thomas v. New York City Hous. Auth.*, 2018 N.Y. Slip Op. 06789, First Dept 10-11-18**

PERSONAL INJURY, MUNICIPAL LAW.

FIREFIGHTER'S RULE DID NOT PRECLUDE NEGLIGENCE SUIT BY A POLICE OFFICER INJURED WHEN HE STEPPED OUT OF HIS VAN INTO A DEPRESSED AREA AROUND A SEWER GRATE, CITY DID NOT DEMONSTRATE IT DID NOT HAVE CONSTRUCTIVE NOTICE OF THE CONDITION.

The First Department, reversing Supreme Court, determined that the firefighter's rule did not preclude a suit by a police officer (Stockbower) who allegedly was injured stepping out of his van into a depressed area around a sewer grate. The court further determined defendant city did not demonstrate it did not have constructive notice of the depressed area: "The negligence cause of action is not barred by the firefighters' rule, because the risk of injury was not increased by Slockbower's performance of his official duties ... . Slockbower had parked the van in order to direct traffic, but was not actually doing so when he fell ... . Although Slockbower admitted that he did not see the depressed sewer grate because he was '[l]ooking to see if there were any cars going by,' and not at the ground, it is clear from the context of this statement that he was not looking at the cars for the purpose of directing traffic, but in order to exit the van safely. Defendants established prima facie that they neither caused nor had actual notice of the depressed sewer grate. However, they failed to establish as a matter of law that they had no constructive notice of it ... . They submitted no evidence of any prior inspections ... . Moreover, they submitted photographs of the grate taken within weeks after the accident that Slockbower testified fairly and accurately depicted the site as it appeared on the day of the accident ... . Because the nature of the defect, as depicted in the photographs, is not latent, and the defect would not have developed overnight, constructive notice may be inferred from its existence ...".

***Genova v. City of New York*, 2018 N.Y. Slip Op. 06813, First Dept 10-11-18**

SECOND DEPARTMENT

CIVIL PROCEDURE.

SECOND MOTION TO VACATE A DEFAULT JUDGMENT SHOULD NOT HAVE BEEN GRANTED ON GROUNDS THAT COULD HAVE BEEN RAISED IN THE FIRST MOTION, SECOND MOTION SHOULD NOT HAVE BEEN TREATED AS A MOTION TO RENEW.

The Second Department determined the motion to vacate a default judgment should not have been granted on grounds that could have been raised in the first motion (which was denied). The court further held that the second motion should not have been deemed a motion to renew, for essentially the same reason: "The Supreme Court should have denied that branch of the defendant's motion which was pursuant to CPLR 5015(a)(3) to vacate the judgment, since that branch was premised on grounds that were apparent at the time that the defendant made the prior motion to vacate, but had not been asserted in that prior motion ... . To the extent that the Supreme Court treated the defendant's second motion as one for leave to renew, the court should not have granted leave to renew and, upon renewal, granted that branch of the defendant's prior motion which was to vacate the judgment. Pursuant to CPLR 2221, a motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination' ... and 'shall contain reasonable justification for the failure to present such facts on the prior motion' ... . 'A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' ... . The Supreme Court lacks discretion to grant renewal where the moving party omits a reasonable justification for failing to present the new facts on the original motion ... . Here, the defendant failed to proffer any justification for the failure to present the new facts on the original motion. Furthermore, the defendant failed to demonstrate that the new facts would have changed the prior determination ...".

***A.G. Parker, Inc. v. 246 Rochester Partners, LLC*, 2018 N.Y. Slip Op. 06711, Second Dept 10-10-18**

CIVIL PROCEDURE.

MOTION TO VACATE A DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED AS A MATTER OF LAW, SIMILARLY THE MOTION TO VACATE THE NOTE OF ISSUE AND CERTIFICATE OF READINESS SHOULD HAVE GRANTED.

The Second Department, reversing Supreme Court, determined the motion to vacate the default judgment should have been granted as a matter of law (no showing of a meritorious defense was required) and the motion to vacate the note of issue and the certificate of readiness should have been granted as well: " 'As a general rule, a defendant who seeks to vacate a default in appearing at a compliance conference is required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense' ... . Here, the defendant demonstrated a reasonable excuse for his failure to appear at the compliance conference on November 29, 2016, including the fact that he had been hospitalized from mid-September to late October 2016 for injuries sustained in a fall. In addition, notice of the conference was sent to the subject property and, although the defendant's grandson resided there, it was never the defendant's residence and the defendant denied any knowledge of the November 29, 2016, conference. The defendant also demonstrated that he did not receive notice of the adjourned conference date of January 24, 2017, and the record is devoid of any evidence demonstrating that such notice was, in fact, given to him. Under such circumstances, the defendant's nonappearance for the conference on January 24, 2017, could not constitute a default, as there was no failure to perform a legal duty ... . 'This is analogous to the situation of a defendant who has not been served with process and suffers a default judgment. In both situations, the default' is a nullity

along with the remedy the court renders in response' ... . As the defendant's default in appearing at the conference on January 24, 2017, is considered a nullity, vacatur of that default ' is required as a matter of law and due process, and no showing of a potentially meritorious defense is required' ... . Therefore, the Supreme Court should have vacated the default and the notice of inquest as a matter of law and due process, and no showing of a potentially meritorious defense was required. In addition, the Supreme Court should have granted that branch of the defendant's motion which was to vacate the note of issue and certificate of readiness. Since the defendant moved for such relief more than 20 days after service of the note of issue and certificate of readiness, he had to show good cause for vacatur (see 22 NYCRR 202.21[e]). 'To satisfy the requirement of good cause,' the party seeking vacatur must demonstrate that unusual or unanticipated circumstances developed subsequent to the filing of the note of issue and certificate of readiness requiring additional pretrial proceedings to prevent substantial prejudice' ...". ***Sposito v. Cutting*, 2018 N.Y. Slip Op. 06782, Second Dept 10-10-18**

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE EXCUSE FOR FAILING TO APPEAR DEEMED INSUFFICIENT.

The Second Department determined defendant's (Expendables') opposition to a motion for leave to enter and default judgment, alleging law office failure as the reason for failing to appear, was properly rejected: "In support of the proffered excuse of law office failure, the attorney for Expendables merely submitted an affirmation in which it was alleged that the corporate defendant had been 'mistakenly omitted' from the answer served by one of the individual defendants. No factual detail or affidavit of personal knowledge was submitted explaining the drafting of the answer, the manner in which the purported omission occurred, or the failure to discover it until the plaintiffs moved for leave to enter a default judgment. Moreover, the answer served by the individual defendant bore no indicia that it was intended to serve as a joint answer for that defendant and Expendables. Accordingly, the Supreme Court providently exercised its discretion in determining that the conclusory and unsubstantiated assertion of counsel failed to constitute a reasonable excuse for the default of Expendables in answering the complaint, and in granting the plaintiffs' motion for leave to enter a default judgment against that defendant ...". ***Lefcort v. Samowitz*, 2018 N.Y. Slip Op. 06727, Second Dept 10-10-18**

CONVERSION, TORTIOUS INTERFERENCE WITH CONTRACT, CIVIL PROCEDURE.

COMPLAINT STATED CAUSES OF ACTION FOR CONVERSION AND TORTIOUS INTERFERENCE WITH A CONTRACT.

The Second Department, modifying Supreme Court, determined the complaint (supplemented with affidavits) stated causes of action for conversion and tortious interference with contract which should not have been dismissed. Plaintiff, a dog trainer, purchased a dog and allegedly entered a contract with the seller of the dog (America' Best) to train the dog. Plaintiff and defendant were in a relationship at the time they agreed to purchase the dog. The complaint alleged that defendant took possession of the dog: "Two key elements of conversion are the plaintiff's (1) legal ownership or an immediate superior right of possession to a specific identifiable thing, and (2) the defendant's unauthorized dominion over the thing in question or interference with it, to the exclusion of the plaintiff's right... . Here, accepting the facts alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference, the complaint sufficiently alleges that the plaintiff is the owner of the dog, that the defendant has unauthorized possession of the dog, and that the defendant has refused to return the dog. ... The elements of tortious interference with a contract are: '(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff' ... . The complaint, as supplemented by the plaintiff's affidavits, sufficiently alleges the elements of a cause of action to recover damages for tortious interference with a contract, including that the defendant's intentional interference with the America's Best contract rendered performance impossible ...". ***Nero v. Fiore*, 2018 N.Y. Slip Op. 06755, Second Dept 10-10-18**

COURT OF CLAIMS, IMMUNITY, PERSONAL INJURY.

STATE WAS ENTITLED TO QUALIFIED IMMUNITY IN THIS NEGLIGENT HIGHWAY DESIGN CASE, CLAIMANT'S DECEDENT WAS KILLED WHEN HIS MOTORCYCLE STRUCK A CAR WHICH CROSSED THREE LANES OF TRAFFIC.

The Second Department, reversing the Court of Claims, determined the state was entitled to qualified immunity in this motorcycle-car accident case. Claimant's decedent was killed when his motorcycle struck a car, driven by Carranca, as Carranca entered Sunrise Highway and crossed three lanes of traffic. Claimant's decedent alleged negligent design of the roadway. However the state had commissioned a study of the area which found no safety concerns and claimant's decedent's expert did not fault the study: " 'To establish its entitlement to qualified immunity, the governmental body must demonstrate that the relevant discretionary determination by the governmental body was the result of a deliberative decision-making process. A municipality is entitled to qualified immunity where a governmental planning body has entertained and passed on the very same question of risk as would ordinarily go to the jury' ... . Here, the State submitted the Urbitran Report as evidence that it had studied the intersection at issue, as part of a larger study of a 1.2-mile stretch of Sunrise Highway. The Urbitran Report considered safety conditions and accident history, traffic volumes, 'speeds and delay studies,' and traffic

control devices. The State concluded that no additional safety measures were necessary regarding the right turn from Old Sunrise Highway onto eastbound Sunrise Highway. The claimant's expert conceded that the Urbitran Report found no safety problems with traffic from Old Sunrise Highway merging with eastbound Sunrise Highway, and further conceded that she found no deficiencies with the Urbitran Report. The subsequent placement of a traffic light at the intersection for reasons other than preventing the type of accident that occurred in this case does not affect the State's entitlement to qualified immunity for decisions pertaining to the right turn from Old Sunrise Highway onto eastbound Sunrise Highway." ***Iovine v. State of New York*, 2018 N.Y. Slip Op. 06723, Second Dept 10-10-18**

CRIMINAL LAW, APPEALS.

THE CONTENTION DEFENDANT WAS ILLEGALLY SENTENCED SURVIVES A WAIVER OF APPEAL AND WILL BE HEARD IN THE INTEREST OF JUSTICE, THE PEOPLE DID NOT SHOW THE EQUIVALENCY OF THE CALIFORNIA ROBBERY CONVICTION, DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND VIOLENT FELONY OFFENDER.

The Second Department, remitting the matter for resentencing, determined defendant should not have been sentenced as a second violent felony offender because the People did not demonstrate the equivalency of the California robbery statute. The court noted that illegal sentence would survive a waiver of appeal and the issue would be reached in the interest of justice: "Penal Law § 70.04 requires the imposition of enhanced sentences for those found to be predicate violent felons ... . 'Subdivision (1)(b)(i) of that section provides, in pertinent part, that a prior out-of-state conviction qualifies as a predicate violent felony conviction if it involved all of the essential elements of any [violent] felony for which a sentence to a term of imprisonment in excess of one year . . . was authorized and is authorized in this state'... . In this context, the Court of Appeals has 'applied a strict equivalency standard that examines the elements of the foreign conviction to determine whether the crime corresponds to a New York [violent] felony, usually without reference to the facts giving rise to that conviction' ... . 'As a general rule, this inquiry is limited to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes' ... . However, 'the strict equivalency test [also] allows a reviewing court to examine . . . any foreign statute or case law that informs the interpretation of a foreign code breached by the defendant' ... . The People have the burden of establishing that the defendant was convicted of an offense in a foreign jurisdiction that is equivalent to a violent felony in New York ... . 'When a statute-to-statute comparison reveals differences in the elements such that it is possible to violate the foreign statute without engaging in conduct that is a [violent] felony in New York, the foreign statute may not serve as a predicate' ... . Here, the People failed to satisfy their burden of establishing that the defendant was convicted of an offense in a foreign jurisdiction that is equivalent to a violent felony in New York .... The People failed to demonstrate that the California offense of robbery in the first degree ... is equivalent to a New York criminal offense designated as a violent felony ...". ***People v. Salako*, 2018 N.Y. Slip Op. 06770, Second Dept 10-10-18**

CRIMINAL LAW, ATTORNEYS, APPEALS.

ALTHOUGH THE ERRORS WERE NOT PRESERVED, DEFENDANT'S MURDER CONVICTION REVERSED FOR THREE REASONS; FAILURE TO GIVE THE ACCOMPLICE IN FACT JURY INSTRUCTION, PROSECUTORIAL MISCONDUCT, AND INEFFECTIVE ASSISTANCE OF COUNSEL.

The Second Department, in the interest of justice, reversed the defendant's murder conviction because (1) the trial judge failed to give the accomplice in fact jury instruction, (2) prosecutorial misconduct and (3) ineffective assistance in failing to object to the prosecutor's statements and failure to request the accomplice instruction: "During her summation, the prosecutor stated that the 'defendant's DNA was on the safety of that gun,' and that 'the science finds him guilty.' The prosecutor further stated that '[t]he DNA has spoken,' and that '[t]he defendant's DNA, by being on that safety without even taking into account [the witness's] testimony, makes him guilty.' This was an overstatement and misrepresentation of the statistical comparison testified to by the People's expert who performed the DNA analysis of the swab taken from the safety of the murder weapon. 'While the prosecutor was entitled to fair comments on the DNA evidence available in this case, she was not entitled to present the results in a manner that was contrary to the evidence and the science' ... . 'In light of the powerful influence of DNA evidence on juries, the opportunity for juror confusion regarding the limited probative value of the DNA methodology employed in this case, and the qualified nature of the test results,' the prosecutor engaged in misconduct when she misrepresented and overstated the probative value of the DNA evidence by telling the jury that the defendant's DNA was on the safety of the murder weapon … . As a result, the defendant was deprived of his right to a fair trial ... . The prosecutor also engaged in misconduct during her summation when she stated that she met with the witness on several occasions, and during those times, 'he did not know that his DNA was on the trigger or the trigger guard or anywhere on that weapon,' and she 'did not tell him that the DNA, his DNA was on that gun.' The prosecutor's summation also included the following statements: 'But [the witness] told me in talking about this case in detail, he told me what he did'; 'He told me that he held that firearm'; 'Exactly how he told you on this stand when the defendant dropped it, . . . he picked it up and quickly threw it into a black bag so his girlfriend wouldn't see'; and 'He's telling me and he doesn't even know what I have. Honesty. Straightforward about what happened.' These statements by the prosecutor improperly encouraged inferences

of guilt based on facts not in evidence, improperly injected her own credibility into the trial, and improperly vouched for the credibility of a witness for the People ... . We further find that the defendant was deprived of the effective assistance of counsel, inter alia, due to defense counsel's failure to object to the prosecutor's improper comments in summation ... and defense counsel's failure to request an accomplice corroboration charge ...". ***People v. Powell*, 2018 N.Y. Slip Op. 06768, Second Dept 10-10-18**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE WEAKNESS OF THE COMPLAINANT'S TESTIMONY ABOUT THE IDENTITY OF THE ASSAILANT AND THE WEAKNESS OF THE HIGH-SENSITIVITY DNA ANALYSIS REQUIRED REVERSAL UNDER A WEIGHT OF THE EVIDENCE REVIEW.

The Second Department, under a weight of the evidence analysis, reversed defendant's gang assault conviction. The Second Department noted the weakness of the complainant's testimony about the identity of the assailant and the weakness of the DNA evidence. One of the assailants removed complainant's sneaker and threw it. There was very little DNA on the sneaker and a special "high-sensitivity" analysis was used: "The complainant's sneaker was recovered six days after the incident. The DNA sample obtained from the sneaker contained only 97.9 picograms of DNA, which is less than the minimum amount of DNA material—100 picograms—needed for traditional DNA testing. Further, the DNA sample was a nondeducible mixture, meaning that it contained the DNA of two or more persons, but that the mixture could not be broken apart to determine which strings of DNA came from which person. Nevertheless, the New York City Office of the Chief Medical Examiner (hereinafter OCME) utilized 'high-sensitivity' DNA analysis, a method of testing OCME developed to analyze DNA samples of less than 100 picograms. An OCME criminologist testifying at the trial admitted that in developing high-sensitivity testing, OCME 'tweaked the protocols' of DNA testing. Based on the high-sensitivity testing, OCME found that the mixture was indicative of a two-person mixture. This OCME criminologist testified that the DNA profiles of the complainant and the defendant were then compared to the sample, and a forensic statistical tool (hereinafter FST) developed by OCME was used to determine the 'likelihood ratio' that the defendant was one of the two contributors. The FST analysis concluded that it was 695,000 times more probable that the DNA sample originated from the defendant and an unknown unrelated person than from two unknown unrelated persons. The analysis also found that it was 133 times more likely that the DNA sample originated from the defendant and the complainant than from the complainant and an unknown unrelated person. The FST analysis of the DNA was based upon a Caucasian population, and failed to take into account the genetic history of the defendant, a member of the Hasidic population. Moreover, the likelihood ratio result was only 133, a relatively insubstantial number. Under the circumstances of this case, including the complainant's inability to positively identify any of his attackers, the varying accounts regarding the incident, and the DNA evidence, which was less than convincing, we find that the evidence, when properly weighed, did not establish the defendant's guilt beyond a reasonable doubt." ***People v. Herskovic*, 2018 N.Y. Slip Op. 06763, Second Dept 10-10-18**

FAMILY LAW.

MATERNAL GRANDMOTHER WAS A PERSON LEGALLY RESPONSIBLE FOR THE CARE OF THE CHILD AND THEREFORE WAS SUBJECT TO A NEGLECT FINDING.

The Second Department determined the maternal grandmother met the definition of a person legally responsible for the child's (Talia's) care, against who a neglect finding can properly be made: "Child protective proceedings encompass only abuse or neglect by a person who is a parent or other person legally responsible for the child's care ... . A person legally responsible is defined as 'the child's custodian, guardian, [or] any other person responsible for the child's care at the relevant time' (Family Court Act § 1012[g]). 'A person is a proper respondent in an article 10 proceeding as an other person legally responsible for the child's care if that person acts as the functional equivalent of a parent in a familial or household setting' ... . 'Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case. Factors such as the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s) are some of the variables which should be considered and weighed by a court' … . However, 'article 10 should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor or those persons who provide extended daily care of children in institutional settings, such as teachers' ... . Here, we agree with the Family Court's determination that the maternal grandmother was a person legally responsible for the children. The maternal grandmother came to the parents' home every day and slept over regularly, as many as two to three times per week. On the days that she did not sleep over, the maternal grandmother would come over in the morning and would stay until the paternal grandmother arrived in the afternoon. The maternal grandmother fed Talia, changed her diaper and her clothes, and, along with the mother, bathed Talia several times a week. The mother testified that the maternal grandmother took care of Talia while the mother played with Jonah, and the maternal grandmother was alone with Talia whenever the mother napped or did laundry, and that at least one to two times per week from Talia's birth until April 2014,

the maternal grandmother was the only person caring for Talia." ***Matter of Jonah B. (Riva V.)*, 2018 N.Y. Slip Op. 06736, Second Dept 10-10-18**

FAMILY LAW.

IT WAS IN THE BEST INTERESTS OF THE CHILD TO RESTRICT CONTACT WITH THE INCARCERATED FATHER TO TELEPHONE CALLS.

The Second Department determined it was in the child's best interests to limit the incarcerated father's contact with the child to telephone calls: "The father had last seen the child in 2011 or 2012, when the mother and child visited the father in a detention facility in Brooklyn. The mother testified that the visit was 'extremely stressful' for the child, the jail personnel asked the mother and the child to leave multiple times, and the child was unable to sit for any period of time. After the fact-finding hearing, the Family Court denied the father's petition, and, instead, directed that the father have telephone contact with the child. The father appeals. The paramount concern in making a parental access determination is the best interests of the child, under the totality of the circumstances ... . Parental access with a noncustodial parent is presumed to be in the best interests of a child, even when that parent is incarcerated ... . However, that presumption may be rebutted by demonstrating, by a preponderance of the evidence, that under all the circumstances parental access would be harmful to the child's welfare, or that the right to parental access has been forfeited ... . Here, there is a sound and substantial basis in the record for the Family Court's determination limiting the father's contact with the child to telephone communication. A preponderance of the evidence adduced at the fact-finding hearing demonstrated that in-person parental access at the prison would be harmful to the child's welfare ...". ***Matter of Grimes v. Pignalosa-Grimes*, 2018 N.Y. Slip Op. 06740, Second Dept 10-10-18**

FAMILY LAW, CRIMINAL LAW.

THE CRIMINAL LAW DEFINITION OF SERIOUS PHYSICAL INJURY IS NOT THE STANDARD FOR ABUSE IN FAMILY COURT, THE STANDARD IS 'CREATING A SUBSTANTIAL RISK OF SERIOUS INJURY.'

The Second Department, reversing Family Court, found that the child, Talia, was abused. Family Court had determined that Talia was not abused because her injuries did not meet the definition of serious physical injury as defined in the Penal Law. The Family Court Act criteria is "creating a substantial risk of serious injury:" "We agree with the Family Court's finding that Talia's injuries were 'clearly inflicted and not accidental.' However, we disagree with the court's finding that Talia was not abused based on its determination that she had not sustained a serious physical injury as defined in Penal Law § 10.00(10). Although the definition of 'abuse' under Family Court Act § 1012 is similar to the definition of 'serious physical injury' under the Penal Law, the definitions are not identical. The Penal Law defines 'serious physical injury as 'physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss of impairment of the function of any bodily organ' (Penal Law § 10.00[10]). However, under the Family Court Act, a 'child need not sustain a serious injury for a finding of abuse as long as the evidence demonstrates that the parent sufficiently endangered the child by creating a substantial risk of serious injury' ... . Here, the fracture to Talia's humerus required her arm to be immobilized for more than two weeks, which is sufficient to establish a protracted impairment of health ... . In addition, the medical testimony revealed that this injury caused Talia pain and discomfort, and could take months to heal. Furthermore, there was a concern that there could be loss of function and loss of growth potential. Although this was unlikely in Talia's case, since her fracture was not completely displaced, the conduct of the mother, the father, and the maternal grandmother still created a substantial risk that such injury could have occurred ...". ***Matter of Jonah B. (Ferida B.)*, 2018 N.Y. Slip Op. 06735, Second Dept 10-10-18**

FRAUD, CIVIL PROCEDURE, INSURANCE LAW.

INSURANCE AGENCY ALLEGED FRAUD ON THE PART OF THE INSURED WHICH RESULTED IN A LOWER PREMIUM, THE COMPLAINT ADEQUATELY ALLEGED A FRAUD CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined the complaint stated a cause of action for fraud and should not have been dismissed. The plaintiff, an insurance agency, alleged the defendant insured (Aminov) misrepresented its gross income, and therefore paid a lower premium: " 'The elements of a cause of action to recover damages for fraud are (1) a misrepresentation or a material omission of fact which was false, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages' ... . 'In actions for fraud, corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally' ... . In addition to alleging all of the elements of a fraud cause of action, CPLR 3016(b) provides that 'the circumstances constituting the wrong shall be stated in detail.' The purpose of this heightened pleading requirement 'is to inform a defendant with respect to the incidents complained of' and 'should not be confused with unassailable proof of fraud' ... . Here, contrary to the Supreme Court's conclusion, the complaint, as amplified by the plaintiff's submission in opposition to the motion, alleged all of the elements constituting fraud, and further stated 'the basic facts to establish [those] elements,' as required by CPLR 3016(b) ... . In particular, the plaintiff alleged a specific misrepresentation, intentionally made by Aminov ... , in the context of applying for a policy of insurance from the plaintiff, and that the plaintiff relied upon that misrepre-

sentation to its detriment, as it consequently charged and collected a lower premium than it otherwise would have for the instant insurance policy. Assuming the facts alleged to be true and according the plaintiff the benefit of every favorable inference, these allegations set forth a cognizable cause of action alleging fraud, and stated in sufficient detail the facts constituting the wrong ... . Moreover, the fraud cause of action is not duplicative of the breach of contract cause of action, as it does not relate to a failure to perform under the insurance policy, but, rather, to an alleged misrepresentation made in applying for the policy ...". ***Minico Ins. Agency, LLC v. B&M Cleanup Servs.*, 2018 N.Y. Slip Op. 06729, Second Dept 10-10-18**

FRAUD, INSURANCE LAW, CIVIL PROCEDURE.

COMPLAINT STATED A FRAUD CAUSE OF ACTION BASED UPON ALLEGED MISREPRESENTATIONS ABOUT INSURANCE COVERAGE MADE BY DEFENDANT TO THE INJURED PLAINTIFF, BUT DID NOT STATE A FRAUD CAUSE OF ACTION BASED UPON ALLEGED MISREPRESENTATIONS MADE BY DEFENDANT TO THE NONPARTY INSURER, THERE WAS NO ALLEGATION THE MISREPRESENTATIONS MADE TO THE INSURER WERE TO BE COMMUNICATED TO THE PLAINTIFF.

The Second Department determined the fraud cause of action against the property insurer which had disclaimed coverage should have been dismissed. Plaintiff was injured on property owned by defendant Kirit and insured by nonparty Liberty Mutual Insurance. The fraud cause of action based upon alleged misrepresentations about the insurance coverage made to plaintiff by Kirit properly survived a motion to dismiss. But the fraud cause of action based upon alleged misrepresentations by Kirit to Liberty Mutual should have been dismissed: "The elements of a cause of action to recover damages for fraud are 'a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages' ... . Moreover, where a cause of action is based on fraud, 'the circumstances constituting the wrong shall be stated in detail' (CPLR 3016[b]...). Here, construing the complaint liberally, accepting all factual allegations to be true, and giving the plaintiff the benefit of all favorable inferences ... , the complaint adequately stated a cause of action alleging fraud based upon the allegations that the defendants knowingly made misrepresentations to the plaintiff regarding insurance coverage for the renovation project. The complaint stated the misrepresentations with sufficient particularity to clearly inform the defendants of the incidents complained of ... . However, the plaintiff failed to state a cause of action based upon alleged misrepresentations the defendants made to Liberty Mutual, as the plaintiff failed to adequately allege that the misrepresentations were made for the purpose of being communicated to the plaintiff in order to induce his reliance thereon or that these misrepresentations were relayed to the plaintiff, who then relied upon them ...". ***Robles v. Patel*, 2018 N.Y. Slip Op. 06779, Second Dept 10-10-18**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF FELL FROM A SCAFFOLD THAT DID NOT HAVE SAFETY RAILINGS, SUMMARY JUDGMENT ON THE LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION PROPERLY GRANTED.

The Second Department determined plaintiff was properly awarded summary judgment on his Labor Law §§ 240(1) and 241(6) causes of action. Plaintiff fell from a scaffold that did not have safety railings: "The plaintiff met his prima facie burden of demonstrating a violation of Labor Law § 240(1) and that this violation was a proximate cause of his injuries, through his uncontradicted deposition testimony that he fell from a scaffold that did not have safety railings and that he was not provided with a safety device to prevent him from falling ... . Similarly, the plaintiff met his prima facie burden with respect to his Labor Law § 241(6) cause of action by establishing that the scaffold was a movable scaffold that lacked safety railings in violation of 12 NYCRR 23-5.18(b) ... . In opposition, the defendant failed to raise a triable issue of fact ...". ***Morocho v. Boulevard Gardens Owners Corp.*, 2018 N.Y. Slip Op. 06730 Second Dept 10-10-18**

LABOR LAW-CONSTRUCTION LAW, CONTRACT LAW, PERSONAL INJURY.

PLAINTIFF ALLEGEDLY TRIPPED OVER CONSTRUCTION DEBRIS IN THIS LABOR LAW §§ 240(1) AND 241(6) ACTION, INDEMNIFICATION CAUSES OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE THE DEFENDANTS COULD NOT DEMONSTRATE THEY WERE FREE FROM NEGLIGENCE, BUT THE CONTRIBUTION CAUSE OF ACTION PROPERLY SURVIVED, CRITERIA FOR INDEMNIFICATION AND CONTRIBUTION EXPLAINED IN SOME DEPTH.

The Second Department, modifying Supreme Court, determined that the contractual and common law indemnification causes of action against defendant STAT should have been dismissed, but the contribution cause of action properly survived summary judgment. Plaintiff alleged he slipped and fell on construction debris and brought actions under Labor Law §§ 240(1) and 241(6). The indemnification causes of action should have been dismissed because the defendants (Granite and Kulka) would not be able to prove they were free from negligence. The contribution claim was viable because STAT employees played some role in the accumulation of the debris: "STAT demonstrated that Granite and Kulka had certain responsibilities with respect to the removal of the construction debris and, thus, that they would not be able to prove themselves free from negligence in the event that the injured plaintiff was successful on his claims against Granite (seeGeneral Obligations Law § 5-322.1 …). For this same reason, STAT established its prima facie entitlement to judgment as a matter of law dismissing the common-law indemnification third third-party cause of action and cross claim against it ... . Howev-

er, we agree with the Supreme Court's determination to deny those branches of STAT's motion which were for summary judgment dismissing Granite's third third-party cause of action for contribution and Kulka's cross claim for contribution. As opposed to indemnification, which shifts the entire liability to the negligent party, 'where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy' ... . In the context of a construction site accident, where a plaintiff's injuries arise not from the manner in which the work was performed but rather due to an allegedly dangerous condition present thereat, liability under a common-law negligence theory 'may be imposed upon a subcontractor where it had control over the work site and either created the allegedly dangerous condition or had actual or constructive notice of it' ...". ***Fedrich v. Granite Bldg. 2, LLC*, 2018 N.Y. Slip Op. 06717, Second Dept 10-10-18**

LANDLORD-TENANT.

OKAY TO REPLACE PART-TIME LOBBY ATTENDANTS WITH VIDEO SURVEILLANCE.

The Second Department determined that the Rent Administrator's determination that a video surveillance system can be installed to replace part-time lobby attendants: "The Rent Stabilization Code provides that '[a]n owner may file an application to modify or substitute required services, at no change in the legal regulated rent, . . . on the grounds that: . . . such modification or substitution is not inconsistent with the [Rent Stabilization Law] or this Code' (9 NYCRR 2522.4[e]). A modification of services may be made if the proposed change is an 'adequate substitute' ... . Here, the DHCR's [New York State Division of Housing and Community Renewal] determination that the Rent Administrator did not err in finding that the video surveillance system was an adequate substitute for the part-time lobby attendants was rational, and was not arbitrary and capricious ...". ***Matter of Bazile v. Rubin*, 2018 N.Y. Slip Op. 06737, Second Dept 10-10-18**

MUNICIPAL LAW, EMPLOYMENT LAW.

PROBATIONARY CITY EMPLOYEE WAS NOT GIVEN SEVEN DAYS NOTICE OF HIS TERMINATION, REMEDY IS TO PAY THE EMPLOYEE FOR THE SEVEN DAYS.

The Second Department, reversing Supreme Court, determined petitioner, a probationary city employee, was not given the requisite seven day's notice of termination. The remedy was to provide petitioner with seven days pay: "... [T]he petitioner correctly contends that, in terminating his employment, the City failed to comply with 4 NYCRR 4.5(b)(5)(iii). That regulation requires, among other things, that a probationer who is to be discharged from employment for unsatisfactory service receive written notice at least one week prior to termination (see 4 NYCRR 4.5[b][5][iii]). Here, the petitioner received written notice on the day his employment was terminated, and the City did not rebut the petitioner's assertion that he had not received oral notice prior to that date. Accordingly, it cannot be said that the City substantially complied with 4 NYCRR 4.5(b)(5)(iii)... . Under the circumstances of this case, including that the petitioner was deprived of the required seven days' notice but was notified of his discharge prior to the expiration of his period of probation ... , we deem it appropriate to award him the relief he has requested on appeal for the failure to comply with 4 NYCRR 4.5(b)(5)(iii), specifically, one day's pay, at the salary he was earning at the time of his discharge, for each of the seven days he was not provided the requisite notice ... . The Court of Appeals has determined that such a remedy is appropriate in the analogous context in which a school authority fails to give a probationary teacher 30 days' written notice of termination, as required by Education Law § 3019-a ... . Seven days of pay is what the petitioner would have received had the City complied with the applicable regulation by making the petitioner's discharge effective seven days after it provided the written notice." ***Matter of Santucci v. City of Mount Vernon*, 2018 N.Y. Slip Op. 06745, Second Dept 10-10-18**

MUNICIPAL LAW, ZONING, CONSTITUTIONAL LAW.

TOWN EXCEEDED ITS AUTHORITY AND VIOLATED A FEDERAL REGULATION WHEN IT ASSESSED CONSULTING FEES IN CONNECTION WITH PETITIONER'S REQUESTS FOR A SPECIAL USE PERMIT AND A VARIANCE TO CONSTRUCT A HAM RADIO ANTENNA ON PETITIONER'S PROPERTY.

The Second Department, in a full-fledged opinion by Justice Scheinkman, determined that the town's attempt to recover consulting fees and set up an escrow account in connection the petitioner's requests for a special use permit and a variance to construct an antenna for a ham radio exceeded the town's authority and was preempted by a federal regulation: "The petitioner is an amateur radio hobbyist who applied for a special use permit and an area variance that would allow him to construct a radio antenna structure on his property in the Town of LaGrange. The Town incurred more than $17,000 in legal consulting fees in connection with the applications, and informed the petitioner that he was required to reimburse the Town for these fees before any determination would be made with respect to the applications. The Town subsequently, as 'an accommodation to the petitioner,' reduced the amount that it was demanding for previously incurred fees to the sum of $5,874, but also required the petitioner to maintain a minimum advance continuing escrow balance of at least $1,000 to cover the Town's future consulting costs in connection with the applications. We hold that, because the Town did not limit the consulting fees charged to the petitioner to those necessary to the decision-making function of the Town's Planning Board and Zoning Board of Appeals, the Town exceeded its State-granted authority by requiring payment of the consulting fees

and, moreover, violated a rule promulgated by the Federal Communications Commission." ***Matter of Landstein v. Town of LaGrange*, 2018 N.Y. Slip Op. 06741, Second Dept 10-10-18**

PERSONAL INJURY.

LESSOR OF VEHICLE INVOLVED IN AN ACCIDENT DID NOT DEMONSTRATE IT WAS NOT LIABLE BASED UPON ITS MAINTENANCE OF THE VEHICLE, THEREFORE THERE WAS A QUESTION OF FACT WHETHER THE GRAVES AMENDMENT APPLIED.

The Second Department determined defendant lessor of a vehicle involved in an accident (BCL) did not demonstrate it could not be liable under the Graves Amendment for negligent maintenance of the vehicle: "Under the Graves Amendment, the owner of a leased vehicle will not be held vicariously liable for the negligent operation of that vehicle where the owner proves that it is engaged in the business of renting or leasing motor vehicles and it was not otherwise negligent... . However, '[t]he Graves Amendment does not apply where, as here, a plaintiff seeks to hold a vehicle owner liable for the alleged failure to maintain a rented vehicle'... . Accordingly, in order to establish its prima facie entitlement to judgment as a matter of law in this action, BCL was required to prove not only that it is in the business of leasing vehicles, but also, that it did not negligently maintain the BCL vehicle ... . BCL failed to sustain its prima facie burden, since the affidavit of its litigation specialist failed to address the plaintiff's negligent maintenance theory of liability, and the copy of the lease documents it submitted stated that Wesner was obligated to have the subject vehicle serviced 'by a BCL partner dealer' according to a service schedule established by BCL." ***Casine v. Wesner*, 2018 N.Y. Slip Op. 06714, Second Dept 10-10-18**

PERSONAL INJURY, CONTRACT LAW.

SNOW REMOVAL CONTRACTOR'S MOTION FOR SUMMARY JUDGMENT IN THIS PARKING LOT SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED, NO QUESTION OF FACT ABOUT ANY OF THE *ESPINAL* FACTORS.

The Second Department, reversing Supreme Court, determined the snow removal contractor's (O & M's) motion for summary judgment in this parking lot slip and fall case should have been granted: " 'As a general rule, a limited contractual obligation to provide snow removal services does not render the contractor liable in tort for the personal injuries of third parties'... . However, the Court of Appeals has recognized three exceptions to the general rule: '(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launche[s] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely' (Espinal v. Melville Snow Contrs., 98 NY2d 136, 140 ...). Here, O & M made a prima facie showing of its entitlement to judgment as a matter of law by submitting evidence that the injured plaintiff was not a party to its snow removal contract and, thus, O & M owed her no duty of care ... . Since the pleadings did not allege facts which would establish the applicability of any of the Espinal exceptions, O & M was not required to affirmatively demonstrate that these exceptions did not apply in order to establish its prima facie entitlement to judgment as a matter of law ... . In opposition to O & M's prima facie showing, the plaintiffs failed to raise a triable issue of fact as to whether O & M 'created or exacerbated a dangerous condition' ... . 'A snow removal contractor cannot be held liable for personal injuries on the ground that the snow removal contractor's passive omissions constituted the launch of a force or instrument of harm, where there is no evidence that the passive conduct created or exacerbated a dangerous condition' ... ". ***Reisert v. Mayne Constr. of Long Is., Inc.*, 2018 N.Y. Slip Op. 06777, Second Dept 10-10-18**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

SCHOOL'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION ACTION STEMMING FROM A STABBING WAS PROPERLY DENIED, THE INADEQUATE SECURITY CAUSE OF ACTION, HOWEVER, SHOULD HAVE BEEN DISMISSED.

The Second Department, modifying Supreme Court, determined the negligent supervision cause of action against the school district properly survived summary judgment, but the inadequate security cause of action should have been dismissed. Plaintiff was stabbed by another student in the hallway at school. The school district did not demonstrate the assault was not foreseeable and did not demonstrate negligent supervision was not the proximate cause of plaintiff's injuries. However the inadequate security cause of action should have been dismissed because no special relationship between the school and the plaintiff was demonstrated: " 'Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision'... . 'In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated'... . Actual or constructive notice to the school of prior similar conduct generally is required, and 'an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence' ... . A plaintiff also must establish that the alleged breach of the duty to provide adequate supervision was a proximate cause of the injuries sustained ... . The adequacy of a school's supervision of its students is generally a question left to the trier of fact to resolve, as is the question of whether

inadequate supervision was the proximate cause of the plaintiff's injury ... . Here, the District failed to demonstrate, prima facie, that the assault on the plaintiff was not foreseeable or that the District's alleged negligent supervision was not a proximate cause of the plaintiff's injuries ... . The District failed to eliminate triable issues of fact as to whether it had knowledge of the offending student's dangerous propensities based on his involvement in other assaultive altercations with fellow students in the recent past ... . Thus, the District failed to establish, prima facie, that it lacked sufficiently specific knowledge or notice of the dangerous conduct that caused the alleged injuries to the plaintiff. As to proximate cause, the District failed to demonstrate, prima facie, that the subject incident occurred so quickly and spontaneously 'that even the most intense supervision could not have prevented it' ... . However, the District established, prima facie, its entitlement to judgment as a matter of law dismissing the cause of action alleging inadequate security by demonstrating that there was no special relationship giving rise to a special duty to protect the plaintiff." ***Gaston v. East Ramapo Cent. Sch. Dist.*, 2018 N.Y. Slip Op. 06720, Second Dept 10-10-18**

PERSONAL INJURY, EMPLOYMENT LAW.

THERE IS A QUESTION OF FACT WHETHER THE DRIVER WHO ALLEGEDLY INJURED PLAINTIFF WAS AN EMPLOYEE OR A SUBCONTRACTOR WITH RESPECT TO ONE OF THE THREE DEFENDANTS, THE OTHER TWO DEFENDANTS DEMONSTRATED THE DRIVER WAS NOT AN EMPLOYEE ENTITLING THEM TO SUMMARY JUDGMENT.

The Second Department, modifying Supreme Court, determined the summary judgment motions brought by two of the defendants in this traffic accident case should have been granted. There was a question of fact whether the driver (Koureichi) who allegedly injured the plaintiff was an employee or a subcontractor of defendant Hudson. But the other two defendants, Stop & Shop and Subcontracting Concepts (SCI), demonstrated Koureichi was not an employee: "As a general rule, an employer who hires an independent contractor, as distinguished from an employee or servant, is not liable for the negligent acts of the independent contractor ... . Control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for purposes of tort liability ... . Factors relevant to assessing control include whether a worker (1) worked at [her or] his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll, and (5) was on a fixed schedule ... . Contrary to Hudson's contention, the evidence it submitted in support of its motion, including, inter alia, a transcript of Koureichi's deposition testimony, did not eliminate all triable issues of fact as to whether Koureichi was an independent contractor when the accident occurred ... ". ***Nachman v. Koureichi*, 2018 N.Y. Slip Op. 06752, Second Dept 10-10-18**

PERSONAL INJURY, EVIDENCE.

ELEVATOR MAINTENANCE COMPANY PROPERLY GRANTED SUMMARY JUDGMENT IN THIS (ALLEGEDLY) MISALIGNED ELEVATOR SLIP AND FALL CASE, THE MAINTENANCE COMPANY DEMONSTRATED IT DID NOT HAVE NOTICE OF THE CONDITION AND PLAINTIFFS FAILED TO DEMONSTRATE THE DOCTRINE OF RES IPSA LOQUITUR APPLIED.

The Second Department determined summary judgment was properly granted to the elevator maintenance company in this (allegedly) 'misaligned elevator' slip and fall case. The maintenance company demonstrated it did not have notice of the condition and plaintiffs did not demonstrate that the doctrine of res ipsa loquitur applied: " 'An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found'... . Here, the defendant submitted sufficient evidence to establish, prima facie, that it did not have actual or constructive notice of a misleveling condition, and that it did not fail to use reasonable care to correct a condition about which it should have been aware ... . In opposition, the plaintiffs failed to raise a triable issue of fact. The affidavit of the plaintiffs' expert, which was speculative, lacking in foundation, and conclusory, was insufficient to raise a triable issue of fact ... . The doctrine of res ipsa loquitur was not applicable as the plaintiffs failed to demonstrate that the accident 'was one that would not ordinarily occur in the absence of someone's negligence' ...". ***Daconta v. Otis El. Co.*, 2018 N.Y. Slip Op. 06716, Second Dept 10-10-18**

PERSONAL INJURY, MUNICIPAL LAW.

TOWN DID NOT HAVE WRITTEN NOTICE OF A RUSTY DRAINAGE PIPE IN THE WATER AT A TOWN BEACH AND WAS THEREFORE NOT LIABLE FOR THE INJURY TO THE INFANT PLAINTIFF WHO CUT HIS FOOT ON THE PIPE WHEN WALKING IN THE WATER.

The Second Department determined a rusty drainage pipe under the water at a town beach was a culvert within the meaning of the town code, requiring written notice of the condition before the town could be held liable for an injury, Infant plaintiff cut his foot on the pipe when he was walking in the water: "... [T]he Town demonstrated by the submission of the affidavit of its expert engineer, that the drainage pipe at issue is a culvert and, thus, falls within the ambit of the statute. In opposition, the plaintiffs failed to raise a triable issue of fact as to the nature of the subject drainage pipe. 'A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies' ... . 'The only two recognized exceptions to a prior written

notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property' ... . Insofar as is relevant here, the Town established its prima facie entitlement to judgment as a matter of law by demonstrating that it did not have prior written notice of the alleged defect through the submission of, inter alia, the affidavit of an employee of the Town's Department of Highways, who averred that his search of the Town's records revealed no prior written notice of any hazardous condition of the culvert where the accident occurred ...". ***Coventry v. Town of Huntington*, 2018 N.Y. Slip Op. 06715, Second Dept 10-10-18**

PERSONAL INJURY, MUNICIPAL LAW.

PETITION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN THIS SIDEWALK SLIP AND FALL CASE PROPERLY DENIED, LATE NOTICE OF CLAIM WHICH WAS REJECTED WAS A NULLITY WHICH COULD NOT BE DEEMED TO PROVIDE THE CITY WITH ACTUAL KNOWLEDGE OF THE CLAIM.

The Second Department determined the petition for leave to file a late notice of claim in this sidewalk slip and fall case was properly denied. The medical-treatment excuse was inadequate. The late notice of claim which petitioner attempted to serve on the city was rejected. It therefore was a nullity which would not be deemed to inform the city of the nature of the claim. The petitioner was unable to show the city was not prejudiced by the delay: "Contrary to the petitioner's contention, she failed to demonstrate that her injuries and medical care constituted a reasonable excuse for her failure to timely serve a notice of claim. Rather, the medical evidence she submitted in support of her petition demonstrated that she had substantially healed and no longer required any pain medication long before the expiration of the statutory 90-day period for timely filing her notice of claim. Thus, she failed to medically substantiate that her injury and treatment prevented her from making timely service, or that she did not learn of the full extent of her injuries until after the statutory period had expired ... . Furthermore, the petitioner failed to establish any reasonable excuse for her additional nine-month delay in seeking leave to serve a late notice of claim after her original notice of claim was rejected as untimely ... . Similarly, we agree with the Supreme Court's determination that the respondents did not acquire actual knowledge of the essential facts constituting the claim within 90 days or a reasonable time thereafter by reason of the late notice of claim which the respondents rejected as untimely. 'A late notice of claim served without leave of court is a nullity'... . Under the circumstances presented, where the respondents rejected the notice of claim and disallowed the claim based on the untimely service, the petitioner's late notice of claim did not provide the respondents with actual knowledge ... . Additionally, given the transitory nature of the defect upon which the petitioner allegedly fell... , she failed to sustain her initial burden of presenting 'some evidence or plausible argument' ... that granting the petition would not substantially prejudice the respondents in maintaining their defense on the merits ...". ***Matter of Ashkenazie v. City of New York*, 2018 N.Y. Slip Op. 06734, Second Dept 10-10-18**

PERSONAL INJURY, MUNICIPAL LAW, EDUCATION-SCHOOL LAW, LABOR LAW-CONSTRUCTION LAW.

PETITIONER'S REQUEST FOR LEAVE TO FILE A LATE NOTICE OF CLAIM IN A POTENTIAL LABOR LAW §§ 200, 240(1), 241(6) ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined petitioner's request for leave to file a late notice of claim in a potential Labor Law §§ 200, 240(1) and 241(6) action should not have been granted. Petitioner was struck by a falling plank when he was standing on a scaffold during renovation work at a school: "Although the petitioner made no attempt to proffer a reasonable excuse for the failure to serve a timely notice claim, '[n]either the presence nor absence of any one factor is determinative'; thus, '[t]he absence of a reasonable excuse is not necessarily fatal' ... . The petitioner failed to establish that the municipal parties acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual, or within a reasonable time thereafter. Notably, the record is devoid of evidence showing that any of the municipal parties was aware, prior to the commencement of this proceeding, that the petitioner's accident had occurred—let alone that the petitioner was claiming violations of Labor Law §§ 200, 240(1), and 241(6) ... . Contrary to the petitioner's contention, a delay of four months following the expiration of the 90-day notice period does not constitute a 'reasonable time' within the meaning of General Municipal Law § 50-e(5) ... . Further, the petitioner failed to present 'some evidence or plausible argument' supporting a finding that the municipal parties were not substantially prejudiced by the four-month delay from the expiration of the 90-day statutory period ...". ***Matter of Moroz v. City of New York*, 2018 N.Y. Slip Op. 06743, Second Dept 10-10-18**

REAL PROPERTY LAW, NUISANCE.

PLAINTIFFS' COMPLAINT DID NOT STATE PRIVATE AND PUBLIC NUISANCE CAUSES OF ACTION BASED UPON SINKHOLES ON PLAINTIFFS' LAND WHICH ALLEGEDLY RESULTED FROM THE FAILURE OF A BULKHEAD ON DEFENDANT'S PROPERTY.

The Second Department determined the plaintiffs did not state causes of action for private and public nuisance based upon the alleged effects of a body of navigable tidal water (Henry Street Basin) which is adjacent to plaintiffs' and defendant's

properties. Plaintiffs alleged a bulkhead built by defendant was falling into disrepair resulting in sinkholes on plaintiffs' property: "A nuisance is the actual invasion of interests in land, and it may arise from varying types of conduct ... . In the present case, the private nuisance claim is predicated upon the defendant's alleged negligence in maintaining its property. Where 'a nuisance has its origin in negligence, negligence must be proven' ... . Duty is an essential element of negligence ... . Here, the defendant had no duty to prevent the natural encroachment of public waters upon Sunlight's property... . The 'maxim' that 'requires one so to use his lands as not to injure his neighbor's . . . does not require one lot owner so to improve his lot that his neighbor can make the most advantageous use of his, or be protected against its natural disadvantages' ... . Accordingly, the plaintiffs have not stated a cause of action sounding in private nuisance ... . The plaintiffs further failed to state a cause of action sounding in public nuisance. 'A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons' ... . Here, the plaintiffs' mere allegation that '[t]he deteriorated state of the Bulkhead [was] substantially certain to result in an interference with the public's use or enjoyment of the Henry Street Basin and/or may endanger or injure the health of persons using the Henry Street Basin' was too conclusory and speculative to set forth a viable cause of action sounding in public nuisance." ***Sunlight Clinton Realty, LLC v. Gowanus Indus. Park, Inc.*, 2018 N.Y. Slip Op. 06783, Second Dept 10-10-18**

ZONING, CIVIL PROCEDURE, ADMINISTRATIVE LAW.

PETITIONER MUST EXHAUST ITS ADMINISTRATIVE REMEDIES BY APPEALING THE DENIAL OF A BUILDING PERMIT BY THE TOWN BUILDING DEPARTMENT TO THE ZONING BOARD OF APPEALS BEFORE BRINGING A COURT ACTION.

The Second Department, reversing Supreme Court, determined petitioner was required to exhaust its administrative remedies by appealing the town building department's ruling to the zoning board of appeals before bringing a court action. Petitioner's request for a permit to put in a convenience store in a rural use district had been denied by the building department: "… [T]he petitioner was required to exhaust its administrative remedies before commencing the instant proceeding/action. The petitioner's constitutional challenges to the Building Department's determination did not excuse the petitioner's failure to exhaust its administrative remedies through an appeal to the Zoning Board of Appeals... . Furthermore, the petitioner did not establish that the Building Department's determination was 'wholly beyond its grant of power' or that the pursuit of administrative remedies would cause the petitioner irreparable injury ...". ***Matter of Vineland Commons, LLC v. Building Dept. of Town of Riverhead*, 2018 N.Y. Slip Op. 06748, Second Dept 10-10-18**

THIRD DEPARTMENT

COURT OF CLAIMS.

CLAIM DID NOT MEET THE SPECIFICITY REQUIREMENTS OF COURT OF CLAIMS ACT § 11 AND WAS PROPERLY DISMISSED.

The Third Department determined the claim, alleging employment discrimination, did not comply with the specificity requirements of Court of Claims Act section 11 and was properly dismissed: " 'Pursuant to Court of Claims Act § 11 (b), a claim must set forth the nature of the claim, the time when and place where it arose, the damages or injuries and the total sum claimed' ... . 'The purpose of the pleading requirements contained therein is to provide a sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its liability' ... . To that end, the Court of Claims Act does not require defendant 'to ferret out or assemble information that section 11 (b) obligates the claimant to allege'... . Strict compliance with the pleading requirements contained in Court of Claims Act § 11 (b) is required, and the failure to satisfy any of the pleading requirements is a jurisdictional defect ... . We agree with the Court of Claims that the claim, consisting of 88 prolix paragraphs, raises vague, conclusory and non-linear allegations that lack context and fail to provide a coherent and sufficiently detailed description of the particulars of the claim to enable defendant to investigate and promptly ascertain the existence and extent of its liability... . Many of the allegations fail to provide a time and place when and where the alleged conduct occurred (see Court of Claims Act § 11 [b]), and, for those allegations that specify a date or general time period when alleged conduct occurred, the nature of the claim or identity and role of the individuals involved cannot be adequately ascertained...". ***Clark v. State of New York*, 2018 N.Y. Slip Op. 06844, Third Dept 10-11-18**

UNEMPLOYMENT INSURANCE, EMPLOYMENT LAW, MUNICIPAL LAW, CRIMINAL LAW.

CLAIMANT'S TERMINATION FROM HER EMPLOYMENT WITH THE CITY BASED UPON TWO DRIVING WHILE UNDER THE INFLUENCE CONVICTIONS DID NOT PRECLUDE HER FROM RECEIVING UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined the fact that the claimant was terminated from her employment as a city tax assessor because of two drunk-driving-related crimes did not preclude her from eligibility for unemployment insurance, The drunk driving incidents had nothing to do with her job and there was evidence she could have continued doing her job even though her license had been suspended for 90 days: "The disciplinary determination was founded, in part, upon claimant's two convictions for driving while under the influence of alcohol and her resulting license suspension. Whether this amounted to disqualifying misconduct posed a factual question for the Board, 'and not every mistake, exercise of poor judgment or discharge for cause will rise to the level of misconduct' ... . The drunk driving incidents did not occur while claimant was working. Notably, possession of a valid driver's license was not listed among the qualifications necessary to hold the position of Sole Assessor and claimant testified that she was not advised that this was a requirement ... . Claimant was not incarcerated as a result of her convictions and she testified that she was ready and able to fulfill her job duties notwithstanding the suspension of her driver's license ... . Moreover, while claimant acknowledged that she occasionally did site visits, she testified that she could perform her duties while her license was temporarily suspended given that much of the data needed to compute the assessments had already been compiled and she could obtain a lot of the information online." ***Matter of Stack (City of Glens Falls--Commissioner of Labor)*, 2018 N.Y. Slip Op. 06840, Third Dept 10-11-18**

WORKERS' COMPENSATION.

CLAIMANT-NURSE'S MENTAL HEALTH PROBLEMS WERE NOT COMPENSABLE AS THEY WERE NOT CAUSED BY GREATER THAN NORMAL STRESSORS.

The Third Department determined claimant-nurse's mental health problems were not compensable because they were not deemed to have been caused by stress greater than that experienced in the normal work environment: "We find that substantial evidence supports the Board's factual determination that claimant's depressive condition was not compensable, as the work-related incidents and conditions that led to her mental injuries did not involve stressors that were 'greater than that which other similarly situated workers experienced in the normal work environment' ... . Claimant's supervisors described normal oversight and monitoring practices undertaken to assist her in correcting deficiencies in and improving her performance, and claimant failed to identify any unusual stressors or conduct that would constitute harassment or bullying as alleged in her claim for benefits. With regard to her job transfer, the testimony established that it was voluntary and, while it appears that the transition and organization of the new unit were somewhat chaotic and that her accommodations were not immediately communicated to her new supervisors, there was no credible evidence that the transfer was retaliatory or that she was knowingly denied accommodations. Further, claimant was never disciplined, reprimanded or singled out for unfair treatment, and the work evaluations and feedback were undertaken in a good faith." ***Matter of Lanese v. Anthem Health Servs.*, 2018 N.Y. Slip Op. 06845, Third Dept 10-11-18**

WORKERS' COMPENSATION, EMPLOYMENT LAW.

THE WORKERS' COMPENSATION BOARD PROPERLY FOUND CLAIMANT WAS AN EMPLOYEE OF A TRUCKING COMPANY AND A SPECIAL EMPLOYEE OF A COMPANY WITH WHICH THE TRUCKING COMPANY HAD A CONTRACT, THEREFORE THE WORKERS' COMPENSATION AWARD WAS PROPERLY SPLIT BETWEEN THEM.

The Third Department determined that claimant, a tractor trailer driver, was an employee of Eaton's Trucking Service and a special employee of Quality Carrier, with which Eaton had entered a contract. Therefore the Workers' Compensation Board properly found Eaton and Quality were each responsible for 50% of the workers' compensation awards: "... [W]e find that substantial evidence supports the Board's factual determination that claimant was a special employee of Quality ... . Looking at 'the underlying facts of the parties' relationship' ... , the evidence established that Eaton and Quality had an arrangement whereby Eaton's drivers, including claimant, hauled products exclusively for Quality's customers and did so in furtherance of Quality's business, and that Eaton operated under Quality's logo and license without which Eaton could not have conducted its hauling operation. Their arrangement was the type of arrangement in which the 'employee and equipment of [the] general employer were necessarily used and temporarily assigned to work for th[e] business' of the special employer, which has been recognized as creating a special employment relationship ... . While Quality did not control the day-to-day oversight of claimant, this is not dispositive as Eaton and claimant operated entirely under Quality's authority and pursuant to its policies. As a result, Quality had sufficient control over the 'details and ultimate result' of claimant's work, and Quality's working relationship with claimant was 'sufficient in kind and degree so that [Quality] may be deemed [to be his] employer' ...". ***Matter of Mitchell v. Eaton's Trucking Serv., Inc.*, 2018 N.Y. Slip Op. 06839, Third Dept 10-11-18**

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