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FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

IN THIS SINGLE EYEWITNESS CASE IT WOULD HAVE BEEN BETTER PRACTICE TO INSTRUCT THE JURY ON THE 'WEAPON FOCUS EFFECT' AND 'MEMORY DECAY,' THE CONVICTION WAS AFFIRMED HOWEVER.

The First Department, affirming defendant's conviction, noted that it would have been better practice in this single eyewitness case to grant defendant's request to instruct the jury on the "weapon focus effect" and "memory decay:" "Although the better practice in this case, where a single eyewitness identification was the only evidence linking defendant to this crime, would have been to grant defendant's request for an identification charge that discussed the weapon focus effect and memory decay as factors affecting the reliability of eyewitness identification, the trial court did not abuse its discretion in failing to do so ... , particularly since the court generally followed the Criminal Jury Instructions ...". ***People v. Carmona*, 2019 N.Y. Slip Op. 00240, First Dept 1-21-19**

CRIMINAL LAW, EVIDENCE, JUDGES.

CELL PHONE COMPANY WITNESS WAS NOT AN ENGINEER AND SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY AS AN EXPERT ABOUT HOW FAR DEFENDANT'S PHONE WAS FROM THE TOWER, POLICE OFFICER SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY ABOUT THE VICTIM'S IDENTIFICATION OF THE DEFENDANT, JUDGE SHOULD NOT HAVE MARSHALED THE EVIDENCE TO FAVOR THE PROSECUTION, THESE ERRORS, AS WELL AS ADDITIONAL JUDICIAL ERRORS, CUMULATIVELY DEPRIVED DEFENDANT OF A FAIR TRIAL,

The First Department, reversing defendant's conviction, described a number of errors which had the cumulative effect of depriving defendant of a fair trial. Those errors include: (1) the witness from the cell phone company was not an engineer and therefore could not provide competent expert opinion about where defendant's cell phone was in relation to the cell phone tower which picked up the signal; (2) a police officer should not have been allowed to testify that the victim had twice identified the defendant by name; (3) the charge to the jury improperly marshaled the identification evidence in a light favorable to the prosecution; (4) the court should have given the missing witness jury instruction for two lead detectives who had interviewed the victim and a witness; and (5) the judge should not have referenced the defendant's failure to testify (twice). With respect to the cell tower and identification evidence, the court wrote: "'[T]estimony on how cell phone towers operate must be offered by an expert witness' because an analysis of the possible ranges of cell phone towers and how they operate is beyond a juror's day-to-day experience and knowledge ... . [The witness] was not an engineer and was not qualified, without an engineering background, to reach further conclusions about why defendant's cell phone hit the Starling Avenue tower, i.e. whether it was because it was closest or strongest ... . The trial court also permitted a police officer to testify twice, over defense objection, that the victim had identified her attacker as 'male Hispanic, bald, by the name of Jose Ortiz.' This too was error. 'Testimony by one witness (e.g., a police officer) to a previous identification of the defendant by another witness (e.g., a victim) is inadmissible' ...". ***People v. Ortiz*, 2019 N.Y. Slip Op. 00221, First Dept 1-15-19**

INSURANCE LAW, CONTRACT LAW, CIVIL PROCEDURE.

THERE IS NO HEIGHTENED PLEADING REQUIREMENT FOR CONSEQUENTIAL DAMAGES STEMMING FROM A BREACH OF AN INSURANCE CONTRACT, PLAINTIFF ALLEGED THE INSURER'S DELAY IN PAYING THE CLAIM FOR DAMAGE TO PLAINTIFF'S BUILDING, WHICH SHIFTED WHEN WORK WAS DONE ON AN ADJOINING BUILDING, RESULTED IN AN ARRAY OF CONSEQUENTIAL DAMAGES, THE CONSEQUENTIAL DAMAGES ASPECT OF THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED.

The First Department, reversing Supreme Court, determined plaintiff had sufficiently alleged consequential damages stemming from the insurer's alleged delay in paying a claim for damage to plaintiff's building which shifted after work on an adjoining building. The First Department noted that there is no heightened pleading requirement for consequential damages stemming from a breach of contract. The consequential damages aspect of the complaint should not have been dismissed: "The complaint alleges that rather than pay the claim, defendant has made unreasonable and increasingly burdensome information demands throughout the three year period since the property damage occurred. Plaintiff contends that this was a tactic by defendant to make the claim so expensive to pursue that plaintiff would abandon it altogether. Plaintiff contends

defendant's investigatory process has taken so long and become so attenuated that the structural damage to the building has worsened. Among the consequential damages alleged are engineering costs, painting, repairs, monitoring equipment, and moisture abatement to address water intrusion, loss of rents, and other expenses attributable to mitigating further damage to the property. ... A plaintiff may sue for consequential damages resulting from an insurer's failure to provide coverage if such damages ('risks') were foreseen or should have been foreseen when the contract was made ... . [T]he inquiry is not whether plaintiff will be able to establish its claim, but whether plaintiff has stated a claim. Here, plaintiff's allegations meet the pleading requirements of the CPLR with respect to consequential damages, whether in connection with the first cause of action or the second cause of action for breach of the covenant of good faith and fair dealing in the context of an insurance contract ... . [T]here is no heightened pleading standard requiring plaintiff to explain or describe how and why the 'specific' categories of consequential damages alleged were reasonable and forseeable at the time of contract. There is no heightened pleading requirement for consequential damages .... Furthermore, an insured's obligation to 'take all reasonable steps to protect the covered property from further damage by a covered cause of loss' supports plaintiff's allegation that some or all the alleged damages were forseeable ...". ***D.K. Prop., Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2019 N.Y. Slip Op. 00347, First Dept 1-21-19**

INSURANCE LAW, REAL ESTATE, REAL PROPERTY.

INSURANCE LAW STATUTE AND RELATED REGULATIONS WHICH PROHIBIT REAL PROPERTY TITLE INSURANCE COMPANIES FROM PROVIDING SPORTS TICKETS, MEALS AND OTHER ENTERTAINMENT TO SOLICIT BUSINESS FROM THOSE WHO USE THEIR SERVICES ARE VALID AND ENFORCEABLE.

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Singh, determined that Insurance Law § 6409(d) was not ambiguous and the related regulations promulgated by the Department of Financial Services (DFS), with two exceptions, were valid. The statute and regulations deal with real property title insurance companies and prohibit the companies from soliciting business by providing sports tickets, meals and other entertainment to those who can use their services, including attorneys: "Following the investigation, DFS determined that some practices that resulted in higher premiums and closing costs for consumers, violate Insurance Law § 6409(d). DFS found that 'insurers reported meal and entertainment expenses in the following categories: advertising, marketing and promotion, and travel, and other' (Statement of Maria T. Vullo, Superintendent New York State DFS, Prepared for Delivery at Public Hearing: An Examination of Recent Title Insurance Regulation in New York, January 12, 2018) and expenses reported in the 'other' category were 'replete with excessive entertainment,' often including 'wining and dining . . . of real estate professionals' (id.). For example, one insurer spent approximately $2.5 million to $5.4 million a year, amounting to about 5% to 14% of its charged premiums, on tickets to basketball, baseball, and tennis events for attorneys and other clients in a position to refer business to the insurer (id.). Some insurers paid for their clients to go to bars, strip clubs, and Hooters restaurants (id.). Insurers paid for 'expensive designer goods' and 'gift cards' for referral sources (id.). One insurer spent about 15% to 30% of premiums on entertainment and gifts for referral sources. Another insurer spent about 50% of its revenue on meals for referral sources. Insurers would report these expenses in the information submitted to DFS to support the premiums they charged (id.). As a result of its investigation, DFS estimated that, on average, 5.3% of premiums charged statewide violated Insurance Law § 6409(d) from 2008 to 2012. To prevent such practices and to protect consumers from exorbitant costs, DFS promulgated Insurance Regulation 208." ***Matter of New York State Land Tit. Assn., Inc. v. New York State Dept. of Fin. Servs.*, 2019 N.Y. Slip Op. 00245, First Dept 1-15-19**

SECURITIES, CONTRACT LAW, ATTORNEYS.

IN THIS ACTION STEMMING FROM WORTHLESS RESIDENTIAL MORTGAGE BACKED SECURITIES, THE COMPLAINT SUFFICIENTLY PLED THAT GROSS NEGLIGENCE PRECLUDED ENFORCEMENT OF THE 'SOLE REMEDIES' CLAUSES AND THE DEMANDS FOR PUNITIVE DAMAGES AND ATTORNEY'S FEES SHOULD NOT HAVE BEEN DISMISSED.

The First Department, in a full-fledged opinion by Justice Kahn, reversing Supreme Court, determined that the complaint in this residential mortgage backed securities (RMBS) action sufficiently pled that gross negligence precluded enforcement of the "sole remedies" clauses in the contracts and that the demands for punitive damages and attorney's fees should not have been dismissed: "On this appeal, which arises from the securitization and sale of residential mortgages, plaintiff, Deutsche Bank National Trust Company (Trustee), as trustee of the Morgan Stanley ABS Capital I Inc. Trust 2007-NC4 (Trust), challenges the motion court's pre-answer dismissal of the Trustee's cause of action for breach of contract to the extent that it included a demand for compensatory damages. The motion court dismissed the Trustee's compensatory damages demand on the ground that the 'sole remedies' clauses in the underlying securitization agreements precluded the Trustee from seeking such relief. The Trustee maintains, however, that it sufficiently pleaded gross negligence on the part of defendants Morgan Stanley Mortgage Capital Holdings LLC (MSMCH) and Morgan Stanley ABS Capital I Inc. (MSAC) to render the 'sole remedies' clauses unenforceable. On that issue, we hold, consistent with our decision in Morgan Stanley Mortgage Mtge. Loan Trust 2006-13ARX v. Morgan Stanley Mtge. Capital Holdings LLC (143 AD3d 1 [1st Dept 2016]), that the complaint's allegations of gross negligence in this case are sufficient to render the 'sole remedies' clauses unenforceable. We are

also called upon to decide whether the motion court properly dismissed the Trustee's demands for punitive damages and attorneys' fees. As to those issues, for the reasons that follow, we hold that those demands should not have been dismissed. Specifically, this action arises from the securitization of subprime mortgages by Morgan Stanley & Co., Inc. in 2007, shortly before the housing market collapsed. The Trustee, as trustee of the Trust, seeks damages for the numerous loan defaults that occurred, rendering the residential mortgage backed securities (RMBS) it sold to outside investors virtually worthless." ***Matter of Part 60 Put-Back Litig.*, 2019 N.Y. Slip Op. 00368, First Dept 1-17-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, EMPLOYMENT LAW, LABOR LAW.

TIMELINESS OF A MOTION SEEKING CLASS CERTIFICATION IS MEASURED BY THE INITIAL MOTION, NOT A SUBSEQUENT MOTION TO RENEW AFTER DENIAL WITHOUT PREJUDICE, DEFENDANTS WERE EFFECTIVELY PREVENTING PLAINTIFFS FROM RENEWING THE CLASS CERTIFICATION MOTION BY REFUSING TO TURN OVER PAYROLL DATA TO WHICH THE PLAINTIFFS WERE ENTITLED.

The Second Department, reversing Supreme Court, determined defendants' motion to dismiss the class action allegations of the complaint should not have been granted and plaintiffs' motion to compel the production of payroll data should have been granted. Plaintiffs are home health aides employed by defendants. Plaintiffs sought class certification for their Labor Law underpayment claims. Their initial motion for class certification was denied without prejudice. The defendants subsequently moved to dismiss alleging the plaintiffs did not timely move to renew their motion for class certification. The Second Department held that it is the initial motion for class certification which determines timeliness, not any subsequent motion to renew. The court further held that defendants were effectively preventing plaintiffs from renewing their motion by refusing to turn over the payroll data: "The time limitation to file a motion for class certification 'applies only to a motion for the initial certification of the class' ... . Here, the plaintiffs' initial motion for class certification was timely made. Moreover, while the defendants contend that the plaintiffs failed to timely renew their motion, the defendants refused to provide material sought by the plaintiffs which was needed to determine whether the prerequisites of a class action set forth in CPLR 901(a) could be satisfied and to address the considerations set forth in CPLR 902 for determining whether the matter may proceed as a class action ... . The items of discovery sought are material and necessary to the determination of whether the plaintiffs 'will fairly and adequately protect the interests of the class'... , and the evaluation of whether prosecuting or defending separate actions would be impractical or inefficient and any 'difficulties likely to be encountered in the management of a class action' ...". ***Melamed v. Americare Certified Special Servs., Inc.*, 2019 N.Y. Slip Op. 00268, Second Dept 1-16-19**

DEFAMATION, PRIVILEGE, MUNICIPAL LAW.

DEFAMATORY REMARKS MADE AT A MUNICIPAL PUBLIC MEETING HAD NOTHING TO DO WITH THE SUBSTANCE OF THE MEETING AND THEREFORE WERE NOT ABSOLUTELY PRIVILEGED, PLAINTIFF'S DEFAMATION ACTION PROPERLY SURVIVED A MOTION TO DISMISS.

The Second Department determined plaintiff's defamation action properly survived a motion to dismiss. The defendant sought permission from the Village's Board of Historic Preservation and Architectural Review to add an exterior stairway to her house. At the public meeting plaintiff, defendant's neighbor, objected to the stairway. Then defendant made some remarks directly to plaintiff which, in essence, accused plaintiff of setting up a camera to view defendant's daughter's bedroom. The Second Department noted that statements at a public meeting before a municipal body are generally absolutely privileged. But here the statements had nothing to do with the substance of the meeting: " 'The elements of a cause of action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se' ... . 'Absolute privilege is based upon the personal position or status of the speaker and is limited to the speaker's official participation in the processes of government' ... . 'The absolute privilege generally is reserved for communications made by individuals participating in a public function, such as executive, legislative, judicial or quasi-judicial proceedings. This protection is designed to ensure that such persons' own personal interests—especially fear of a civil action, whether successful or otherwise—do not have an adverse impact upon the discharge of their public function' ... . Here, as a threshold matter, the challenged statements, considered in the context in which they were made, tended to expose the plaintiff to public contempt, hatred, ridicule, aversion, or disgrace. The challenged statements, which were made in the context of a contested application before a municipal body whose determination is subject to judicial review pursuant to CPLR article 78 ..., would ordinarily be subject to absolute privilege... . Nevertheless, the absolute privilege embraces only those statements that may possibly be or become material or pertinent to the matters before the Board, construed under an extremely liberal standard... . Upon our review of the papers and documentary evidence submitted by the parties, we discern 'not one scintilla of evidence present upon which to base the possible pertinency of [the] defendant's statement[s]'... . Therefore, under the circumstances of this case,

the challenged statements are not subject to an absolute privilege ...". ***Gugliotta v. Wilson*, 2019 N.Y. Slip Op. 00261, Second Dept 1-16-19**

EDUCATION-SCHOOL LAW, PERSONAL INJURY, ADMINISTRATIVE LAW.

NEGLIGENCE AND NEGLIGENT SUPERVISION CAUSES OF ACTION AGAINST THE SCHOOL DISTRICT BROUGHT BY A STUDENT WITH SPECIAL NEEDS WHO LEFT SCHOOL AND ATTEMPTED SUICIDE ARE NOT SUBJECT TO THE EXHAUSTION OF REMEDIES REQUIREMENTS OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA).

The Second Department, reversing Supreme Court, determined the negligence and negligent supervision, hiring, training and retention causes of action against the school district should not have been granted. Infant plaintiff is a special needs student who had an Individualized Education Program (IEP) pursuant to the Individuals with Disabilities Education Act (IDEA). The infant plaintiff left school, went home and attempted suicide. The school district argued plaintiffs did not exhaust their administrative remedies as required by the IDEA. The Second Department held that the negligence causes of action were not subject to the administrative requirements of the IDEA: " 'An IEP is developed jointly by a school official, the child's teacher and parents, and, where appropriate, the child. It details the special needs of a disabled child and the services which are to be provided to serve the individual needs of that child' ... . Because parents and school officials sometimes cannot agree on such issues, the IDEA establishes formal administrative procedures for resolving disputes... . If a parent is dissatisfied with the outcome after having exhausted the IDEA's administrative remedies, the parent may then seek judicial review by filing a civil action in state or federal court... . The IDEA's exhaustion requirement is not limited to actions brought explicitly pursuant to the IDEA. 20 USC § 1415(l) states: 'Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title v. of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.' Here, the complaint alleges only common-law causes of action to recover damages for, inter alia, negligence, negligent supervision, hiring, training, and retention, and loss of consortium. Thus, the plaintiffs were not required to exhaust the IDEA's administrative remedies before commencing the instant action ...". ***Matter of P.S. v. Pleasantville Union Free Sch. Dist.*, 2019 N.Y. Slip Op. 00282, Second Dept 1-16-19**

FAMILY LAW.

THE EVIDENCE PROVIDED BY THE THERAPIST THAT THE CHILDREN SUFFERED FROM PTSD, EXPERIENCED TRAUMA, AND EXPRESSED THEIR DESIRE TO STOP SEEING THEIR FATHER, COUPLED WITH THE CHILDREN'S STATEMENTS THAT THEY WITNESSED ABUSE, WARRANTED TERMINATION OF PARENTAL ACCESS WITH FATHER, FAMILY COURT REVERSED.

The Second Department, reversing Family Court, determined the evidence demonstrated supervised parental access with father should have been terminated: "According to [Family Court], there was no legal authority to suspend the father's parental access with the children premised solely on their therapists' belief that the children witnessed domestic violence and were sexually abused by the father, when no such transgressions had been alleged in the petitions or proven. A parent's parental access, even supervised, should not be suspended unless there is substantial evidence that the parental access would be detrimental to the welfare of the child ... . The determination to suspend a parent's parental access is within the sound discretion of the Family Court based upon the best interests of the child, and its determination will not be set aside unless it lacks a sound and substantial basis in the record ... , Here, the Family Court's determination lacks a sound and substantial basis in the record, which shows that parental access with the father, even if supervised, would not be in the children's best interests. The uncontroverted evidence established that the children suffered from PTSD, experienced both physical and mental manifestations of trauma when having parental access with the father, and expressed their desire to cease parental access with him. In addition, each child corroborated the other's statements regarding the abuse they witnessed in the home." ***Matter of Mia C. (Misael C.)*, 2019 N.Y. Slip Op. 00270, Second Dept 1-16-19**

FAMILY LAW, APPEALS.

FAMILY COURT SHOULD NOT HAVE REVIEWED THE SUPPORT MAGISTRATE'S NONFINAL ORDER AND GRANTED FATHER'S OBJECTIONS, FATHER'S ARGUMENT THAT HE WOULD NEED TO PAY ATTORNEY'S FEES AND SPEND TIME AWAY FROM WORK TO LITIGATE THE MATTER DID NOT RISE TO THE LEVEL OF IRREPARABLE HARM NEEDED TO JUSTIFY A REVIEW OF A NONFINAL ORDER.

The Second Department, reversing Family Court, determined that father's objections to the support magistrate's nonfinal order should have been denied and explained the relevant criteria: "Pursuant to Family Court Act § 439(e), '[s]pecific, written objections to a final order of a support magistrate may be filed by either party with the court within thirty days after receipt of the order.' '[O]bjections from nonfinal orders made by a Support Magistrate are typically not reviewed unless

they could lead to irreparable harm' ... . Here, the father's claim that he would be forced to incur attorney fees and spend time away from work litigating a case that would ultimately be dismissed does not rise to the level of irreparable harm ... . Therefore, the Family Court should have denied the father's objections to the Support Magistrate's nonfinal order." ***Matter of Tobing v. May*, 2019 N.Y. Slip Op. 00286, Second Dept 1-16-19**

FAMILY LAW, IMMIGRATION LAW.

PETITION SEEKING FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Family Court, determined the petition for findings to enable the child to petition for special immigrant juvenile status (SIJS) should have been granted: "[R]eunification of the child with her father is not viable due to parental neglect ... . The petitioner testified that after the father came to the United States with the child, they lived in the petitioner's home, during which time the father would 'drink every day,' and that the father eventually returned to El Salvador on his own. The petitioner stated in his affidavit in support of his motion that the father's drinking caused him to become 'aggressive,' [h]e hit doors, walls, and started to yell at all times of the night,' and that the child became 'scared of [the father].' Further, the child stated in her affidavit that the father '[drank] to the point that he could not walk,' and testified in court that she did not believe she could live with the father if she returned to El Salvador due to his excessive drinking. Thus, the record demonstrates that the father repeatedly misused alcoholic beverages to the extent of producing a state of intoxication or a 'substantial manifestation of irrationality,' triggering a presumption that the child was neglected by the father ... . Since the presumption of neglect was not rebutted, the Family Court should have found that reunification of the child with the father was not viable due to parental neglect. The record also supports a finding that it would not be in the child's best interests to be returned to El Salvador, where gang members had threatened the father in the presence of the child, made the father 'complete tasks and favors for them,' and murdered the child's cousin ...". ***Matter of Agustin E. v. Luis A.E.S.*, 2019 N.Y. Slip Op. 00273, Second Dept 1-16-19**

FAMILY LAW, IMMIGRATION LAW.

MOTHER'S MOTION TO AMEND FAMILY COURT'S FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS AFTER THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES NOTIFIED THE CHILD THAT THE FINDINGS DID NOT ADDRESS THE CHILD'S MEMBERSHIP IN THE MS-13 GANG SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Second Department, reversing Family Court, determined mother's motion to amend the findings made to allow the child to petition for special immigrant juvenile status (SIJS) should not have been denied without a hearing to address the merits. After Family Court had made the required findings, the child submitted an I-360 petition for special immigrant juvenile status to the United States Citizenship and Immigration Services (USCIS). USCIS notified the child the petition would be denied because of deficiencies in Family Court's findings, including the failure to consider the child's alleged involvement with the MS-13 gang. Mother then made a motion to amend the findings but Family Court denied the motion stating that mother failed to state a sufficient reason for the requested amendments: "Given USCIS's determination, the Family Court, having granted the mother's guardianship petition in the first instance, should have considered the merits of the subject motion as to whether an amendment of the specific findings order was appropriate, and, if so, amended the specific findings order. Although '[t]his Court's power to review the evidence is as broad as that of the hearing court, and where . . . the record is sufficiently complete to make our own factual determinations, we may do so' ... , here, the record is insufficient to determine whether the Family Court considered the child's alleged involvement with the MS-13 gang, which would not necessarily preclude a finding that it is not in the child's best interests to be returned to El Salvador. Consequently, the matter must be remitted to the Family Court ... for a hearing on that issue and a new determination thereafter of the mother's motion, inter alia, to amend the specific findings order ...". ***Matter of Jose S.J. (Veronica E.J.)*, 2019 N.Y. Slip Op. 00275, Second Dept 1-16-19**

INSURANCE LAW, CONTRACT LAW, EVIDENCE.

INSURER SOUGHT A DECLARATION IT WAS NOT OBLIGATED TO DEFEND THE PROPERTY OWNER IN THIS FATAL ACCIDENT CASE, THE COURT ACCEPTED IN EVIDENCE A COPY OF THE POLICY WHICH DID NOT MEET THE REQUIREMENTS OF THE BEST EVIDENCE RULE, NEW TRIAL ORDERED.

The Second Department, reversing Supreme Court and ordering a new trial, determined that the best evidence rule was violated when the court accepted a copy of the insurance policy. The plaintiff insurer (PLM) sought a declaration it was not obligated to defend the property owner in the action brought by a worker who fell through a skylight and was killed: "The copy of the policy admitted into evidence ... did not specify a location for which the policy applied. Moreover, the copy of the policy admitted into evidence provided a different description of an endorsement titled 'Exclusion- Designated Ongoing Operations' than a copy of the policy that PLM had produced during discovery. ... The best evidence rule requires the production of an original writing where its contents are in dispute and are sought to be proven ... . Under an exception to

the rule, 'secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith' ... . The proponent of the secondary evidence 'has the heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original' ... . Here, PLM failed to offer any explanation as to the unavailability of the primary evidence, i.e., the original policy. PLM also did not establish that the copy of the policy proffered at trial was a 'reliable and accurate portrayal of the original' ...". ***Pennsylvania Lumbermens Mut. Ins. Co. v. B&F Land Dev. Corp.*, 2019 N.Y. Slip Op. 00292, Second Dept 1-16-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALTHOUGH PLAINTIFF ALLEGED THAT THE A-FRAME LADDER TOPPLED OVER, THERE WERE QUESTIONS OF FACT WHETHER THE LADDER WAS AN ADEQUATE SAFETY DEVICE AND, IF NOT, WHETHER THE LADDER WAS THE PROXIMATE CAUSE OF THE FALL, THE TRIAL COURT PROPERLY DENIED PLAINTIFF'S MOTION TO SET ASIDE THE DEFENSE VERDICT.

The Second Department determined plaintiff's (Loretta's) motion for summary judgment in this Labor Law § 240(1) action was properly denied, and the trial court properly denied plaintiff's motion to set aside the defense verdict. Apparently plaintiff alleged the A-frame latter toppled over when he was attempting to install a pipe. The facts of the case were not discussed, but there were questions of fact whether the ladder was an adequate safety device and, if not, whether the ladder was the proximate cause of the fall: "We agree with the Supreme Court's determination to deny that branch of the plaintiffs' motion pursuant to CPLR 4404(a) which was to set aside the verdict and for judgment as a matter of law, as there was a valid line of reasoning and permissible inferences which could have led a rational jury to conclude that the ladder furnished to Loretta was adequate to protect him from the hazards arising from his work. The jury could have credited Loretta's deposition and trial testimony that he did not remember if he was twisting the vertical pipe at the time of the accident, as well as the trial testimony of the plaintiff's engineering expert that, if the ladder did not topple over as Loretta was twisting the vertical pipe, the expert's opinion that the ladder was an inadequate safety device would be different, to rationally conclude that the plaintiffs did not meet their burden of demonstrating that the ladder was an inadequate safety device. We also agree with the court's determination to deny that branch of the plaintiffs' motion which was to set aside the verdict as contrary to the weight of the evidence. A fair interpretation of the evidence could have led the jury to reach its verdict that the ladder was an adequate safety device. Accordingly, we agree with the court's denial of the plaintiffs' motion pursuant to CPLR 4404(a) ...". ***Loretta v. Split Dev. Corp.*, 2019 N.Y. Slip Op. 00265, Second Dept 1-16-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S DEPOSITION TESTIMONY INDICATED HIS FALL FROM AN A-FRAME LADDER WAS NOT CAUSED BY A DEFECT IN THE LADDER, PLAINTIFF LOST HIS BALANCE WHILE HOLDING A PIECE OF SHEETROCK, LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY DISMISSED.

The Second Department determined the Labor Law § 240(1) cause of action against the homeowner (Recio) was properly dismissed. Plaintiff alleged he fell from the third rung of a six-foot A-frame ladder. Plaintiff's deposition testimony demonstrated the ladder did not fail. Plaintiff simply lost his balance while holding a piece of sheetrock: "Recio demonstrated her prima facie entitlement to judgment as a matter of law dismissing the Labor Law § 240(1) cause of action by submitting, inter alia, the plaintiff's deposition testimony, which showed that the ladder from which the plaintiff fell was not defective or inadequate and that the ladder did not otherwise fail to provide protection. The evidence showed that the plaintiff fell because he lost his balance ...". ***Pacheco v. Recio*, 2019 N.Y. Slip Op. 00291, Second Dept 1-16-19**

PERSONAL INJURY, BATTERY.

DEFENDANT GRANDFATHER DID NOT HAVE A DUTY TO CONTROL HIS COLLEGE-AGE GRANDSON IN THIS ROAD RAGE INCIDENT, THEREFORE THE NEGLIGENCE ACTION WAS PROPERLY DISMISSED, HOWEVER THE AIDING-AND-ABETTING ASSAULT CAUSE OF ACTION AGAINST DEFENDANT GRANDFATHER SHOULD NOT HAVE BEEN DISMISSED.

The Second Department determined defendant Mancuso's motion for summary judgment on the negligence cause of action was properly granted, but the motion for summary judgment on the aiding-and-abetting-assault cause of action should not have been granted. The action stemmed from a road rage incident. Defendant Mancuso was driving and his college-age grandson, Vaccaro, was a passenger. The grandson got out of the car and hit plaintiff in the face: "Mancuso established, prima facie, that he did not owe a duty to the plaintiff by virtue of the relationship Mancuso had with Vaccaro. The fact that Mancuso could have exercised control over Vaccaro, his college-aged grandson, did not create a duty to do so ... . In addition, the mere fact that Vaccaro was a passenger in Mancuso's vehicle did not create a duty on the part of Mancuso to control Vaccaro's conduct ... . To be liable for an assault under an aiding and abetting theory, a defendant must have committed some overt act, either by words or conduct, in furtherance of the assault ... . Here, Mancuso established, prima facie, that he did not commit an overt act in furtherance of Vaccaro's assault on the plaintiff ... . In opposition, however, the plaintiff

raised a triable issue of fact as to whether Mancuso's actions preceding the assault constituted an overt act in furtherance of the assault ...". ***McKiernan v. Vaccaro*, 2019 N.Y. Slip Op. 00267, Second Dept 1-16-19**

PERSONAL INJURY, MUNICIPAL LAW, CONTRACT LAW, LANDLORD-TENANT.

IN THIS SLIP AND FALL CASE, THE PARKING LOT WAS THE SUBJECT OF A LICENSE AGREEMENT BETWEEN THE CITY AND THE ATHLETIC CLUB, NOT A LEASE, THEREFORE THE OUT OF POSSESSION LANDLORD DOCTRINE WAS NOT APPLICABLE, ALTHOUGH THE LICENSE AGREEMENT REQUIRED THE ATHLETIC CLUB TO MAINTAIN THE PARKING LOT, THE LICENSE AGREEMENT IMPOSED CERTAIN MAINTENANCE DUTIES ON THE CITY AS WELL, THE CITY'S SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the defendant city did not demonstrate that it had relinquished control over the parking lot where plaintiff allegedly fell into an access pit. The access pit was exposed because a snow removal contractor pushed the cover off when plowing snow. The city had a license agreement with an athletic club, Fitmar, which required Fitmar to maintain the parking lot. Fitmar had hired the snow removal contractor. The city argued it was an out of possession landlord and the parking lot was solely Fitmar's responsibility. The Second Department held that the parking lot was subject to a license agreement, not a lease, and therefore the out of possession landlord doctrine did not apply. The Second Department went on to find that the terms of the license agreement did not demonstrate as a matter of law that the city had relinquished control over the maintenance of the parking lot: "... [T]he license agreement granted Fitmar a license to use the premises, and not a leasehold interest ... . Thus, the standard applied to out-of-possession landlords is inapplicable here ... . Rather, the City, 'as landowner, remains in presumptive control over its property and subject to the attendant obligations of ownership until it is found that control was relinquished' ... . The City failed to meet its prima facie burden of demonstrating that it relinquished control of the premises such that it owed no duty to the plaintiff to remedy the allegedly defective condition. While the license agreement assigned responsibility for maintenance of the premises, and specifically of the parking lot, to Fitmar, it vested the City with ultimate approval authority over Fitmar's operating procedures. The City had unfettered access to the premises and could sponsor or promote its own special events at the premises. The agreement required a yearly inspection of the premises by the City to determine the extent of any repairs to be performed by Fitmar, and the City was permitted to inspect the premises at any time and direct Fitmar to undertake repairs. The City could maintain field personnel at the premises to observe the means and methods of anticipated construction work by Fitmar, and also reserved the right for the City to perform construction or maintenance work at the premises at any time. Fitmar's former general manager testified at his deposition that the City conducted regular inspections of the premises, and that representatives of the Parks Department would often show up unannounced to conduct inspections." ***Agbosasa v. City of New York*, 2019 N.Y. Slip Op. 00250, Second Dept 1-16-19**

THIRD DEPARTMENT

CRIMINAL LAW.

DEFENDANT WAS REQUIRED TO WEAR AN ALCOHOL MONITORING DEVICE AS A CONDITION OF PROBATION BUT WAS UNABLE TO PAY FOR IT, THE PEOPLE DID NOT DEMONSTRATE DEFENDANT'S FAILURE TO PAY WAS WILLFUL, THEREFORE COUNTY COURT WAS OBLIGATED TO CONSIDER PUNISHMENT OTHER THAN INCARCERATION.

The Third Department, reversing County Court, determined the People did not make a sufficient showing that defendant willfully failed to pay for the alcohol monitoring device (SCRAM bracelet). Wearing the bracelet, which cost $11 per day, was a requirement of defendant's probation. County Court was obligated to consider punishment other than imprisonment because the evidence supported defendant's inability to pay: "We agree with defendant that County Court erred in finding that the People established by a preponderance of the evidence that defendant violated the terms and conditions of his probation by willfully refusing to pay or failing to make sufficient good faith efforts to pay the cost of the SCRAM monitoring. .. .[T]he record lacks a basis to substantiate a finding that defendant willfully refused to make the required payments. Moreover, the hearing testimony establishes that defendant made sufficient bona fide efforts to acquire the fiscal resources to pay the costs associated with SCRAM monitoring and that he could not do so as a result of his indigence, which resulted, at least in part, from the serious injuries that he sustained in August 2013. In our view, County Court was therefore required to 'consider alternate measures of punishment other than imprisonment' and erred in failing to do so ...". ***People v. Hakes*, 2019 N.Y. Slip Op. 00324, Third Dept 1-17-19**

CRIMINAL LAW, APPEALS.

THIRD DEPARTMENT DECLINED TO EXERCISE ITS INTEREST OF JUSTICE JURISDICTION TO REVIEW WHETHER DEFENDANT WAS ADEQUATELY INFORMED OF THE RIGHTS SHE WAS GIVING UP BY PLEADING GUILTY, TWO JUSTICE DISSENT.

The Second Department, over a two-justice dissent, declined to exercise its interest of justice jurisdiction to review whether defendant was adequately informed of the rights she was giving up by pleading guilty: "... [W]e find that this is not a proper matter for the exercise of our interest of justice jurisdiction. Defendant has a lengthy criminal history and admitted at the time of the plea that she was guilty of possessing heroin with the intent to sell it. Defendant was represented by counsel and entered into a plea agreement with a favorable sentence. Although defendant later filed a motion to withdraw her plea, she elected to withdraw the motion after being granted an adjournment and conferring with counsel. Significantly, defendant has since served her negotiated sentence and been released from custody; however, if this conviction is reversed, defendant once again faces prosecution for the original charge, which, if convicted, carries a greater sentencing range ... . **From the dissent:** Our review of the plea colloquy reveals that County Court engaged in an extremely limited exchange with defendant, advising her only that, by pleading guilty, she would forever relinquish her 'right to go to trial, the right to testify, to call witnesses, [and to] cross-examine the People's witness[es].' Critically, there was no discussion of the privilege against self-incrimination, the right to be tried by a jury or whether defendant had conferred with counsel and understood the constitutional rights that she was automatically waiving by pleading guilty ...". ***People v. Glover*, 2019 N.Y. Slip Op. 00325, Third Dept 1-17-19**

CRIMINAL LAW, APPEALS.

THE THIRD DEPARTMENT EXERCISED ITS INTEREST OF JUSTICE JURISDICTION AND VACATED DEFENDANT'S PLEA BECAUSE HE WAS NOT ADEQUATELY INFORMED OF THE RIGHTS HE WAS GIVING UP BY PLEADING GUILTY, TWO JUSTICE DISSENT.

The Third Department, vacating defendant's guilty plea, exercising its interest of justice jurisdiction, over a two-justice dissent, determined defendant was not adequately informed of the rights he was giving up by pleading guilty: "Defendant contends that his plea was not knowing, voluntary and intelligent because County Court failed to advise him of the constitutional rights he was waiving by pleading guilty. Although defendant failed to preserve this contention for our review through an appropriate postallocution motion ... , we nonetheless exercise our interest of justice jurisdiction to take corrective action and reverse the judgment ... . [D]uring the abbreviated plea colloquy, County Court briefly advised defendant that, if he were to plead guilty, he would be giving up his 'right to a trial, . . . the right to testify at that trial, to call witnesses and to cross-examine the People's witnesses.' Significantly, County Court did not advise defendant that he had a right to a jury trial or that he would be waiving the privilege against self-incrimination by entering a guilty plea ... . Further, the court failed to obtain any assurance that defendant had discussed with counsel the trial-related rights that are automatically forfeited by pleading guilty or the constitutional implications of a guilty plea ... . **From the dissent:** .. .[W]e do not think that the unpreserved error cited by the majority, standing alone, necessitates this Court exercising its interest of justice jurisdiction to reverse the judgment of conviction as there is nothing compelling about this case that 'cries out for fundamental justice beyond the confines of conventional considerations' ...". ***People v. Demkovich*, 2019 N.Y. Slip Op. 00326, Third Dept 1-17-19**

CRIMINAL LAW, EVIDENCE.

TERRORISM CONVICTION NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE, THERE WAS NO EVIDENCE DEFENDANT INTENDED TO INFLUENCE THE POLICY OR ACTIONS OF THE SHERIFF'S OFFICE WHEN HE SAID HE WAS GOING TO 'COME BACK AND SHOOT THE PLACE DOWN.'

The Third Department, reversing defendant's "terrorism" conviction after trial, determined there was legally insufficient evidence defendant intended to influence the policy or actions of a governmental body, here the Warren County Sheriff's Office (WCSO). When defendant was told at the sheriff's office that his certificate of disposition was insufficient and defendant's property could not be returned to him, he allegedly said he would "come back and shoot the place down." He was convicted of making a terroristic threat and sentenced to five years in prison. "... [T]he record contains no evidence of a necessary element of the crime of making a terroristic threat — that defendant intended to influence a policy of a governmental unit by intimidation or coercion, or that he intended to affect the conduct of a unit of government by murder, assassination or kidnapping. [The sheriff's evidence custodian] testified that as defendant exited the lobby of the WCSO building, he was mumbling to himself and she 'heard the word shoot.' She then asked defendant what he had said, and he replied by stating 'come back and shoot the place down.' Defendant made no statement relating his threat to any policy of the WCSO or demanding that it take any specific action." ***People v. Kaplan*, 2019 N.Y. Slip Op. 00329, Third Dept 1-17-19**

FAMILY LAW, ATTORNEYS.

FAMILY COURT SHOULD NOT HAVE ORDERED A GENETIC MARKER TEST WITHOUT A HEARING AND THE CHILD DID NOT RECEIVE ADEQUATE ASSISTANCE OF COUNSEL.

The Third Department determined Family Court should not have ordered a genetic marker paternity test without a hearing and the child did not receive adequate assistance of counsel: "The attorney for the child (hereinafter AFC) informed the court that, through discussions with the grandmother, the AFC learned that the child might also hold a belief that someone else is his father. The record does not give any indication that the AFC discussed with the child his belief as to who his father is. Beyond a few short and scattered statements, there was no substantive evidence or discussion of who has a parent-child relationship with the child and whether, due to equitable estoppel, a genetic marker test would not be in the child's best interests. The court's order is reflective of this, as it strictly relates to how the test is to be carried out and contains no case-specific discussion. Accordingly, Family Court did not possess adequate information to determine the child's best interests and, as such, it erred in ordering genetic marker testing without first conducting a hearing ... . Additionally, we find that the child did not receive the effective assistance of counsel. The record is bereft of evidence indicating that the AFC consulted with the child, who was from 4½ to 6 years old throughout the time of this litigation ... . We recognize that such consultation runs the risk of raising parentage concerns not harbored by the child; nevertheless, a patient, careful and nuanced inquiry is not only possible, but necessary ... . 'Counsel's failure to consult with and advise the child to the extent of and in a manner consistent with the child's capabilities constitutes a failure to meet [his or her] essential responsibilities as the [AFC]' … . Inasmuch as consultation with the child and subsequent communication of the child's position to Family Court are of the utmost importance ... , it is clear that the child did not receive meaningful representation ... '". ***Matter of Schenectady County Dept. of Social Servs. v. Joshua BB.*, 2019 N.Y. Slip Op. 00335, Third Dept 1-17-19**

FAMILY LAW, EVIDENCE, JUDGES.

PETITION WAS PROPERLY DISMISSED BECAUSE IT DID NOT DEMONSTRATE SUBJECT MATTER JURISDICTION ON ITS FACE, BUT BECAUSE THE MERITS WERE NOT ADDRESSED THE PETITION SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE.

The Third Department determined Family Court properly dismissed a petition because there was no indication that New York had jurisdiction, the petition should not have been dismissed with prejudice because the merits were not reached: "Upon review of the petition, Family Court, sua sponte, found that the children resided in Georgia and dismissed the petition with prejudice for lack of subject matter jurisdiction. Petitioner appeals. In his petition, petitioner alleged that respondent is an aunt of the children who obtained temporary guardianship of them following the mother's death and, further, that the children reside with respondent in Georgia; notably, however, he did not allege that a New York court had made a prior custody determination involving the children, nor did he allege any circumstances involving the children that would support a specific basis for jurisdiction. Thus, the petition fails to allege any facts that would provide New York with jurisdiction to make the determination in this case ... and, therefore, Family Court did not err by dismissing this proceeding without a hearing ... . However, inasmuch as Family Court dismissed the proceeding for lack of subject matter jurisdiction based solely upon a review of petitioner's sparse pro se petition and without reaching the merits, it erred in dismissing the proceeding with prejudice ...". ***Matter of David EE. v. Laquanna FF.*, 2019 N.Y. Slip Op. 00336, Third Dept 1-17-19**

LABOR LAW-CONSTRUCTION LAW, CIVIL PROCEDURE.

PLAINTIFF'S DECEDENT WAS NOT ENGAGED IN CONSTRUCTION WORK COVERED BY LABOR LAW §§ 240(1) AND 241(6) WHEN A BRIDGE FORM HE WAS UNLOADING FELL ON HIM, PLAINTIFF MADE A SUFFICIENT SHOWING OF LONG-ARM JURISDICTION TO WARRANT DISCOVERY.

The Third Department determined the Labor Law §§ 240(1) and 241(6) causes of action were properly dismissed because plaintiff's decedent was not involved in construction work when a 2500 pound bridge form fell on him. The court further found that plaintiff had made a sufficient showing that long-arm jurisdiction may apply to Spillman, the manufacturer of the bridge form, to allow discovery: "In support of her claimed violations of Labor Law §§ 240 (1) and 241 (6), plaintiff alleged that, at the time that decedent sustained the fatal injuries, he had been unloading a bridge form that had been delivered to the manufacturing facility operated by LHV so that it could be used in the manufacture and fabrication of construction materials that would be eventually used during unspecified construction at an unspecified construction site. As Supreme Court aptly concluded, these allegations 'do not support any contention that the work being done at the time of the incident was, in any manner, an integral part of an ongoing construction contract or was being performed at an ancillary site, incidental to and necessitated by such construction project, where the materials involved were being readied for use in connection with a covered activity,' so as to bring it within the ambit of Labor Law § 240 (1) ... . For the same reasons, plaintiff's factual allegations did not support a conclusion that decedent's injuries occurred in an 'area[] in which construction, excavation or demolition work [was] being performed' (Labor Law § 241 [b]) and, thus, Supreme Court's dismissal of plaintiff's Labor Law § 241 (6) claim was proper ... . Viewing the facts in the light most favorable to plaintiff as the nonmoving party, we agree with Supreme Court that the foregoing provided the 'sufficient start' required to warrant further discovery on the issue of whether personal jurisdiction may be properly exercised over Spillman under CPLR 302

(a) (3), while also comporting with federal due process requirements ...". ***Archer-Vail v. LHV Precast Inc.*, 2019 N.Y. Slip Op. 00341, Third Dept 1-17-19**

LIEN LAW, JUDGES.

QUESTIONS OF FACT ABOUT THE TIMELINESS OF THE NOTICE OF LIEN, THE CHARACTER OF THE WORK AND EXAGGERATION PRECLUDED SUMMARY DISCHARGE OF THE NOTICE OF LIEN, SUPREME COURT REVERSED.

The Third Department, reversing Supreme Court, determined that the contractor's notice of lien was valid on its face and should not have been summarily because unresolved questions of fact required trial: " 'A court has no inherent power to vacate or discharge a notice of lien except as authorized by Lien Law § 19 (6)' ... . Pursuant to that provision, a court may summarily discharge a notice of lien where, among other things, 'it appears from the face of the notice of lien that the claimant has no valid lien by reason of the character of the labor or materials furnished' or the notice was not timely filed ... . 'Because the lien was timely on its face, the court was not permitted to summarily discharge it on the basis of untimeliness' ... . Petitioners attack the character of the labor furnished, asserting that respondent's work in July 2016 was for a water line that was not part of any contract between the parties. This assertion merely 'raises a factual issue as to the relationship of the last item of work to the parties' contract' ... . '[A]lthough Lien Law § 39 provides that a willfully exaggerated lien is void, the issue of willful or fraudulent exaggeration is one that also ordinarily must be determined at the trial of [a lien] foreclosure action' ...". ***Matter of Beebe v. Liebel*, 2019 N.Y. Slip Op. 00337, Third Dept 1-17-19**

MUNICIPAL LAW, ENVIRONMENTAL LAW, PERSONAL INJURY.

APPLICATION FOR LEAVE TO FILE LATE NOTICES OF CLAIM AGAINST THE VILLAGE STEMMING FROM A HAZARDOUS SUBSTANCE IN THE WATER SUPPLY PROPERLY GRANTED, ALTHOUGH THERE WAS NO ADEQUATE EXCUSE FOR THE DELAY, THE VILLAGE HAD TIMELY NOTICE OF THE FACTS UNDERLYING THE CLAIM AND WAS NOT PREJUDICED BY THE DELAY.

The Third Department determined Supreme Court properly granted petitioners' application to file late notices of claim against the village stemming from a hazardous substance, PFOA, in the municipal water supply. Although petitioners did not have an adequate excuse for the delay, respondents had timely knowledge of the facts underlying the claim and were not prejudiced by the the delay: "... [I]t is evident that respondent was well aware of the PFOA contamination in its municipal water system, the likelihood of increased PFOA levels in the blood of its residents as a result of exposure to PFOA and the potential negative health consequences as a result thereof. On the record before us, therefore, respondent cannot plausibly claim that it had only a 'general awareness' of the presence of PFOA in its municipal water system. Accordingly, we conclude that Supreme Court properly found that respondent had actual notice of all the essential facts underlying petitioners' claims ... . Further, there has been no demonstration of substantial prejudice to respondent as a result of petitioners' delay in seeking to file late notices of claim ... . Respondent has been aware of the subject PFOA contamination since at least October 2014, it was apprised of the potential negative health risks to its residents from PFOA exposure and, as a result of the blood testing program commenced by DOH, it learned of the elevated levels of PFOA in its residents — despite its efforts to downplay said results. Moreover, respondent alleges that it has located the source of the PFOA contamination and petitioners, as residents of respondent, remain available for any further investigation into whether respondent's conduct was the proximate cause of their alleged injuries. In turn, other than the passage of time, respondent has offered no particularized evidence in opposition to establish that it suffered substantial prejudice ...". ***Matter of Holbrook v. Village of Hoosick Falls*, 2019 N.Y. Slip Op. 00342, Third Dept 1-17-19**

MUNICIPAL LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER CITY HAD PRIOR WRITTEN NOTICE OF THE DEFECTS IN THE SIDEWALK AND RAILING WHERE PLAINTIFF'S DECEDENT FELL INTO A GORGE, CITY'S MOTION FOR SUMMARY JUDGMENT PROPERLY DENIED.

The Third Department determined the city's motion for summary judgment in this slip and fall case was properly denied. Plaintiff's decedent fell from a paved trail into a gorge. There were questions of fact about whether the city had prior written notice of the broken sidewalk and railing: "... [P]laintiff produced a police investigation report concluding that decedent had fallen along a part of the trail with multiple defects, including broken pavement, a 'bent/unsecured hand railing . . . and huge gap spaces in sidewalk edge adjacent to [the] cliff side edge.' Plaintiff also demonstrated that, by the time of the fall, the Department of Public Works had received numerous written complaints about the condition of the trail. General complaints and the subsequent efforts of department personnel to evaluate the condition of the trail did not 'obviate the need for prior written notice' of the particular defects implicated in decedent's fall ... . That said, one of the written complaints was a January 2012 email forwarded to an Assistant Superintendent of Public Works that was, according to his testimony, 'probably' shared with the Superintendent of Public Works, and attached to the email is a map with photographs that appear to reference the defects in the area where decedent fell." ***Van Wageningen v. City of Ithaca*, 2019 N.Y. Slip Op. 00343, Third Dept 1-17-19**