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FIRST DEPARTMENT

CONSTITUTIONAL LAW, MUNICIPAL LAW.

A PORTION OF THE NYC CHARTER WHICH ALLOWS UNLIMITED SEARCHES OF PAWNBROKERS, THEIR PERSONNEL, PREMISES, MERCHANDISE AND PAPERS IS UNCONSTITUTIONAL; THE UNDERLYING REGULATORY SCHEMES ADDRESSING REPORTING REQUIREMENTS AND INSPECTIONS ARE NOT UNCONSTITUTIONAL.

The First Department determined that the portion of the NY City Charter which gave the police commissioner the power to examine pawnbrokers, their personnel, premises, merchandise and papers was facially unconstitutional because there was no limit on the scope of the searches and allowed for immediate arrest. However the reporting requirements imposed on pawnbrokers are constitutional: "... [W]e hold that NY City Charter § 436 is facially unconstitutional to the extent that it provides that the commissioner 'shall have power to examine such persons, their clerks and employees and their books, business premises, and any articles of merchandise in their possession' ... . That portion of NY City Charter § 436 is facially unconstitutional because it is unlimited in scope, and provides 'no meaningful limitation on the discretion of the inspecting officers' ... . NY City Charter § 436 contains no limits on the time, place, and scope of searches of persons or property. It contains no record keeping requirements and it authorizes an immediate arrest for a failure to comply. * * * ... [W]ith respect to the reporting requirements contained in the statutory and regulatory scheme, we ... conclude that there is little or no expectation of privacy in the reported information, whether in traditional paper or electronic form, and that the requirements at issue, which are imposed on a closely regulated industry, sufficiently describe and limit the information to be provided, and are reasonably related to the regulatory authority of the agency to which the information is provided ... . With respect to the inspection programs ... [:] The regulatory scheme here was not created solely to uncover evidence of criminality. Rather it serves to enforce the reporting requirements that provide consumer protection." ***Collateral Loanbrokers Assn. of N.Y., Inc. v. City of New York*, 2019 N.Y. Slip Op. 09354, First Dept 12-26-19**

CONSTITUTIONAL LAW, REAL ESTATE, INSURANCE LAW.

INSURANCE REGULATION WHICH PROHIBITS TITLE INSURERS FROM PROVIDING VALUABLE INDUCEMENTS TO ATTRACT TITLE INSURANCE BUSINESS IS NOT UNCONSTITUTIONALLY VAGUE, SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined Insurance Regulation 208 (11 N.Y.C.R.R part 228), which prohibits title insurers from providing valuable inducements to attract title insurance business, is not unconstitutionally vague: "Petitioners contend that section 228.2(c) is unconstitutionally vague in setting forth a non-exhaustive list of activities that are 'permissible, provided[,]' among other things, that they are 'reasonable and customary, and not lavish or excessive' ... . The court should have rejected this vagueness challenge, since section 228.2(c) 'is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden,' and 'the enactment provides officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis' ... . [T}he words 'lavish' and 'excessive,' standing in clear contrast with the word 'reasonable,' provide adequate notice of the type of behavior that is proscribed. The word 'customary' also sets forth a standard that can be understood by an ordinary person ... . The provisions of section 228.2(c) generally permitting advertising, charitable contributions, and political contributions are consistent with the right to free speech under the First Amendment to the United States Constitution and article I, § 8 of the New York Constitution. ... The content-neutral provisions at issue in this case are narrowly tailored to the substantial government interest of clarifying a statute intended to 'prevent consumers from being required to subsidize unscrupulous exchanges of valuable things for real estate professionals' ... , and that interest is 'unrelated to the suppression of free expression' ... ". ***Matter of New York State Land Tit. Assn., Inc. v. New York State Dept. of Fin. Servs.*, 2019 N.Y. Slip Op. 09366, First Dept 12-26-19**

CRIMINAL LAW, ATTORNEYS.

AN INQUIRY INTO DEFENDANT'S MENTAL HEALTH WAS REQUIRED BEFORE ALLOWING DEFENDANT TO REPRESENT HIMSELF; THE RESULTS OF CPL ARTICLE 730 EXAMS, OF WHICH THE PRESIDING JUDGE WAS NOT MADE AWARE AT THE TIME OF THE REQUEST TO PROCEED PRO SE, INDICATING DEFENDANT MAY BE DELUSIONAL, CONSTITUTED 'RED FLAGS' WARRANTING THE INQUIRY.

The First Department, reversing defendant's conviction, over a dissent, determined defendant's request to represent himself should not have been granted without further inquiry into defendant's mental health. The First Department found that the results of defendant's CPL Article 730 competency exams, finding that defendant may have been delusional, constituted "red flags" that warranted further inquiry before allowing defendant to represent himself: "Not every indication of a defendant's mental infirmity mandates inquiry. Expressions of paranoia or distrust of an attorney, common for many defendants, are not red flags ... . Nor is a defendant's belief that he or she was framed by police ... . On the other hand, notwithstanding a CPL Article 730 exam finding defendant fit, court observations that a defendant was irrational and had a tendency to 'fly off the handle' warranted a searching inquiry into defendant's mental capacity ... . So too, inquiry was warranted where defendant was observed by the court to be unruly, volatile and physically menacing ... . In many cases, whether or not the behavior would trigger an inquiry may be a question of degree. * * * Defendant appeared for trial before a justice who was presiding over the case for the first time. Defense counsel informed the court that defendant wished to proceed pro se. Neither defense counsel nor the prosecution made the court aware of defendant's CPL Article 730 exams or the potential for him to be experiencing delusional thoughts. Although the trial court conducted an extensive colloquy with defendant regarding the waiver of the right to counsel, at no point did the court inquire into defendant's mental health. We find that, notwithstanding other aspects of the record supporting defendant's capacity, the information in the CPL Article 730 reports indicating a potential for delusional thought was a red flag that required a particularized assessment of defendant's mental capacity before resolving his request to proceed pro se ...". ***People v. Zi*, 2019 N.Y. Slip Op. 09353, First Dept 12-26-19**

CRIMINAL LAW, EVIDENCE.

CROSS-EXAMINATION OF A POLICE OFFICER ABOUT A CIVIL LAWSUIT SHOULD HAVE BEEN ALLOWED; CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined the hearing and trial courts should have allowed cross-examination of a police officer about a lawsuit naming the officer: "Both the hearing and trial courts erred in denying defendant's request to cross-examine a police officer regarding allegations of misconduct in a civil lawsuit in which it was claimed, among other things, that this particular officer arrested the plaintiff without suspicion of criminality and lodged false charges against him ... . The civil complaint contained specific allegations of falsification by this officer that bore on his credibility at both the hearing and trial. At each proceeding, this officer was the only witness for the People." ***People v. Burgess*, 2019 N.Y. Slip Op. 09364, First Dept 12-26-19**

HUMAN RIGHTS LAW, EMPLOYMENT LAW.

ALTHOUGH THE ALLEGED RETALIATORY ACTIONS BY THE EMPLOYER TOOK PLACE YEARS AFTER PLAINTIFF STOPPED WORKING FOR THE EMPLOYER, THE COMPLAINT STATED VALID CAUSES OF ACTION FOR RETALIATORY EMPLOYMENT DISCRIMINATION AND PROMISSORY ESTOPPEL, SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, reinstated the retaliation (employment discrimination) and promissory estoppel causes of action against Artforum International Magazine. Plaintiff, an art curator, alleged sexual harassment by an Artforum publisher. After meeting with the two other publishers about the alleged harassment, the publishers allegedly promised to ensure the harassment would never happen again. Instead, plaintiff alleged, the publishers retaliated against her. The central issue on appeal is whether the actions by Artforum, which took place after plaintiff had left the magazine's employment, could still be subject to the employment-discrimination prohibitions of the New York City Human Rights Law (NYC Administrative Code § 8-107). The First Department held that the close-knit nature of the fine art business, and the effect the alleged retaliation by Artforum can have of plaintiff's career in the art world, warranted finding plaintiff had stated valid causes of action: "... [T]here is jurisprudential grounding for expanding the boundaries of the employment context that is central to discrimination and retaliation claims in section 8-107(7) to the extent necessary to provide redress when there exists some nexus between the retaliatory harm alleged and a relationship characterized in some manner as one of employment, past or present. ... Similar reasoning can be justified in reading some expansiveness into the undefined and similarly ambiguous term 'employment' for remedying retaliation under Administrative Code section 8-107(7). However, some safeguards are necessary to avoid the unintended consequence of allowing a lawsuit against a party who happens to be a plaintiff's former employer on a retaliation theory when there is no reasonable connection between the harm alleged and that economic relationship. The plaintiff, if not a current employee, should be shown to occupy a subordinate position in an ongoing economic relationship that is threatened by the 'employer's' retaliation, and the nature of the retaliation itself should have a demonstrable nexus to the harm being alleged." ***Schmitt v. Artforum Intl. Mag., Inc.*, 2019 N.Y. Slip Op. 09352, First Dept 12-2619**

INSURANCE LAW, CONTRACT LAW, PERSONAL INJURY.

THE BUILDING OWNER AND MANAGER WERE ADDITIONAL INSUREDS UNDER A POLICY ISSUED TO THE CONTRACTOR HIRED TO RENOVATE CONCRETE WALKWAYS; THE OWNER AND MANAGER ARE ENTITLED TO COVERAGE FOR A SLIP AND FALL ALLEGED TO HAVE BEEN CAUSED BY PAINTING THE WALKWAYS ALL THE SAME COLOR AND THEREBY DISGUISING A CHANGE IN ELEVATION

The First Department, in a full-fledged opinion by Justice Kapnick, determined plaintiffs are additional insureds under an insurance policy issued by defendant to nonparty Upgrade, the contractor hired to restore concrete catwalks. Plaintiffs, Windsor Apartments and Argo Real Estate, are entitled to coverage for a slip and fall in plaintiffs' building allegedly caused by painting the floor all the same color, thereby disguising a change in elevation: "Defendant State National issued a commercial general liability (CGL) policy to Upgrade during the relevant time period. The policy contained a 'Blanket Additional Insured' Endorsement that limited coverage to operations performed by or on behalf of Upgrade: 'It is agreed that this Policy shall include as additional Insureds any person or organization to whom the Named Insured [Upgrade] has agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such written contract.' The State National policy also stated that its coverage was primary, with exceptions not applicable here, for damages arising out of the premises or operations for which an entity is added as an additional insured. The policy issued by plaintiff Fireman's Fund Insurance Company (Fireman's) to Windsor and Argo provided that coverage was excess when its insureds, Windsor and Argo, have other primary insurance available to them covering liability for damages arising out of the premises or operations for which they have been added as an additional insured. * * * ... [S]ince the injury to the plaintiff in the underlying action here 'arose out of' Upgrade's operation of painting the walkways, plaintiffs are additional insureds under the State National policy and the policy is primary in connection with the underlying action." ***Fireman's Fund Ins. Co. v. State Natl. Ins. Co.*, 2019 N.Y. Slip Op. 09399, First Dept 12-26-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER SNAKING A WIRE ABOVE CEILING TILES IS 'CONSTRUCTION' WITHIN THE MEANING OF LABOR LAW § 241(6); SUPREME COURT REVERSED.

The First Department, reversing Supreme Court, determined plaintiff's Labor Law § 241(6) cause of action should not have been dismissed. Plaintiff was injured while snaking a wire about ceiling tiles. Supreme Court held the work was not "construction" within the meaning of the statute and the First Department disagreed: "Labor Law § 241(6) requires owners, contractors and their agents to provide a safe workplace for workers performing 'construction, excavation or demolition work.' 'In determining what constitutes construction' for purposes of the statute we look to the Industrial Code which, as relevant here, defines construction to include alteration of a structure' ... . We find that an issue of fact is raised as to whether plaintiff was altering the structure when he was pulling cable above the drop ceiling ... . In his deposition plaintiff stated that, in order to access the cable, plaintiff pushed a ceiling tile 'over to the next tile.' He described his work at the time of the accident as 'going up into the ceiling . . . to figure out where we were going with the cable.' Plaintiff had been provided with a saw to cut holes in the wall and ceiling when necessary. ... [A]s 'running cables' is considered to be a 'significant physical change' to fall within the purview of alteration and not 'routine' maintenance, there remains a question of fact as to whether plaintiff's work constituted an alteration within the meaning of Labor Law § 241(6)." ***Emery v. Steinway, Inc.*, 2019 N.Y. Slip Op. 09368, First Dept 12-26-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF'S LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFF FELL ATTEMPTING TO USE AN INVERTED BUCKET TO STEP UP TO AN ELEVATED PLATFORM.

The First Department, reversing Supreme Court, determined plaintiff's Labor Law §§ 240(1) and 241(6) causes of action should not have been dismissed. Plaintiff fell attempting to use an inverted bucket to access an elevated platform: "The protection of Labor Law § 240(1) encompasses plaintiff['s] ... fall while trying to access an elevated work platform by stepping up onto an inverted bucket, an inadequate safety device that failed to provide proper protection ... . Moreover, defendants failed to cite any evidence rebutting the affidavit by plaintiff's foreman stating that stairs or other access points to the work platform were either restricted or blocked by materials. Because no safety devices were available to plaintiff to access the platform, as a matter of fact and law, plaintiff's attempt to use the inverted bucket cannot be the sole proximate cause of his accident ... . Because no stairways, ramps, or runaways were available to plaintiff to access the platform, he was entitled to summary judgment on his Labor Law § 241(6) claim predicated upon Industrial Code (12 NYCRR) § 23-1.7(f) ...". ***Ferguson v. Durst Pyramid, LLC*, 2019 N.Y. Slip Op. 09388, First Dept 12-26-19**

LANDLORD-TENANT, CONTRACT LAW.

GENERAL OBLIGATIONS LAW 5-321 VOIDS A LEASE PROVISION ABSOLVING THE LANDLORD OF LIABILITY FOR DAMAGE TO A TENANT'S PROPERTY CAUSED BY THE LANDLORD'S NEGLIGENCE, BUT DOES NOT VOID A LEASE PROVISION ABSOLVING THE LANDLORD OF LIABILITY FOR THE TENANT'S LOST PROFITS CAUSED BY THE LANDLORD'S NEGLIGENCE.

The First Department noted that the exculpatory clauses in the lease which relieved the landlord from liability for the tenant's lost profits caused by the landlord's negligence is not void pursuant to General Obligations Law (GOL) § 5-321. GOL § 5-321 refers only to property damage, not lost profits: "The claim for lost profits, however, was properly dismissed. General Obligations Law § 5-321 provides: 'Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.' The exculpatory clauses in the lease relieving defendants of liability for lost profits resulting from their own negligence are not void under General Obligations Law § 5-321 because lost profits are distinct from property damage ... . Moreover, paragraph 23 of the lease amendment specifically provides that '[n]otwithstanding anything to the contrary . . . Tenant waives, to the full extent permitted by law, any claim for consequential or punitive damages in connection [with damage to Tenant's property]' ... . In view of this unequivocal exculpatory clause stating that no other provision in the lease shall entitle the tenant to consequential damages, the claim for lost profits is barred ...". ***Chaitman v. Moezinia*, 2019 N.Y. Slip Op. 09396, First Dept 12-26-19**

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

THERE IS A QUESTION OF FACT WHETHER A DRUG, WHICH CAN DISSOLVE BLOOD CLOTS IN MINUTES, SHOULD HAVE BEEN ADMINISTERED TO PLAINTIFF WHO WAS SUFFERING FROM A PULMONARY EMBOLISM UPON ADMISSION; SUPREME COURT REVERSED; TWO-JUSTICE DISSENT.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, over a two-justice dissent, determined that the defendants' motion for summary judgment in this medical malpractice case should not have been granted. The opinion is fact-specific and too detailed to fairly summarize here. The majority concluded there was a question of fact whether the administration of a drug, which defendants averred was contraindicated, would have saved decedent's life. Decedent was suffering from a pulmonary embolism upon admission. The staff waited hours for blood tests and an angiogram to confirm the diagnosis. A drug which can dissolve blood clots in minutes was not administered. ***Barry v. Lee*, 2019 N.Y. Slip Op. 09397, First Dept 12-26-19**

MUNICIPAL LAW, VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION LAW, CRIMINAL LAW.

PLAINTIFF'S ALLEGATIONS OF RAPE AND SEXUAL ASSAULT BY DEFENDANT ARE SUFFICIENT TO ALLEGE A CAUSE OF ACTION UNDER NEW YORK CITY'S VICTIMS OF GENDER-MOTIVATED VIOLENCE PROTECTION LAW; THERE IS NO NEED TO ALLEGE SIMILAR ASSAULTS AGAINST OTHER WOMEN TO DEMONSTRATE ANIMUS ON THE BASIS OF GENDER.

The First Department, in a full-fledged opinion by Justice Moulton, over a concurring opinion, determined that plaintiff's complaint, alleging rape and sexual assault, stated a valid cause of action under New York City's Victims of Gender-Motivated Violence Protection Law (VGM). The central question on appeal was the meaning of the term "animus." Supreme Court held that allegations defendant had sexually assaulted other women were properly included in the complaint to demonstrate animus. The First Department held plaintiff's allegations of rape and assault, without allegations involving other women, were sufficient: "... [P]laintiff's claims in the amended complaint that she was raped and sexually assaulted are sufficient to allege animus on the basis of gender. She need not allege any further evidence of gender-based animus. Defendant has conceded that the allegations herein are sufficient to show that the acts alleged were 'committed because of gender or on the basis of gender.' That the alleged rape and sexual assault was 'due, at least in part, to an animus based on the victim's gender' is sufficiently pleaded by the nature of the crimes alleged. Rape and sexual assault are, by definition, actions taken against the victim without the victim's consent ... . Without consent, sexual acts such as those alleged in the complaint are a violation of the victim's bodily autonomy and an expression of the perpetrator's contempt for that autonomy. Coerced sexual activity is dehumanizing and fear-inducing. Malice or ill will based on gender is apparent from the alleged commission of the act itself. Animus inheres where consent is absent." ***Breest v. Haggis*, 2019 N.Y. Slip Op. 09398, First Dept 12-26-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANTS PRESENTED NO EVIDENCE OF SNOW REMOVAL EFFORTS OR LACK OF CONSTRUCTIVE NOTICE IN THIS ICE-ON-SIDEWALK SLIP AND FALL CASE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, determined defendants' motion for summary judgment in the ice-on-sidewalk slip and fall case should not have been granted: "[Defendants] failed to sustain their initial burden of demonstrating that they neither created nor had actual or constructive knowledge of the icy condition of the sidewalk ... . Neither presented evidence concerning snow removal immediately prior to plaintiff's accident and/or their lack of notice of the condition ...". ***Burton v. Khedouri Ezair Corp.*, 2019 N.Y. Slip Op. 09379, First Dept 12-26-19**

SECOND DEPARTMENT

CIVIL PROCEDURE.

MOTION TO AMEND THE BILL OF PARTICULARS MADE AFTER THE NOTE OF ISSUE WAS FILED SHOULD HAVE BEEN GRANTED DESPITE THE ABSENCE OF A GOOD EXCUSE FOR THE DELAY; THE MOTION HAD MERIT, DID NOT PRESENT ANY NEW THEORIES AND SOUGHT TO NARROW THE ISSUES FOR TRIAL.

The Second Department, reversing Supreme Court, determined plaintiffs' motion to amend the bill of particulars should have been granted, even though the motion was made after the note of issue was filed and there was no good excuse for the delay: "... '[L]eave to amend a bill of particulars may properly be granted, even after the note of issue has been filed, where the plaintiff makes a showing of merit, and the amendment involves no new factual allegations, raises no new theories of liability, and causes no prejudice to the defendant' ... . Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine ... . Here, despite their unreasonable and unexplained delay in seeking leave to amend their bill of particulars and interrogatory responses, the plaintiffs did not seek to assert any new theory of liability, but rather, sought to narrow a theory previously asserted. Specifically, whereas the plaintiffs had previously alleged violation of 'all provisions of the [Federal Motor Carrier Safety Regulations] Parts 300 to 399,' their proposed amendment sought to narrow this allegation to specify a violation of 49 CFR 392.2 as a result of a violation of Tuckahoe Village Code § 21-33.1. Since the proposed amendment was meritorious and sought to narrow the issues before the Supreme Court, the court should have granted the plaintiffs' cross motion for leave to amend their bill of particulars and interrogatory responses as requested ...". ***Cioffi v. S.M. Foods, Inc.*, 2019 N.Y. Slip Op. 09252, Second Dept 12-24-19**

CIVIL PROCEDURE.

MOTION FOR A DECLARATORY JUDGMENT SHOULD NOT HAVE BEEN GRANTED BECAUSE THERE WAS NO DEMAND FOR DECLARATORY RELIEF IN THE PLEADINGS.

The Second Department, reversing Supreme Court, determined the motion for a declaratory judgment should not have been granted because declaratory relief was not in the pleadings: "... Supreme Court should have denied the ... motion for a declaration that the contract and its amendments are null and void, because that declaratory relief was not demanded in the pleadings filed in this proceeding (see CPLR 3017[b] ...)." ***Matter of Mount Olive Baptist Church of Manhasset*, 2019 N.Y. Slip Op. 09270, Second Dept 12-24-19**

CONTRACT LAW, CIVIL PROCEDURE.

PLAINTIFF SUBMITTED EVIDENCE OF DEFENDANTS' BREACH OF A STIPULATION OF SETTLEMENT; PLAINTIFF'S MOTION TO VACATE (RESCIND) THE STIPULATION SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The Second Department, reversing Supreme Court, determined plaintiff's motion to vacate a stipulation of settlement should not have been granted without a hearing. Plaintiff presented evidence defendants breached the stipulation raising a question whether the stipulation should be rescinded: "... [T]he plaintiff argued that the stipulation should be vacated because the defendants had "openly and willfully violated" the terms of the stipulation. In support of his position, the plaintiff submitted, inter alia, his own affidavit, in which he stated that the defendants had, among other things, assaulted his wife, refused to provide him with an accounting, and had made it impossible for him to operate his plumbing business as agreed to in the stipulation by, among other things, removing and destroying equipment from his office, disconnecting his phone line, and changing locks on the property. 'As a general rule, rescission of a contract is permitted for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual, or technical breach, but . . . only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract' ... . Under the circumstances, the factual assertions set forth in the plaintiff's affidavit were sufficient to warrant a hearing on the issue of whether the stipulation should be rescinded due to the defendants' alleged breaches ...". ***Young v. Young*, 2019 N.Y. Slip Op. 09321, Second Dept 12-24-19**

CRIMINAL LAW, EVIDENCE.

PROOF OF A PROBATION VIOLATION SUBMITTED AFTER THE CLOSE OF EVIDENCE SHOULD NOT HAVE BEEN CONSIDERED.

The Second Department determined County Court should not have held defendant violated the probation condition prohibiting him from committing a new crime because the evidence of the new crime was not presented to the court until after the close of evidence: "... [T]he defendant correctly contends that the County Court erred in finding that he violated the condition of his probation prohibiting him from committing any additional crime, offense, or violation based solely on his arrest and indictment for attempted murder. While the court would have been permitted to take judicial notice of the defendant's subsequent indictment for attempted murder ... , that evidence was presented after the close of evidence at the revocation of probation hearing. The defendant had no opportunity to be heard regarding the indictment and related documents relied upon by the court. Accordingly, the court should not have found that the defendant violated the condition of his probation based upon the commission of a new crime ...". ***People v. Herring*, 2019 N.Y. Slip Op. 09287, Second Dept 12-24-19**

CRIMINAL LAW, EVIDENCE.

THE SEARCH WARRANT WHICH ALLOWED THE SEIZURE OF BUSINESS COMPUTERS, COMPUTER FILES AND BUSINESS DOCUMENTS WITH ONLY A DATE-RESTRICTION AMOUNTED TO A GENERAL WARRANT, THE SEIZED ITEMS SHOULD HAVE BEEN SUPPRESSED.

The Second Department, reversing Supreme Court, over a dissent, determined the search warrant for business computers, computer files and documents amounted to a general warrant, and the items seized should have been suppressed. The warrant was procured by the Office of Attorney General (OAG) and targeted two realty companies which were alleged to have involvement in the illegal construction and demolition of a rent-stabilized building: "The search warrant ... permitted the OAG to search and seize broad categories of items relating to 1578 Union Street Realty Corporation, Dream Home Realty, and a number of other businesses allegedly controlled by the defendant through which he had conducted real estate transactions. The items permitted to be searched and seized included: corporate documents; employment records, employee lists, and employment contracts; all calendar books, appointment books, and address books; all computers, computer hard drives, and computer files stored on other media; and all bank, tax and financial records. The warrant did not name or specify any particular crime or offense to which the search was related, and did not incorporate the affidavit by reference. * * * ... [O]ther than a date restriction covering a period of approximately five years, the warrant permitted the OAG to search and seize all computers, hard drives, and computer files stored on other devices, without any guidelines, parameters, or constraints on the type of items to be viewed and seized ... . As has been observed by federal courts, where the property to be searched is computer files, 'the particularity requirement assumes even greater importance' ... since '[t]he potential for privacy violations occasioned by an unbridled exploratory search' of such files is 'enormous' … . Additionally, as to paper documents, the warrant merely identified generic classes of items, effectively permitting the OAG to search and seize virtually all conceivable documents that would be created in the course of operating a business ...". ***People v. Melamed*, 2019 N.Y. Slip Op. 09295, Second Dept 12-24-19**

CRIMINAL LAW, IMMIGRATION LAW, JUDGES.

JUDGES SHOULD NOT ASK A DEFENDANT WHETHER HE OR SHE IS A US CITIZEN IN PLEA PROCEEDINGS; RATHER JUDGES SHOULD INFORM ALL DEFENDANTS THE PLEA TO A FELONY MAY RESULT IN DEPORTATION IF HE OR SHE IS NOT A US CITIZEN.

The Second Department, over a concurrence, rejected defendant's argument that his plea was involuntary because he was not informed he would be deported as a consequence of the plea. There was no indication in the record that plaintiff was not a US citizen. Defendant told the court he was a citizen. And the pre-sentence report indicated defendant was a naturalized US citizen. However, the Second Department took the opportunity to instruct the courts how the citizenship issue should be handled: "... [A] trial court should not ask a defendant whether he or she is a United States citizen and decide whether to advise the defendant of the plea's deportation consequence based on the defendant's answer. Instead, a trial court should advise all defendants pleading guilty to felonies that, if they are not United States citizens, their felony guilty plea may expose them to deportation . This recommendation is consistent... with the Court of Appeals' pronouncement in Peque: "[T]o protect the rights of the large number of noncitizen defendants pleading guilty to felonies in New York, trial courts must now make all defendants aware that, if they are not United States citizens, their felony guilty pleas may expose them to deportation" ... . Additionally, this recommendation is consistent with the legislature's pronouncement in CPL 220.50(7). Although that statute, deemed to be repealed September 1, 2020, indicates, in part, that '[t]he failure to advise the defendant pursuant to this subdivision shall not be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction, nor shall it afford a defendant any rights in a subsequent proceeding relating to such defendant's deportation, exclusion or denial of naturalization[,]' it specifically provides, in part, that '[p]rior to accepting a defendant's plea of guilty to a count or counts of an indictment or a superior court information charging a felony offense, the court must advise the

defendant on the record, that if the defendant is not a citizen of the United States, the defendant's plea of guilty and the court's acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States'... . Moreover, giving a 'short, straightforward statement' ... regarding deportation will neither add significantly to the length of the plea proceeding nor encroach meaningfully on the trial court's discretion. Whether a defendant receives the Peque warning should not depend on the defendant having to acknowledge, on the record in open court, that he or she is not a United States citizen, particularly since eliciting noncitizen status may raise, in some cases, concerns of compelled self-incrimination ...". ***People v. Williams*, 2019 N.Y. Slip Op. 09303, Second Dept 12-24-19**

FAMILY LAW.

REMOVAL OF THE CHILD FROM MOTHER'S CARE WAS NOT WARRANTED, NO SHOWING OF AN IMMINENT THREAT TO THE CHILD'S LIFE OR HEALTH.

The Second Department, reversing Family Court, determined the child should not have been removed for the mother's care because there was not showing of an imminent threat to the child's life or health: "Upon a hearing pursuant to Family Court Act § 1027, 'temporary removal is only authorized where the court finds it necessary to avoid imminent risk to the child's life or health' ... . 'In determining a removal application pursuant to Family Court Act § 1027, the court must engage in a balancing test of the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal' ... . 'Imminent danger, however, must be near or impending, not merely possible' ... . Here, the petitioner failed to establish that the child would be subjected to imminent risk if he were not removed from the mother's custody pending the outcome of the neglect proceeding ... . The Family Court's concerns about, inter alia, whether the mother would keep in contact with the petitioner or return to court for continued proceedings did not amount to an imminent risk to the child's life or health that could not be mitigated by reasonable efforts to avoid removal." ***Matter of Cameron L. (Ashley L.)*, 2019 N.Y. Slip Op. 09268, Second Dept 12-24-19**

FAMILY LAW.

FATHER'S PETITION FOR SOLE CUSTODY SHOULD NOT HAVE BEEN GRANTED ABSENT A FULL HEARING.

The Second Department, reversing Family Court, determined father's petition for sole custody should not have been granted absent a full hearing: "By 'Agreed Order in Suit Affecting the Parent-Child Relationship' (hereinafter the Texas custody order) dated October 4, 2016, which was so-ordered by the District Court, Harris County, Texas, the parties agreed to be appointed 'Joint Managing Conservators' of their child, and the father was granted the exclusive right to designate the child's primary residence within Westchester County, New York, or any contiguous county. Less than two months later, on November 16, 2016, the father filed a petition in the Family Court, Westchester County, to modify the Texas custody order, inter alia, so as to award him sole custody of the child. The mother opposed the petition. Over 21 months, the parties made eight formal appearances in Family Court in connection with the father's petition. The court never conducted an evidentiary hearing on the father's petition, with the exception of taking the partial testimony of one nonparty witness. By order dated September 25, 2018, over the mother's objection and request for an evidentiary hearing, the court, inter alia, granted the father's petition to the extent of awarding him sole legal custody of the child. The mother appeals. We reverse. Custody determinations should ' [g]enerally' be made only after a full and plenary hearing and inquiry' ... . 'This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child' ... . Here, the record does not demonstrate the absence of unresolved factual issues so as to render a custody hearing unnecessary ...". ***Matter of Salvi v. Salvi*, 2019 N.Y. Slip Op. 09272, Second Dept 12-24-19**

FAMILY LAW.

COURT SHOULD NOT HAVE AWARDED PLAINTIFF WIFE $25,000 AS AN INTEREST IN HER HUSBAND'S MBA DEGREE; MARITAL ASSETS WERE USED TO PROCURE THE DEGREE AND THE COST OF THE DEGREE IS NOT A PROPER BASIS FOR SUCH AN AWARD.

The Second Department, reversing (modifying) Supreme Court, determined plaintiff wife in this divorce action should not have been awarded $25,000 for her interest in her husband's MBA degree: "At the time that this action was commenced, an academic degree earned during a marriage constituted marital property subject to equitable distribution (... cf. Domestic Relations Law § 236[B][5][d][7]). The value of a degree is measured by the present value of the enhanced earning capacity which it affords the holder ... . The nontitled spouse is required to establish the value of the enhanced earning capacity and demonstrate that the nontitled spouse made a substantial contribution to the acquisition of the degree ... . Here, the Supreme Court awarded the plaintiff $25,000, not based on the value of the defendant's enhanced earning capacity, but rather on its determination of the cost of the acquisition of the MBA degree. The utilization of marital funds for the acquisition of the defendant's MBA degree was a choice made by the parties during the course of the marriage that should not be second-guessed once the marriage has ended ... . Furthermore, the plaintiff failed to establish the actual value of the defendant's enhanced earning capacity ... , and the court declined to award the defendant any distribution of the plaintiff's

master's degree, which was also earned during the marriage. Accordingly, we modify the judgment by deleting the provision awarding the plaintiff $25,000 as and for her interest in the defendant's MBA degree." ***Ospina-Cherner v. Cherner*, 2019 N.Y. Slip Op. 09276, Second Dept 12-24-19**

FORECLOSURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE.

PLAINTIFF FAILED TO PROVE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff's (PennyMac's) motion for summary judgment in this foreclosure action should not have been granted. Plaintiff did not present sufficient proof of compliance with the notice requirements of RPAPL 1304: "... [A]lthough Somarriba and Carras-Gomez 'stated in [their] affidavit[s] that the RPAPL 1304 notices were mailed by certified and regular first-class mail, and attached copies of those notices, the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened' ... . Instead, the plaintiff submitted a certificate of bulk mailing, which did not identify any particular mailing, and two internal reports generated by the plaintiff, which appear to demonstrate that some unidentified pieces of mail were sent to the borrower's address ... . Additionally, no foundation was laid for the admission of these business records, as neither Somarriba nor Carras-Gomez attested that they had personal knowledge of the plaintiff's business practices and procedures, or that the plaintiff's records were incorporated into PennyMac's own records or routinely relied upon by PennyMac in its business ... . Finally, the plaintiff failed, alternatively, to provide proof of actual mailing of the RPAPL 1304 notice, to provide proof of 'a standard office mailing procedure designed to ensure that items are properly addressed and mailed, sworn to by someone with personal knowledge of the procedure' ... . Neither Somarriba nor Carras-Gomez averred that they had personal knowledge of any such standard office mailing procedure of the plaintiff." ***PennyMac Corp. v. Khan*, 2019 N.Y. Slip Op. 09278, Second Dept 12-24-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

ALTHOUGH A REFERRING PHYSICIAN CAN NOT BE VICARIOUSLY LIABLE FOR THE NEGLIGENCE OF THE PHYSICIAN TO WHOM THE PATIENT WAS REFERRED, THE REFERRING PHYSICIAN MAY BE LIABLE FOR HER OWN NEGLIGENCE WITH RESPECT TO CONFERRING WITH THE OTHER PHYSICIAN ABOUT THEIR DIFFERENT FINDINGS.

The Second Department, reversing Supreme Court, determined the motion for summary judgment by one of the two doctors who examined plaintiff (Dr. Andreyko) should not have been granted: "Although a medical provider cannot be held vicariously liable for the malpractice of a physician to whom a patient is referred, the referring medical provider may be held liable for his or her own independent negligent conduct that proximately causes the patient injury ... ... Here, Andreyko examined the plaintiff on May 30, 2012, and noted the existence of palpable masses, 'tender to palpation,' in the plaintiff's right breast. Later that day, the plaintiff was examined by Wertkin who, though detecting thickening of the right breast, did not detect any palpable masses. Wertkin reported his findings to Andreyko who, upon reviewing them, reviewed her notes from her examination of the plaintiff but did not contact Wertkin to discuss the differences in their respective examinations. We conclude that the plaintiff raised a triable issue of fact as to whether Andreyko, upon learning that Wertkin was unable to palpate any masses in the plaintiff's right breast, departed from the accepted standard of care by failing to advise Wertkin that Andreyko had been able to palpate distinct masses in the plaintiff's breast, and whether Andreyko's failure to do so was a substantial factor in contributing to the delay in diagnosis that the plaintiff had breast cancer. Notably, Wertkin testified at his deposition that, given the plaintiff's medical history, had he been able to locate any distinct palpable masses in the plaintiff's breast, the standard of care would have called for a biopsy of the breast." ***Yanchynska v. Wertkin*, 2019 N.Y. Slip Op. 09320, Second Dept 12-24-19**

PERSONAL INJURY, MUNICIPAL LAW, EMPLOYMENT LAW, WORKERS' COMPENSATION, CONTRACT LAW, VEHICLE AND TRAFFIC LAW.

PLAINTIFF POLICE OFFICER'S MOTION FOR SUMMARY JUDGMENT AGAINST THE DRIVER OF THE TRACTOR TRAILER WHICH STRUCK HIM WHEN HE WAS STANDING IN THE ROADWAY SHOULD HAVE BEEN GRANTED, FREEDOM FROM COMPARATIVE FAULT NO LONGER NEED BE SHOWN; OTHER ISSUES ADDRESSED IN THE DECISION INCLUDE THE EMPLOYER'S LIABILITY, THE TRUCK RENTAL COMPANIES' LIABILITY, THE EMERGENCY DOCTRINE, WORKERS' COMPENSATION AND GENERAL MUNICIPAL LAW § 205-e.

The Second Department, reversing (modifying) Supreme Court determined plaintiff police officer was entitled to summary judgment against the driver of the tractor trailer which struck the officer who was standing in the roadway both under a common law negligence theory and under General Municipal Law § 205-e. The court dealt with several other issues including: (1) whether a second police officer was engaged in an emergency operation, giving rise to the reckless disregard standard, when he stopped to assist the plaintiff who had made a traffic stop (the answer is no); (2) whether the second officer was liable based upon the position of his car (the answer is no, the car furnished a condition for the accident but was not the cause); (3) whether the injured officer's recovery was confined to Workers' Compensation (there is a question

of fact whether the injury was "grave"); (4) whether the Graves Amendment protected the truck rental companies (the answer is yes); (5) whether vicarious liability applies to the truck driver's employer (there is a question of fact on that issue). With respect to the common law negligence and the General Municipal Law 205-e causes of action, the court wrote: "... [T]he plaintiffs were not required to demonstrate that the injured plaintiff was free from comparative negligence in order to obtain summary judgment on the issue of Burke's [the truck driver's] liability on the first cause of action [negligence]. * * * When the light changed, Burke began his left turn onto northbound Midland Avenue. Prior to beginning his turn, Burke was aware that there was a police officer conducting a traffic stop on foot and a police car parked on the northbound side of Midland Avenue. Although Burke believed he could make the turn safely, the rear of the trailer hit the injured plaintiff. * * * The plaintiffs also established ... Burke's liability as to ... a violation of General Municipal Law § 205-e. ... [T]hat statute permits a police officer to bring a tort claim for injuries sustained 'while in the discharge or performance at any time or place of any duty imposed by . . . superior officer[s]' where such injuries occur 'directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments' ... . In order to recover under the statute, "a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties" ... . Vehicle and Traffic Law § 1146(a) requires a driver to 'exercise due care to avoid colliding with any . . . pedestrian.' Here, the unrebutted evidence established a prima facie violation of § 1146(a), as it demonstrated that Burke failed to exercise due care to avoid hitting the injured plaintiff." ***Cioffi v. S.M. Foods, Inc.*, 2019 N.Y. Slip Op. 09251, Second Dept 12-24-19**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

THE CAR IN WHICH PLAINTIFFS WERE PASSENGERS HAD THE RIGHT OF WAY ON A THROUGH ROAD; WHETHER DEFENDANT'S CAR STOPPED AT THE STOP SIGN BEFORE PULLING OUT INTO THE PATH OF PLAINTIFFS' CAR WAS NOT DISPOSITIVE; PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff-passengers' motion for summary judgment in this intersection traffic accident case should have been granted. The Hernandez/Transit car, in which plaintiffs were passengers, had the right of way on a through road. The defendant Desriviere's car was on an intersecting street with a stop sign. The Second Department held that the fact the Desriviere car may have stopped at the stop sign before entering the intersection did not raise a relevant question of fact: "As a general matter, a driver who fails to yield the right-of-way after stopping at a stop sign in violation of Vehicle and Traffic Law § 1142(a) is negligent as a matter of law ... . The driver with the right-of-way is entitled to anticipate that the other motorist will obey traffic laws that require him or her to yield ... . Yet, 'a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident' ... . Here, Hernandez and Julie P. Transit established their entitlement to judgment as a matter of law by submitting evidence demonstrating that (1) Hernandez had the right-of-way, (2) that because Desriviere failed to yield the right-of-way upon entering the intersection in violation of Vehicle and Traffic Law § 1142(a), he was negligent as a matter of law, and (3) that Desriviere's negligence was the sole proximate cause of the accident ... . The question of whether Desriviere stopped at the stop sign is not dispositive, since the evidence established that he failed to yield even if he did stop ...". ***Belle-Fleur v. Desriviere*, 2019 N.Y. Slip Op. 09244, Second Dept 12-24-19**

THIRD DEPARTMENT

ARBITRATION, CONTRACT LAW.

THE SUBCONTRACTORS DID NOT SIGN THE PRIMARY CONTRACT WHICH INCLUDED AN ARBITRATION PROVISION; HOWEVER THE SUBCONTRACTORS EXPLOITED THE ARBITRATION PROVISION BY PARTICIPATING IN PRE-ARBITRATION MEDIATION; THEREFORE THE SUBCONTRACTORS WERE ESTOPPED FROM COMPELLING LITIGATION.

The Third Department, reversing Supreme Court, determined that the subcontractors, who did not sign the primary contract which included an arbitration provision in the "General Conditions," had exploited the benefits of the primary contract and therefore should be compelled to arbitrate. The primary contract was between Corning Hospital and Gilbane, the general contractor. One subcontractor (Mancini) was responsible for general construction of the building and the other (Alliance) was responsible for the installation of veneer stone panels, which had begun to fall off the building: "... '[U]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement' ... . 'Where the benefits are merely 'indirect,' a nonsignatory cannot be compelled to arbitrate a claim. A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself' ... . Noting that 'it can be difficult to distinguish between direct and indirect benefits,' the Court of Appeals stated that '[t]he guiding principle is whether the benefit gained by the nonsignatory is one that can be traced directly to the agreement containing the arbitration clause' ... . Respondent argues that Mancini and Alliance are estopped from compelling litigation regarding the veneer stone panels because Alliance previously served a demand for arbitration on Gilbane and Mancini, with the demand specifically

stating that one of the bases for seeking arbitration was the dispute resolution section of the General Conditions related to the construction project ... . Following that demand for arbitration, Alliance, Gilbane and Mancini took part in mediation, as required prior to arbitration per a provision of the dispute resolution section of the General Conditions — a provision that Alliance also cited in its demand for arbitration. As a result of the mediation, those three entities then entered into a settlement agreement and released each other from liability regarding anything related to the veneer panels. ... Based on Alliance's demand citing the applicability of the arbitration section of the General Conditions, and Mancini's acquiescence to that demand, both of these nonsignatories to the prime contract and General Conditions should be compelled to arbitrate pursuant to the direct benefits theory of estoppel. Accordingly, the applications to permanently stay arbitration should have been denied, and the parties should proceed to arbitration." ***Matter of Alliance Masonry Corp. (Corning Hosp.)*, 2019 N.Y. Slip Op. 09348, Third Dept 12-26-19**

CIVIL PROCEDURE, EVIDENCE, PERSONAL INJURY.

IT WAS AN ABUSE OF DISCRETION TO STRIKE PLAINTIFF'S COMPLAINT BASED UPON AN ALLEGED FAILURE TO COMPLY WITH COURT-ORDERED DISCOVERY.

The Third Department, reversing Supreme Court, determined it was an abuse of discretion to grant defendants' motion to strike the complaint for plaintiff's alleged failure to comply with discovery orders. Discovery had been ongoing for years with several conferences with the judge and several orders to comply with new discovery demands: "... [I]t is undisputed that defendants' motion to strike the complaint failed to include an affirmation of good faith as required by 22 NYCRR 202.7 ... . Moreover, this error is compounded by the lack of other record evidence demonstrating that defendants engaged in good faith efforts to resolve the ongoing discovery issues without the need for judicial intervention. Despite plaintiff having at least partially complied with defendants' discovery demands, the record is devoid of any correspondence or other documentation indicating that defendants ever specifically informed plaintiff's counsel, other than in a generalized conclusory manner, in what manner the subject discovery responses were deficient or inadequate. Further, following the filing of defendants' April 2018 motion to strike, defendants' counsel failed to respond to four separate letters sent by plaintiff's counsel in May 2018 wherein he provided certain additional discovery and otherwise attempted to ascertain from defendants what, if any, paper discovery remained outstanding. Notably, defendants have provided no explanation as to why they failed to provide any such response prior to the filing of defendants' second motion to strike plaintiff's complaint ... . Although we appreciate Supreme Court's concern regarding the length of time that this action has been pending and the fact that the various discovery responses that plaintiff's counsel did provide were unquestionably untimely, we do not find that defendants have established a 'deliberately evasive, misleading and uncooperative course of conduct or a determined strategy of delay [by plaintiff] that would be deserving of the most vehement condemnation' ...". ***Mesiti v. Weiss*. 2019 N.Y. Slip Op. 09343. Third Dept 12-26-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S PRESENCE WHERE METHAMPHETAMINE WAS BEING PRODUCED AND APPARENT POSSESSION (IN A BACKPACK) OF CHEMICAL REAGENTS (BATTERIES AND SALT) USED IN METH PRODUCTION, WERE INSUFFICIENT TO DEMONSTRATE CONSTRUCTIVE POSSESSION OF METH LAB EQUIPMENT, CONVICTIONS REVERSED.

The Third Department, reversing defendant's convictions relating to his presence in an apartment where methamphetamine was being produced, determined the evidence did not support the defendant's constructive possession of the relevant contraband in the apartment: "... [W]e find that the evidence fell short of establishing that defendant constructively possessed the requisite items with the necessary intent. The uncontroverted evidence established that defendant did not live in or have keys to the apartment or store any of his personal belongings there ... . Rather, the evidence demonstrated that the apartment was leased to Stevens and Short, that Schunk had recently been staying in the apartment and that defendant and Gardner had arrived at the apartment, as guests, not long before the police. Stevens, Short and Gardner ... adamantly testified that, although he likely knew what was occurring in the apartment, defendant did not participate in the process of preparing, producing or manufacturing the methamphetamine.... . Stevens and Short each testified that defendant did not use methamphetamine that day, that they had never observed defendant use methamphetamine and that defendant was only in the apartment to try to convince Schunk that she needed to enter a rehabilitation program. Stevens also testified that defendant did not know how to make methamphetamine. Further, the responding officers stated that, unlike their observations of Stevens, they did not observe any black soot, which is indicative of methamphetamine production, on defendant's clothing or hands. ... Stevens testified that defendant arrived with a backpack and that batteries (a reagent [used in meth production]) from that backpack went into the bathroom with him and Gardner. Stevens vaguely testified that the backpack contained 'lab equipment,' but stated that he did not see defendant use anything out of the backpack. The evidence revealed that a backpack was ultimately recovered from the living room and that the backpack contained sea salt, a reagent in the production of methamphetamine, but no 'lab equipment.' Viewed in the light most favorable to the People ... , the evidence could reasonably support the conclusion that defendant had dominion or control over two reagents — batteries and salt.

However, considering the witness testimony and the photographs demonstrating the extremely cluttered state of the living room and apartment overall, the evidence was legally insufficient to establish that defendant 'had the ability and intent to exercise dominion or control over' any of the items of lab equipment seized from the apartment ...". ***People v. Gillette*, 2019 N.Y. Slip Op. 09323, Third Dept 12-26-19**

FAMILY LAW.

FORMER SAME SEX PARTNER WHO AGREED TO THE CONCEPTION OF A CHILD CARRIED BY HER FORMER PARTNER DEMONSTRATED SHE HAD STANDING AS A PARENT TO SEEK PARENTING TIME WITH THE CHILD.

The Third Department, in a full-fledged opinion by Justice Garry, determined that petitioner, who participated in the conception of the child (by artificial insemination) carried by her then same-sex partner, was a "parent" entitled to visitation (parenting time) with the child pursuant to Matter of Brooke S.B. v. Elizabeth A.C.C. (28 NY3d 1 [2016]): "... [T]he parties agreed to conceive a child using artificial insemination. Both parties attended appointments with a fertility doctor. In testimony that Family Court found to be credible, petitioner stated that she and respondent agreed to select a sperm donor who would reflect petitioner's ethnic background. There were two inseminations; petitioner was present and injected the sperm on at least one of these occasions. Petitioner's credit card was used to pay the related expenses. ... Petitioner attended at least one baby shower where friends and family members of both parties were present. Petitioner attended respondent's prenatal appointments, was present when the child was born, and cut the child's umbilical cord. The child was given two last names, reflecting the parties' two surnames. ... Petitioner testified that the child was named, in part, after petitioner's mother. Petitioner assisted in buying items for the child and shared day-care costs with respondent. The two parties are listed as the child's two mothers in some of her medical and immunization records. Respondent testified that she told petitioner that the child would be part of petitioner's life if they continued to reside together and also if they separated, so long as petitioner did not engage in illegal activities, but that if petitioner did so engage, she would not have a role in the child's life. Upon this record, we find that Family Court correctly determined that petitioner falls within the statutory definition of a parent and, thus, has standing in this proceeding. Contrary to respondent's argument, Family Court did not err in applying the conception test to determine petitioner's standing rather than a "functional" test that would have examined the relationship between petitioner and the child after the child's birth ... . The evidence fully establishes that the parties planned jointly for the child's conception, participated jointly in the process of conceiving the child, planned jointly for her birth, and planned to raise her together. Accordingly, petitioner satisfied her burden to prove by clear and convincing evidence that she and respondent entered into an agreement to conceive the child and raise her as co-parents. Thus, she established her standing to seek custody and parenting time under the conception test without regard to her subsequent relationship with the child ...". ***Matter of Heather NN. v. Vinnette OO.*, 2019 N.Y. Slip Op. 09325, Third Dept 12-26-19**

FAMILY LAW.

BY STATUTE FAMILY COURT MAY NOT SET A GOAL OF ADOPTION BY SOCIAL SERVICES WITHOUT ORDERING THE FILING OF A PETITION TO TERMINATE PARENTAL RIGHTS; HERE FAMILY COURT ATTEMPTED TO SET THE INCOMPATIBLE GOALS OF ADOPTION AND REUNIFICATION WITH THE PARENT; THE INTENT OF FAMILY COURT IS CLEAR (HOPED-FOR REUNIFICATION) BUT THERE IS NO STATUTORY AUTHORITY FOR THE METHOD CHOSEN BY THE COURT.

The Third Department, reversing Family Court, determined that the goals set by Family Court, moving toward adoption of the child while setting another hearing to see if reunification of the child with mother is possible, were incompatible under the statutes. The intent of Family Court was clear, but the method was not allowed by statute. The matter was sent back for further proceedings: "... [W]e find that Family Court erred in modifying the permanency goal to placement for adoption without directing petitioner to commence a proceeding to terminate respondent's parental rights. Family Ct Act § 1089 (d) (2) (i) provides that a court may impose one of five specified permanency goals, including 'placement for adoption with the local social services official filing a petition for termination of parental rights' ... . Nothing in the statutory language permits a permanency goal of placement for adoption to be imposed in the absence of a concurrent petition to terminate the respondent's parental rights. Further, the statute does not permit 'the court [to] select and impose on the parties two or more goals simultaneously' ... . Here, in addition to stating that the permanency goal was being changed to placement for adoption and that no immediate termination proceeding would be commenced, Family Court also stated that another permanency hearing would be scheduled in six months and that it was the court's "expectation and hope" that the goal could be changed back to reunification at that time. The express language of the permanency order imposes only one goal. However, the effect of the failure to commence termination proceedings and the court's directions to petitioner regarding services and diligent efforts was to impose two concurrent, contradictory goals of placement for adoption and reunification." ***Matter of Joseph PP. (Kimberly QQ.)*, 2019 N.Y. Slip Op. 09347, Third Dept 12-26-19**

FAMILY LAW, APPEALS, ATTORNEYS.

FATHER'S VISITATION SHOULD NOT HAVE BEEN SUBJECT TO MOTHER'S CONSENT; ATTORNEY FOR THE CHILD SHOULD NOT HAVE REFERRED TO EVIDENCE TAKEN IN THE *LINCOLN* HEARING IN THE APPELLATE BRIEF; THE HEARING TRANSCRIPTS ARE SEALED AND CONFIDENTIAL.

The Third Department, modifying Family Court, determined father's visitation rights should not have been made subject to mother's consent and the attorney for the child should not have referred to the *Lincoln* hearing in the appellate brief: "Although the order provides the father with the opportunity for frequent and regular unsupervised access, the provision conditioning expansion of visitation to include overnight visitation only upon the mother's consent is an impermissible delegation of authority ... . [W]e note our displeasure that the attorney for the children made repeated references to the Lincoln hearing in the appellate brief that he submitted on their behalf ... . Family Court's promise of confidentiality should not be lightly breached, and these transcripts are sealed. We again emphasize that '[t]he right to confidentiality during a Lincoln hearing belongs to the child and is superior to the rights or preferences of the parents. Children whose parents are engaged in custody and visitation disputes must be protected from having to openly choose between parents or openly divulging intimate details of their respective parent/child relationships' ... . We further note that the breach of the confidentiality of the Lincoln hearing — and of the trust of the children — was exacerbated by the fact that the attorney for the children made certain representations about the children's testimony that were inconsistent with their statements during the hearing." ***Matter of Ellen TT. v. Parvaz UU.*, 2019 N.Y. Slip Op. 09328, Third Dept 12-26-19**

MUNICIPAL LAW, EMPLOYMENT LAW, CIVIL PROCEDURE.

UNION REPRESENTING CITY EMPLOYEES HAS STANDING TO CONTEST THE CREATION OF A NEW CITY DEPARTMENT AFFECTING THOSE EMPLOYEES.

The Third Department, reversing Supreme Court, determined the labor union representing employees of the city's Office of the Building Inspector and Bureau of Code Enforcement had standing to contest an executive order issued by the mayor and related regulations which created a new Building Department: " '[S]tanding is a threshold determination and a litigant must establish standing in order to seek judicial review, with the burden of establishing standing being on the party seeking review' ... . A petitioner challenging governmental action must 'show 'injury in fact,' meaning that [the petitioner] will actually be harmed by the challenged [governmental] action[,]' and, further, that the injury 'fall[s] within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the [governmental entity] has acted' ... . For an organization to have standing, it must establish 'that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members' ... . Petitioners allege that the Mayor unlawfully engaged in a legislative act by creating the Buildings Department and that this unlawful legislative act brought the union's members under the auspices/jurisdiction of the Commissioner, who used that unlawful grant of authority to enact a regulation that respondents have relied on to supplant the members' negotiated rights regarding disciplinary proceedings, as set forth in the applicable collective bargaining agreement. In our view, these allegations would, if proven, demonstrate the requisite harm flowing from the executive order, which would fall within the zone of interests ...". ***Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME, AFL-CIO v. City of Schenectady*, 2019 N.Y. Slip Op. 09342, Thrid Dept 12-26-19**

REAL PROPERTY LAW, CIVIL PROCEDURE, EVIDENCE.

THE JURY WAS WRONGLY INSTRUCTED ON THE INFERENCE WHICH CAN BE DRAWN ABOUT THE LOCATION OF A BOUNDARY LINE FROM A SURVEY MAP FILED FOR MORE THAN 10 YEARS; VERDICT FINDING PLAINTIFF HAD WRONGLY SET THE PROPERTY BOUNDARY REVERSED.

The Third Department, reversing the jury verdict finding that plaintiff had incorrectly set the western boundary of his property, held that the jury was wrongly instructed: "The jury received defective instructions as to the application of CPLR 4522. In that regard, Supreme Court charged the jury that '[a] 2002 survey map prepared by Surveyor Dickinson is in evidence. The survey was filed in 2002 with the Rensselaer County Clerk. The law provides that a map which has been on file with the County [Clerk] for more than [10] years is presumed to be accurate unless rebutted by other credible survey or expert opinion. In deciding whether the presumption of accuracy of the 2002 survey has been rebutted by other evidence you will apply the rules that I have already given you and will continue to give you about the evaluation of evidence.' CPLR 4522 states that '[a]ll maps, surveys and official records affecting real property, which have been on file in the state in the office of . . . any county clerk . . . for more than [10] years, are prima facie evidence of their contents.' In analyzing similar statutory language from another hearsay exception contained in the same article of the CPLR, the Court of Appeals held that '[p]resumptive evidence[] is, . . . like the prima facie evidence to which CPLR 4518 (c) refers, evidence which permits but does not require the trier of fact to find in accordance with the presumed fact, even though no contradictory evidence has been presented. It is, in short, not a presumption which must be rebutted but rather an inference, like the inference of negligence

denominated res ipsa loquitor' ... . Supreme Court's charge required the jury to locate the western boundary of plaintiff's property as depicted in the 2002 survey unless plaintiff offered evidence that rebutted the survey's presumed accuracy. The jury should have been instructed that, in the absence of contradictory evidence, it was permitted but not required to adopt the western boundary as depicted in the 2002 survey. Hence, Supreme Court committed reversible error because the effect of the charge was to improperly require plaintiff to disprove the alleged accuracy of the 2002 survey map ...". ***Kennedy v. Nimons*, 2019 N.Y. Slip Op. 09332, Third Dept 12-26-19**

TAX LAW.

CHANGE IN TAX LAW RESULTING IN THE REMOVAL OF PETITIONER LAW FIRM'S CERTIFICATION AS A QUALIFIED EMPIRE ZONE ENTERPRISE ENTITLED TO TAX CREDITS SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY.

The Third Department, reversing Supreme Court, determined the amendments to the Economic Development Zones Act of 2009 should not have been applied retroactively to petitioners, MSLMSH (a law firm and related parties), to remove petitioners' certification as a qualified empire zone enterprise (QEZE) entitled to tax credits based upon the location of the business in Syracuse: "... [R]esolution of this issue hinges upon examining the three factors articulated by the Court of Appeals in Matter of Replan Dev. v. Department of Hous. Preserv. & Dev. of City of N.Y. (70 NY2d 451, 456 [1987] ...) — specifically, a taxpayer's forewarning of the change in law and the reasonableness of his or her reliance on the old law, the length of the retroactive period and the public purpose of the retroactive application. ... [T]he record reflects that MSLMSH was considering various places to relocate, but ultimately executed the 15-year lease in 2001 to remain in downtown Syracuse. MSLMSH also invested approximately $800,000 in equipment and furnishings. Around that time, MSLMSH was undergoing a corporate restructuring and reorganization, which led to the formation of Mackenzie Hughes in 2002. Mackenzie Hughes assumed many assets of MSLMSH, including the lease, and became QEZE certified in 2003. The testimony from the hearing further reflects that the expenditures and investments were made in reliance on receiving QEZE credits, and Mackenzie Hughes continued to operate its business with the QEZE certification until it was decertified in 2009. Based on the foregoing, we conclude that the partner petitioners' reliance on the old law was reasonable. Nor do we find merit in the Commissioner's assertion that the actions taken by MSLMSH prior to Mackenzie Hughes obtaining its QEZE certification were too attenuated to constitute justifiable reliance by the partner petitioners. Inasmuch as this factor weighs in favor of petitioners ... and viewing all factors holistically, we conclude that the retroactive application of the 2009 amendments in this case was improper ...". ***Matter of Mackenzie Hughes LLP v. New York State Tax Appeals Trib.*, 2019 N.Y. Slip Op. 09337, Third Dept 12-26-19**

WORKERS' COMPENSATION, EVIDENCE.

CLAIMANT SHOULD NOT HAVE BEEN REQUIRED TO PROVIDE AN UNLIMITED MEDICAL RELEASE AS OPPOSED TO A LIMITED RELEASE CONCERNING ONLY THOSE AREAS OF HIS BODY AT ISSUE IN THE CLAIM FOR BENEFITS.

The Third Department, reversing the Workers' Compensation Board, determined claimant was not required to provide an unlimited medical release. Claimant should have been required to provide a release limited to those areas of his body which were at issue in the claim for benefits: "The Board's regulations provide that a limited release is a 'limited authorization to obtain relevant medical records regarding the prior medical history of the body part or illness at issue' (12 NYCRR 300.37 [b] [1] [iii]). It is applicable 'if the claimant files a completed employee claim form and indicates on the form that he or she had a prior injury to the same body part or similar illness to the one(s) listed on the form' (12 NYCRR 300.37 [b] [1] [iii]). There is no question that, prior to filing his claim, claimant received medical treatment from various physicians for the same sites of injury dating back to at least 2011. It is evident from the record and the briefs that both parties agree that the employer is entitled to claimant's past medical records for the claimed sites. That said, claimant maintains that the Board erred in requiring him to sign an open-ended HIPAA release, without limiting that release to treatment records pertaining to the claimed sites. Although the employer would certainly be entitled to the medical records of all providers, once identified, who treated the claimed sites, the fact remains that claimant was only obligated to provide a limited release for those providers. As such, we agree with claimant that the Board erred in directing him to provide an unlimited medical release." ***Matter of Trusewicz v. Delta Envtl.*, 2019 N.Y. Slip Op. 09336, Third Dept 12-26-19**

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