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# FIRST DEPARTMENT

## ATTORNEYS.

LAW FIRM ENTITLED TO ATTORNEY'S FEES FROM ADDITIONAL DEFENDANTS WHO DID NOT SIGN THE RETAINER AGREEMENT, THE ADDITIONAL DEFENDANTS BENEFITED FROM THE SETTLEMENT AGREEMENT REACHED BY THE LAW FIRM AND THE ADDITIONAL DEFENDANTS HAD SIGNED THE SETTLEMENT AGREEMENT.

The First Department determined the law firm, SGA, was entitled to attorney's fees and expenses from "additional defendants" who did not sign the retainer agreement but who benefited from the law firm's work: "In a prior appeal in index no. 153449/14, this Court recognized that an award of attorneys' fees and expenses against additional defendants pursuant to the common fund doctrine was appropriate, because, although they did not sign the retainer agreement with plaintiffs' counsel (SGA), additional defendants 'signed a settlement agreement obtained by SGA entitling [them] to receive a pro-rata payout from the proceeds of the sale of a building in which [they] had invested' ... . Additional defendants received a 'substantial benefit' as a result of SGA's efforts, i.e., funds from the liquidation of an asset (the subject property) as to which defendants had successfully excluded them for 30 years ... . ... The fact that SGA has already been partially compensated by plaintiffs does not preclude a fee award, as that would be inconsistent with the purpose of the common fund doctrine to prevent unjust enrichment by 'allow[ing] the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses' ...". ***Ital Assoc. v. Axon*, 2018 N.Y. Slip Op. 09013, First Dept 12-27-18**

## ATTORNEYS, FAMILY LAW, FRAUD, FIDUCIARY DUTY, NEGLIGENCE, LEGAL MALPRACTICE.

BREACH OF FIDUCIARY DUTY, FRAUD AND JUDICIARY LAW § 487 ALLEGATIONS STEMMING FROM DEFENDANT LAW FIRM'S REPRESENTATION OF PLAINTIFF IN DIVORCE PROCEEDINGS DUPLICATED THE LEGAL MALPRACTICE ALLEGATIONS, THE COMPLAINT SHOULD HAVE BEEN DISMISSED.

The First Department, in a full-fledged opinion by Justice Singh, determined that plaintiff's legal malpractice, breach of fiduciary duty, fraud and Judiciary Law § 487 causes of action against the law firm which represented her in divorce proceedings should have been dismissed. The opinion is fact-specific. The legal issues mentioned include: the breach of fiduciary duty allegations were identical to the legal malpractice allegations and therefore required the "but for" element of legal malpractice (which was missing), and the fraud and Judiciary Law 487 claims were identical and duplicated the legal malpractice allegations, requiring dismissal. ***Knox v. Aronson, Mayefsky & Sloan, LLP*, 2018 N.Y. Slip Op. 09030, First Dept 12-27-18**

## DEBTOR-CREDITOR, MUNICIPAL LAW, TAX LAW.

ONCE THE CITY TAX LIENS HAD BEEN ASSIGNED PAYMENT TO THE CITY, INSTEAD OF THE LIENHOLDER, IS NOT APPLIED TO THE DEBT.

The First Department, reversing Supreme Court, determined the tax and sewer charges paid to the city by defendant after defendant had been notified that the tax liens had been assigned could not be applied to the debt: "Plaintiffs are the lawful assignees of certain City of New York water and sewer tax liens against property owned by defendant. The City complied fully with the provisions of Administrative Code of City of NY § 11-320, which requires, inter alia, that four notices of the sale of the liens be sent to the property owner at specified intervals before the sale and that another notice be sent 30 days after the sale ... . The City's four pre-sale notices informed defendant of the debt, of the impending sale, and of defendant's obligation to pay the City, if at all, by August 1, 2011. The notices also informed defendant that, after the sale, it should make payment arrangements with the new lienholder's representative. Defendant did not pay the amounts owed by August 1, 2011. On the day after the tax liens were assigned to plaintiffs, defendant made payments to the City. The payments were not credited against defendant's debt, because, once the assignment had taken place, payments had to be made to plaintiffs ... . Contrary to defendant's argument, there is no tension between the Administrative Code's provisions for tax liens and tax sales and the law generally governing payments of an assigned debt. Once a debtor has notice that the debt has been assigned, or has been put 'on inquiry' as to an assignment of the debt, payments to the assignor (the original creditor) are not applied to the debt ...". ***NYCTL 1998-2 Trust v. 70 Orchard LLC*, 2018 N.Y. Slip Op. 09004, First Dept 12-27-18**

### FAMILY LAW, EVIDENCE.

FAMILY COURT DID NOT HAVE SUFFICIENT EVIDENCE BEFORE IT TO GRANT FATHER'S PETITION FOR CUSTODY WHEN MOTHER FAILED TO APPEAR, MOTHER'S MOTION TO VACATE THE DEFAULT ORDER SHOULD HAVE BEEN GRANTED.

The First Department, reversing Family Court, determined the court did not have sufficient evidence before it to grant father's petition for custody when mother did not appear: "While the decision to grant or deny a motion to vacate a default rests in the sound discretion of the court, 'default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously' ... . Although the mother did not demonstrate a reasonable excuse for her default in the change of custody case, she had a meritorious defense. The children have resided primarily with her, and insufficient evidence was submitted to make an informed change of circumstances determination (see Family Ct Act § 467[b][ii]) that serves the best interests of the children ... . Also, the court failed to sua sponte appoint an attorney for the children, which, based upon the insufficient evidence it had to make an informed best interests determination, would have been advisable ...". ***Matter of Abel A. v. Imanda M.*, 2018 N.Y. Slip Op. 09000, First Dept 12-27-18**

### LANDLORD-TENANT, MENTAL HYGIENE LAW, MUNICIPAL LAW, FAIR HOUSING ACT.

HEARING WAS REQUIRED TO DETERMINE WHETHER A PERMANENT STAY OF EVICTION WAS A PROPER ACCOMMODATION FOR DISABLED TENANTS PURSUANT TO THE FAIR HOUSING ACT.

The First Department, reversing (modifying) the Appellate Term, First Department, ruled that a hearing should be held to determine whether eviction proceedings should be permanently stayed. A guardian (GAL) had been appointed pursuant to Mental Hygiene Law article 81 for the disabled tenants who had not complied with stipulations for fumigation of the apartment to rid it of bed bugs. With the GAL's help the apartment was eventually fumigated. Under the Fair Housing Act the tenants were entitled to accommodations for their disabilities. A hearing was required to determine whether a permanent stay of eviction was an appropriate accommodation: "Under the Fair Housing Act (FHA), as amended, it is unlawful to discriminate in housing practices on the basis of a 'handicap' (42 USC § 3604[f][2][A]). Handicap is very broadly defined, and a person is considered handicapped and thereby protected under the FHA if he or she: 1. Has a physical or mental impairment that substantially limits one or more major life activities, or 2. Has a record of such impairment, or 3. Is regarded as having such an impairment. No specific diagnosis is necessary for a person to be 'handicapped' and protected under the statute. In fact, the determination may even be based upon the observations of a lay person ... . The appointment of an article 81 guardian for tenants sufficiently establishes that these tenants are 'handicapped' within the meaning of the FHA, leading us to consider whether they are entitled to a reasonable accommodation. What is 'reasonable' varies from case to case, because it is necessarily fact-specific ... . The overarching guiding factor, however, is that a landlord is obligated to provide a tenant with a reasonable accommodation if necessary for the tenant to keep his or her apartment. The ' refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [the handicapped individual] equal opportunity to use and enjoy a dwelling' is a discriminatory practice... . A landlord does not have to provide a reasonable accommodation if it puts other tenants at risk, but should consider whether such risks can be minimized ...". ***Matter of Prospect Union Assoc. v. DeJesus*, 2018 N.Y. Slip Op. 09016, First Dept 12-27-18**

## SECOND DEPARTMENT

### CIVIL PROCEDURE.

INDICATING INCONSISTENT DECISIONS SHOULD NO LONGER BE FOLLOWED, THE SECOND DEPARTMENT DETERMINED SUPREME COURT COULD NOT DISMISS A CASE BASED ON THE FAILURE TO FILE A NOTE OF ISSUE WITHIN 90 DAYS OF THE COURT'S ORDER UNLESS THE STATUTORY REQUIREMENTS OF CPLR 3216 ARE COMPLIED WITH.

The Second Department, reversing Supreme Court and departing from precedent, determined that, because the court had not complied with CPLR 3216, the action had never been dismissed and plaintiff's very late (three years) motion to restore the matter to calendar should have been granted. In January 2013 the court certified the matter ready for trial and directed plaintiff to file a note of issue within 90 days in an order which stated the failure to file the note of issue will result in dismissal without further order. Plaintiff moved to restore the matter in January, 2016: "... [T]he court order which purported to serve as a 90-day notice pursuant to CPLR 3216 'was defective in that it failed to state that the plaintiff's failure to comply with the notice will serve as a basis for a motion' by the court to dismiss the action for failure to prosecute'... . Moreover, the record contains no evidence that the court ever made a motion to dismiss, or that there was an 'order' of the court dismissing the case ... , '[i]t is evident from this record that the case was ministerially dismissed,' without the court having made a motion, and 'without the entry of any formal order by the court dismissing the matter' ... . The procedural device of dismissing an action for failure to prosecute is a legislative creation, not a part of a court's inherent power ... , and, therefore, a court desiring to dismiss an action based upon the plaintiff's failure to prosecute must follow the statutory preconditions

under CPLR 3216. Since the action was not properly dismissed pursuant to CPLR 3216, the Supreme Court should have granted that branch of the plaintiff's motion which was to restore the action to the active calendar. To the extent that prior cases from this Court are inconsistent with the holding herein (see e.g. Stroll v. Long Is. Jewish Med. Ctr., 151 AD3d 789; Duranti v. Dream Works Constr., Inc., 139 AD3d 1000, 1000; Bender v. Autism Speaks, Inc., 139 AD3d 989; Dai Mang Kim v. Hwak Yung Kim, 118 AD3d 661, 661; Bhatti v. Empire Realty Assoc., Inc., 101 AD3d 1066, 1067), henceforth they should no longer be followed." ***Element E, LLC v. Allyson Enters., Inc.*, 2018 N.Y. Slip Op. 08915, Second Dept 12-26-18**

## CIVIL PROCEDURE, FORECLOSURE.

MOTION TO VACATE DEFAULT JUDGMENT OF FORECLOSURE WAS SUPPORTED BY A SWORN DENIAL OF SERVICE AND SPECIFIC FACTS WHICH REBUTTED THE PRESUMPTION OF PROPER SERVICE, MATTER SENT BACK FOR A HEARING.

The Second Department, reversing Supreme Court, determined that defendant's motion to vacate his default in this foreclosure action should not have been denied without a hearing to determine whether he was served. Defendant's motion was supported by a sworn denial of service and specific facts, which was deemed sufficient to rebut the presumption of proper service: " 'Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service' ... . To be entitled to vacatur of a default judgment under CPLR 5015(a)(4), a defendant must overcome the presumption raised by the process server's affidavit of service ... . 'Although bare and unsubstantiated denials are insufficient to rebut the presumption of service, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the affidavit of service and necessitates a hearing' ... . A determination as to whether service was properly made pursuant to CPLR 308(1), as here, turns on issues of credibility, which should be determined by a hearing ... " ***Federal Natl. Mtge. Assn. v. Alverado*, 2018 N.Y. Slip Op. 08918, Second Dept 12-26-18**

## CIVIL PROCEDURE, TRUSTS AND ESTATES.

MOTION TO SUBSTITUTE THE ADMINISTRATRIX OF PLAINTIFF'S ESTATE FOR THE DECEASED PLAINTIFF PROPERLY DENIED BECAUSE THE DELAY IN SEEKING SUBSTITUTION WAS NOT EXPLAINED, THE MERITS WERE NOT DESCRIBED, AND THE EXISTENCE OF PREJUDICE WAS NOT REBUTTED, HOWEVER THE ACTION COULD NOT BE DISMISSED ABSENT THE SUBSTITUTION OF A LEGAL REPRESENTATIVE.

The Second Department agreed with Supreme Court's denial of a motion to substitute plaintiff's daughter, as administratrix, for the deceased plaintiff in an action because the delay in seeking substitution was not explained, the merits of the action were not described, and the presumption of prejudice was not rebutted. But the Second Department noted that the action should not have been dismissed because the plaintiff's stayed all proceedings pending substitution: "CPLR 1021 provides, in part, that '[a] motion for substitution may be made by the successors or representatives of a party or by any party.' Although a determination rendered without such substitution will generally be deemed a nullity, determinations regarding substitution pursuant to CPLR 1021 are a necessary exception to the general rule, and the court does not lack jurisdiction to consider such a motion ... . Here, the Supreme Court had jurisdiction to consider those branches of the motion which were pursuant to CPLR 1015 for leave to substitute the plaintiff's daughter as the plaintiff and, upon substitution, to restore the action thereafter (see CPLR 1021). On the merits, we agree with the court's determination to deny those branches of the motion given the failure to provide any detailed excuse for the delay in seeking substitution, the failure to include an affidavit of merit demonstrating that the claim against Rehab was potentially meritorious, and the failure to rebut Rehab's claim of prejudice stemming from the delay ... . However, since the plaintiff's death triggered a stay of all proceedings in the action pending substitution of a legal representative ... , the Supreme Court should not have directed dismissal of the action pursuant to CPLR 3404, as the order was issued after the plaintiff's death and in the absence of any substitution of a legal representative ...". ***Medlock v. Dr. William O. Benenson Rehabilitation Pavilion*, 2018 N.Y. Slip Op. 08922, Second Dept 12-26-18**

## CRIMINAL LAW, EVIDENCE.

COUNTY COURT SHOULD NOT HAVE DENIED THE REQUEST FOR A CROSS-RACIAL IDENTIFICATION JURY INSTRUCTION, THE COURT OF APPEALS CROSS-RACIAL IDENTIFICATION RULING IN PEOPLE V. BOONE APPLIES RETROACTIVELY, HOWEVER THE ERROR WAS HARMLESS.

The Second Department determined County Court should have given the cross-racial jury instruction, but deemed the error harmless: "The defendant correctly contends that the County Court erred in denying his request for a jury charge on cross-racial identification. In People v. Boone (30 NY3d 521, 526), the Court of Appeals held that where, as here, 'identification is an issue in a criminal case and the identifying witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification.' Contrary to the People's contention, Boone applies retroactively to cases pending on direct appeal ... . Nevertheless, the County Court's failure to give a cross-racial identification charge constituted harmless error. At trial, the complainant identified the defendant as one of the three perpetrators who robbed him inside the office of the car wash. The evidence at trial established that shortly after the robbery, a police officer

located the defendant and his accomplices, who matched the descriptions of the perpetrators, in a car. The defendant and his accomplices then led the police on a high-speed car chase and a subsequent chase on foot. When the defendant was apprehended following the foot chase, the police searched him for weapons, and the defendant stated, 'they're not on me, the guns are in the car.' The guns and proceeds of the robbery were found in the car from which the defendant and his accomplices fled. Additionally, money that the complainant had withdrawn from the bank earlier that day, which was bound with blue bands, was recovered from a jacket the defendant had discarded as he was running from the police. Under these circumstances, the error in failing to give the charge on cross-racial identification was harmless, as there was overwhelming evidence of the defendant's guilt, and no significant probability that the defendant would have been acquitted if not for the error ...". ***People v. Jordan*, 2018 N.Y. Slip Op. 08956, Second Dept 12-26-18**

## CRIMINAL LAW, EVIDENCE, APPEALS.

DETECTIVE'S TESTIMONY INDICATING DEFENDANT WAS IDENTIFIED IN A LINEUP IDENTIFICATION PROCEDURE CONSTITUTED INADMISSIBLE BOLSTERING, ALTHOUGH THIS WAS A ONE WITNESS IDENTIFICATION CASE, THE EVIDENCE WAS OVERWHELMING AND THE ERROR WAS DEEMED HARMLESS.

The Second Department, reviewing the unpreserved issue in the interest of justice, determined that the detective's testimony indicated defendant had been identified in a lineup was inadmissible bolstering. The unpreserved error was reviewed in the interest of justice. In light of the overwhelming evidence, however, the error was deemed harmless: "We conclude that the detective's testimony that the defendant was arrested '[a]fter the lineup was conducted' could have led the jury to believe that the police were induced to take action as a result of the lineup identification, and therefore constituted improper implicit bolstering of the witness's identification testimony ... . ... 'Harmless error analysis proceeds in two stages' ... . First, 'unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error' ... . Second, for a nonconstitutional error to be harmless the appellate court must conclude 'that there is [no] significant probability . . . in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred'... . In analyzing the effect of a bolstering error, the Court of Appeals has stated that '[t]he standard of harmlessness ... is whether the evidence of identity is so strong that there is no substantial issue on the point'... . In the context of a case involving an identification by a single witness, the Court of Appeals has concluded that a bolstering error was harmless in light of, among other things, the 'unusually credit-worthy' nature of the witness's identification ... . Here, although the only direct evidence connecting the defendant to the commission of the crimes charged was the identification testimony of a single witness, the evidence of the defendant's guilt, without reference to the error, was overwhelming ...". ***People v. Holmes*, 2018 N.Y. Slip Op. 08954, Second Dept 12-26-18**

## CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH SUPREME COURT DENIED DEFENDANT'S MOTION TO SUPPRESS A GUN FOUND IN A VEHICLE, THE COURT DID NOT ARTICULATE THE REASON FOR THE DENIAL, THE SECOND DEPARTMENT DID NOT THEREFORE HAVE THE POWER TO REVIEW THE ISSUE, MATTER SENT BACK SO SUPREME COURT CAN ARTICULATE ITS REASONING.

The Second Department remitted the matter to Supreme Court for the basis of its ruling on a suppression motion: "This Court is statutorily limited to reviewing errors or defects that 'may have adversely affected the appellant' (CPL 470.15[1]), and thus has no power 'to review issues either decided in an appellant's favor, or not ruled upon, by the trial court' ... . The Court of Appeals has observed that, once the Appellate Division has rejected a trial court's ruling on a particular issue, it may not proceed to consider other issues that might provide a basis for affirmance if they were not determined adversely to the appellant... . Here, the defendant contends that the Supreme Court incorrectly denied that branch of his omnibus motion which was to suppress the gun, arguing that the inevitable discovery and search incident to a lawful arrest exceptions did not apply. The People contend, as they did before the Supreme Court, that the automobile exception applies. However, the court did not set forth the basis for its denial of the branch of the defendant's motion which was to suppress the gun. Furthermore, on this record, we cannot determine the unarticulated predicate for the court's evidentiary ruling ... Therefore, in order to avoid exceeding our statutory authority pursuant to CPL 470.15(1), we hold the appeal in abeyance and remit the matter to the Supreme Court, Queens County, for a new determination of that branch of the defendant's omnibus motion which was to suppress the gun." ***People v. Thomas*, 2018 N.Y. Slip Op. 08962, Second Dept 12-26-18**

## FAMILY LAW, EVIDENCE.

EVIDENCE THE CHILD WITNESSED A PHYSICAL ALTERCATION BETWEEN MOTHER AND FATHER WAS SUFFICIENT FOR A FINDING FATHER NEGLECTED THE CHILD.

The Second Department, reversing Family Court in this child neglect proceeding, determined there was sufficient admissible evidence to find father had neglected the child. Although hearsay statements by mother were properly deemed inadmissible, the evidence that the child witnessed a physical altercation between mother and father was sufficient: " '[E]xposing a child to domestic violence is not presumptively neglectful'... However, a finding of neglect based on an

incident or incidents of domestic violence is proper where a preponderance of the evidence establishes that the child was actually placed in imminent danger of harm by reason of the failure of the parent or caretaker to exercise a minimal degree of care ... . Except for certain exceptions provided for in the Family Court Act, only competent, material, and relevant evidence may be admitted at a fact-finding hearing held under article 10 of the Family Court Act ... . ... [R]elevant evidence, which included, ... the mother's in-court admission that she and the father engaged in a physical altercation in the child's presence, as well as other competent, material, and relevant evidence establishing a history of domestic violence between the parents, established that the child's physical, mental, or emotional condition was in imminent danger of being impaired as a result of the father's failure to exercise a minimum degree of care ...". ***Matter of Meeya P. (Anthony C.)*, 2018 N.Y. Slip Op. 08938, Second Dept 12-26-18**

## FAMILY LAW, EVIDENCE.

FAMILY COURT SHOULD HAVE FOUND BISHME'S DAUGHTER TO HAVE BEEN DERIVATIVELY ABUSED AND NEGLECTED BASED UPON BISHME'S ABUSE AND NEGLECT OF ANOTHER CHILD.

The Second Department, reversing Family Court, determined that the derivative abuse and neglect petition against Bishme A. should not have been dismissed and found that Bishme A. had derivatively abused his own daughter based upon the abuse and neglect of another child, Jassir R.: "The Administration for Children's Services (hereinafter ACS) commenced two related child protective proceedings pursuant to Family Court Act article 10. One proceeding was against Jazmin R. and Bishme A., alleging that they abused and neglected the child Jassir R. when that child was approximately 14 months of age. The other proceeding was against Bishme A., alleging that he derivatively abused his own daughter, Akeliah A., who was several weeks older than Jassir R. I... [A]fter a fact-finding hearing, the court ... denied the petition alleging that Bishme A. derivatively abused Akeliah A., and dismissed that proceeding. ... The Family Court should have found that Bishme A. derivatively abused Akeliah A. In a child protective proceeding pursuant to Family Court Act article 10, 'proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child' (Family Ct Act § 1046[a][i]). ACS established that Jassir R. suffered extensive inflicted injuries while in the care of Bishme A. Based on this evidence, ACS established, by a preponderance of the evidence, that Bishme A. derivatively abused Akeliah A." ***Matter of Akeliah A. (Bishme A.)*, 2018 N.Y. Slip Op. 08925, Second Dept 12-26-18**

## FAMILY LAW, IMMIGRATION LAW, SOCIAL SERVICES LAW.

FAMILY COURT SHOULD HAVE APPOINTED A GUARDIAN FOR THE CHILD AND MADE THE FINDINGS NECESSARY FOR THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

The Second Department, reversing Family Court, determined that a guardian should have been appointed for the child and findings should have been made to allow the child to petition for special immigrant juvenile status (SIJS): " 'When considering guardianship appointments, the infant's best interests are paramount' ... . Here, the Family Court erred in determining that the proposed guardian should not be appointed (see generally Family Ct Act § 355.5[7][d][ii]; Social Services Law § 371[7]), as it failed to base its decision on any assessment of the credibility of the witnesses at the hearing, and failed to examine the facts of the case within the context of the required best interests analysis ... . ... [T]he child is under the age of 21 and unmarried, and since we have found that the proposed guardian should have been appointed as the child's guardian, a finding also should have been made that the child is dependent on a juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) ... .Further, based upon our independent factual review, the record supports a finding that reunification of the child with her father is not a viable option due to parental neglect ...". ***Matter of Grechel L.J.*, 2018 N.Y. Slip Op. 08934, Second Dept 12-26-18**

## FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF BANK DID NOT DEMONSTRATE STANDING TO FORECLOSE ON THE REVERSE MORTGAGE WITH EVIDENCE ADMISSIBLE UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The Second Department, reversing (modifying) Supreme Court, determined that plaintiff bank did not demonstrate standing to foreclose on the reverse mortgage. The evidence submitted did not meet the requirements of the business records exception to the hearsay rule: "... [T]he plaintiff submitted, among other things, the affidavit of Stephen Craycroft, an assistant secretary of Nationstar Mortgage, LLC, who attested that the plaintiff was in possession of the note at the time of the commencement of this action. However, the plaintiff failed to demonstrate the admissibility of the records relied upon by Craycroft under the business records exception to the hearsay rule (see CPLR 4518[a]), since Craycroft did not clearly attest that he was personally familiar with the plaintiff's record-keeping practices and procedures ... . Inasmuch as the plaintiff's cross motion was based on evidence that was not in admissible form, the plaintiff failed to establish its prima facie entitlement to judgment as a matter of law ... . Contrary to the plaintiff's contention, the copy of the note annexed to the summons and complaint was insufficient to demonstrate, prima facie, its standing to commence the action, since the note bore a specific endorsement to an entity other than the plaintiff ...". ***Nationstar HECM Acquisition Trust 2015-2 v. Andrews*, 2018 N.Y. Slip Op. 08944, Second Dept 12-26-18**

## MENTAL HYGIENE LAW, CRIMINAL LAW, EVIDENCE, APPEALS.

RESPONSE TO A JURY NOTE MAY HAVE MISLED THE JURY TO CONCLUDE THEY COULD MAKE THEIR OWN LAY JUDGMENT, AS OPPOSED TO RELYING ON EXPERT OPINION, ABOUT WHETHER DEFENDANT SEX OFFENDER SUFFERED FROM A MENTAL ABNORMALITY IN THIS CIVIL MANAGEMENT PROCEEDING, ISSUE REVIEWED ON APPEAL IN THE INTEREST OF JUSTICE, NEW TRIAL ORDERED.

The Second Department, in a full-fledged opinion by Justice Duffy, over a dissent, reversed the finding that defendant sex offender (Timothy R.) suffers from a mental abnormality and requires civil commitment and ordered a new trial. The jury sent out a note asking whether they must agree with the diagnosis of one of the experts to find defendant has a mental abnormality. The court, over defendant's counsel's objection, answered "no." On appeal defendant argued that the jury was effectively told it could ignore the experts and come to their own judgment on the mental abnormality issue. Although that specific argument was not made below, and therefore was not preserved, the Second Department reviewed it in the interest of justice and held that the jury would have to agree with an expert's diagnosis to find defendant suffered from a mental abnormality: "... [C]ontrary to the Supreme Court's response to the jury note, in order to conclude that Timothy R. has a mental abnormality, the jury was required to accept expert testimony as to at least one diagnosis that meets the legal predicate for mental abnormality. When the court answered the note in the negative and reiterated to the jury the general instruction as to accepting or rejecting all or some of an expert's testimony as it sees fit ... , the jury could have been misled into relying solely upon its own lay opinion or so much of the expert testimony as relied upon nonpredicate diagnoses, without regard to the expert testimony, that Timothy R. has a congenital or acquired condition, disease, or disorder ...". ***Matter of State of New York v. Timothy R.*, 2018 N.Y. Slip Op. 08940, Second Dept 12-26-18**

## PERSONAL INJURY.

QUESTION OF FACT WHETHER FRONTMOST DRIVER NEGLIGENTLY BROUGHT HER CAR TO A COMPLETE STOP IN THIS REAR-END COLLISION CASE, FRONTMOST DRIVER'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the transit authority's and the frontmost driver's (Conway's) motions for summary judgment should not have been granted in this rear-end collision case. There was evidence the bus pulled into traffic suddenly without a turn signal, and there was evidence Conway negligently brought her car to a complete stop: "A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the operator of the rear vehicle, requiring that operator to come forward with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence ... . 'However, not every rear-end collision is the exclusive fault of the rearmost driver' ... . '[W]here the frontmost driver also operates [their] vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide' ... . ... Gill [the driver behind Conway] testified at his deposition that the bus was in the right lane when the accident occurred and that, although he could not be sure, he did not recall the bus ever entering the left lane. Additionally, in contrast to Conroy's testimony that she attempted to gradually bring her vehicle to a stop, Gill testified that Conroy apparently panicked and slammed on her brakes when the bus pulled away from the curb. Thus, Gill's deposition testimony raised triable issues of fact as to whether the bus entered the left lane of traffic and whether Conroy negligently brought her vehicle to a complete stop ...". ***Conroy v. New York City Tr. Auth.*, 2018 N.Y. Slip Op. 08913, Second Dept 12-26-18**

## PERSONAL INJURY.

DEFENDANT BAR NOT LIABLE FOR INJURIES AND DEATH OF PLAINTIFF'S DECEDENT RESULTING FROM AN ALTERCATION ON A PUBLIC ROAD IN FRONT OF THE BAR, BAR EXERCISED NO CONTROL OVER THE AREA WHERE THE ALTERCATION OCCURRED.

The Second Department, affirming the defendant bar's motion for summary judgment in this third party assault case, determined that the owner of the bar was not liable to plaintiff's decedent who died of injuries from an altercation which occurred on the public road in front of the bar: "Landowners in general have a duty to act in a reasonable manner to prevent harm to those on their property … . In particular, they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control... . Under this rationale, courts have recognized that a landowner may have responsibility for injuries caused by an intoxicated guest … . However, it is 'uniformly acknowledged that liability may be imposed only for injuries that occurred on defendant's property, or in an area under defendant's control, where defendant had the opportunity to supervise the intoxicated guest' ... . Moreover, a landowner is not an insurer of a visitor's safety, and has no duty to protect visitors against unforeseeable and unexpected assaults... . Here, the bar defendants submitted evidence demonstrating that the altercation was a sudden and unforeseeable event, which occurred on a public roadway, outside of their premises and control ...". ***Covelli v. Silver Fist, Ltd.*, 2018 N.Y. Slip Op. 08914, Second Dept 12-26-18**

## PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

THERE WAS NO PROPER FOUNDATION FOR THE DEFENSE EXPERT'S TESTIMONY IN THIS TRAFFIC ACCIDENT CASE, DEFENSE VERDICT FINDING THAT PLAINTIFF DID NOT SUFFER A SERIOUS INJURY WAS NECESSARILY BASED ON THE DEFENSE EXPERT'S TESTIMONY, VERDICT WAS PROPERLY SET ASIDE.

The Second Department determined plaintiff's motion to set aside the verdict in this traffic accident case was properly granted. Plaintiff had been granted summary judgment on liability and proceeded to trial on damages. Defendants' expert, McGowan, purported to analyze the forces involved in the collision and opined that the impact could not have caused plaintiff's injuries. The jury returned a verdict finding that plaintiff did not suffer a "serious injury:" "... [W]e agree with the Supreme Court's determination to grant the plaintiff's motion pursuant to CPLR 4404(a) to set aside the jury verdict on the issue of damages... . 'An expert's opinion must be based on facts in the record or personally known to the witness'... . Here, a proper foundation was lacking for the admission of McGowan's opinion ... . Among other things, McGowan failed to calculate the force exerted by all four vehicles, the crash test he utilized to determine the delta-v differed in several significant respects from the instant accident, and he reviewed simulations in which the weight of the dummies was not similar to that of the plaintiff." ***Imran v. R. Barany Monuments, Inc.*, 2018 N.Y. Slip Op. 08921, Second Dept 12-26-18**

## PERSONAL INJURY, MEDICAL MALPRACTICE.

QUESTION OF FACT WHETHER FALL FROM BED WAS THE RESULT OF THE FAILURE TO TAKE ADEQUATE PRECAUTIONS AGAINST FALLING AND QUESTION OF FACT WHETHER THE FALL EXACERBATED THE PROGRESSION OF PLAINTIFF'S INTERCRANIAL HEMORRHAGE IN THIS MEDICAL MALPRACTICE ACTION, DEFENDANTS' SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiffs raised a question of fact about whether defendants in this medical malpractice case deviated for accepted standards of care. Plaintiff Salgado, who was suffering from an intercranial hemorrhage, fell out of bed, which may have exacerbated the progression of the hemorrhage. There was a question of fact whether proper precautions to prevent a fall were taken, given that Salgado had no right hand grip or right arm or leg movement: "... [T]he plaintiffs raised triable issues of fact as to whether the defendants departed from accepted standards of practice by failing to prevent Salgado from falling out of bed and whether his injuries were exacerbated by his fall. More particularly, the plaintiffs submitted the affirmation of an expert who opined that the monitoring and precautions against falls implemented by the hospital in its Medical Intensive Care Unit departed from accepted standards of practice because, given the medical condition noted in Salgado's chart, i.e., 'calm' and 'lethargic' with no right hand grip or right arm or leg movement early the same day, Salgado's fall could not have occurred unless restraints were improperly applied. Furthermore, with respect to causation, the plaintiffs' expert opined that the increase in the size of Salgado's intercranial hemorrhage from the morning of the fall, accompanied by the new onset of midline shift, was too extensive and rapid in onset to be due solely to the natural progression of Salgado's original hemorrhage." ***Salgado v. North Shore Univ. Hosp.*, 2018 N.Y. Slip Op. 08967, Second Dept 12-26-18**

## PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

THE PARTY WITH THE RIGHT OF WAY ENTERING THE INTERSECTION WAS ENTITLED TO SUMMARY JUDGMENT AGAINST THE DRIVER MAKING A LEFT TURN, ALLEGATIONS THE PARTY WITH THE RIGHT OF WAY WAS SPEEDING DID NOT RAISE A QUESTION OF FACT BECAUSE THERE WAS NO EVIDENCE THE ACCIDENT COULD HAVE BEEN AVOIDED IF SPEEDING WAS NOT INVOLVED.

The Second Department, reversing Supreme Court in this traffic accident case, determined that the driver who had the right of way entering an intersection. Aly, was entitled to summary judgment against the driver, Varela, who made a left turn into Aly's path. The deposition testimony that Aly was speeding did not raise an issue of fact because there was no evidence Aly could have avoided the accident if traveling at the speed limit. In an apparent reference to the emergency doctrine the court noted that Aly had only seconds to react and therefore could not be deemed comparatively negligent: "The moving [ALY] defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint and all cross claims insofar as asserted against them by submitting, among other things, the deposition transcripts of the parties, as well as video surveillance footage of the accident, which demonstrated that the sole proximate cause of the accident was Varela's violation of Vehicle and Traffic Law § 1141 in making a left turn into the path of the oncoming Aly vehicle without yielding the right-of-way... . As the driver with the right-of-way, Aly was entitled to anticipate that Varela would obey the traffic laws which required him to yield ... . ' Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision' ... . Here, the moving defendants established that Aly had only seconds to react to the Varela vehicle, which failed to yield. In opposition, the plaintiffs and the Varela defendants failed to raise a triable issue of fact as to whether any negligence on the part of Aly was a substantial factor in the happening of the accident. Under the circumstances, the plaintiffs' respective deposition testimony that Aly was speeding is 'inconsequential

inasmuch as the [plaintiffs] did not raise a triable issue as to whether [Aly] could have avoided the accident even if she had been traveling at or below the posted speed limit' ...". ***Rohn v. Aly*, 2018 N.Y. Slip Op. 08966, Second Dept 12-26-18**

# THIRD DEPARTMENT

## CIVIL PROCEDURE.

DEFENDANTS NEVER INTERPOSED AN ANSWER SO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED, DEFENDANTS' MOTION FOR PERMISSION TO SERVE A LATE ANSWER PROPERLY DENIED, MATTER REMITTED SO PLAINTIFF CAN MOVE FOR A DEFAULT JUDGMENT.

The Third Department determined Supreme Court should not have granted plaintiff's motion for summary judgment because defendants never interposed an answer. The Third Department further determined defendants' motion for permission to serve a late answer was properly denied. The matter was remitted to afford plaintiff the opportunity to make a late motion for a default judgment. The underlying matter is plaintiff's action to recover the cost of cleaning up a highway accident involving defendants' truck: "Supreme Court erred in granting plaintiff summary judgment because defendants never filed an answer and, thus, issue was not joined, a prerequisite that is 'strictly adhered to'... . Further, summary judgment was not granted here pursuant to CPLR 3211 (c) ... . Even if defendants are deemed to have appeared by filing a notice of removal of the action to federal court or by other conduct (see CPLR 320 [a]), they did not file a responsive pleading (see CPLR 3011) and, consequently, plaintiff was barred from seeking summary judgment ... . ... Although Supreme Court possessed discretion to permit late service of an answer 'upon a showing of [a] reasonable excuse for [the] delay or default' (CPLR 3012 [d]...), the reasonableness of the excuse 'is a discretionary, sui generis determination to be made by the court based on all relevant factors'... . ... We discern no basis for finding that Supreme Court abused its discretion in denying defendants' motion, given the absence of a reasonable excuse for the delay ...". ***Gerster's Triple E. Towing & Repair, Inc. v. Pishon Trucking, LLC*, 2018 N.Y. Slip Op. 08979, Third Dept 12-27-18**

## CIVIL PROCEDURE, CONTEMPT, CONSTITUTIONAL LAW, PRIVILEGE.

DEFENDANTS ARE REQUIRED TO PRODUCE TAX AND WAGE DOCUMENTS AND TO PROVIDE FACTUAL BASES FOR THEIR REFUSAL TO ANSWER QUESTIONS, SUPREME COURT SHOULD NOT HAVE ACCEPTED DEFENDANTS' BLANKET ASSERTIONS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION AND SPOUSAL PRIVILEGE IN THIS CONTEMPT PROCEEDING STEMMING FROM AN ACTION TO RECOVER A DEFICIENCY JUDGMENT.

The Third Department, reversing (modifying) Supreme Court, determined that the defendant's blanket assertion of his Fifth Amendment privilege against self-incrimination and his wife's assertion of her Fifth Amendment and her spousal privileges did not justify the denial of plaintiff's motion to hold defendant in contempt or the denial of a motion to compel defendant's wife to submit to a deposition and produce documents. Plaintiff sought payment of a multi-million dollar deficiency judgment. The Third Department explained that tax returns, W-2 forms and 1099 forms fall within the "required records exception" to the privilege against self-incrimination. The Third Department further found that defendant and his wife must provide a factual basis for their refusal to answer each of the 358 questions posed by plaintiff because there had been no showing that criminal proceedings against the defendant were imminent or that the spousal privilege was applicable: "... [D]efendant's income tax returns, W-2 wage statements and 1099 forms — fall within the 'required records exception' to the privilege against self-incrimination. Under this exception, '[t]he Fifth Amendment privilege which exists as to private papers cannot be asserted with respect to records which are required, by law, to be kept and which are subject to governmental regulation and inspection' ... . … [T]here is nothing in this record indicating, nor does defendant assert, that he is the subject of any criminal investigation or proceeding. More to the point, defendant has not shown that his claimed fear of prosecution is anything other than 'imaginary' ... . ... [W]e conclude that Supreme Court's order denying plaintiff's motion to compel as to Chava Nelkenbaum [defendant's wife] must be reversed and the matter remitted for an in camera inquiry to test the validity of her invocation of the Fifth Amendment privilege as to each of the questions asked and each of the documents demanded of her. To the extent that Chava Nelkenbaum invoked the spousal privilege as a basis for refusing to answer certain questions propounded at the deposition or to produce documents responsive to the subpoena, we note that the privilege 'attaches only to those statements made in confidence and 'that are induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship' ... . Further, this privilege does not attach to 'ordinary conversations relating to matters of business' ...". ***Carver Fed. Sav. Bank v. Shaker Gardens, Inc.*, 2018 N.Y. Slip Op. 08975, Third Dept 12-27-18**

## COURT OF CLAIMS, CRIMINAL LAW.

CLAIMANT WAS CONVICTED OF MURDER AND AN UNRELATED ROBBERY WHICH WERE CHARGED IN A SINGLE INDICTMENT, AFTER A MAN CONFESSED TO THE MURDER, CLAIMANT'S MURDER CONVICTION WAS VACATED BUT THE ROBBERY CONVICTION REMAINED, REVERSING THE COURT OF CLAIMS, THE THIRD DEPARTMENT DETERMINED CLAIMANT WAS ENTITLED TO COMPENSATION FOR THE UNJUST MURDER CONVICTION AND RELATED IMPRISONMENT.

The Third Department, reversing the Court of Claims, determined that claimant was entitled to compensation based upon his unjust conviction and imprisonment. Claimant's murder conviction was vacated after another man confessed to the murder. Claimant had been charged with an unrelated robbery and the murder and robbery charges were joined in a single indictment. At the time the murder conviction was vacated, defendant pled guilty to the robbery. The state contended that the guilty plea to robbery precluded the claimant from compensation for the unjust murder conviction based upon the wording of the statute. The Third Department disagreed and interpreted the statute to allow compensation: "Court of Claims Act § 8-b allows individuals who are unjustly convicted and imprisoned to recover damages from defendant. To avoid dismissal of his claim, claimant was required to establish, as relevant here, that 'he did not commit any of the acts charged in the accusatory instrument' ... . * * * The term 'accusatory instrument' could be literally construed to refer to the single indictment that charged claimant with crimes that arose from both events — the robbery and the subsequent murder. However, that conclusion must be measured against the intent of the legislation plainly expressed in the statute, which states that '[t]he [L]egislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages. The [L]egislature intends by enactment of the provisions of this section that those innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned be able to recover damages against [defendant]' ... . Hence, 'the linchpin of the statute is innocence' ... . ... Under the unique facts of this case, a literal interpretation of 'accusatory instrument' would lead to an unreasonable result starkly at odds with the clearly-expressed intent of the statute by denying recovery to claimant — who is indisputably innocent of the murder for which he was wrongfully convicted and imprisoned — solely because the charges arising from events now known to be unrelated were joined in a single indictment." ***Jones v. State of New York*, 2018 N.Y. Slip Op. 08985, Third Dept 12-27-18**

## CRIMINAL LAW.

THE MAJORITY CONCLUDED COMMUNITY OPPOSITION TO PETITIONER'S RELEASE ON PAROLE WAS PROPERLY CONSIDERED BY THE BOARD OF PAROLE AND UPHELD THE DENIAL OF PAROLE, TWO-JUSTICE DISSENT ARGUED COMMUNITY OPPOSITION IS NOT INCLUDED IN THE STATUTORY FACTORS TO BE CONSIDERED BY THE BOARD.

The Third Department, over a two-justice dissent, determined that petitioner's request to be released on parole was properly denied. The majority held that community opposition to release is a factor to be considered. The dissenters argued that community opposition is not included in the statutory factors to be considered: "By statutorily protecting the confidentiality of those members of the community — in addition to the crime victim or victim's representative — who choose to express their opinion, either for or against, an inmate's bid to obtain parole release, the Legislature demonstrated a clear intent that such opinions are a factor that may be considered by respondent in rendering its ultimate parole release decision. Significantly, such statements and opinions are germane to respondent's determination as to whether an inmate will live and remain at liberty without violating the law, whether such release is compatible with the welfare of society and whether an inmate's release will deprecate the seriousness of the underlying crime as to undermine respect for the law — statutory factors that respondent must consider in rendering its parole release determinations (see Executive Law § 259-i [2] [c] [A] ...). **From the Dissent:** Respondent based its denial of petitioner's parole, in part, on 'consistent community opposition' — an element that is not among the factors that the Legislature directed respondent to consider in making parole release determinations (see Executive Law § 259-i [2] [c] [A]). Although the majority's approach may have some practical appeal, we are bound by the governing law. It is well established that respondent may not rely upon factors outside the scope of Executive Law § 259-i in making decisions concerning parole release ...". ***Matter of Applewhite v. New York State Bd. of Parole*, 2018 N.Y. Slip Op. 08989, Third Dept 12-27-18**

## JUDGES.

LAWSUIT SEEKING TO ENJOIN JUDICIAL SALARY INCREASES WAS PROPERLY DISMISSED.

The Third Department determined summary judgment dismissing the action brought by the Center for Judicial Accountability was properly granted: "[P]laintiff Center for Judicial Accountability, Inc. (hereinafter CJA) and plaintiff Elena Ruth Sassower, CJA's director, commenced this action seeking, among other things, a declaratory judgment that the bill establishing the budgets for the Legislature and the Judiciary for the 2016-2017 fiscal year ... was unconstitutional and also seeking an injunction permanently enjoining respondents from making certain disbursements under the bill, including judicial salary increases. * * * ... Supreme Court properly granted defendants' cross motion for summary judgment dismissing the sixth

cause of action ... which alleged that the enabling statute that created the Commission [Commission on Legislative, Judicial and Executive Compensation] is facially unconstitutional with respect to judicial compensation." ***Center for Jud. Accountability, Inc. v. Cuomo*, 2018 N.Y. Slip Op. 08996, Third Dept 12-27-18**

## WORKERS' COMPENSATION, EVIDENCE.

THE OPINION EVIDENCE THAT CLAIMANT'S PRE-EXISTING HEART CONDITION WAS A HINDRANCE TO HER EMPLOYABILITY WAS INSUFFICIENT, THE WORKERS' COMPENSATION CARRIER, THEREFORE, WAS NOT ENTITLED TO REIMBURSEMENT FROM THE SPECIAL DISABILITY FUND.

The Third Department, reversing the Workers' Compensation Board, determined the evidence did not support the finding that the claimant's pre-existing conditions posed a hindrance to her employability. Therefore the carrier was not entitled to reimbursement from the Special Disability Fund: "Claimant, a licensed practical nurse, established a claim for a work-related injury to her right knee stemming from a September 3, 2004 accident that occurred while she was dispensing medication to patients. * * * We find that the carrier failed to prove that claimant's preexisting conditions hindered or were likely to hinder her employability. Although Moriarty, an orthopedist, did offer an opinion based upon a records review that claimant's heart conditions could pose a hindrance to employability, the opinion was based upon generalities and speculation, and did not rationally support the conclusion that claimant's present disability was 'materially and substantially greater than what would have arisen from the [2004] work-related injury by itself' ... . Moriarty did not examine or interview claimant, and the record does not reflect that claimant was subject to any restrictions or that any of her preexisting conditions hindered her job performance or ability to work... . In addition, as noted in Moriarty's addendum, claimant's aortic insufficiency from a heart valve condition was controlled by medication, and 'preexisting conditions that are controlled by medication have been found, without more, not to constitute a hindrance to employability' ... . In view of the lack of evidence that claimant's preexisting conditions hindered or were likely to hinder her employability, we find that the Board's decision is not supported by substantial evidence and, therefore, it must be reversed .." . ***Matter of Ricci v. Maria Regina Residence*, 2018 N.Y. Slip Op. 08980, Third Dept 12-27-18**

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