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FIRST DEPARTMENT

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A JURY CHARGE ON THE LESSER INCLUDED OFFENSE OF PETIT LARCENY; THE VALUE OF THE STOLEN CELL PHONES SHOULD NOT HAVE BEEN ADDED TOGETHER BECAUSE THERE WAS NO PROOF THE CELL PHONES WERE OWNED BY THE SAME OWNER.

The First Department, reversing defendant's conviction, determined: (1) defense counsel was ineffective for failing to request the jury be charged with the lesser included offense of petit larceny in this robbery case involving the theft of cell phones: and (2), the value of the cell phones should not have been added together because there was no proof the phones were owned by the same owner: "Defendant was charged with thefts of cell phones from four wireless phone stores. As to one incident, it was alleged defendant forcibly stole a cell phone in that his showing of a knife to the store employee constituted a threat of force and was perceived by the employee as a threat. While the defense conceded that defendant stole a cell phone, it denied any force was used. Nevertheless, at the charge conference prior to jury deliberations, defense counsel failed to ask for submission of the charge of petit larceny. Since the existing record clearly establishes that this was a mistake, rather than a strategic decision, no CPL 440.10 motion is necessary. When counsel asked for submission of the lesser included offense in the midst of jury deliberations, he expressly admitted that he had been 'remiss' in not making a timely request. In any event, counsel could not have been employing an all-or-nothing strategy as to the robbery as argued by the People. This strategy would have made no sense, because the defense was conceding that defendant was guilty of petit larceny as to the other incidents and was already inviting convictions of several misdemeanors. ... Defendant is also entitled to dismissal of the grand larceny charge, which was based upon the improper aggregation of the value of phones taken from two separate AT & T stores on two different days. The People failed to prove that the stores, and the phones located therein, had the same 'owner' for the purpose of aggregating multiple thefts ... . There was no evidence that these stores were owned by the same corporation, as opposed to, for example, dealerships separately owned and authorized to sell AT & T wireless products and services ,,,", ***People v. Camacho*, 2019 N.Y. Slip Op. 08944, First Dept 12-12-19**

FALSE ARREST, MALICIOUS PROSECUTION, CIVIL PROCEDURE, EVIDENCE.

TESTIMONY OF A DEFENSE WITNESS WHO IDENTIFIED PLAINTIFF AS THE PERSON FLEEING THE SCENE OF A CRIME SHOULD NOT HAVE BEEN PRECLUDED IN THIS FALSE ARREST AND MALICIOUS PROSECUTION ACTION; THE JURY WAS NOT INSTRUCTED ON THE CRITERIA FOR A TERRY STOP; PLAINTIFF'S JUDGMENT VACATED AND NEW TRIAL ORDERED.

The First Department, vacating the plaintiff's judgment and ordering a new trial in this false arrest and malicious prosecution action, determined that the testimony of the defense witness who identified plaintiff as fleeing the scene of a crime should not have been precluded. The name and address of the witness had been provided to plaintiff four years before the trial and the fact that she had since moved and did not want to disclose her new address to any party was not something the defense could control. In addition, the jury was given no guidance on the criteria for an alleged wrongful stop of the plaintiff by police (reasonable suspicion, not probable cause), despite the questions concerning the stop on the special verdict sheet: "The trial court improvidently exercised its discretion in precluding testimony from the witness who identified plaintiff to the police as an individual she had seen fleeing the scene of a crime. Defendants satisfied their discovery obligation by providing the witness's last known address and telephone number during discovery, more than four years before trial. Thus, there could have been no surprise or prejudice warranting the preclusion ... . While the witness subsequently moved, she declined to disclose her new address to any parties to the suit, a factor defendants could not control ... . As defendants did not know her new address, they had no obligation under CPLR 3101(h). Nor should defendants have been sanctioned for the fact that the witness did not wish to discuss the case with plaintiff's counsel when counsel called her. Notably, plaintiff's counsel did not attempt to contact the witness until two months before trial and did not attempt to obtain a nonparty deposition of the witness during discovery. Defendant offered to have the witness further confirm these facts, under oath and outside the presence of the jury. Under these circumstances, the trial court improvidently exercised its discretion in ordering a hearing at which defendants' trial attorney would be subject to questioning by plaintiff's trial attorney, and precluding the witness's testimony when defense counsel declined to participate in such a hearing. Given that the witness would have

offered highly relevant and non-cumulative trial testimony, the error was not harmless ... . It was error to include on the special verdict sheet a questions as to a wrongful stop (Terry v. Ohio, 392 US 1 [1968]), because there was no charge given instructing the jury on the legal standard that must be applied in resolving those claims. The jury was never told that a stop is improper if the detaining officer does not have 'reasonable suspicion' that the detainee committed a crime, which is less demanding than the 'probable cause' standard applicable to the malicious prosecution claims ... . That the jury sent a note requesting clarification on the question indicated its awareness of the lack of guidance ...". ***Onilude v. City of New York*, 2019 N.Y. Slip Op. 08925, First Dept 12-12-19**

INSURANCE LAW, CONTRACT LAW.

POLICIES DID NOT REQUIRE THE INSURER TO DEFEND THE INSURED, BUT DID REQUIRE THE INSURER TO PAY THE INSURED'S DEFENSE COSTS.

The First Department, in a full-fledged opinion by Justice Friedman, determined that the terms of the policies at issue did not obligate the insurer to defend the insured, but do require the insurer to pay the insured's defense costs. The opinion is too fact-specific and too comprehensive to fairly summarize here: "In this insurance coverage action brought by a putative additional insured, the liability insurance policies at issue do not impose on the insurers a duty to defend the insured in a covered action. The policies do, however, require the insurers to reimburse the insured for defense costs incurred in an action 'in which damages . . . to which this insurance applies are alleged.' The ultimate factual determination in the underlying personal injury actions was that the loss was actually outside the scope of the additional insured coverage. This determination, while it means that the insurers have no duty to indemnify the putative additional insured for its liability to pay damages, is not conclusive of a different question posed to us, which is whether the putative additional insured is entitled reimbursement of its defense costs. * * * Under the terms of the ... policy, the timing of the Port Authority's demand for reimbursement does not defeat its claim for reimbursement of its defense costs through the time its liability was adjudicated in the underlying actions. ... [The] policy entitles the insured to coverage of the costs it incurred in defending 'any . . . suit' to which this policy applies,' and the policy defines the term 'suit' to mean an action 'in which damages because of bodily injury' . . . to which this insurance applies are alleged' ... . [U]ntil the jury rendered the verdict adverse to the Port Authority, each of the underlying actions remained a 'suit' to which th[e] ... policy applie[d]' ...". ***Port Auth. of N.Y. & N.J. v. Brickman Group Ltd., LLC*, 2019 N.Y. Slip Op. 08958, First Dept 12-12-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION IN THIS FALLING OBJECT CASE; QUESTION OF FACT ON HIS LABOR LAW § 241(6) CAUSE OF ACTION.

The First Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) "falling object" cause of action: "The record reflects that plaintiff was on a temporary exterior platform on the 21st floor of a building under construction, when he was struck and injured by a falling piece of DensGlass, an exterior sheetrock material, which matched the size of a missing piece of sheetrock one floor above. Plaintiff was in the process of dismantling the bridge that was linked to the exterior hoist elevator. Plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1) claim based on the record evidence that a piece of the exterior facade of the building still under construction fell on him, that workers were performing patch work to the DensGlass on the floors above plaintiff, and that the exterior facade was not complete ... . Furthermore, defendants' cross motions for summary judgment dismissing the § 241(6) claim should have been denied because there is a triable issue of fact as to whether the area where the accident occurred was 'normally exposed to falling material or objects' requiring that plaintiff be provided with "suitable overhead protection" (see 12 NYCRR 23-1.7[a][1] ...)." ***Garcia v. SMJ 210 W. 18 LLC*, 2019 N.Y. Slip Op. 08791, First Dept 12-10-19**

MEDICAL MALPRACTICE, PERSONAL INJURY.

QUESTION OF FACT WHETHER DEFENDANT NEUROLOGIST AND DEFENDANT CARDIOLOGIST WERE JOINTLY DIAGNOSING AND TREATING PLAINTIFF FOR HER STROKE; QUESTION OF FACT WHETHER THE NEUROLOGIST SHOULD HAVE ENSURED THAT A TEST ORDERED BY THE NEUROLOGIST, BUT TO BE PERFORMED BY THE CARDIOLOGIST, WAS DONE WITHIN 48 HOURS.

The First Department, reversing Supreme Court, determined the defendant doctors' motions for summary judgment in this medical malpractice case should not have been granted. There was a question of fact whether defendants were jointly diagnosing and treating the plaintiff. Defendant neurologist ordered a trans-esophageal electrocardiogram (TEE), to be done by a cardiologist, to determine the origin of plaintiff's stroke. Plaintiff alleged defendant neurologist should have made sure the TEE was performed immediately. The TEE was performed more than two weeks after plaintiff's initial stroke: "Plaintiffs allege that defendants were negligent for scheduling a TEE, the definitive diagnostic tool to detect the presence of atrial clots, more than two weeks after the patient's initial stroke was confirmed and she was referred to the cardiology defendants. Plaintiffs allege that defendants should have scheduled the TEE to take place within 48 hours, or, alternatively, placed the patient on anticoagulants as a prophylactic measure. The expert affidavit submitted by plaintiff raises an issue

of fact whether the neurology defendants retained a duty to ensure that the patient received a timely TEE insofar as Dr. Xie referred her to the cardiology defendants as part of his overall neurological assessment, and he continued to manage her condition throughout. Under these circumstances, questions exist whether defendants were engaged in 'joint action in diagnosis or treatment' so as to make it appropriate to impose liability on one for the negligence of the other ...". ***Lin v. Yi Xie*, 2019 N.Y. Slip Op. 08943, First Dept 12-12-19**

PERSONAL INJURY, CONTRACT LAW.

IN THIS ELEVATOR ACCIDENT CASE, ONE DEFENDANT FAILED TO DEMONSTRATE IT HAD NOT DISPLACED THE BUILDING OWNER'S DUTY TO KEEP THE PREMISES SAFE, AND ANOTHER DEFENDANT DEMONSTRATED IT DID NOT LAUNCH AN INSTRUMENT OF HARM; FAILING TO MAKE A DANGEROUS CONDITION SAFER DOES NOT EQUATE WITH LAUNCHING AN INSTRUMENT OF HARM.

The First Department, reversing (modifying) Supreme Court, determined that one defendant in this elevator accident case, Cooper Square, did not demonstrate that it did not displace the building owner's duty to keep the premises safe, and another defendant, PS Marcato [elevator company] , sufficiently demonstrated it did not launch an instrument of harm. The court noted that PS Marcato's failure to make the elevator safer did not equate to launching and instrument of harm: "Cooper Square failed to establish prima facie that it did not displace [the building owner's] duty to maintain the premises in a reasonably safe condition. Its management agreement with [the owner] authorized Cooper Square to make repairs or alterations to the premises and to purchase supplies and materials for the building. Cooper Square also agreed to 'directly supervise the work of, hire and discharge all maintenance and security personnel,' and was 'clothed with such general authority and powers as may be necessary or advisable to carry out the spirit and intent of th[e] Agreement.' An amendment to the management agreement recognized that Cooper Square 'ha[d] been delegated significant authority and discretion in the operation of the Building under th[e] Agreement.' * * * PS Marcato, which inspected and made repairs to the elevator before plaintiff was injured by it, established prima facie that it did not create or exacerbate the dilapidated condition of the elevator, and therefore did not launch a force or instrument of harm (see Espinal, 98 NY2d at 142-143 ...). While the record suggests that PS Marcato knew that the elevator was in disrepair and being tampered with, it 'did nothing more than neglect to make the [elevator] safer — as opposed to less safe — than it was before' the inspection and repairs were made ...". ***Ileiwat v. PS Marcato El. Co., Inc.*, 2019 N.Y. Slip Op. 08946, First Dept 12-12-19**

PERSONAL INJURY, CONTRACT LAW, EVIDENCE.

ELEVATOR MAINTENANCE COMPANY DID NOT DISPLACE THE BUILDING OWNER'S AND MANAGER'S DUTY TO KEEP THE ELEVATORS SAFE AND DID NOT LAUNCH AN INSTRUMENT OF HARM; IT'S MOTION FOR SUMMARY JUDGMENT IN THIS ELEVATOR ACCIDENT CASE SHOULD HAVE BEEN GRANTED; A VIOLATION OF THE NYC BUILDING CODE IS NOT NEGLIGENCE PER SE.

The First Department, modifying Supreme Court in this elevator accident case, noted that violation of the NYC Building Code is some evidence of negligence but not negligence per se, and held that Dunwell's (the elevator maintenance company's) motion for summary judgment should have been granted. Dunwell had demonstrated two Espinal factors did not apply (it did not displace the building defendants' obligation to keep the elevators safe and it did not launch an instrument of harm, i.e., it did not exacerbate or create the defects in the elevator): "Dunwell's motion for summary judgment dismissing all claims against it should be granted. Dunwell cannot be held liable to plaintiff, because it did not owe the decedent any duty. There is no evidence in the record that Dunwell created or exacerbated any of the alleged elevator defects, including the missing door rollers and link arms, even if it were found to have wrongfully failed to diagnose or correct them (see Espinal v. Melville Snow Contrs., 98 NY2d 136, 140, 142-143 [2002] ...). Moreover, Dunwell in fact did recommend that these parts be replaced, but its proposal was not accepted by the Building Defendants, and the governing maintenance agreement did not allow Dunwell to replace them without authorization ... . The maintenance agreement was not comprehensive and exclusive and therefore did not displace the Building Defendants' obligations to maintain the elevators in a safe condition … . Plaintiff does not argue that the decedent detrimentally relied on Dunwell's continued performance of its duties ...". ***Baez v. 1749 Grand Concourse LLC*, 2019 N.Y. Slip Op. 08948, First Dept 12-12-19**

SECOND DEPARTMENT

CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE DETERMINED THE MERITS OF THIS ACTION FOR A DECLARATORY JUDGMENT ON A MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION.

The Second Department, reversing Supreme Court, determined the motion to dismiss a declaratory judgment action should have been denied. Supreme Court had issued a declaratory judgment in favor of the moving party (the county). This is a class action contending that the imposition of a driver responsibility fee on red-light camera violations is illegal: "The plaintiff commenced this putative class action against Nassau County and the Nassau County Traffic and Parking Violations

Agency (hereinafter together the County) seeking, inter alia, a judgment declaring that the imposition of a driver responsibility fee on a red-light camera violation is 'inconsistent with New York's general law, or is otherwise ultra vires, preempted, unconstitutional, or void as a matter of law.' Prior to interposing an answer, the County moved, inter alia, pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action. The Supreme Court, treating that branch of the County's motion as one for a declaration in the County's favor with respect to the first cause of action, granted that branch of the motion to the extent of declaring that the imposition of a driver responsibility fee on a red-light camera violation was a proper exercise of the County's power to charge and collect administrative fees and, based on that declaration, directed dismissal of the remainder of the complaint for failure to state a cause of action. We reverse. ... '... [I]f the record before the motion court is insufficient to resolve all factual issues such as the rights of the parties cannot be determined as a matter of law, a declaration upon a motion to dismiss is not permissible' ...". ***Guthart v. Nassau County*, 2019 N.Y. Slip Op. 08825, Second Dept 12-11-19**

CIVIL PROCEDURE, FORECLOSURE.

TIME TO SERVE DEFENDANT, WHO LIVED IN INDIA, IN THIS FORECLOSURE ACTION WAS PROPERLY EXTENDED IN THE INTEREST OF JUSTICE BUT SUPREME COURT SHOULD NOT HAVE DIRECTED AN ALTERNATIVE METHOD OF SERVICE, CRITERIA EXPLAINED.

The Second Department, modifying Supreme Court, determined the time for serving defendant (Kothary), who lived in India, in this foreclosure action was properly extended in the interest of justice pursuant to CPLR 306-b. But Supreme Court should not have directed an alternative method of service (service upon the defendant's attorney) pursuant to CPLR 308 (5): "... [W]e agree with the Supreme Court's determination granting, in the interest of justice, that branch of the plaintiff's motion which was pursuant to CPLR 306-b to extend the time to serve the summons and complaint upon Kothary. The plaintiff established, among other things, that the action was timely commenced, and that service was timely attempted and was perceived by the plaintiff to have been within the 120-day period but was subsequently found to have been defective ... . Additionally, the plaintiff demonstrated that it has a potentially meritorious cause of action, and that there was no identifiable prejudice to Kothary as a consequence of the delay in service ... . However, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was pursuant to CPLR 308(5) to direct an alternative method for service of process by permitting service upon Kothary's attorney. 'CPLR 308(5) vests a court with discretion to direct an alternative method for service of process when it has determined that the methods set forth in CPLR 308(1), (2), and (4) are impracticable' ... . '[A] plaintiff seeking to effect expedient service must make some showing that the other prescribed methods of service could not be made' ... . Here, at the hearing, Kothary provided the address where he resides in New Delhi ... , and the plaintiff failed to submit any evidence that effectuating service in India by any of the authorized methods would have been unduly burdensome ... . 'That [Kothary] resided in a foreign country did not, by itself, relieve the plaintiff of [its] obligation to make a reasonable effort to effectuate service in a customary manner before seeking relief pursuant to CPLR 308(5)' ...". ***JPMorgan Chase Bank, N.A. v. Kothary*, 2019 N.Y. Slip Op. 08832, Second Dept 12-11-19**

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

PROSECUTOR'S UNTRUE CLAIM, MADE IN SUMMATION, THAT DEFENDANT'S DNA WAS FOUND ON THE WEAPON USED IN THE SHOOTING REQUIRED REVERSAL.

The Second Department, reversing defendant's conviction, determined that the prosecutor's untrue claim, made in summation and immediately objected to, that defendant's DNA was found on the weapon used to shoot the victim, required a new trial: "... [T]he prosecutor's comments during summation that the defendant's DNA was found on the weapon used to shoot the victim had no evidentiary support in the record. The remarks, which were promptly objected to by defense counsel, were highly prejudicial and ultimately deprived the defendant of his right to a fair trial ... , particularly as the Supreme Court refused to give any curative instruction or grant a mistrial based upon the prosecutor's improper comments." ***People v. Day*, 2019 N.Y. Slip Op. 08858, Second Dept 12-11-19**

FAMILY LAW, CIVIL PROCEDURE.

SUPREME COURT SHOULD NOT HAVE MODIFIED THE PARENTAL ACCESS PROVISIONS OF THE JUDGMENT OF DIVORCE WITHOUT HOLDING A HEARING.

The Second Department, reversing Supreme Court, determined the parental access provisions of the judgment of divorce should not have been modified without holding a hearing: "A party seeking a change in [parental access] or custody is not automatically entitled to a hearing, but must make an evidentiary showing sufficient to warrant a hearing' ... . As a general matter, custody and parental access determinations should only be rendered after a full hearing ... .However, this general right is not absolute ... , and 'a hearing' .is not necessary where the undisputed facts before the court are sufficient, in and of themselves, to support a modification of custody ... . The plaintiff made the necessary showing entitling him to a hearing regarding that branch of his motion which was to modify the parental access provisions of the judgment of divorce with respect to the child ... . The record shows that there were disputed factual issues regarding the child's best interests such that

a hearing on modification of parental access was required ... . Further, '[a] decision regarding child custody and parental access should be based on admissible evidence' ... . Here, in making its determination, the Supreme Court relied solely on information provided at court conferences, and the hearsay statements and conclusions of the family specialist, whose opinions and credibility were untested by either party ...". ***Katsoris v. Katsoris*, 2019 N.Y. Slip Op. 08833, Second Dept 12-11-19**

FORECLOSURE, CIVIL PROCEDURE, JUDGES, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL).

THE DOCTRINE OF THE LAW OF THE CASE PRECLUDED CONSIDERATION OF WHETHER THE BANK COMPLIED WITH THE NOTICE PROVISIONS OF RPAPL 1304; THE ISSUE HAD BEEN DETERMINED IN THE BANK'S FAVOR AT THE SUMMARY JUDGMENT STAGE AND SHOULD NOT HAVE BEEN RECONSIDERED, SUA SPONTE, WHEN THE BANK MOVED FOR A JUDGMENT OF FORECLOSURE.

The Second Department, reversing Supreme Court, determined the doctrine of the law of the case precluded the court from sua sponte, considering whether the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 were met by the bank in this foreclosure action. The issue was determined in the bank's favor in the initial summary judgment proceeding and should not have been considered again when the bank moved to confirm the referee's report and for a judgment of foreclosure: "... [T]he defendants raised the issue of noncompliance with RPAPL 1304 in their answer, the plaintiff presented evidence of its compliance with the statute on its motion, inter alia, for summary judgment on the complaint, and, in granting that motion, the Supreme Court decided the issue in the plaintiff's favor. Therefore, pursuant to the doctrine of law of the case ... , the court was precluded from reconsidering the issue on the plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale ... . Moreover, since the defendants did not oppose the plaintiff's motion to confirm the referee's report and, therefore, did not raise the issue of the plaintiff's noncompliance with RPAPL 1304 in opposition to the motion, the court should not have raised the issue sua sponte ...". ***Wells Fargo Bank, N.A. v. Morales*, 2019 N.Y. Slip Op. 08891, Second Dept 12-11-19**

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

THE BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE PROVISIONS OF REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL) 1304.

The Second Department, reversing Supreme Court, determined compliance with the notice provisions of Real Property Actions and Proceedings Law (RPAPL) 1304 was not demonstrated by the bank: "... [T]he affidavit of Theresia Ang, assistant vice president for the loan servicer, PHH Mortgage Corporation (hereinafter PHH), which was submitted in support of the motion, was insufficient to establish that the notice was sent to the defendants in the manner required by RPAPL 1304 ... . While Ang attested that 'a ninety (90) day pre-foreclosure notice' was sent to the defendants 'by registered or certified and first class mail,' and attached a copy of the notice along with a proof of filing statement from the New York State Banking Department, 'the plaintiff failed to attach, as exhibits to the motion, any documents to prove that the mailing actually happened' ... . The plaintiff did not submit an affidavit of service, or proof of mailing by the post office evincing that it served the defendants pursuant to RPAPL 1304 by registered or certified mail and also by first-class mail to their last known address ... . Moreover, while Ang attested that she had personal knowledge of the records maintained in PHH's electronic record keeping system, the plaintiff failed to submit 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' ...". ***KeyBank N.A. v. Barrett*, 2019 N.Y. Slip Op. 08835, Second Dept 12-11-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

DEFENDANT DOCTOR WAS PROPERLY ALLOWED TO TESTIFY ABOUT HIS USUAL PRACTICE OR HABIT IN PERFORMING KNEE REPLACEMENT SURGERY.

The Second Department, affirming the defense verdict in this medical malpractice action, determined that defendant doctor (Baez) was properly allowed to testify about his usual practice or "habit" in performing a knee replacement: "Baez's habit testimony as to how he performs knee replacement surgeries, including that the methodology for measuring and dissecting 10 millimeters of the patient's patella did not vary from patient to patient, that the manner in which he performed knee replacement surgeries was done in a deliberate, identical, and repetitive manner on every patient, and that he was in complete control of the circumstances concerning the measuring and dissection of the patient's patella, was properly admitted by the Supreme Court ... . The evidence supported a finding that Baez's surgical techniques a deliberate and repetitive practice by a person in complete control of the circumstances ...". ***Heubish v. Baez*, 2019 N.Y. Slip Op. 08826, Second Dept 12-11-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

MALPRACTICE ACTION AGAINST A DOCTOR PROPERLY SEVERED FROM A NEGLIGENT HIRING AND RETENTION ACTION AGAINST THE DOCTOR'S EMPLOYER.

The Second Department determined the action against a doctor (Wishner) for medical malpractice was properly severed from an action against the doctor's employer (HMG) for negligent training, supervision, hiring and retention. Evidence the doctor had negligently treated another patient would not be admissible in the malpractice action but would be admissible in the action against the employer: " 'In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue' (CPLR 603). Here, the Supreme Court providently exercised its discretion in granting that branch of Wishner's motion which was to sever the causes of action asserted against HMG alleging negligent training, supervision, hiring, and retention from the causes of action premised on medical malpractice. In general, 'it is improper to prove that a person did an act on a particular occasion by showing that he or she did a similar act on a different, unrelated occasion' ... . Thus, generally, evidence of prior unrelated bad acts of negligent treatment of other patients, even if relevant, constitutes impermissible propensity evidence that lacks probative value and 'has the potential to induce the jury to decide the case based on evidence of [a] defendant's character' ...". ***Mullen v. Wishner*, 2019 N.Y. Slip Op. 08850, Second Dept 12-11-19**

NEGLIGENT MISREPRESENTATION, FRAUD, CONSUMER LAW.

NEGLIGENT CONCEALMENT CAUSE OF ACTION AGAINST HOSPITAL ALLEGING THE FAILURE TO DISCLOSE BILLING PRACTICES SHOULD HAVE BEEN DISMISSED; GENERAL BUSINESS LAW 349 CAUSE OF ACTION PROPERLY SURVIVED.

The Second Department determined the complaint did not state a cause of action for negligent concealment/misrepresentation, but did state a cause of action for violation of General Business Law 349. The plaintiff alleged defendant hospital failed to to disclose material facts about the hospital's billing practices for emergency treatment: "As a threshold matter, while the parties appear to dispute whether the first cause of action should be characterized as one sounding in 'negligent concealment' or 'negligent misrepresentation,' this is a distinction without a difference. The gravamen of the plaintiff's allegations are that the hospital negligently failed to disclose material facts to him concerning the hospital's billing practices. This is a species of negligent misrepresentation based on the omission to disclose material facts ... . As a general proposition, 'a duty to speak with care exists when the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information' ... . Thus, 'liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified' ... . Contrary to the plaintiff's contention, the fact that the parties are in a contractual relationship, without more, is insufficient to support the imposition of a duty to speak with care ... . While it cannot be doubted that the relationship between a physician and a patient is one of confidence and trust regarding matters of medical treatment ... , we decline to hold that such relationship, and any duty to speak with care that may come with it, also extends to matters of billing having nothing to do with the rendition of medical treatment. ... [W]e agree with the Supreme Court's determination that the hospital was not entitled to summary judgment dismissing the General Business Law § 349 cause of action insofar as asserted against it. First, contrary to the hospital's contention, it was engaged in consumer-oriented activity ... . Second, it is possible to engage in deceptive trade practices through omissions as well as affirmative representations ... , particularly where, as here, it is alleged that 'the business alone possesses material information that is relevant to the consumer and fails to provide this information' ... . Third, contrary to the hospital's contention, there is a triable issue of fact as to whether the plaintiff suffered an injury under General Business Law § 349 ...". ***Krobath v. South Nassau Communities Hosp.*, 2019 N.Y. Slip Op. 08838, Second Dept 12-11-19**

PERSONAL INJURY.

THE NURSING HOME SUED BY DECEDENT'S DAUGHTER AS EXECUTOR OF HER MOTHER'S ESTATE BROUGHT A THIRD-PARTY ACTION AGAINST THE DAUGHTER ALLEGING HER MOTHER'S INJURIES DID NOT RESULT FROM A FALL AT THE NURSING HOME BUT RATHER FROM THE DAUGHTER'S NEGLIGENT FAILURE TO FOLLOW THE NURSING HOME'S INSTRUCTIONS FOR THE HOME CARE AND SUPERVISION OF HER MOTHER; UNDER THE FACTS OF THIS CASE THERE EXISTED NO DUTY OF CARE UNDER WHICH THE DAUGHTER COULD BE HELD LIABLE FOR CONTRIBUTION BY THE NURSING HOME.

The Second Department, in a comprehensive opinion by Justice Hinds-Radix, reversing Supreme Court, determined plaintiff (Santoro), the daughter of the decedent and the executor of her mother's estate, did not owe a duty of care to her infirm mother such that Santoro could be sued for contribution by the nursing home her mother's estate was suing. The decedent was released from the nursing home to reside with Santoro. Subsequently Santoro, as executor, sued the nursing home based upon her mother's fall at the facility. The nursing home then brought a third-party action against Santoro alleging that the decedent's injuries stemmed from a fall at Santoro's home resulting from Santoro's negligent care and supervision of

her mother. The opinion discusses contribution versus indemnification and all possible theories which might impose a duty upon Santoro, but ultimately held no extant duty was applicable to these facts: "There is no common-law duty of a child to care for a parent ... . While a statutory duty may be imposed in derogation of common law, the defendant here does not rely on any such statute. However, a duty may also be imposed by contract ... . 'The general rule is that, where the relationship between the parties is that of parent and child, the law presumes that where there is no proof of a contract under which the services were performed . . . they were rendered gratuitously' ... ." ... [A] party also may assume a duty to a third party based upon gratuitous conduct. ... [T]he question is whether [the] defendant's conduct placed [the] plaintiff in a more vulnerable position than [the] plaintiff would have been in had [the] defendant done nothing' ... . When determining whether a cause of action exists, the question is whether the alleged wrongdoer has 'launched a force or instrument of harm,' not whether the alleged wrongdoer 'stopped where inaction is at most a refusal to become an instrument of good' ... . In this case, the defendant alleged that Santoro failed to act in accordance with its instructions—which, in its view, would make her an instrument of good—not that she placed the decedent in a more vulnerable position than if she had done nothing. Further, a duty may arise .where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid' ... . However, the defendant cites no duty imposed in derogation of common law. Further, it is not alleged that Santoro secluded the decedent while she was in a helpless state, preventing others from rendering aid. ... The defendant would impose a new duty on those who live with infirm individuals 'to use reasonable care' and 'be liable for harm caused by the failure to use reasonable care by affirmative act or omission' ... . The imposition of such an obligation carries with it public policy considerations of possible negative consequences, since such a general obligation could discourage persons from residing with the infirm, discourage children and infirm parents from living together, and discourage the infirm from attempting to resume independent living ... . The circumstances alleged here 'provide no justification for creating' such a duty ...". ***Santoro v. Poughkeepsie Crossings, LLC*, 2019 N.Y. Slip Op. 08883, Second Dept 12-11-19**

PERSONAL INJURY, EVIDENCE.

ALTHOUGH DEFENDANT MAY HAVE STOPPED AT A STOP SIGN, HE NEVERTHELESS FAILED TO YIELD; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS INTERSECTION TRAFFIC ACCIDENT CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff was entitled to summary judgment in this intersection traffic accident case. The fact that defendant (Maicol) allegedly stopped at a stop sign before pulling out into plaintiff's path did not raise a question of fact: "... [T]he plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating that Maicol's negligence in failing to yield the right-of-way was a proximate cause of the accident (see Vehicle and Traffic Law §§ 1142[a]; 1172[a] ...). Moreover, the plaintiff's case was buttressed by Maicol's admission in the police report to the effect that he failed to see the plaintiff's vehicle prior to the collision ... . That Maicol stopped at the stop sign was not dispositive, as he nevertheless failed to yield ... . The assertions in the defendants' counsel's affirmation that the plaintiff may have been speeding or negligent in failing to take evasive action were speculative ... . In any event, to be entitled to summary judgment on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case ...". ***Ashby v. Estate of Encarnacion*, 2019 N.Y. Slip Op. 08815, Second Dept 12-11-19**

PERSONAL INJURY, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD ONLY RESPONSIBLE FOR STRUCTURAL REPAIRS; THE ONE-STEP RISER WHICH CAUSED PLAINTIFF'S SLIP AND FALL WAS NOT A STRUCTURAL ELEMENT.

The Second Department, reversing Supreme Court, determined the out-of-possession landlord (Steph-Leigh) was not responsible for the repair of a one-step riser inside a warehouse, which allegedly caused plaintiff's slip and fall: " 'An out-of-possession landlord is not liable for injuries that occur on its premises unless the landlord has retained control over the premises and has a duty imposed by statute or assumed by contract or a course of conduct' ... . Here, where the complaint sounds in common-law negligence and the pleadings do not allege the violation of a statute, Steph-Leigh demonstrated its prima facie entitlement to judgment as a matter of law by establishing that it was an out-of-possession landlord that was not bound by contract or course of conduct to repair the allegedly damaged step ... . Although the lease obligated Steph-Leigh to make necessary structural repairs to the interior of the premises, contrary to the plaintiff's contentions, the allegedly cracked and eroded single-step riser was not a structural element of the warehouse for which Steph-Leigh was contractually responsible ...". ***Michaele v. Steph-Leigh Assoc., LLC*, 2019 N.Y. Slip Op. 08844, Second Dept 12-11-19**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, EVIDENCE.

PLAINTIFFS (CUPID AND ROBINSON) DEMONSTRATED DEFENDANT DRIVER WAS NEGLIGENT AND HIS NEGLIGENCE CAUSED THE TRAFFIC ACCIDENT; DEFENDANTS' ALLEGATION THAT PLAINTIFF CUPID, NOT PLAINTIFF ROBINSON, WAS DRIVING THE CAR DID NOT CREATE A RELEVANT QUESTION OF FACT.

The Second Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this traffic accident case should have been granted. The evidence demonstrated defendant driver (Paul) went through a red light and

failed to see what he should have seen. The defendants' argument that the plaintiffs claimed that Cupid was driving when in fact the other plaintiff, Robinson, was driving was irrelevant: "The evidence submitted in support of Robinson's motion demonstrated, prima facie, that Paul entered the subject intersection against a red light, in violation of Vehicle and Traffic Law § 1111(d) ... . That evidence further showed that Paul failed to see the plaintiffs' vehicle before colliding with it in the middle of the intersection, thus demonstrating that Paul failed to see that which he should have seen through the proper use of his senses. Contrary to the defendants' contention in the Supreme Court, Robinson was not required to demonstrate her freedom from comparative fault in order to establish her prima facie entitlement to summary judgment on the issue of liability ... . Thus, Robinson made a prima facie showing of entitlement to judgment as a matter of law on the issue of the defendants' liability by demonstrating that Paul was negligent and that his negligence was a proximate cause of the subject accident and her resulting injuries ... . In opposition, the defendants failed to raise a triable issue of fact. On the facts presented here, whether Robinson or Cupid was driving their vehicle is not germane to the issue of the defendants' liability." ***Robinson v. City of New York*, 2019 N.Y. Slip Op. 08881, Second Dept 12-11-19**

THIRD DEPARTMENT

UNEMPLOYMENT INSURANCE.

CLAIMANT, WHO DISTRIBUTED NEWSPAPERS, WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimant, who distributed newspaper and other publications, was an employee of Gannett Satellite Information Network and was therefore entitled to unemployment insurance benefits: "Claimant was assigned delivery routes within a defined area, was required to deliver the newspapers by a certain time and was paid at a specified per-paper rate ... . Additionally, claimant was required to provide proof of a valid driver's license and insurance, was offered (and declined) additional accident coverage provided by a carrier utilized by Gannett and was precluded from placing any inserts or additional materials in the newspapers that he was delivering ... . Finally, one of the two agreements signed by claimant reflects that he elected to purchase a tablet from Gannett — with the purchase price paid via weekly deductions from the moneys owed to claimant for his delivery services." ***Matter of Clifford (Gannett Satellite Info. Network, Inc.--Commissioner of Labor)*, 2019 N.Y. Slip Op. 08898, Second Dept 12-12-19**

WORKERS' COMPENSATION.

REGULATION LIMITING BRIEFS TO EIGHT PAGES IS ARBITRARY AND CAPRICIOUS AND THE LONGER BRIEF WAS NOT AN ADEQUATE GROUND FOR REJECTING THE EMPLOYER'S APPLICATION AND APPEAL.

The Third Department determined the regulation limiting the length of briefs to eight pages was arbitrary and capricious. The employer's application had been rejected solely because the brief was longer than eight pages: "The difficulty here is that there is no defined standard as to what explanation the Board would consider adequate. Worse yet, the regulation, by its express terms, does not authorize the Board to dismiss an application for Board review where a brief longer than eight pages is submitted without an adequate explanation. In such an instance, the regulation simply specifies that the brief 'will not be considered' (12 NYCRR 300.13 [b] [1] [i]). Although the regulation also provides that an application may be denied 'when the applicant . . . does not comply with prescribed formatting. . . requirements' (12 NYCRR 300.13 [b] [4] [i]), the filing of a brief is discretionary, not mandatory. As such, we find that the Board acted arbitrarily in dismissing the employer's application for Board review. We further conclude that it would not be reasonable in the first instance for the Board to reject an oversized brief outright for to do so would undermine the role of counsel. We find this aspect of the regulation flawed for there is simply no safety valve that would allow an applicant to seek permission to file a lengthier brief without jeopardizing the ability to submit a legal analysis supportive of the application for Board review ... . As such, we find that the regulation is unreasonable with respect to the oversized brief exception and must be rejected as arbitrary and capricious. The matter must be remitted to the Board for further proceedings." ***Matter of Daniels v. City of Rochester*, 2019 N.Y. Slip Op. 08902, Second Dept 12-12-19**

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