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FIRST DEPARTMENT

EMPLOYMENT LAW, HUMAN RIGHTS LAW.

PLAINTIFF'S HOSTILE WORK ENVIRONMENT CAUSE OF ACTION SHOULD NOT HAVE BEEN DISMISSED.

The First Department determined that plaintiff's hostile work environment cause of action should not have been dismissed. Plaintiff alleged employment discrimination pursuant to the New York State and New York City Human Rights Law (HRL): "Plaintiff submitted evidence that his supervisors repeatedly made racially derogatory comments, including calling him 'Bubbles,' which he testified was a reference to Michael Jackson's pet chimpanzee, and referring to him as 'boy' using a Southern accent. Plaintiff also asserts that he was told that he was 'too old for the job,' that he worked like he 'just came back from surgery,' and that he had 'too many worker's comp cases and . . . should resign.' According to plaintiff, the supervisors' comments were continuous in nature and occurred on a regular basis. This evidence, viewed in the light most favorable to plaintiff, raises issues of fact as to whether plaintiff was subjected to a hostile work environment based on race, age and disability under both the State and City HRLs ...". ***Sims v. Trustees of Columbia Univ. in the City of N.Y.*, 2019 N.Y. Slip Op. 00672, First Dept 1-31-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF FELL ABOUT NINE FEET FROM ONE FLOOR TO ANOTHER, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing (modifying) Supreme Court, determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action. Plaintiff fell from one floor to another, a distance of about nine feet: "There is no dispute that plaintiff fell from the seventh floor to the sixth floor of the building on which he was working, a distance of approximately nine feet. Further, it is undisputed that there were no safety harnesses or other safety devices for plaintiff to use. 'Thus, the fact that the parties offered different versions of plaintiff's accident makes no difference with respect to defendants' liability under Labor Law § 240(1). Under either version, defendants . . . failed to secure an area at a construction site from which a fall could occur, thereby exposing the injured worker to an elevation-related risk' ... . However, the motion court properly denied the cross motion of defendants/third-party plaintiffs on the Labor Law §§ 241(6), 200, and common-law negligence claims, since there are triable issues of fact as to exactly how, where and why the underlying incident occurred ...". ***Cashbamba v. 1056 Bedford LLC*, 2019 N.Y. Slip Op. 00690, Second Dept 1-31-19**

PERSONAL INJURY, TOXIC TORTS, MUNICIPAL LAW.

STATUTORY PRESUMPTION THAT THE PAINT CONTAINED LEAD DID NOT APPLY BECAUSE THERE WAS NO EVIDENCE THE INTERIOR OF THE BUILDING WAS PAINTED PRIOR TO JANUARY 1, 1960; HOWEVER QUESTIONS OF FACT WERE RAISED ABOUT THE PRESENCE OF LEAD PAINT AND THE CONNECTION BETWEEN THE PAINT AND INFANT PLAINTIFF'S LEAD POISONING, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, in a full-fledged opinion by Justice Moulton, reversing Supreme Court, determined that questions of fact were raised about the landlord's (New York City Housing Authority's, NYCHA's) responsibility for the lead poisoning of infant plaintiff (A.L.). Successive blood tests revealed increasing lead levels as the child aged, and a decrease after the apartment was repainted. The first issue the court dealt with was whether Local Law 1, which creates a presumption that the paint in the apartment contains more than .5 percent lead for buildings "erected" prior to January 1, 1960, applied. The certificate of occupancy for the building was issued in March, 1961, but there was evidence the building was under construction in 1959. "Erected" was (apparently) interpreted to mean when the apartment was painted, so the statutory presumption did not apply: "Here, A.L.'s elevated blood lead level suggests ... a hazardous condition may have existed in the apartment during the relevant period. While there are other sources of lead poisoning, housing is a prime source ... The circumstantial evidence of a hazardous lead-based paint condition is also supported by an affirmation by Dr. Douglas B. Savino and an affidavit by lead paint expert William Savarese. Dr. Savino concluded that the apartment contained a hazardous level of lead-based paint, given the 'chronology of the infant plaintiff's blood lead levels,' which was 'environmentally and temporally related to the infant plaintiff's residence.' He noted that A.L.'s blood levels increased over time until he was

diagnosed with 16 ug/dl on March 19, 2003, coinciding with the repainting of the apartment on March 5-6, 2003. Dr. Savino attributed the lead spike in A.L.'s blood to A.L. ingesting an excessive amount of lead dust. Dr. Savino further pointed out that A.L.'s blood lead levels declined gradually after the 2003 apartment repair and the 2004 removal of the chipped and peeling interior doors. William Savarese echoed Dr. Savino's statements and conclusions." ***A.L. v. New York City Hous. Auth.*, 2019 N.Y. Slip Op. 00702, First Dept 1-31-19**

SECOND DEPARTMENT

ATTORNEYS, CONTRACT LAW, LEGAL MALPRACTICE, NEGLIGENCE.

THE LETTER OF ENGAGEMENT SPELLED OUT WHAT THE ATTORNEYS AGREED TO DO, DEFENDANT-ATTORNEYS' MOTION TO DISMISS THE LEGAL MALPRACTICE COMPLAINT ON THE BASIS OF DOCUMENTARY EVIDENCE WAS PROPERLY GRANTED.

The Second Department found that the retainer agreement determined the scope of what the attorneys agreed to do and the motion to dismiss the legal malpractice complaint was properly granted. The plaintiff had retained the defendants after he was expelled from the New York College of Osteopathic Medicine: "The letter of engagement provided, in relevant part, that: 'Our services will include all activities necessary and appropriate in our judgment to investigate and consider options that may be available to urge administrative reconsideration of your dismissal from the New York College of Osteopathic Medicine (the College'). This engagement does not, however, encompass any form of litigation or, to the extent ethically prohibited in this circumstance, the threat of litigation, to resolve this matter. This engagement will end upon your re-admittance to the College or upon a determination by the attorneys working on this matter that no non-litigation mechanisms are available to assist you. The scope of the engagement may not be expanded orally or by conduct; it may only be expanded by a writing signed by our Director of Public Service.' * * * An attorney may not be held liable for failing to act outside the scope of a retainer (see AmBase Corp. v. Davis Polk & Wardwell, 8 NY3d 428). Therefore, since the defendant's alleged failure to negotiate with the school, its alleged failure to commence litigation against the school, and its alleged failure to properly advise the plaintiff on the efficacy of a defamation action against nonschool parties fell outside the scope of the parties' letter of engagement, dismissal of the cause of action alleging legal malpractice was warranted, pursuant to CPLR 3211(a)(1), on documentary evidence grounds." ***Attallah v. Milbank, Tweed, Hadley & McCloy, LLP*, 2019 N.Y. Slip Op. 00583, Second Dept 1-30-19**

CIVIL PROCEDURE.

PLAINTIFF'S PRO SE LEGAL MALPRACTICE COMPLAINT WAS PROPERLY DISMISSED AND LIMITS ON PLAINTIFF'S ABILITY TO ENGAGE IN FUTURE VEXATIOUS LITIGATION PROPERLY IMPOSED.

The Second Department determined Supreme Court properly dismissed plaintiff's pro se legal malpractice action and properly limited plaintiff's ability to file additional motions: " 'Public policy generally mandates free access to the courts' ... . Although a pro se litigant is afforded ' some latitude,' he or she is not entitled to rights greater than any other litigant and may not disregard court rules or deprive an adversary of rights normally enjoyed by an opposing party ... . Accordingly, 'when a litigant is abusing the judicial process by harassing individuals solely out of ill will or spite, equity may enjoin such vexatious litigation' ... . Here, the plaintiff's pattern of vexatious and duplicative motion practice warranted the modest limitation of directing the plaintiff to bring future motions via order to show cause …" . ***Strujan v. Kaufman & Kahn, LLP*, 2019 N.Y. Slip Op. 00630, Second Dept 1-30-19**

CRIMINAL LAW, APPEALS, ATTORNEYS.

DEFENSE COUNSEL GAVE DEFENDANT THE WRONG INFORMATION ABOUT THE MAXIMUM SENTENCE SHOULD HE GO TO TRIAL, DEFENDANT'S GUILTY PLEA WAS THEREFORE NOT VOLUNTARY, EXCEPTION TO THE PRESERVATION REQUIREMENT FOR APPEAL APPLIED.

The Second Department, vacating defendant's guilty plea, determined: (1) the plea was not voluntary because defendant was given the wrong information about the possible maximum sentence if he went to trial; and (2) the error is an exception to the preservation requirement for appeal because defendant could not have known of the error at the time of the plea: "The Court of Appeals ... has carved out an exception to the preservation doctrine 'because of the actual or practical unavailability of either a motion to withdraw the plea' or a motion to vacate the judgment of conviction,' in certain instances, reasoning that ' a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge' ... . Moreover, the defendant's contention that his plea of guilty was not knowing, voluntary, and intelligent survives his valid appeal waiver ... . Here, the defendant's plea was not made knowingly, voluntarily, and intelligently. The record demonstrates that the defendant was not presented with legitimate alternatives about the maximum sentence he faced in the event he chose to reject the People's plea offer and was convicted after trial. ... On this record, given the difference between the incorrect maximum aggregate sentence of 3 to 5 years that defense counsel communicated to the defendant, the

actual maximum aggregate sentence of 2 to 4 years, and the bargained-for sentence of 1½ to 3 years, the threat of a higher sentence rendered the defendant's plea involuntary ...". ***People v. Keller*, 2019 N.Y. Slip Op. 00620, Second Dept 1-30-19**

CRIMINAL LAW, EVIDENCE.

EVIDENCE THAT DEFENDANT USED HIS FAMILIAL RELATIONSHIP WITH THE WITNESS (DEFENDANT'S COUSIN) TO INDUCE THE WITNESS'S REFUSAL TO TESTIFY WAS SUFFICIENT TO WARRANT INTRODUCTION OF THE WITNESS'S PRIOR STATEMENTS AT TRIAL.

The Second Department determined the evidence presented at the Sirois hearing was sufficient to warrant the conclusion that a witness, defendant's cousin, refused to testify because of the actions of the defendant. Therefore statements made by the defendant's cousin were properly admitted at trial: "The People presented phone records evidencing the dates and the content of certain calls made by the cousin to other individuals while the cousin was incarcerated at Riker's Island, and calls by the defendant to other individuals believed to be family members. The People contended these calls demonstrated that the defendant and other family members secured the cousin's agreement not to testify against the defendant. The People also represented to the Supreme Court that they planned to offer the testimony of an inmate who knew the defendant and his family, who claimed, among other things, that the defendant had told him that the defendant had 'put the wolves out' on the cousin to keep him from testifying, and that the defendant was confident that he would beat the charges as a result. According to the People, the inmate subsequently refused to testify at the hearing out of fear. An Assistant District Attorney testified at the hearing as to the substance of her interview of the inmate, which had taken place the day before. … [T]he People 'demonstrate[d] by clear and convincing evidence that the defendant, by violence, threats or chicanery, caused [the] witness's unavailability' ... . Misconduct is not limited to threats or intimidation; it can also include situations where, as here, the People established by clear and convincing evidence that the defendant used his close personal relationship with his cousin and/or threats to pressure him not to testify ...". ***People v. Walton*, 2019 N.Y. Slip Op. 00623, Second Dept 1-30-19**

FORECLOSURE, APPEALS, CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF, AFTER FAILING TO ARGUE THAT DEFENDANTS WAIVED THE LACK OF STANDING DEFENSE BEFORE SUPREME COURT, COULD NOT RAISE DEFENDANTS' WAIVER OF THE DEFENSE FOR THE FIRST TIME ON APPEAL, PLAINTIFF DID NOT DEMONSTRATE STANDING TO COMMENCE THE FORECLOSURE ACTION.

The Second Department determined plaintiff did not demonstrate standing to bring the foreclosure action, and, further, could not raise defendant's waiver of the lack-of-standing defense for the first time on appeal: "The defense of lack of standing in an action to foreclose a mortgage is waived if the defendant does not raise it in a pre-answer motion to dismiss or as an affirmative defense (see CPLR 3018[b]...). Here, in opposition to the plaintiff's motion for summary judgment and in support of their cross motion to dismiss, the defendants argued that the plaintiff lacked standing to commence this action. The plaintiff, in its 'reply . . . in further support of plaintiff's motion for summary judgment, and in opposition to defendant's [sic] cross-motion to dismiss,' entirely disregarded the defendants' waiver of the standing defense. Instead, the plaintiff sought to establish that it had standing to commence the action. Now, having litigated the standing defense on the merits in the Supreme Court—both on the original motion and in opposition to reargument—the plaintiff argues on appeal that the issue of standing was waived. Having neglected to raise that dispositive issue in the Supreme Court, the plaintiff may not raise it for the first time on this appeal ... . The plaintiff also failed, on the merits, to establish prima facie that it had standing to commence the action. The loan servicer's affidavit, which asserted that the named plaintiff 'was in possession of the Note at the time of commencement of this action,' provided no specifics as to the date of delivery or the date of commencement. The plaintiff's conclusory assertion as to possession on the date of commencement is insufficient to establish standing ...". ***BAC Home Loans Servicing, LP v. Alvarado*, 2019 N.Y. Slip Op. 00584, Second Dept 1-30-19**

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

PLAINTIFF BANK DID NOT DEMONSTRATE NOTICE BY PROOF WHICH MET THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, THEREFORE THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank did not demonstrate compliance with Real Property Actions and Proceedings Law (RPAPL) 1304 and, therefore, the bank's motion for summary judgment should not have been granted: "[T]he plaintiff failed to submit an affidavit of service or proof of mailing by the post office evincing that it properly served the defendant pursuant to RPAPL 1304. Contrary to the plaintiff's contention, its submission of an affidavit of the employee of its servicer was not sufficient to establish that the notices were sent to the defendant in the manner required by RPAPL 1304. While mailing may be proved by documents meeting the requirements of the business records exception to the hearsay rule under CPLR 4518 ... , here, the affiant did not aver that he was familiar with the servicer's mailing practices and procedures and therefore did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... . The affiant's unsubstantiated and conclusory statements were insufficient to establish that the RPAPL 1304 notice was mailed to the defendant by first-class and certified mail ...". ***Wells Fargo Bank, N.A. v. Moran*, 2019 N.Y. Slip Op. 00637, Second Dept 1-30-19**

Similar issue and result in ***Fifth Third Mtge. Co. v. Seminario*, 2019 N.Y. Slip Op. 00589, Second Dept 1-30-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

ALLEGATION THE LADDER PLAINTIFF WAS USING SHIFTED FOR NO APPARENT REASON ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause of action based upon the allegation the ladder he was using shifted for no apparent reason: "The plaintiff made a prima facie showing of entitlement to judgment as a matter of law through his deposition testimony, demonstrating that the ladder on which he was working shifted for no apparent reason, causing him to fall ... . In opposition, the defendants failed to raise a triable issue of fact ...". ***Vicuna v. Vista Woods, LLC*, 2019 N.Y. Slip Op. 00635, Second Dept 1-30-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS INJURED UNLOADING A TRUCK, HIS MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted. Plaintiff was injured when a truck was being unloaded: "A hydraulic lift was being used to lower the flooring materials in pallets, or 'skids,' weighing approximately 2,500 to 3,000 pounds, from the bed of the truck to the ground, an elevation of approximately four feet. One of the skids, which had been loaded onto the lift, fell off the lift and struck the plaintiff. ... ' Labor Law § 240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person' ... . The plaintiff's evidence established, prima facie, that the ... defendants violated Labor Law § 240(1) by failing to provide an appropriate safety device to secure the subject materials as they were being lowered, and that this failure was a proximate cause of the plaintiff's injury ...". ***Ramos-Perez v. Evelyn USA, LLC*, 2019 N.Y. Slip Op. 00629, Second Dept 1-30-19**

PERSONAL INJURY, EMPLOYMENT LAW, MUNICIPAL LAW, CIVIL PROCEDURE.

CITY'S POTENTIAL LIABILITY FOR THE ACTIONS OF A CITY BUS DRIVER WAS BASED ON RESPONDEAT SUPERIOR, THEREFORE A NEGLIGENT HIRING AND RETENTION ACTION WAS NOT VIABLE AND THE DRIVER'S PERSONNEL FILE WAS NOT DISCOVERABLE.

The Second Department, reversing Supreme Court, determined the city's motion to vacate the order compelling disclosure of the city bus driver's personnel file should have been granted. Plaintiff alleged she was injured when she fell on a city bus. The city acknowledged that the driver was acting within the scope of his employment when the accident occurred. Therefore the city's potential liability was based upon respondeat superior, and a negligent hiring and retention action was not viable. Therefore the personnel records were not discoverable: " 'Generally, where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior, and a plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention'... . In light of the defendants' formal concession that the bus driver was acting within the scope of his employment when the accident occurred, the personnel records of the bus driver are not discoverable... . Furthermore, the plaintiff failed to show any other basis to justify granting her request for the personnel records, as 'any prior acts of carelessness or incompetence of the defendant's employee would not be admissible at trial' ... . Therefore, the additional discovery sought by the plaintiff is not relevant or reasonably calculated to lead to evidence relevant to the issue of the driver's alleged negligence ...". ***Trotman v. New York City Tr. Auth.*, 2019 N.Y. Slip Op. 00631, Second Dept 1-30-19**

PERSONAL INJURY, MEDICAL MALPRACTICE, EVIDENCE.

FOUNDATION FOR OPINION EVIDENCE OUTSIDE PLAINTIFF'S EXPERT'S FIELD WAS NOT LAID, DEFENDANT SURGEON'S MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this medical malpractice action should have been granted. Plaintiff's decedent died from a pulmonary embolism five days after knee replacement surgery. Plaintiff contended decedent was not given the proper dosage of a medication designed to prevent deep vein thrombosis (DVT). The Second Department noted that the plaintiff's expert was a forensic pathologist and a proper foundation for expert opinion outside the expert's field was not laid: " 'While it is true that a medical expert need not be a specialist in a particular field in order to testify regarding accepted practices in that field, the witness nonetheless should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable'... . 'Thus, where a physician provides an opinion beyond his or her area of specialization, a foundation must be laid tending to support the reliability of the opinion rendered'... . Here, the plaintiff's expert, who specialized in forensic pathology, did not indicate that he had any specific training or expertise in orthopaedic surgery, or

prophylactic anticoagulation treatment to prevent DVT, and failed to 'set forth how he was, or became, familiar with the applicable standards of care in this specialized area of practice' ...". ***Noble v. Kingsbrook* Jewish Med. Ctr., 2019 N.Y. Slip Op. 00608, Second Dept 1-30-19**

PRODUCTS LIABILITY, PERSONAL INJURY.

PLAINTIFF'S PROOF THAT DEFENDANT SUPPLIED THE ALLEGEDLY DEFECTIVE WIRE MESH TO THE RETAILER IN THIS PRODUCTS LIABILITY ACTION WAS SPECULATIVE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant Prime Source's motion for summary judgment in this products liability case should have been granted. Plaintiff alleged he was injured when a roll of wire mesh recoiled and struck him. Prime Source presented it was not in the manufacturing or distribution chain of the wire mesh and plaintiff's proof too speculative to raise a question of fact: "In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product regardless of privity, foreseeability, or the exercise of due care ... . Liability, however, may not be imposed upon a party that is outside the manufacturing, selling, or distribution chain ... . The identity of the manufacturer or supplier of a defective product may be established by circumstantial evidence ... . The circumstantial evidence of the identity of the manufacturer or supplier of a defective product causing personal injury must establish, however, 'that it is reasonably probable, not merely possible or evenly balanced, that the defendant was the source of the offending product' ... . 'Speculative or conjectural evidence of the manufacturer's identity is not enough' ... . Prime Source established its prima facie entitlement to judgment as a matter of law by demonstrating that it was outside the manufacturing, selling, or distribution chain of the mesh ... . In opposition to the motion by Prime Source, the plaintiff's attorney submitted an affirmation in which he stated that on the return date of the order to show cause which commenced the proceeding to obtain pre-action disclosure, a representative from Sand Man [the retailer] 'produced a sheet of paper on which she had written the names of two suppliers she claims had supplied wire mesh to Sand Man' prior to the date of the subject accident. This affirmation was insufficient to raise a triable issue of fact, because it did not establish 'that it is reasonably probable, not merely possible or evenly balanced' ... that Prime Source, rather than Steel Services, was the source of the mesh ... . The plaintiff failed to come forward with any evidence 'that might permit a reasoned inference' that Prime Source, rather than Steel Services, supplied the mesh to Sand Man ...". ***Tyminskyy v. Sand Man Bldg. Materials, Inc.*, 2019 N.Y. Slip Op. 00632, Second Dept 1-30-19**

ZONING, LAND USE.

CEMETERY'S APPLICATION FOR A USE VARIANCE TO CONSTRUCT A CREMATORY SHOULD NOT HAVE BEEN DENIED BY THE ZONING BOARD, CRITERIA EXPLAINED.

The Second Department determined Supreme Court had properly annulled the zoning board's denial a cemetery's application for a use variance to allow the construction of a crematory: " 'To qualify for a use variance premised upon unnecessary hardship there must be a showing that (1) the property cannot yield a reasonable return if used only for permitted purposes as currently zoned, (2) the hardship resulted from unique characteristics of the property, (3) the proposed use would not alter the character of the neighborhood, and (4) the alleged hardship was not self-created' ... . With regard to the first element, '[i]t is well settled that a landowner who seeks a use variance must demonstrate factually, by dollars and cents proof, an inability to realize a reasonable return under existing permissible uses' ... . [T]here was no rational basis for the Board's finding that the Cemetery was not experiencing a financial hardship. As to the third element, the Board improperly determined that the 1,800-square-foot crematory would alter the essential character of the neighborhood. The unrebutted evidence demonstrated that the crematory would be shielded from view, would be odorless and not emit visible smoke, and had passed all necessary emissions and air quality testing." ***Matter of White Plains Rural Cemetery Assn. v. City of White Plains*, 2019 N.Y. Slip Op. 00606, Second Dept 1=30-19**

ZONING, LAND USE, ENVIRONMENTAL LAW.

REQUEST WAS PROPERLY DEEMED AN APPLICATION FOR AN AREA VARIANCE, NOT A USE VARIANCE, AND WAS PROPERLY GRANTED, CRITERIA EXPLAINED.

The Second Department determined: (1) RAM's request for permission to build a hotel was a request for an area variance, not a use variance; (2) the statutory factors for granting a use variance were considered by the zoning board; (3) the board complied with the State Environmental Quality Review Act (SEQRA); and (4) the area variance was properly granted: "Pursuant to Town Law § 267(1)(b), an area variance is defined as the 'authorization by the zoning board of appeals for the use of land in a manner which is not allowed by the dimensional or physical requirements of the applicable zoning regulations' ... . One aspect of RAM's request for a variance related to a provision of the Town's Zoning Law which required that a hotel have its 'principal frontage' on a state or county highway ... . We agree with the ZBA and the Supreme Court that the 'principal frontage' requirement is a 'physical requirement,' rather than a use restriction, and that RAM's application is thus properly regarded as one for an area variance. We note that the other aspect of RAM's application for an area variance relat-

ed to the height of the roof of the proposed hotel, and there is no dispute that that aspect of RAM's application was properly categorized as a request for an area variance. ... In determining whether to grant an application for an area variance, a zoning board must engage in a balancing test weighing the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood or community ... . Town Law § 267-b(3)(b) provides that in making its determination, the zoning board shall take into consideration the benefit to the applicant if the variance is granted, as weighed against the detriment to the health, safety, and welfare of the neighborhood or community by such grant. In making such determination the board shall also consider: (1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance. In applying the balancing test set forth in Town Law § 267-b(3)(b), a zoning board need not justify its determination with supporting evidence with respect to each of the five statutory factors as long as its ultimate determination balancing the relevant considerations is rational ...". ***Matter of Route 17K Real Estate, LLC v. Zoning Bd. of Appeals of the Town of Newburgh*, 2019 N.Y. Slip Op. 00605, Second Dept 1-30-19**

THIRD DEPARTMENT

CRIMINAL LAW, ADMINISTRATIVE LAW, ATTORNEYS.

REGULATIONS PROMULGATED BY THE OFFICE OF VICTIM SERVICES WHICH LIMITED THE AVAILABILITY OF ATTORNEY'S FEES IN THE EARLY STAGES OF A CLAIM CONFLICT WITH THE CONTROLLING STATUTE.

The Third Department, in a full-fledged opinion by Justice Garry, determined that certain changes made by the Office of Victim Services (OVS) to regulations affecting the availability of attorney's fees in early stages of a claim conflicted with the controlling statute: "Executive Law § 626 (1) requires OVS to reimburse crime victims for out-of-pocket loss, which 'shall . . . include . . . the cost of reasonable attorneys' fees for representation before [OVS] and/or before the [A]ppellate [D]ivision upon judicial review' … . Our primary purpose in interpreting this provision 'is to discern the will of the Legislature and, as the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof' ... . Applying these principles, we find no authorization in the statute's plain language for OVS to conclude that counsel fees are never 'reasonable' during the early stages of a claim and, thus, to categorically exclude awards of counsel fees for such representation in every instance. Neither this statutory language nor the similar language of Executive Law § 623 (3) — that authorizes OVS to promulgate regulations for the approval of counsel fees 'for representation before [OVS] and/or before the [A]ppellate [D]ivision' — distinguishes among the stages of a victim's representation before OVS, nor does the statutory text suggest that OVS may do so." ***Matter of Juarez v. New York State Off. of Victim Servs.*, 2019 N.Y. Slip Op. 00653, Third Dept 1-31-19**

CRIMINAL LAW, ATTORNEYS.

DEFENSE COUNSEL'S TAKING A POSITION ADVERSE TO DEFENDANT'S PRO SE MOTION TO WITHDRAW HIS GUILTY PLEA VIOLATED DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Third Department determined defense counsel violated defendant's right to effective assistance of counsel by taking a position adverse to defendant's pro se motion to vacate his guilty plea: "Defense counsel's repeated assertions that there was no basis for defendant's motion and that his plea had been entered knowingly and voluntarily created a conflict of interest between him and defendant, thereby giving rise to County Court's obligation to assign new counsel before deciding the motion ... . Accordingly, we vacate the sentence and remit the matter for assignment of new counsel and reconsideration of defendant's motion." ***People v. Faulkner*, 2019 N.Y. Slip Op. 00645, Third Dept 1-31-19**

UNEMPLOYMENT INSURANCE.

THE RELATIONSHIP BETWEEN THE ONLINE PLATFORM WHICH CONNECTED PERSONS WITH CERTAIN SKILLS TO THOSE SEEKING TO HIRE FOR ODD JOBS WAS NOT AN EMPLOYER-EMPLOYEE RELATIONSHIP, CLAIMANT WAS NOT ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department, reversing the Unemployment Insurance Board, determined claimant was not entitled to unemployment benefits after leaving TaskRabbit, an online platform which connected people with certain skills to clients looking people to hire for odd jobs (taskers). The relationship between TaskRabbit and the taskers was not an employer-employee relationship: "By virtue of the nature of the platform, TaskRabbit exercised absolutely no control over the manner in which the taskers completed the jobs that they obtained from clients. Indeed, the taskers bidded on the jobs posted on the platform and were awarded jobs either by a client selecting the most competitive bid or by being the first tasker to submit a bid on a particular job. All communications regarding the job were between the client and the tasker. Although TaskRabbit required

taskers to submit to an identification verification process and criminal background check, complete an online questionnaire and take a quiz on use of the platform, it did not review their qualifications, provide them with training or evaluate their work performance. TaskRabbit provided customer service support to both clients and taskers, but it was directed at helping them use the platform. Similarly, the guidelines that it provided to taskers were designed to assist them in effectively using the platform, and no penalties were imposed for noncompliance. Both taskers and clients were rated based upon the feedback that they received without any input from TaskRabbit. TaskRabbit, however, did require taskers and clients to comply with its terms of use and retained the authority to curtail a tasker's access to the platform for safety and/or security reasons. Nevertheless, it used a third-party payment provider to facilitate payments between clients and taskers, did not provide taskers with any equipment, supplies or uniforms, and did not reimburse them for expenses. Furthermore, taskers were free to cancel jobs and to provide their services on other platforms." ***Matter of Walsh (Taskrabbit Inc.—Commissioner of Labor)*, 2019 N.Y. Slip Op. 00649, Third Dept 1-31-19**

FOURTH DEPARTMENT

ANIMAL LAW, PERSONAL INJURY.

PLAINTIFF TRAMPLED BY TWO HORSES, STRICT LIABILITY ACTION SHOULD NOT HAVE BEEN DISMISSED.

The Fourth Department, reversing (modifying) Supreme Court, determined plaintiff's strict liability cause of action in this injury-caused-by-a-horse action should not have been dismissed: "Plaintiff commenced this action seeking damages for injuries that he sustained when he was trampled by defendant's two horses, who broke free while plaintiff was assisting defendant in hitching the horses to a cart. ... 'Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation' ... . In support of his motion, defendant submitted plaintiff's deposition transcript, wherein plaintiff testified that, prior to plaintiff's injury, defendant stated that 'once the horses are kept inside . . . they go crazy in the winter.' Thus, defendant's own submissions raise triable issues of fact whether his horses 'had vicious propensities and, if so, whether [he] knew or should have known of those propensities' ...". ***Bavifard v. Capretto*, 2019 N.Y. Slip Op. 00756, Fourth Dept 2-1-19**

CIVIL PROCEDURE, EVIDENCE, LABOR LAW-CONSTRUCTION LAW.

EXPERT TESTIMONY PROPERLY PRECLUDED BECAUSE OF LATE NOTICE, NEW TRIAL REQUIRED BECAUSE JURY WAS NOT INSTRUCTED ON MITIGATION OF DAMAGES.

The Fourth Department determined defendants in this Labor Law § 240(1) action were properly precluded from offering expert testimony because of late notice. The Fourth Department further determined that the jury should have been instructed on mitigation of damages, requiring a new trial: "... [T]he court determined that there was a willful failure to disclose because, prior to jury selection, defendants' attorneys knew that they intended to present testimony from the psychiatric expert, but they did not disclose the expert until the day after jury selection began, which violated the court's directive that defendants disclose an expert as soon as they knew of said expert. Although the record establishes that plaintiff was aware of the possibility that defendants would call an expert psychiatrist, he was prejudiced by the tardiness of the disclosure both because it impaired his ability to discuss the relevant issues during jury selection and because it hamstrung his opportunity to retain an expert psychiatrist of his own. Thus, based on the evidence in the record supporting the court's determination that defendants had engaged in purposeful gamesmanship by withholding the information, and the resulting prejudice to plaintiff, we conclude that the court did not abuse its discretion in precluding the proposed expert testimony ... . We agree with defendants that the court erred in failing to instruct the jury on mitigation of damages insofar as it applied to past and future lost wages... . Here, plaintiff's physicians unanimously agreed that he was capable of working in a light duty or sedentary setting and, although he did obtain work shortly after being advised by a doctor to seek job training, there is a question, under the circumstances, of whether the part-time job that he took was a reasonable mitigation of his damages." ***Flowers v. Harborcenter Dev., LLC*, 2019 N.Y. Slip Op. 00749, Fourth Dept 2-1-19**

CONTRACT LAW, CORPORATION LAW, ENVIRONMENTAL LAW, REAL ESTATE.

THE TERMS OF THE PURCHASE CONTRACT INDICATED BUYER, WHO PURCHASED THE PROPERTY KNOWING IT WAS CONTAMINATED BY OIL, WOULD INDEMNIFY SELLER FOR COSTS RELATED TO THE ENVIRONMENTAL CONDITIONS, QUESTION OF FACT WHETHER BUYER, WHO SIGNED THE CONTRACT 'ON BEHALF OF AN ENTITY TO BE FORMED,' WAS INDIVIDUALLY LIABLE.

The Fourth Department determined that the terms of the purchase contract for property contaminated by oil indicated the buyer would indemnify the seller for costs associated with the condition of the property. The Fourth Department further held there was a question of fact whether the buyer signed the contract in his individual capacity in that he signed "on behalf of an entity to be formed:" "The purchase contract provided that a 'Phase One Environmental report' had been completed on the property and that Marks, the 'Buyer' of the property, was in receipt of the environmental report and 'approve[d] of same.' The contract further provided that Atkin was the 'Seller,' the property 'was not in compliance with federal, state

and/or local laws/ordinances,' the Buyer agreed to purchase the property 'as is,' the 'Buyer accept[ed] the property as is, with no representations or warranties as to environmental conditions' of the property, and the Buyer 'release[d] and indemnifie[d] Seller with respect to any claims as to environmental conditions on or related to the property.' Thus, the terms of the contract establish that, prior to entering into the contract, both Atkin and Marks were generally aware of the property's historical environmental contamination by the Exxon defendants and their predecessor, and the language in the indemnification provision, considered in light of the contract as a whole and the circumstances of the sale of the property, clearly and unambiguously expresses the intent of the parties that the Buyer would indemnify the Seller with respect to any claims regarding environmental conditions related to the property ... . Although it is well settled that '[a]n individual who acts on behalf of a nonexistent corporation can be held personally liable' ... , the determination '[w]hether a person is personally obligated on a preincorporation transaction depends on the intention of the parties' ...". ***One Flint St., LLC v. Exxon Mobil Corp.*, 2019 N.Y. Slip Op. 00752, Fourth Dept 2-1-19**

CRIMINAL LAW, ATTORNEYS.

WHETHER TO MOVE FOR A MISTRIAL IS A DECISION FOR DEFENSE COUNSEL, NOT DEFENDANT, THE JUDGE'S ALLOWING DEFENDANT TO DECIDE VIOLATED THE SIXTH AMENDMENT RIGHT TO COUNSEL.

The Fourth Department, although finding the error harmless, determined that the trial judge should not have left the decision whether or not to move for a mistrial up to the defendant, as opposed to defense counsel. The basis for a potential mistrial was the medical examiner's testimony that the drowning death of the victim was a "homicide:" "Defendant ... contends in his pro se supplemental brief that he was denied his Sixth Amendment right to counsel when the court allowed him to decide, against the professional judgment of his counsel, not to request a mistrial as the remedy for the Medical Examiner's improper testimony. We agree. 'It is well established that a defendant, having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case' such as whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal' ... . Defense counsel has ultimate decision-making authority over matters of trial strategy, including the decision whether to request a mistrial ... . Here, defense counsel explained to the court that he recommended that defendant move for a mistrial, but that defendant instructed him not to do so. The court then addressed defendant directly and confirmed that defendant wished to proceed with trial. Thus, the court 'denied [defendant] the expert judgment of counsel to which the Sixth Amendment entitles him' ...". ***People v. Szatanek*, 2019 N.Y. Slip Op. 00794, Fourth Dept 2-1-19**

CRIMINAL LAW, EVIDENCE.

TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON ASSAULT THIRD AS A LESSER INCLUDED OFFENSE, TWO-JUSTICE DISSENT.

The Fourth Department, over a two-justice dissent, determined the trial judge properly refused to instruct the jury on the lesser included offense of assault third degree. The dissenters disagreed: "[T]he court did not err in refusing to charge the jury on the lesser included offense of assault in the third degree (Penal Law § 120.00 [2]). Based on the number and sizes of the scars to her face, there is no reasonable view of the evidence that would support a finding that the victim sustained only a physical injury as opposed to a serious physical injury ...". ***People v. Sipp*, 2019 N.Y. Slip Op. 00771, Fourth Dept 2-1-19**

DEFAMATION, PRIVILEGE, MUNICIPAL LAW.

STATEMENTS MADE BY THE COUNTY EXECUTIVE CONCERNING HER DECISION TO FIRE PLAINTIFF, THE EXECUTIVE DIRECTOR OF THE MONROE COMMUNITY HOSPITAL, WERE EITHER ABSOLUTELY OR QUALIFIEDLY PRIVILEGED.

The Fourth Department, reversing Supreme Court, determined statements made to the press by the county executive (Brooks) concerning her decision to terminate plaintiff (the executive director of the Monroe Community Hospital (MCH)) were either absolutely or qualifiedly privileged: "The absolute privilege defense affords complete immunity from liability for defamation to 'an official [who] is a principal executive of State or local government' . . . with respect to statements made during the discharge of those responsibilities about matters which come within the ambit of those duties' ... 'The first prong of that test . . . [requires an examination of] the personal position or status of the speaker,' and 'the second prong . . . requires an examination of the subject matter of the statement and the forum in which it is made in the light of the speaker's public duties' ... . We conclude that absolute privilege applies here because Brooks was the Monroe County Executive (see id.) and her statements with respect to plaintiff's termination concerned matters involving her official duties. Furthermore, because the investigation and the underlying actions of plaintiff became a matter of public attention and controversy, Brooks's form of communication, i.e., statements to the press, was warranted ... . Even assuming, arguendo, that the statements were not covered by absolute privilege, we conclude that the defense of qualified privilege applies. 'Generally, a statement is subject to a qualified privilege when it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his [or her] own affairs, in a matter where his [or her] interest is concerned' ... . Here, defendants satisfied their initial burden by establishing that Brooks made the relevant statements in her role as the Monroe County Executive, thereby discharging her responsibility to keep the public informed regarding a sensitive issue that had obtained extensive

media attention ... , and thus 'the burden shifted to plaintiff[] to raise a triable issue of fact whether the statements were motivated solely by malice' ...". ***Spring v. County of Monroe*, 2019 N.Y. Slip Op. 00747, Fourth Dept 2-1-19**

FAMILY LAW, EVIDENCE, JUDGES.

A NEGATIVE INFERENCE SHOULD NOT HAVE BEEN DRAWN BASED UPON MOTHER'S FAILURE TO TESTIFY, SHE HAD NO FIRST-HAND KNOWLEDGE OF THE FACTS UNDERLYING FATHER'S PETITION TO MODIFY VISITATION, FATHER DID NOT DEMONSTRATE A CHANGE IN CIRCUMSTANCES AND DID NOT DEMONSTRATE MODIFICATION WOULD BE IN THE BEST INTERESTS OF THE CHILDREN, JUDGE DID NOT MAKE THE REQUIRED FACTUAL FINDINGS, FATHER'S PETITION SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Family Court, determined father did not demonstrate a change in circumstances that warranted visitation in his home, supervised by his new wife. The modified visitation was not demonstrated to be in the best interests of the children. The existing visitation arrangement, supervised by grandmother, was long-standing and was working well. In addition, the Fourth Department held that the fact that mother did not testify should not have been the basis of a negative inference. Mother had no knowledge of the circumstances underlying father's petition: "Family Court erred in drawing a negative inference against [mother] based on her failure to testify at the hearing. The mother had no relevant testimony to offer inasmuch as she had no personal knowledge of the allegations in the modification petition ... . Thus, we conclude that a negative inference against the mother was unwarranted because she did not 'withhold[] evidence in [her] possession or control that would be likely to support [her] version of the case' ... . … Although the court correctly identified in its decision the applicable standard for modification of an existing custody and visitation order and referenced several circumstances that generally may support a court's finding of a sufficient change in circumstances, the court failed to make express findings relative to the change in circumstances alleged by the father in his petition. Notwithstanding that failure, 'we have the authority to review the record to ascertain whether the requisite change in circumstances existed' ... . Although the father's marriage, new home, and diagnosis with sleep apnea are changes that have occurred since the time of the stipulation, those changes to the father's personal circumstances do not ' reflect[] a real need for change to ensure the best interest[s] of the child[ren]' ... . .. [T]here is no sound and substantial basis in the record to support the court's determination that the children's best interests warranted replacing the visitation supervisor, their grandmother, with the father's new wife and permitting the father to select any location for his visits with the children ...". ***Matter of William F.G. v. Lisa M.B.*, 2019 N.Y. Slip Op. 00774, Fourth Dept 2-1-19**

FAMILY LAW, JUDGES.

FAMILY COURT SHOULD NOT HAVE LET A PARTY DETERMINE THE AMOUNT OF SUPERVISED CONTACT MOTHER IS TO BE ALLOWED, AND FAMILY COURT SHOULD NOT HAVE CONDITIONED FURTHER PETITIONS BY MOTHER ON PERMISSION FROM THE COURT.

The Fourth Department determined Family Court should not have delegated its authority to order the amount of supervised contact with the children mother is to be allowed and should not have conditioned further petitions by mother on permission from the court: "... [T]he court erred in granting her only so much supervised contact as was 'deemed appropriate' by petitioners. The court is 'required to determine the issue of visitation in accord with the best interests of the children and fashion a schedule that permits a noncustodial parent to have frequent and regular access' ... . 'In so doing, the court may not delegate its authority to make such decisions to a party' … , which the court did here by delegating to petitioners its authority to set a supervised visitation schedule. We therefore … remit the matter to Family Court to determine the supervised visitation schedule. ... [T]he court erred in ordering that any petition filed by the mother to modify or enforce the custody orders must have a judge's permission to be scheduled. 'Public policy mandates free access to the courts' ... , and it is error to restrict such access without a finding that the restricted party 'engaged in meritless, frivolous, or vexatious litigation, or . . . otherwise abused the judicial process' ... . Here, it is undisputed that the mother had not commenced any frivolous proceedings. In the absence of such a finding, it was error for the court to restrict the mother's access to the court ...". ***Matter of Lakeya P. v. Ajja M.*, 2019 N.Y. Slip Op. 00761, Fourth Dept 2-1-19**

FAMILY LAW, TAX LAW.

SUPPORT MAGISTRATE DID NOT HAVE JURISDICTION TO REDUCE FATHER'S CHILD SUPPORT BY DISTRIBUTING A TAX REFUND.

The Fourth Department determined the Support Magistrate did not have jurisdiction to reduce father's child support by distributing a tax refund: "We agree with the mother, however, that the court erred in denying her ... objection to that part of the Support Magistrate's order that, in effect, distributed half of the parties' tax refund to the father by reducing his child support obligation by that amount. We have previously stated that 'the jurisdiction of Family Court is generally limited to matters pertaining to child support and custody . . . , and tax deductions or exemptions are not an element of support'... . '[T]he father's entitlement to claim the child[ren] as [] dependent[s] for income tax purposes is not an element of support set forth in Family Court Act article 4, and thus the court lacks jurisdiction' to distribute the parties' tax refund ... . Therefore,

... we remit the matter to Family Court to recalculate the father's child support obligation without regard to the parties' income tax refund." ***Matter of Bashir v. Brunner*, 2019 N.Y. Slip Op. 00746, Fourth Dept 2-1-19**

LABOR LAW-CONSTRUCTION LAW, LANDLORD-TENANT.

DEFENDANT, AN OUT OF POSSESSION LESSEE OF THE PROPERTY WHERE PLAINTIFF WAS INJURED, WAS NOT AN OWNER WITHIN THE MEANING OF LABOR LAW §§ 240(1) AND 241(6), DEFENDANT'S MOTION FOR SUMMARY JUDGMENT DISMISSING THOSE CAUSES OF ACTION WAS PROPERLY GRANTED.

The Fourth Department determined defendant demonstrated it was not an owner of the property where plaintiff was injured and therefore was entitled to summary judgment dismissing the Labor Law §§ 240(1) and 241(6) causes of action. Defendant had leased the property from the state and then subleased the property to a non-party (EDGE). EDGE hired Jersen, the construction company for which the injured plaintiff worked: "It is well established that, for purposes of Labor Law §§ 240 (1) and 241 (6) liability, 'the term owner' is not limited to the titleholder of the property where the accident occurred and encompasses a [party] who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for [its] benefit' ... . ' [The owner] is the party who, as a practical matter, has the right to hire or fire subcontractors and to insist that proper safety practices are followed' ... . Thus, '[t]he key factor in determining whether a non-titleholder is an owner' is the right to insist that proper safety practices were followed and it is the right to control the work that is significant, not the actual exercise or nonexercise of control' ... . In his affidavit, Jersen's project manager averred that defendant was neither a party to nor involved with the negotiation of the construction contract between EDGE and Jersen; the project manager never saw any employees or representatives of defendant on site during the project; Jersen employees were not permitted to take orders from anyone other than an authorized Jersen representative; and defendant had no authority or control over Jersen employees working on the project. Those averments are consistent with the construction contract, which defined EDGE as the '[o]wner' and Jersen as the '[c]ontractor,' and provided that Jersen, as the '[c]ontractor,' was solely responsible for instituting and supervising all safety precautions and protections. Contrary to plaintiffs' contention, the mere fact that the sublease between defendant and EDGE required defendant's approval of the plans and specifications for the project work does not raise a material issue of fact where, as here, defendant did not contract to have the project work performed and the sublease 'did not vest [defendant] with authority to determine which contractors to hire, . . . control the [project] work or . . . insist that proper safety practices [be] followed' ...". ***Ritter v. Fort Schuyler Mgt. Corp.*, 2019 N.Y. Slip Op. 00769, Fourth Dept 2-1-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

REMOVING ICE AND SNOW FROM THE ROOF OF A COMMERCIAL BUILDING IS COVERED UNDER LABOR LAW § 240(1), IT DOESN'T MATTER WHETHER PLAINTIFF WAS INJURED FROM THE FALL FROM THE BUCKET OF THE BACKHOE OR FROM BEING STRUCK BY THE BACKHOE (WHICH WAS BEING USED TO LIFT PLAINTIFF TO THE ROOF), PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Fourth Department determined plaintiff's motion for summary judgment on his Labor Law § 240(1) cause of action was properly granted. Plaintiff fell from the bucket of a backhoe which was being used to lift him to the roof, where he was to remove snow and ice: "Labor Law § 240 (1) 'applies where an employee is engaged in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure' ... . We conclude that, contrary to defendant's contention, the removal of snow and ice from the roof of a commercial building, under these circumstances, constitutes a form of 'cleaning,' thereby bringing it within the ambit of Labor Law § 240 (1) ... . We reject defendant's contention that plaintiff was not injured by an elevation-related risk within the scope of Labor Law § 240 (1). Plaintiff established the necessary elements for liability under section 240 (1) by submitting evidence that he suffered 'harm directly flowing from the application of the force of gravity to an object or person'... , and defendant did not raise a question of material fact... . ... [P]laintiff is entitled to summary judgment irrespective of whether his injuries were caused by the fall itself or by being struck by the backhoe in the moments immediately following the fall. 'To establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from defendants' conduct was foreseeable' ... . 'Thus, a plaintiff merely has to demonstrate that he or she was injured when an elevation-related safety device failed to perform its function to support and secure him from injury'... . Here, the safety equipment provided to plaintiff did not prevent him from falling; thus, the core objective of Labor Law § 240 (1) was not met ... . Plaintiff's injury was a normal and foreseeable consequence of the failure of the safety equipment ...". ***Burns v. Marcellus Lanes, Inc.*, 2019 N.Y. Slip Op. 00801, Fourth Dept 2-1-19**

PERSONAL INJURY, CIVIL PROCEDURE.

PLAINTIFF WAS INJURED WHEN HE FELL THROUGH A FLOOR OPENING IN A HOUSE UNDER CONSTRUCTION, DEFENDANT HAD PLACED CARDBOARD OVER THE OPENING, THE MOTION TO SET ASIDE THE DEFENSE VERDICT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiff's motion to set aside the defense verdict in this personal injury case should have been granted. Defendant Keleher had placed cardboard over the floor opening to the basement in this house under construction. Plaintiff, whose presence was foreseeable, and who (allegedly) was aware of the opening in the floor, fell through and landed on his back on the basement floor: "Timothy Keleher admitted at trial that he covered the hole, which measured several feet in width and length, with a sheet of cardboard in an effort to preserve the heat in the basement, where he was working. It was undisputed at trial that covering such a hole with cardboard created an unsafe condition. The evidence at trial further established that plaintiff's presence at the property was foreseeable inasmuch as both Timothy Keleher and plaintiff testified that plaintiff stated that he would return to the property later that day. The fact that plaintiff may have returned later than was expected does not, in our view, render it unforeseeable that he would come back to the residence. Moreover, contrary to the Kelehers' contention, the fact that plaintiff was allegedly 'aware of the condition did not relieve [them] of [their] duty to maintain the [premises] in a reasonably safe condition' ... . Rather, such awareness 'bears only on the injured person's comparative fault' ... . Inasmuch as plaintiff's presence was foreseeable, the risk of serious injury was great and the burden of avoiding the risk minimal, we conclude that a finding that the Kelehers were not negligent could not have been reached on any fair interpretation of the evidence." ***Pasceri v. Keleher*, 2019 N.Y. Slip Op. 00758, Fourth Dept 2-1-19**

PERSONAL INJURY, MEDICAL MALPRACTICE, CIVIL PROCEDURE.

QUESTIONS OF FACT WHETHER THE CONTINUOUS TREATMENT DOCTRINE TOLLED THE STATUTE OF LIMITATIONS IN THIS MEDICAL MALPRACTICE ACTION, REQUESTING MEDICAL RECORDS AND MEETING WITH AN ATTORNEY TO EXPLORE A MALPRACTICE ACTION DID NOT NECESSARILY INDICATE THE TERMINATION OF TREATMENT.

The Fourth Department, reversing Supreme Court, determined the medical malpractice action should not have been dismissed as untimely. Plaintiff raised questions of fact supporting the application of the continuous-treatment toll of the statute of limitations. The court noted the fact plaintiff may have considered bringing a malpractice action did not signal the termination of treatment. Although the lawsuit named the surgeon, Kates, who did the hip replacement, the suit encompassed treatment by others at the clinic, treatment that was well-within the statute of limitations: "[A]lthough plaintiff requested her medical records and consulted with attorneys in 2010, the mere consultation with an attorney to explore a potential malpractice claim does not, by itself, terminate a course of treatment ... . Furthermore, on January 26, 2011, Kates ordered an ultrasound for plaintiff and, on July 27, 2011, plaintiff was seen in the clinic by another physician to evaluate the results of the ultrasound. That physician recommended to plaintiff that she see Kates to discuss those results, and plaintiff testified in her deposition that she was expecting to see Kates after the ultrasound to discuss whether corrective hip revision surgery was necessary. That testimony further indicates that plaintiff expected her doctor-patient relationship with Kates to continue ... . Thus, even though plaintiff was somewhat disaffected with Kates, the record does not conclusively establish that either plaintiff or Kates regarded the gap in treatment or plaintiff's consultation with counsel as the end of their treatment relationship, and we therefore cannot conclude that the continuous treatment doctrine no longer applied as a matter of law after January 14, 2009 ... . [A]lthough the court did not reach this issue, we ... conclude that questions of fact exist regarding whether, for purposes of the continuous treatment doctrine, plaintiff's treatment by various other physicians in the clinic should be imputed to Kates ...". ***Clifford v. Kates*, 2019 N.Y. Slip Op. 00744, Fourth Dept 2-1-19**

WORKERS' COMPENSATION, EMPLOYMENT LAW, PERSONAL INJURY.

PLAINTIFF WAS DEFENDANT'S SPECIAL EMPLOYEE WHEN INJURED, PLAINTIFF'S SOLE REMEDY IS WORKERS' COMPENSATION.

The Fourth Department, reversing Supreme Court, determined that defendant demonstrated plaintiff was its special employee. Therefore plaintiff's sole remedy for his on the job injury is workers' compensation: "It is well settled that 'a general employee of one employer may also be in the special employ of another, notwithstanding the general employer's responsibility for payment of wages and for maintaining workers' compensation and other employee benefits' ... . '[A] person's categorization as a special employee is usually a question of fact'; however, a 'determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact' ... . Here, defendant demonstrated that it exercised 'complete and exclusive control over the manner, details and ultimate results of plaintiff's work' ... ; that Remedy [plaintiff's usual employer] 'was not present at the job site and had no right to direct, supervise or control plaintiff's work' ... ; that defendant provided plaintiff with all the training and materials necessary for plaintiff to perform his job ... ; and that defendant 'had the authority to fire plaintiff with respect to his employment at its job site' ...". ***Ferguson v. National Gypsum Servs. Co.*, 2019 N.Y. Slip Op. 00709, Fourth Dept 2-1-19**

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