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FIRST DEPARTMENT

CIVIL PROCEDURE.

MOTION TO DISMISS SUIT SEEKING RETURN OF A PAINTING ALLEGEDLY LOOTED BY THE NAZI-OCCUPIED FRENCH GOVERNMENT DURING WORLD WAR II PROPERLY DENIED.

The First Department determined defendants' motion to dismiss on forum non conveniens grounds was properly denied. The suit seeks the return of a painting allegedly looted by the Nazi-occupied French government: "In weighing the relevant factors, the court correctly observed that plaintiff and several defendants maintained residences in New York ... . Although defendants suggest that France is the more appropriate forum, they also argued below, and submitted expert affidavits in support of the position, that this action would be time-barred in that jurisdiction, an important factor to consider ... . This Court observes that retaining this action would not be particularly burdensome; New York has previously entertained actions concerning Nazi looting of art during World War II ... . That the originals of some documents are located abroad does not require dismissal, and it is noted that the key documents have already been translated for the court... . In light of the foregoing, defendants failed to meet their heavy burden of establishing that the action should be dismissed on forum non conveniens grounds ...". ***Gowen v. Helly Nahmad Gallery, Inc.*, 2019 N.Y. Slip Op. 01350, First Dept 2-26-19**

CIVIL PROCEDURE, PRIVILEGE, ATTORNEYS, BATTERY, PERSONAL INJURY.

PLAINTIFF'S DEPLORABLE MISCONDUCT, INCLUDING ACCESSING DEFENDANT'S ATTORNEY-CLIENT COMMUNICATIONS, DELETING RELEVANT DOCUMENTS AND LYING UNDER OATH, IN DELAWARE COURT PROCEEDINGS REQUIRED DISMISSAL OF PLAINTIFF'S PERSONAL INJURY ACTION AGAINST THE SAME DEFENDANT IN NEW YORK.

The First Department, reversing Supreme Court, determined that the plaintiff's personal injury action should have been dismissed because of plaintiff's misconduct in a Delaware court proceeding. The New York personal injury action alleged plaintiff was injured in a physical fight with the defendant which stemmed from the Delaware litigation. The Delaware court found that plaintiff had engaged in deplorable misconduct by accessing defendant's privileged attorney-client communications, deleting relevant documents and lying under oath: "Plaintiff's improper and willful access of defendant's privileged communications and spoliation of evidence supports dismissal of his claims in this action (CPLR 3103[c]; CPLR 3126[3]; Lipin v. Bender , 84 NY2d 562 [1994] [dismissing the plaintiff's complaint because her improper taking of the defendant's attorney/client documents and work product caused prejudice to the defendant and irreparably tainted the litigation process]). Among the materials improperly accessed here was a privileged memorandum from defendant's counsel about his strategy concerning the incident underlying this action. Further, plaintiff's counsel referred to the contents of some of the privileged communications during motion practice in this litigation. Since '[p]laintiff's knowledge . . . can never be purged,' and he would 'carry [that knowledge] into any new attorney-client relationship,' we find that dismissal of the complaint is 'the only practicable remedy here' ...". ***Shawe v. Elting*, 2019 N.Y. Slip Op. 01374, First Dept 2-26-19**

CRIMINAL LAW.

PROSECUTION'S REVERSE-*BATSON* CHALLENGE TO PEREMPTORY JUROR CHALLENGES BY THE DEFENSE SHOULD NOT HAVE BEEN GRANTED, CONVICTION REVERSED.

The First Department, reversing defendant's conviction, determined that the prosecution's reverse-*Batson* challenge to defense peremptory juror challenges should not have been granted: " '[A]lthough appellate courts accord great deference to trial judges' step three determinations, . . . there is no record support for Supreme Court's rejection of defense counsel's race-neutral reasons for striking [two panelists]. The People simply failed to meet their burden that racial discrimination was the motivating factor' ... . Defense counsel presented facially race-neutral reasons for challenging the panelists at issue based on their having been crime victims or relatives of crime victims ... , and there was no evidence of disparate treatment by defense counsel of similarly situated panelists ... . The record otherwise fails to support the court's finding that the race-neutral reasons given for these challenges were pretextual." ***People v. Bloise*, 2019 N.Y. Slip Op. 01363, First Dept 2-26-19**

CRIMINAL LAW, EVIDENCE.

PHOTOGRAPH OF DEFENDANT WITH A WEAPON PROPERLY ADMITTED DESPITE THE ABSENCE OF EVIDENCE THE DEPICTED WEAPON WAS USED IN THE CHARGED OFFENSE, JURY WAS PROPERLY INSTRUCTED ON ACCESSORIAL LIABILITY DESPITE THE ABSENCE OF AN ALLEGATION OF ACCESSORIAL LIABILITY IN THE INDICTMENT AND DESPITE THE PEOPLE'S THEORY THAT DEFENDANT WAS THE SHOOTER.

The First Department determined a photograph depicting defendant with a weapon was properly admitted into evidence despite the absence of evidence that the weapon in the photograph was the weapon used in the offense. The trial court properly instructed the jury on accessorial liability despite the absence of an allegation of accessorial liability in the indictment and the People's theory that defendant shot the victim: "The court providently exercised its discretion in admitting in evidence a photograph, taken less than two months before the shooting, showing a person, sufficiently established to be defendant, holding a revolver of the type used in the crime. This evidence was relevant to show that defendant had access to such a weapon, thus tending to establish his identity as the perpetrator, and there was no requirement of proof that the revolver in the photograph was the actual weapon used in the crime ... . The court properly instructed the jury on accessorial liability, notwithstanding that no such language appeared in the indictment and the People's main theory was that defendant personally shot the victim. There was no improper amendment of the indictment, because an indictment charging a defendant as a principal is 'not unlawfully amended by the admission of proof and instruction to the jury that a defendant is additionally charged with acting-in-concert to commit the same crime, nor does it impermissibly broaden a defendant's basis of liability, as there is no legal distinction between liability as a principal or criminal culpability as an accomplice' ... . A theory that defendant intentionally aided a particular other person, who did the actual shooting, was supported by defendant's own testimony. Although defendant claimed he had not shared the gunman's intent, such intent could be inferred from the totality of the evidence. We reject defendant's claim of unfair surprise, particularly because the theory of accessorial liability arose from defendant's own testimony ...". ***People v. Alexander*, 2019 N.Y. Slip Op. 01341, First Dept 2-26-19**

CRIMINAL LAW, MUNICIPAL LAW.

THE EXCLUSIONARY LANGUAGE IN THE NYC ADMINISTRATIVE CODE PROVISION WHICH CRIMINALIZES POSSESSION OF AMMUNITION IS AN EXCEPTION THAT MUST BE AFFIRMATIVELY PLED, CONVICTION REVERSED.

The First Department, reversing defendant's conviction of unlawful possession of ammunition pursuant to New York City Administrative Code § 10-131(i)(3), determined that the exclusionary language in the code provision is an exception which must be affirmatively pled in the accusatory instrument: "We find that the relevant language in section 10-131(i)(3), which makes it a crime to possess pistol or revolver ammunition unless authorized to possess a pistol or revolver, constitutes an exception and not a proviso. Consequently, it was the People's burden to prove that the defendant was not authorized to possess a pistol or revolver within the City of New York. As the People failed to do so, defendant's conviction under section 10-131(i)(3) must be vacated and that count dismissed. In order to determine whether a statute defining a crime contains 'an exception that must be affirmatively pleaded as an element in the accusatory instrument' or 'a proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial,' one must look to the language of the statute itself ... . Indeed, '[i]f the defining statute contains an exception, the indictment must allege that the crime is not within the exception. But when the exception is found outside the statute,' it is termed a proviso and 'generally is a matter for the defendant to raise in defense' ... . 'Legislative intent to create an exception [whose existence must be negated by the prosecution] has generally been found when the language of exclusion is contained entirely within' the statute itself ... . In contrast, where the language of the exclusion depends on a source outside the statute, courts will infer that the language functions as a proviso ...". ***People v. Tatis*, 2019 N.Y. Slip Op. 01507, First Dept 2-28-19**

PERSONAL INJURY, MUNICIPAL LAW.

APPLICATION FOR LEAVE TO FILE A LATE NOTICE OF CLAIM SHOULD HAVE BEEN GRANTED DESPITE ABSENCE OF A REASONABLE EXCUSE.

The First Department, reversing Supreme Court, determined petitioner's application for leave to file a late notice of claim should have been granted. Petitioner alleged he was injured by the malfunction of weightlifting equipment at a city recreation center: "Assuming that the law firm's clerical error was not a reasonable excuse, '[t]he absence of a reasonable excuse is not, standing alone, fatal to the application,' where the municipal respondent had actual notice of the essential facts constituting the claim and was not prejudiced by the delay ... . Here, petitioner's affidavit stating that he signed an incident report prepared by respondent's employee shortly after the accident, and that the weightlifting equipment was repaired a few months later, demonstrate prima facie that respondent received actual notice of the pertinent facts underlying his claim, if not the negligence claim itself, which supports a 'plausible argument' that the City will not be substantially prejudiced in investigating and defending the claim ...". ***Matter of Mercedes v. City of New York*, 2019 N.Y. Slip Op. 01487, First Dept 2-28-19**

PERSONAL INJURY, MUNICIPAL LAW, VEHICLE AND TRAFFIC LAW, IMMUNITY.

QUESTION OF FACT WHETHER THE RECKLESS STANDARD APPLIED IN THIS PEDESTRIAN-POLICE CAR ACCIDENT CASE.

The First Department, reversing Supreme Court, determined there was a question of fact whether the reckless standard applied in this pedestrian-police car traffic accident case. The court noted that the governmental function immunity doctrine does not apply to this scenario: "The governmental function immunity doctrine does not apply in this case where plaintiff pedestrian was injured when she was struck by a police vehicle that was allegedly pursuing a vehicle that had committed a traffic infraction ... . Instead, where a plaintiff alleges that a municipality and/or its employees were negligent in the ownership or operation of an authorized emergency vehicle while engaged in one of the activities protected by Vehicle and Traffic Law § 1104(b), the 'reckless disregard' standard set forth in Vehicle and Traffic Law § 1104(e) applies ... . Here, a factual issue exists as to whether defendants were engaged in a protected activity under Vehicle and Traffic Law § 1104(b), namely, proceeding past a steady red signal (see Vehicle and Traffic Law § 1104[b][2]), while pursuing a vehicle for a traffic violation so as to apply the reckless standard of care as opposed to ordinary negligence principles ...". ***Santana v. City of New York*, 2019 N.Y. Slip Op. 01348, First Dept 2-26-19**

TRUSTS AND ESTATES, ATTORNEYS.

$1 MILLION ATTORNEY'S FEE REQUEST CUT IN HALF BY SURROGATE'S COURT AND REDUCED A FURTHER $100,000 BY THE FIRST DEPARTMENT CITING EXCESSIVE CHARGES FOR IN-FIRM DISCUSSIONS AND UNNECESSARY WORK.

The First Department determined Surrogate's Court properly reduced by half the $1 million attorney's-fees request, which represented 1/3 of the estate and trust assets. First Department further reduced the fees by another $100,000: "Respondent's counsel sought approval for legal fees in the amount of $1,037,183 for their representation of respondent. The amount requested represented 33.7% of the estate and trust assets. The Surrogate noted that the fees were far in excess of a typical fee for the services performed by respondent's counsel, concluded that the fees were excessive, and fixed the fees in the total amount of $520,000. Although the Surrogate reduced the fees from the exorbitant amount originally requested, we conclude that the fees as reduced are still excessive given the size of the estate ... . While there is no set formula for fee awards, upon our review of counsel's time records and in the exercise of discretion, we conclude that a further reduction in the amount of $100,000 is warranted. This additional reduction is necessary to properly account for excessive charges for inter-office communications and discussions amongst members of the firm, and unnecessary work performed ...". ***Matter of SR*, 2019 N.Y. Slip Op. 01343, First Dept 2-26-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, ANIMAL LAW.

ALTHOUGH THE MOTION TO SET ASIDE THE DEFAULT JUDGMENT IN THIS DOG BITE CASE SHOULD NOT HAVE BEEN GRANTED, A FULL EVIDENTIARY HEARING WAS REQUIRED TO DETERMINE THE APPROPRIATE DAMAGES AMOUNT.

The Second Department, reversing Supreme Court, determined that the motion to vacate the default in this dog-bite case should not have been granted because it was untimely and unsubstantiated, but a full evidentiary hearing was required to determine the appropriate amount of damages: "[A] court has the 'inherent power to set aside excessive awards made upon default,' despite the fact that there is no reasonable excuse for the default ... . 'An unwarranted and excessive award after inquest will not be sustained, as to do otherwise would be tantamount to granting the plaintiffs an 'open season' at the expense of a defaulting defendant'... . In light of the evidence in the record, including the plaintiff's testimony at the inquest, which was not supported by any expert testimony, and a police report of the incident which stated that the plaintiff suffered 'minor injuries from an animal bite,' there are significant questions as to whether the award of the principal sum of $500,000, consisting of $200,000 for past pain and suffering and $300,000 for future pain and suffering, was excessive. Thus, we agree with the Supreme Court's determination to stay enforcement of the default judgment and the settlement agreements based upon that judgment, and to direct further discovery. However, the court also should have stated in its order dated September 21, 2016, that the issues to be determined on the motion to stay enforcement of the default judgment are limited to the issue of damages." ***Loeffler v. Glasgow*, 2019 N.Y. Slip Op. 01401, Second Dept 2-27-19**

CIVIL PROCEDURE, BANKRUPTCY.

DEBTOR'S LAWSUIT WAS DISMISSED BECAUSE IT WAS NOT LISTED AS AN ASSET IN THE BANKRUPTCY FILINGS, BANKRUPTCY TRUSTEE WAS ENTITLED TO RECOMMENCE THE SUIT PURSUANT TO CPLR 205(a) WITHIN SIX MONTHS OF THE DISMISSAL.

The Second Department determined the bankruptcy trustee could take advantage of CPLR 205(a) to recommence a lawsuit within six months of the dismissal. The timely filed action was dismissed because the debtor did not list the suit as an asset

in the bankruptcy filings: "[D]ismissal of the 2013 action was not based upon a voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute the action, or a final judgment on the merits (see CPLR 205[a]). ... CPLR 205(a) is applicable even though the 2013 action was dismissed based on the debtor's incapacity to sue. The extension provisions of CPLR 205(a) are available to a plaintiff who seeks to recommence an action, notwithstanding that the prior action upon which the plaintiff relies was 'invalid' in the sense that it contained a fatal defect ... . Although, as a general matter, only the plaintiff in the original action is entitled to the benefits of CPLR 205(a), the Court of Appeals has nevertheless recognized an exception to this general rule under certain circumstances where the plaintiff in the new action is seeking to enforce 'the rights of the plaintiff in the original action' ... . The Court of Appeals also has stated that the statute's ' broad and liberal purpose is not to be frittered away by any narrow construction' ... . In this case, the plaintiff, the debtor's bankruptcy trustee, seeks to recommence a personal injury action as the debtor's successor-in-interest. As the debtor's successor-in-interest, the plaintiff has the capacity to commence this action to recover damages for the debtor's alleged personal injuries ... . Consequently, the plaintiff is not seeking to enforce any rights separate and independent from those asserted by the debtor in the prior action ...". ***Goodman v. Skanska USA Civ., Inc.*, 2019 N.Y. Slip Op. 01394, Second Dept 2-27-19**

CIVIL PROCEDURE, BANKRUPTCY.

PLAINTIFF IN THIS SLIP AND FALL CASE ENTITLED TO SEVERANCE OF THE ACTION AGAINST THE PROPERTY OWNER, WHICH FILED FOR BANKRUPTCY, AND THE SNOW REMOVAL CONTRACTOR.

The Second Department, reversing Supreme Court, determined plaintiff in this slip and fall case was entitled to severance of the action against the property owner, Pathmark (supermarket), which filed for bankruptcy, from the action against the snow removal contractor, Peterman: "The supermarket defendants filed for chapter 11 bankruptcy relief, resulting in an automatic stay pursuant to 11 USC § 362(a). However, the automatic stay provisions of 11 USC § 362(a) did not extend to the nonbankrupt Peterman ... . 'Generally, the balance of the equities lies with plaintiff[ ] when severance is sought because the case against one defendant is stayed pursuant to 11 USC § 362(a), and that is particularly so in this personal injury action where a delay would be prejudicial to the plaintiff[ ]' ... . The supermarket defendants are subject to a $750,000 self-insured retention, which would make a lifting of the bankruptcy stay less likely. As the prejudice to the plaintiff in being required to await the conclusion of the bankruptcy proceeding before obtaining any remedy outweighs any potential inconvenience to Peterman, the Supreme Court improvidently exercised its discretion in denying the plaintiff's motion pursuant to CPLR 603 to sever the action insofar as asserted against the supermarket defendants from the action insofar as asserted against Peterman ...". ***Vogric v. Pathmark Stores, Inc.*, 2019 N.Y. Slip Op. 01447, Second Dept 2-27-19**

CORPORATION LAW, CONTRACT LAW, DEBTOR-CREDITOR.

DEFENDANT SOLE SHAREHOLDER OF DEFENDANT CORPORATION WAS NOT ENTITLED TO SUMMARY JUDGMENT ON THE ACTION AGAINST HIM PREMISED UPON PIERCING THE CORPORATE VEIL, THERE WERE QUESTIONS OF FACT WHETHER THE WARRANTY PROVISIONS OF THE CONTRACT WERE VIOLATED AND WHETHER DEFENDANT CORPORATION WAS STRIPPED OF ASSETS SUCH THAT IT COULD NOT MEET ITS CONTRACTUAL OBLIGATIONS.

The Second Department, over a partial dissent, reversing (modifying) Supreme Court, determined that defendant Brookstein, the sole shareholder of corporate defendant DKM, was not entitled to summary judgment in the action against him based upon piercing the corporate veil: " 'The general rule, of course, is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability... . The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation ... . A plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over [the corporation] in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff ...'. A plaintiff seeking to pierce the corporate veil bears a heavy burden... . 'Veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution' ... . Here, Brookstein did not establish his prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against him. It is undisputed that Brookstein dissolved DKM without making any reserves for contingent liabilities, despite the existence of a provision in the contract of sale pursuant to which DKM agreed to indemnify [plaintiff] for any breach of warranty for a period of 7½ years after the closing of the sale. This factor was sufficient to raise a triable issue of fact as to whether Brookstein stripped the corporation of assets, leaving DKM without sufficient funds to pay its contractual contingent liabilities ...". ***Town-Line Car Wash, Inc. v. Don's Kleen Mach. Kar Wash, Inc.*, 2019 N.Y. Slip Op. 01443, Second Dept 2-27-19**

CORPORATION LAW, NEGLIGENCE, CIVIL PROCEDURE, EVIDENCE.

MOTION TO DISMISS THE NEGLIGENCE ACTION AGAINST DEFENDANT SECURITY COMPANY IN THIS THIRD PARTY ASSAULT CASE SHOULD NOT HAVE BEEN GRANTED, THE EVIDENCE SUBMITTED BY THE DEFENDANT DID NOT RULE OUT LIABILITY BASED UPON THE RELATIONSHIP BETWEEN THE DEFENDANT SECURITY COMPANY AND THE COMPANY PROVIDING SECURITY AT THE TIME OF THE ASSAULT.

The Second Department determined defendant security company's (USSA's) motion to dismiss the complaint should not have been granted in this third party assault case. The complaint alleged the security company's negligence resulted in the murder of plaintiff's decedent at an assisted living facility. The defendant alleged it did not provide security there at the time of the murder. However, the documentary evidence submitted by defendant did not rule out the possibility the defendant company could be liable based upon its relationship with the company which was providing security at the time of the murder: "Generally, 'a corporation which acquires the assets of another is not liable for the torts of its predecessor'... . However, such liability may arise if the successor corporation expressly or impliedly assumed the predecessor's tort liability, there was a consolidation or merger of seller and purchaser, the purchaser corporation was a mere continuation of the seller corporation, or the transaction was entered into fraudulently to escape such obligations... . Moreover, '[w]here, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR 3211(a)(7) . . . the motion should not be granted unless the movant can show that a material fact as claimed by the plaintiff is not a fact at all and unless it can be said that no significant dispute exists regarding it'... . ' Accordingly, consideration of such evidentiary materials will almost never warrant dismissal under CPLR 3211(a)(7) unless the materials establish conclusively that [the plaintiff] has no [claim or] cause of action'... . Contrary to the Supreme Court's determination, the documentary and affidavit evidence submitted by USSA in support of its motion failed to conclusively establish that the plaintiff had no cause of action against it. More particularly, that evidence failed to demonstrate that the exceptions to the general rule of a successor corporation's nonliability where there was a de facto merger between the purchaser and the seller, or where the purchaser is a mere continuation of the seller, do not apply to this case ...". ***Shea v. Salvation Army*, 2019 N.Y. Slip Op. 01441, Second Dept 2-27-19**

CRIMINAL LAW, EVIDENCE.

DENIAL OF YOUTHFUL OFFENDER STATUS WAS AN ABUSE OF DISCRETION,

The Second Department, reversing Supreme Court, determined it was an abuse of discretion to deny defendant youthful offender status: "The evidence demonstrated that the defendant, who was only 18 years old when he participated in the subject robbery and had spent nearly two years in pretrial detention prior to pleading guilty to robbery in the first degree, played a relatively minor role in the robbery, which, although serious, was orchestrated by his considerably older brother, who was a repeat offender. The defendant suffers from developmental delays. While the defendant did participate in the robbery, it was the defendant's brother, not the defendant, who wielded a gun and committed a sexual assault against one of the victims. Additional mitigating circumstances include the defendant's lack of a prior juvenile record, criminal record, or violent history, and his cooperation with the authorities as part of the plea deal. Moreover, the defendant either had graduated from high school or was on the cusp of graduating from high school. Under all the circumstances, the interest of justice would be served by 'relieving the defendant from the onus of a criminal record' ...". ***People v. Sheldon O.*, 2019 N.Y. Slip Op. 01430, Second Dept 2-27-19**

CRIMINAL LAW, EVIDENCE.

TRIAL COURT FAILED TO INSTRUCT THE JURY THAT FINDING DEFENDANT NOT GUILTY OF THE TOP COUNT BASED ON THE JUSTIFICATION DEFENSE PRECLUDED CONSIDERATION OF THE LESSER COUNTS, NEW TRIAL REQUIRED.

The Second Department, reversing defendant's conviction, noted that the trial court failed to instruct the jury that finding the defendant not guilty of the top count (attempted murder) based upon the justification defense would preclude consideration of the lesser counts. Defendant was acquitted of attempted murder but found guilty of assault first: "[T]he Supreme Court's jury charge in conjunction with the verdict sheet failed to adequately convey to the jury that if it found the defendant not guilty of attempted murder in the second degree based on justification, then 'it should simply render a verdict of acquittal and cease deliberation, without regard to' assault in the first degree and reckless endangerment in the first degree ... . Thus, the court's instructions, together with the verdict sheet, may have led the jurors to conclude that deliberation on each of the three counts required reconsideration of the justification defense, even if they had already acquitted the defendant of attempted murder in the second degree based on justification ... . Since we cannot say with any certainty and there is no way of knowing whether the acquittal on attempted murder in the second degree was based on a finding of justification, a new trial is necessary... . In light of the defendant's acquittal on the charge of attempted murder in the second degree, the highest offense for which the defendant may be retried is assault in the first degree ...". ***People v. Rosario*, 2019 N.Y. Slip Op. 01432, Second Dept 2-27-19**

CRIMINAL LAW, EVIDENCE.

DEFENDANT ENTITLED TO PERMISSIVE ADVERSE INFERENCE JURY INSTRUCTION BASED UPON THE PEOPLE'S LOSS OR DESTRUCTION OF EVIDENCE REQUESTED BY THE DEFENDANT.

The Second Department, reversing defendant's conviction, determined that the permissive adverse inference jury instruction should have been given because of the loss or destruction of evidence requested by the defendant: "The defendant contends that the Supreme Court should have granted his request for a permissive adverse inference charge with respect to the People's failure to turn over duly requested tape recordings and any other police records related to taped interactions between the undercover officer and a witness to the March 4, 1998, sale, who was also the defendant's unindicted co-defendant. ' A permissive adverse inference instruction typically serves as either: (1) a penalty for the government's violation of its statutory and constitutional duties or its destruction of material evidence; or (2) an explanation of logical inferences that may be drawn regarding the government's motives for failing to present certain evidence at trial' ... We agree with the defendant that the Supreme Court should have granted his request for a permissive adverse inference charge based upon the People's loss or destruction of the material requested by the defendant ... . '[A] permissive adverse inference charge should be given where a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and where that evidence has been destroyed by agents of the State'... . Although the prosecutor stated that the missing tapes were unrelated to the sales at issue and were not recorded on the dates of the buys, he concededly never listened to them. Additionally, the officer who relayed the information that the tapes were not recorded on the dates of the buys to the prosecutor did not testify at trial." ***People v. Torres*, 2019 N.Y. Slip Op. 01434, Second Dept 2-27-29**

FAMILY LAW, IMMIGRATION LAW.

ORDER MAKING THE FINDINGS NECESSARY FOR THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS SHOULD HAVE BEEN GRANTED, CHILD ESCAPED EL SALVADOR BECAUSE OF GANG VIOLENCE AND THREATS.

The Second Department, reversing Family Court, determined the father's motion for an order making the findings necessary for the child to petition for Special Immigrant Juvenile Status (SIJS) should have been granted: "Based upon our independent factual review, we find that the record establishes that the child met the age and marital status requirements for special immigrant status ... , and the dependency requirement has been satisfied by the granting of the father's guardianship petition prior to the child's 21st birthday ... . Further, we find that reunification of the child with her mother is not a viable option due to parental abandonment ... . The record reflects that after the child came to the United States in February 2014, she did not live with the mother because the 'mother did not want to support her,' and that the child lived in close proximity to the mother, but the mother only visited the child once, in March 2014, and did not visit or even contact the child from that time through the time the father made the subject motion in April 2018. We also find that the record supports a finding that it would not be in the best interests of the child to return to El Salvador, her previous country of nationality or country of last habitual residence. The record reflects that the child was threatened by gang members in El Salvador while walking home from school, that the gang members 'wanted to recruit [the child] and have her sell drugs' and told her that 'she had to join them or they would murder her and her family,' that the gang members started texting her to 'extort money from her,' that the child was sent to live with a family friend, but the threats continued, and that the child left El Salvador to escape from the gangs ...". ***Matter of Rina M. G.C. (Oscar L.G.--Ana M. C.H.)*, 2019 N.Y. Slip Op. 01407, Second Dept 2-27-19**

FAMILY LAW, IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE ISSUED AN ORDER MAKING FINDINGS TO ALLOW THE CHILDREN TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS, IT WAS NOT IN THE CHILDREN'S BEST INTERESTS TO RETURN TO HONDURAS.

The Second Department, reversing Family Court, determined the court should have issued an order making findings to allow the child to petition for Special Immigrant Juvenile Status (SIJS): "[B]ased upon our independent factual review, the record supports a finding that reunification of the children with their mother is not viable due to parental abandonment ... . The children testified that the mother left when they were both only three years old, and that they have not seen or spoken to the mother since that time. Thus, the record establishes that the mother has had no involvement with the children for the majority of their lives ... . Further, the record supports a finding that it would not be in the best interests of the children to return to Honduras, their previous country of nationality or country of last habitual residence ... . Francis testified that when the children lived with their paternal aunt in Honduras, they were 'mistreat[ed] . . . emotionally and physically.' The children testified that when they then went to live with their father and stepmother in Honduras, the stepmother beat them and 'wouldn't give us food' when the father was not around, and that the stepmother was 'verbally abusive,' telling the children, among other things, that they were 'good for nothing.' The record reflects that the children had no one else to take care of them if they returned to Honduras. Consequently, the record demonstrates that it would not be in the best interests of the children to return to Honduras ...". ***Matter of Norma U. v. Herman T. R.F.*, 2019 N.Y. Slip Op. 01421, Second Dept 2-27-19**

FAMILY LAW, JUDGES.

FAMILY COURT DID NOT HAVE AUTHORITY TO SUA SPONTE VACATE A CONSENT ORDER IN THIS SUPPORT PROCEEDING, VACATION OF THE CONSENT ORDER AND THE RESULTING COMMITMENT ORDER REVERSED.

The Second Department, reversing Family Court, determined the court did have the authority to issue a sua sponte order vacating a consent order: "Upon the father's admission to a willful violation of the support order and upon the father's representation that he was employed, an order of disposition was entered upon the parties' consent, finding the father to be in willful violation of the support order and committing him to a term of incarceration of five months, but suspending his commitment on the condition that he complied with the support order (hereinafter the consent order). Shortly after the consent order was entered, the Family Court received a telephone call, ostensibly from the father's purported employer, informing the court that the father was not, in fact, employed. The court, over the father's objection, sua sponte issued an order vacating the consent order (hereinafter the sua sponte order). The court then proceeded to a willfulness hearing, at the conclusion of which it issued the second order of disposition, finding the father to be in willful violation of the support order and directing that he be committed to the Orange County Jail for a period of six months unless he paid the purge amount of $19,839 (hereinafter the commitment order). ... As the father correctly contends, the Family Court lacked authority to issue the sua sponte order vacating the consent order (see CPLR 5019[a]) ...). Moreover, the court issued the sua sponte order on the basis of unsworn statements made during a telephone call between the court and the father's purported employer ... . Accordingly, the sua sponte order must be reversed, and the commitment order, which was based in part on the sua sponte order, must be reversed as well." ***Matter of Schiavone v. Mannese*, 2019 N.Y. Slip Op. 01419, Second Dept 2-27-19**

FORECLOSURE, CIVIL PROCEDURE, EVIDENCE.

IN THIS FORECLOSURE ACTION THE MORTGAGE COMPANY DID NOT DEMONSTRATE STANDING WITH PROOF MEETING THE REQUIREMENTS OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The First Department, reversing Supreme Court, determined plaintiff mortgage company did not demonstrate standing with proof meeting the requirements of the business records exception to the hearsay rule: "In support of its motion, the plaintiff submitted the affidavit of Melissa Black, an employee of the plaintiff's loan servicer, who alleged, based upon a review of business records maintained by the loan servicer, that the plaintiff had been 'in continuous possession of the note and mortgage since June 26, 2007.' However, because Black did not attest that she was personally familiar with the plaintiff's record-keeping practices and procedures, the plaintiff failed to demonstrate that the records relied upon by Black were admissible under the business records exception to the hearsay rule (see CPLR 4518[a] ...). In any event, the submissions by the plaintiff of different copies of the note raise a triable issue of fact, inter alia, as to whether the note was assigned to the plaintiff prior to the commencement of the action ...". ***EMC Mtge. Corp. v. Tinari*, 2019 N.Y. Slip Op. 01392, Second Dept 2-27-19**

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

BANK'S FAILURE TO SUBMIT EVIDENCE WHICH MET THE CRITERIA OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE REQUIRED DENIAL OF THE BANK'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION, THE BANK'S FAILURE TO COMPLY WITH THE RPAPL 1304 NOTICE AND MAILING CRITERIA REQUIRED THAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BE GRANTED.

The Second Department, reversing Supreme Court, determined the bank's evidence in this foreclosure action did not meet the requirements of the business records exception to the hearsay rule and therefore the bank's summary judgment motion should not have been granted in this foreclosure action. The court further held that defendant's motion for summary judgment based upon the bank's failure to comply with the notice requirements of RPAPL 1304, an issue that can be raised at any time, should have been granted: "The plaintiff failed to demonstrate that the records Wallace relied upon were admissible under the business records exception to the hearsay rule (see CPLR 4518[a]). Wallace did not attest to personal knowledge of SLS's record-keeping business practices and procedures ... . Wallace also failed to attest that the records were made in the regular course of SLS's business and that it was the regular course of SLS's business to make them, at the time of the act, transaction, occurrence, or event, or within a reasonable time thereafter (see CPLR 4518[a] ...). Thus, Wallace failed to lay a proper foundation for the admission of records, and her assertions based on these records were inadmissible ...". ***Bank of N.Y. Mellon v. Weber*, 2019 N.Y. Slip Op. 01383, Second Dept 2-27-19**

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

PROOF OF MAILING REQUIREMENTS OF RPAPL 1304 NOT MET, BANK'S SUMMARY JUDGMENT MOTION IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court in this foreclosure action, determined plaintiff bank did not present sufficient proof of compliance with the notice requirements in Real Property Actions and Proceedings Law (RPAPL) 1304: "The plaintiff submitted the affidavit of Sherry Benight, an officer of the plaintiff's loan servicer, Select Portfolio Servicing, Inc. (hereinafter SPS), stating that her review of records maintained by SPS revealed that a '[ninety-day pre-foreclosure notice]

dated September 13, 2012, . . . was sent to Borrower(s) by certified and first class mail.' A copy of the notice to Fisher was annexed to Benight's affidavit, which contained a bar code with a 20-digit number below it, but no language indicating that a mailing was done by first-class or certified mail, or even that a mailing was done by the U.S. Postal Service ... . Further, Benight did not make the requisite showing that she was familiar with the plaintiff'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 ...". ***U.S. Bank N.A. v. Fisher*, 2019 N.Y. Slip Op. 01444, Second Dept 2-27-19**
Similar issues and result in ***US Bank N.A. v. Rode*, 2019 N.Y. Slip Op. 01446, Second Dept 2-27-19**

PERSONAL INJURY, EVIDENCE, APPEALS.

PLAINTIFF ENTITLED TO SUMMARY JUDGMENT IN THIS REAR-END COLLISION CASE, ALTHOUGH SUPREME COURT DIDN'T REACH THE LIABILITY ISSUE, THE MERITS WERE LITIGATED AND BRIEFED ALLOWING APPELLATE REVIEW.
The Second Department determined plaintiff was entitled to summary judgment in this rear-end collision traffic accident case, noting that the plaintiff no longer has to demonstrate freedom from comparative fault to warrant a judgment on liability. Supreme Court had not reached the liability issue and the Second Department did so because the merits were litigated and briefed: "[T]he plaintiff testified at her deposition that her vehicle was stopped at a red light when it was struck in the rear by the defendants' vehicle. This testimony established, prima facie, that the defendant driver's negligence was a proximate cause of the accident ... . Moreover, although the plaintiff also submitted a transcript of the defendant driver's deposition testimony, that testimony does not present a triable issue of fact. The defendant driver testified that before the accident occurred, the light turned green, and the plaintiff began to slowly move forward. The defendant driver began to accelerate, then he saw the plaintiff's brake lights go on. He testified that he 'hit the brakes and hit her.' In essence, his testimony amounted to a claim that the plaintiff's vehicle came to a sudden stop which, standing alone, was insufficient to rebut the presumption of negligence on the part of the defendants' vehicle ...". ***Buchanan v. Keller*, 2019 N.Y. Slip Op. 01385, Second Dept 2-27-19**

REAL PROPERTY LAW, CONTRACT LAW, ASSOCIATIONS.

COVENANT TO BUILD A WALKWAY LINKING PARTS OF A RESIDENTIAL COMMUNITY RAN WITH THE LAND AND WAS THEREFORE ENFORCEABLE BY THE HOMEOWNERS ASSOCIATION AGAINST A SUBSEQUENT PURCHASER OF THE PROPERTY.
The Second Department, reversing Supreme Court, determined that the plaintiff homeowners association (HOA) was entitled to enforce an agreement made with the prior owners of the residential community to construct a walkway linking the newly constructed area to the existing areas of the community. The walkway covenant was deemed to run with the land: "As stated by the Court of Appeals, '[i]n Neponsit [Neponsit Prop. Owners' Assn. v. Emigrant Indus. Sav. Bank, 278 NY 248] we articulated three conditions . . . that must be met in order for a covenant to run with the land: (1) it must appear that grantor and grantee intended that the covenant should run with the land; (2) it must appear that the covenant is one touching or concerning the land with which it runs; [and] (3) it must appear that there is privity of estate between the promisee or party claiming the benefit of the covenant and the right to enforce it, and the promisor or party who rests under the burden of the covenant' ... . The contract entered into in 2000, and the 2002 Amendment, as well as the circumstances of the transaction, demonstrate that the grantor and grantee intended that the walkway covenant should run with the land, thus satisfying the first Neponsit condition ... . Indeed, the walkway covenant was expressly deemed an 'inducement' for the HOA to sell the property ... . The second Neponsit condition, that the walkway covenant touches and concerns the land, is easily met here, since the walkway covenant requires construction of a walkway linking the property with the Bay Street Landing community, and construction of common amenities. Thus, it 'directly affects the uses to which the land may be put and substantially affects its value' ... . The third Neponsit condition is satisfied by the undisputed facts establishing the requisite privity ...". ***Bay St. Landing Homeowners Assn., Inc. v. Meadow Partners, LLC*, 2019 N.Y. Slip Op. 01384, Second Dept 2-27-19**

REAL PROPERTY LAW, INSURANCE LAW, MUNICIPAL LAW.

A TAX FORECLOSURE SALE OF THE SERVIENT ESTATE SUBSEQUENT TO THE PLAINTIFFS' PURCHASE OF TITLE INSURANCE WAS NOT A TITLE DEFECT WHICH ENTITLED THE TITLE INSURANCE COMPANY, AS A MATTER OF LAW, TO DENY PLAINTIFFS' CLAIM, THE CLAIM STEMMED FROM THE CONSTRUCTION OF A FENCE ACROSS AN EASEMENT ON THE SERVIENT ESTATE WHICH WAS THE ONLY ACCESS TO PLAINTIFFS' PROPERTY.
The Second Department, reversing (modifying) Supreme Court, determined defendant title insurance company should not have been granted summary judgment supporting its denial of plaintiffs' title insurance claim. A fence had been constructed across an easement on the servient estate which blocked plaintiffs' access to their property. Years after the title insurance was purchased and before the fence was constructed, the servient was the subject of a tax foreclosure and sale. The Second Department held that the tax sale was not a title defect which justified, as a matter of law, denial of the claim by the title insurance company: "[P]laintiffs purchased a policy of title insurance from the defendant Old Republic National Title Insur-

ance Company (hereinafter Old Republic), dated January 17, 2007. The policy specifically insured against losses or damages sustained as a result of the plaintiffs' '[l]ack of a right of access to and from the land.' The policy excluded from coverage '[d]efects, liens, encumbrances, adverse claims, or other matters . . . attaching or created subsequent to Date of Policy.' ... Contrary to Old Republic's contention, if the plaintiffs acquired a valid easement appurtenant from [plaintiffs' predecessors in title] in 2007, such easement would not have been extinguished by the 2013 tax sale ... . Thus, Old Republic's contention that the 2013 tax sale constituted a defect, lien, encumbrance, adverse claim or other matter 'attaching or created subsequent to Date of Policy' within the meaning of the relevant policy exclusion is without merit, and cannot serve to establish Old Republic's prima facie entitlement to judgment as a matter of law." ***Buroker v. Phillips*, 2019 N.Y. Slip Op. 01386, Second Dept 2-27-19**

REAL PROPERTY LAW, WATER LAW, MUNICIPAL LAW.

CITY, AS THE OWNER OF THE MARINA WITH RIPARIAN RIGHTS, WAS ENTITLED TO EJECT DEFENDANTS WHO WERE USING AN INOPERABLE VESSEL AS A HOUSEBOAT DOCKED AT THE MARINA.

The Second Department, reversing (modifying) Supreme Court, determined that the city should have been granted summary judgment in this ejectment proceeding. The defendants were using an inoperable vessel as a houseboat docked at a city marina: "To demonstrate entitlement to judgment on a cause of action for ejectment, a plaintiff must establish '(1) it is the owner of an estate in tangible real property, (2) with a present or immediate right to possession thereof, and (3) the defendant is in present possession of the estate' ... . 'The owner of uplands on a tidal, navigable waterway possesses riparian rights' which include the right to build a pier, dock, or wharf ... . Here, the City established its prima facie entitlement to judgment as a matter of law with respect to its first cause of action, for ejectment, by demonstrating that it is the owner of the subject slip ... , with a present or immediate right to possession thereof ... , and that the defendants are in possession of that property." ***City of New York v. Anton*, 2019 N.Y. Slip Op. 01389, Second Dept 2-27-19**

ZONING, LAND USE, MUNICIPAL LAW.

ZONING BOARD OF APPEALS (ZBA) HAS EXCLUSIVELY APPELLATE JURISDICTION AND HAS NO AUTHORITY TO DECIDE A MATTER THAT HAS NOT FIRST BEEN THE SUBJECT OF A DECISION BY AN ADMINISTRATIVE OFFICIAL, ALTHOUGH THE OPEN MEETINGS LAW WAS VIOLATED, THE VIOLATION WAS NOT A BASIS FOR ANNULMENT OF THE ZBA DETERMINATION.

The Second Department determined (1) the zoning board of appeals (ZBA) does not have jurisdiction absent a determination of an administrative official which is appealed; and (2) although the Open Meetings Law was violated, the violation did not warrant annulment of the ZBA's determination on that ground. The petitioner had sought an interpretation of the local zoning law to determine whether a particular use of the land was permitted. Because no administrative official had ruled on that issue, the ZBA did not have authority to make a determination and the determination was properly annulled on that ground: "Absent a determination of the Building Inspector or other administrative official charged with the enforcement of the local zoning law, the Zoning Board of Appeals was without jurisdiction to consider Chestnut Ridge Associates' application for an interpretation of the local zoning law to determine if the plaintiffs/petitioners' landscaping business on certain premises was a permitted use in a laboratory office-zoned district ... . Accordingly, we agree with the Supreme Court's annulment of the determination of the Zoning Board of Appeals on that basis. ... ... [T]he record supports a finding that the Zoning Board of Appeals violated the Open Meetings Law with regard to a workshop meeting held on January 17, 2012, by failing to give proper notice of the meeting ... . However, the plaintiffs/petitioners failed to establish good cause to annul the Board's determination on that ground, as the improperly noticed meeting was open to the public and the determination at issue was adopted at a publicized, public meeting, after a series of public meetings with regard thereto had previously been held ... . Accordingly, the Supreme Court should not have annulled the determination of the Zoning Board of Appeals on the ground that the Open Meetings Law had been violated, and should not have awarded the plaintiffs/petitioners costs and attorneys' fees pursuant to Public Officers Law § 107(2) based on that violation ...". ***Chestnut Ridge Assoc., LLC v. 30 Sephar Lane, Inc.*, 2019 N.Y. Slip Op. 01388, Second Dept 2-27-19**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS, ATTORNEYS.

WAIVER OF APPEAL DID NOT PRECLUDE CONSIDERATION OF AN ISSUE WHICH AROSE AFTER THE WAIVER, AT SENTENCING ALL WERE UNDER THE MISCONCEPTION DEFENDANT WAS A SECOND FELONY OFFENDER, SENTENCING JUDGE HAD SINCE BECOME THE PUBLIC DEFENDER, THE PUBLIC DEFENDER'S OFFICE COULD NOT, THEREFORE, REPRESENT DEFENDANT.

The Third Department, reversing Supreme Court, determined that defendant's waiver of appeal did not preclude consideration of an issue that came up after the waiver and the public defender's office could not represent defendant because the sentencing judge had since become the public defender. At sentencing and at the time of the waiver of appeal, all were

under the misconception defendant was a second felony offender: "[D]efendant's waiver of the right to appeal regarding his plea to the probation violation was entered under the misconception by all parties that defendant was a second felony drug offender. Accordingly, the waiver does not preclude our review of defendant's appeal on resentencing because 'the plea was entered pursuant to conditions that changed after defendant's waiver' ... . We agree with defendant's argument on appeal that the Albany County Public Defender's office was precluded, as a matter of law, from representing him at the resentencing hearing because the Public Defender, prior to being appointed to that position, was the County Judge who presided over and initially sentenced him in this matter (see Judiciary Law § 17 ...). Accordingly, the judgment resentencing defendant must be reversed and the matter remitted for resentencing, with different representation assigned to defendant." ***People v. Sumter*, 2019 N.Y. Slip Op. 01460, Second Dept 2-28-19**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER'S REQUEST FOR A VIDEOTAPE OF THE UNDERLYING INCIDENT WAS IMPROPERLY DENIED, EVEN THOUGH THE REQUEST WAS MADE FOR THE FIRST TIME DURING THE HEARING.

The Third Department, ordering a new hearing, determined petitioner's request for a videotape of the underlying incident was improperly denied by the hearing officer: "Although petitioner apparently did not request his assistant to obtain the videotape, he made such request during the course of the hearing. The Hearing Officer denied the request and informed petitioner that because he did not ask his assistant to obtain it, it was unpreserved. Based upon this omission, the Hearing Officer considered the videotape to be 'unavailable.' However, there is nothing in the record to indicate that the videotape was, in fact, unavailable or that the Hearing Officer undertook any measures to ascertain if such videotape existed. In view of this, we conclude that petitioner's request was improperly denied ...". ***Matter of Davison v. Annucci*, 2019 N.Y. Slip Op. 01474, Third Dept 2-28-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY, COURT OF CLAIMS.

ALTHOUGH PLAINTIFF DID NOT FALL ALL THE WAY THROUGH THE GAP IN THE ELEVATED PLATFORM WAS WIDE ENOUGH TO HAVE ALLOWED HIM TO FALL THROUGH, PLAINTIFF WAS ENTITLED TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION.

The Third Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) claim. Plaintiff's leg fell through a one foot wide, twelve feet long, gap in the elevated platform he was working on. The fact that plaintiff could have fallen all the way through the gap entitled him to summary judgment. Although there may have been boards to cover the gap nearby, there was no evidence plaintiff was directed to cover the gap with the boards: "The opening presented an elevation-related risk, rather than a usual and ordinary danger of working on a construction site, because it was of sufficient size that claimant could have fallen entirely through to a lower level; therefore, Labor Law § 240 (1) applies to this accident because it was caused by a failure of the suspended metal deck — which was functioning as a scaffold — to provide adequate protection, even though claimant did not fall entirely through the opening ... . [T]here is no evidence in the record that claimant received any instruction or directive that would establish that he knew that he was responsible for either covering any openings, or requesting that they be covered by coworkers, before beginning work (see id.). Accordingly, we conclude that the Court of Claims properly determined that claimant was not the sole proximate cause of the accident ... .". ***Santos v. State of New York*, 2019 N.Y. Slip Op. 01479, Third Dept 2-28-19**

PERSONAL INJURY, EDUCATION-SCHOOL LAW.

QUESTIONS OF FACT ABOUT THE TYPE OF STICKS AND BALLS USED IN THE LACROSSE GAME AND WHETHER THE FAILURE TO PROVIDE GOGGLES WAS THE PROXIMATE CAUSE OF PLAINTIFF-STUDENT'S EYE INJURY.

The Third Department, reversing Supreme Court, determined the school district's motion for summary judgment should not have been granted in this lacrosse injury case. There were questions of fact about the type of sticks and balls used such that protective goggles were required: "[W]e find that a triable issue of fact exists as to the nature of the lacrosse game played by the students and whether protective goggles should have been used by the students based upon the game they were playing. Furthermore, under the circumstances of this case, a jury must determine whether defendants' breach of their duty to provide protective goggles was a proximate cause of the infant's eye injury ...". ***Powers v. Greenville Cent. Sch. Dist.*, 2019 N.Y. Slip Op. 01477, Third Dept 2-28-19**

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