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COURT OF APPEALS

CRIMINAL LAW, ATTORNEYS.

DEFENDANT'S PAPERS SUFFICIENTLY RAISED A QUESTION WHETHER HE WAS DENIED HIS RIGHT TO EFFECTIVE COUNSEL BECAUSE OF COUNSEL'S CONFLICT OF INTEREST, DENIAL OF DEFENDANT'S MOTION TO VACATE HIS CONVICTION WITHOUT A HEARING WAS AN ABUSE OF DISCRETION.

The Court of Appeals, over a dissenting opinion by Judge Stein, determined that defendant was entitled to a hearing on his motion to vacate his conviction on the ground his attorney (Chabrowe) was ineffective because of a conflict of interest. Defendant alleged a party (Salaam) who was present at the scene of the depraved indifference murder committed by defendant was represented by Chabrowe and had paid Chabrowe's fees on defendant's behalf: "Although defendant had informed the trial court during the Gomberg inquiry that he or his family had hired Chabrowe, he alleged that Salaam paid Chabrowe to represent defendant, resulting in an undisclosed and 'unwaivable' conflict, and that Chabrowe failed to explain any possible conflict of interest related to Salaam's payment of defendant's legal fees. In addition to his own affidavit, defendant submitted an affirmation from his current appellate counsel, who relayed details of a conversation he affirmed he had with Chabrowe about the payment of defendant's legal fees. Defendant also relied on recorded prison phone calls, which purportedly corroborate defendant's allegation that Salaam hired and paid for his attorney. * * * We review the summary denial of a CPL 440.10 motion under an abuse of discretion standard. On this record, we conclude that Supreme Court abused its discretion in determining that a hearing was not warranted to address the allegations contained in defendant's CPL 440.10 motion regarding Chabrowe's representation of defendant and whether any conflict of interest existed warranting reversal." ***People v. Brown*, 2019 N.Y. Slip Op. 03404, CtApp 5-2-19**

CRIMINAL LAW, EVIDENCE.

HAVING DEFENDANT WAIT WITH TWO POLICE OFFICERS WHILE A THIRD TOOK HIS ID TO AN APARTMENT TO VERIFY DEFENDANT'S CLAIM HE WAS VISITING A FRIEND IN THE APARTMENT WAS NOT JUSTIFIED UNDER DE BOUR, CONVICTION REVERSED.

The Court of Appeals, reversing the Appellate Division in this street stop case, determined having defendant "stand right there" with two police officers, while a third took defendant's ID to an apartment to verify defendant's claim he was visiting a friend there, was not justified under *De Bour:* "Defendant ... was approached by New York Police Department officers after they observed him exiting and reentering a building in a New York City Housing Authority development several times. Upon the officers' request, defendant explained that he was visiting a friend who lived in the building. The officers asked defendant for his identification, which he provided. An officer then took defendant's identification to the eleventh floor of the building to verify whether the occupant of the apartment defendant identified knew him ... . Another officer instructed defendant to 'stand right there' under the watch of two officers. When the first officer returned, having determined that the occupant of the apartment did not know defendant, defendant was arrested for trespassing. At the precinct, officers conducted a search of defendant's person incident to his arrest and recovered 42 bags of crack cocaine from his groin area. * * * At its inception, this was 'a general, nonthreatening encounter in which an individual is approached for an articulable reason and asked briefly about his or her identity, destination, or reason for being in the area' ... . That request implicated only level one of *De Bour* … and required only an objective credible reason to make basic inquiries of defendant ... . On this record, the initial inquiry was justified. However, the record demonstrates that the encounter thereafter rose beyond a level-one request for information, which the People failed to justify as lawful. Consequently, the People have failed to preserve any argument that the encounter in this case was justified under levels two or three of *De Bour*." ***People v. Hill*, 2019 N.Y. Slip Op. 03405, CtApp 5-2-19**

FIRST DEPARTMENT

ATTORNEYS, DEBTOR-CREDITOR, CONTRACT LAW.

QUESTIONS OF FACT IN THIS ATTORNEY'S FEES DISPUTE WHETHER THERE WAS AN ORAL AGREEMENT TO RETURN THE UNEXHAUSTED PORTION OF THE RETAINER PAID BY PLAINTIFF AND WHETHER THE VOLUNTARY PAYMENT DOCTRINE APPLIED.

The First Department determined defendant-attorneys failed to eliminate questions of fact about whether there was an oral agreement to return the unexhausted portion of the $176,500 retainer plaintiff paid for representation in an employment discrimination case, and whether the voluntary payment doctrine applied: "It is undisputed that defendants never provided plaintiff with a written agreement, as required under 22 NYCRR 1215.1. In addition, [defendant-attorney] Herman, in his deposition testimony, admitted that he never provided any itemization of the time spent working on plaintiff's case, even when plaintiff's counsel requested it. Thus, defendants failed to show that the amount of plaintiff's payments was fair and reasonably related to the value of services rendered ... . Defendants also failed to establish that plaintiff's claim is barred by the voluntary payment doctrine, which 'bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law' ... . While defendants assert that plaintiff voluntarily made payments to compensate them for their services, rather than any 'deposits' towards a retainer, they failed to establish that plaintiff had full knowledge of the relevant facts, such as the number of hours spent by defendants in connection with their representation of him ... . Plaintiff also averred that defendants told him that part of the payments would be used towards a trial and an appeal, which never occurred. Since defendants allegedly intended to keep the payments, regardless of any trial or appeal, there are material issues of fact whether plaintiff made the payments 'with full knowledge of the facts'... or based on a mistake of material fact ...". ***Dubrow v. Herman & Beinin*, 2019 N.Y. Slip Op. 03297, First Dept 4-30-19**

CIVIL PROCEDURE, APPEALS.

BY JOINING IN A PRE-ANSWER MOTION TO DISMISS DEFENDANT EXTENDED ITS TIME TO ANSWER UNTIL TEN DAYS AFTER NOTICE OF ENTRY OF THE ORDER DECIDING THE MOTION TO DISMISS, SINCE DEFENDANT WAS NOT IN DEFAULT, IT COULD APPEAL THE ORDER FINDING IT IN DEFAULT.

The First Department, reversing Supreme Court, determined defendant did not default. Defendant (Advisors) had joined in a pre-answer motion to dismiss, which extended the time for serving an answer until ten days after notice of entry of the order deciding the motion to dismiss. Because defendant was not in default, it could appeal: "Defendant's time to answer the complaint was extended by virtue of its serving a notice of motion, together with its co-defendants, seeking dismissal of the causes of action asserted against the co-defendants, pursuant to CPLR 3211(f) (see also CPLR 320[a]; 3012[a], [c]). Generally, a CPLR 3211(a) motion to dismiss made against any part of a pleading extends the time to serve a responsive pleading to all of it ... . Here, Advisors did not default, but appeared by joining in defendants' motion to dismiss the causes of action asserted against the individual named defendants, thereby extending its time to answer the complaint ... . Thus, Advisors had ten days from service upon it of notice of entry of the order deciding the partial motion to dismiss, to answer the causes of action against it, pursuant to CPLR 3211(f). Defendant's appeal from the order granting the default motion was proper, as it appeared and contested the application for entry of a default order below ... . Accordingly, CPLR 5511, which generally prohibits an appeal from an order or judgment entered upon default, is inapplicable ...". ***Levine v. Singal*, 2019 N.Y. Slip Op. 03438, First Dept 5-2-19**

CIVIL PROCEDURE, ATTORNEYS.

LAW OFFICE FAILURE WAS A REASONABLE EXCUSE FOR FAILING TO ANSWER, DEFENDANT'S MOTION TO EXTEND THE TIME TO APPEAR SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined low office failure was a legitimate excuse for failing to serve an answer. Defendant had made a pre-answer motion to dismiss, thereby demonstrating defendant did not intend to abandon the action: "Defendants satisfied the requirements of CPLR 3012(d), which authorizes an extension of time to appear or plead 'upon such terms as may be just and upon a showing of reasonable excuse for delay or default.' Here, the delay in filing an answer was occasioned by law office failure, which can constitute a reasonable excuse ... . Defendants' counsel explained that its failure to file its answer was due to an error in its office's case management system, which, upon the entry of a pre-answer motion to dismiss, marked the complaint answered. Notably, service of the pre-answer motion to dismiss revealed that defendants did not intend to abandon the action. Plaintiff does not argue that it has been prejudiced as a result of defendants' three month delay in submitting its answer ... , and our determination comports with New York's strong public policy in favor of litigating matters on the merits ...". ***Hertz Vehicles, LLC v. Mollo*, 2019 N.Y. Slip Op. 03270, First Dept 4-30-19**

CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE.

REPORT OF FIRE MARSHAL, WHO HAD NO INDEPENDENT RECOLLECTION OF HIS INVESTIGATION INTO THE CAUSE OF THE FIRE, WAS ADMISSIBLE PURSUANT TO THE BUSINESS RECORD EXCEPTION TO THE HEARSAY RULE, COURT SHOULD NOT HAVE CONSIDERED A NEW THEORY OF LIABILITY RAISED FOR THE FIRST TIME IN PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

The First Department, reversing Supreme Court, determined plaintiff could not defeat a summary judgment motion by raising a new theory of liability in the opposing papers: "The report established that the fire marshal conducted an investigation at the subject premises and concluded that the fire in defendants' building was caused by combustible clothing left in a dryer for too long, rather than any defect in the premises or dryer ... . Although the fire marshal did not have an independent recollection of his investigation, his report was admissible under the business record exception to the hearsay rule, and was sufficient to satisfy defendants' prima facie burden, since it noted that he independently inspected the premises and concluded that the accident was not due to defendants' negligence ... . In opposition, plaintiff failed to raise a triable issue of fact. Her expert failed to address the theories of liability raised in the complaint and bill of particulars and failed to rebut defendants' showing. Instead, plaintiff's expert raised a new theory, namely that plaintiff's injuries from smoke inhalation were caused by the absence of a self-closing door in the laundry room where the fire occurred, which caused smoke to permeate into plaintiff's apartment. A plaintiff cannot defeat a summary judgment motion by asserting a new theory of liability for the first time in opposition papers ...". ***Mirdita v. Musovic Realty Corp.*, 2019 N.Y. Slip Op. 03284, First Dept 4-30-19**

CIVIL RIGHTS LAW, MUNICIPAL LAW.

POLICE BODY-WORN-CAMERA FOOTAGE DOES NOT CONSTITUTE A PERSONNEL RECORD AND IS NOT THEREFORE PROTECTED FROM RELEASE TO THE PUBLIC BY CIVIL RIGHTS LAW § 50-a.

The First Department determined police officers' body-worn-camera footage did not constitute a personnel record within the meaning of Civil Rights Law § 50-a. Therefore the Patrolmen's Benevolent Assn. of the City of N.Y.'s petition for a preliminary injunction prohibiting release of the footage was properly denied: "We find that given its nature and use, the body-worn-camera footage at issue is not a personnel record covered by the confidentiality and disclosure requirements of § 50-a ... . The purpose of body-worn-camera footage is for use in the service of other key objectives of the program, such as transparency, accountability, and public trust-building. Although the body-worn-camera program was designed, in part, for performance evaluation purposes, and supervisors are required, at times, to review such footage for the purpose of evaluating performance, the footage being released here is not primarily generated for, nor used in connection with, any pending disciplinary charges or promotional processes. New York Civil Liberties Union v. New York City Police Department (__NY3d__, 2018 N.Y. Slip Op. 8423 [2018]), which involved disciplinary matters, does not constrain this analysis. The footage, here, rather, is more akin to arrest or stop reports, and not records primarily generated for disciplinary and promotional purposes. To hold otherwise would defeat the purpose of the body-worn-camera program to promote increased transparency and public accountability." ***Matter of Patrolmen's Benevolent Assn. of the City of N.Y. v. De Blasio*, 2019 N.Y. Slip Op. 03265, First Dept, 4-30-19**

CONTRACT LAW, CIVIL PROCEDURE.

THE PURPORTED WAIVER OF THE STATUTE OF LIMITATIONS DEFENSE WAS NOT IN WRITING AS REQUIRED BY GENERAL OBLIGATIONS LAW § 17-103, PLAINTIFF'S BREACH OF CONTRACT ACTION IS TIME-BARRED.

The First Department, in a full-fledged opinion by Justice Friedman, determined that, because the defendant's (CFA's) purported waiver of the statute of limitations defense was not in writing as required by General Obligations Law 17-103, plaintiff's breach of contract action was time-barred: "To govern the ... 'subtle interplay . . . between the freedom to contract and New York public policy' ... , the legislature enacted General Obligations Law § 17-103 ('Agreements waiving the statute of limitation'), the first paragraph of which provides: 'A promise to waive, to extend, or not to plead the statute of limitation applicable to an action arising out of a contract express or implied in fact or in law, if made after the accrual of the cause of action and made, either with or without consideration, in a writing signed by the promisor or his agent is effective, according to its terms, to prevent interposition of the defense of the statute of limitation in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise' (General Obligations Law § 17-103[1] ...). 'An agreement to extend the statute of limitations that does not comply with these requirements [of § 17-103(1)] has no effect' ...". ***Sotheby's, Inc. v. Mao*, 2019 N.Y. Slip Op. 03477, First Dept 5-2-18**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE POLICE RECEIVED AN ANONYMOUS TIP THAT A MAN MATCHING DEFENDANT'S DESCRIPTION HAD A GUN, THE POLICE SAW NO SIGN OF CRIMINAL ACTIVITY WHEN THEY APPROACHED AND QUESTIONED THE DEFENDANT, THE SUBSEQUENT SEIZURE AND FRISK OF THE DEFENDANT WAS ILLEGAL.

The First Department, in a full-fledged opinion by Justice Manzanet-Daniels, reversing defendant's conviction, determined the police illegally seized and frisked the defendant when they had only a level two right to inquire. The police were given an anonymous tip that a black man in a bodega wearing a black coat with a fur hood had a gun. The defendant matched the description, but he was seized and frisked in the absence of any sign of criminal activity. The fact that the anonymous tip tended to identify a specific person was not enough to justify the seizure: "The police may not stop and frisk a person based solely on information furnished by an anonymous source that the person is carrying a gun ... . Since an anonymous tip 'seldom demonstrates the informant's basis of knowledge or veracity,' it can only give rise to reasonable suspicion if accompanied by sufficient indicia of reliability ... . The tip must 'be reliable in its assertion of illegality, not just in its tendency to identify a determinate person' ... . One of the officers asked defendant if everything was okay, and he replied in the affirmative. Defendant then attempted to pass by the officers and exit the store. He was prevented from exiting when one of the officers 'sidestepped to [his] right,' in order to 'prevent [defendant] from leaving the store.' The officer testified at the hearing that they 'decided to frisk [defendant] for [their] safety, since it came over as male with a firearm and he fit the description.' They walked defendant to the counter, which was 5 to 10 feet away. Defendant put his hands on the counter, and the officers proceeded to frisk him. The officer testified that defendant placed his hand inside his jacket pocket, whereupon he used force to pull defendant's wrist from the pocket. The officer testified that when he grabbed defendant's wrist a silver firearm fell to the ground. The People argue that defendant's action in putting his hand in his pocket gave rise to reasonable suspicion. The problem with this argument is that defendant was already seized prior to this point." ***People v. Brown*, 2019 N.Y. Slip Op. 03305, First Dept 4-30-19**

FORECLOSURE, EVIDENCE.

THE AFFIDAVIT WHICH PURPORTED TO DEMONSTRATE PLAINTIFF HAD STANDING TO BRING THE FORECLOSURE ACTION REFERRED TO UNIDENTIFIED AND UNPRODUCED RECORDS AND THEREFORE LACKED ANY PROBATIVE VALUE.

The First Department, reversing Supreme Court, over a dissent, determined plaintiff failed to demonstrate standing to bring the foreclosure proceedings: "Plaintiff cannot establish that the note was assigned to it by a written assignment prior to commencement of foreclosure proceedings. Therefore, it must 'adequately prove[] that it did, indeed, have possession of the note prior to commencement of this action' ... , and where an affiant's knowledge is based on unidentified and unproduced records, 'the affidavit lacks any probative value' and cannot be the basis for an award of summary judgment ... . Since plaintiff has failed to establish that it had physical possession of the note prior to commencement of this action, we reverse the motion court's award of summary judgment to plaintiff." ***Residential Credit Solutions, Inc. v. Gould*, 2019 N.Y. Slip Op. 03266, First Dept 4-30-19**

FREEDOM OF INFORMATION LAW (FOIL), ATTORNEYS.

CITY AGENCY FAILED TO DEMONSTRATE THE REPORT SOUGHT BY PETITIONERS WAS SUBJECT TO THE INTRA-AGENCY EXEMPTION FROM THE FREEDOM OF INFORMATION LAW (FOIL) BECAUSE THE AGENCY DID NOT PRESENT PROOF THE PREPARER OF THE REPORT WAS RETAINED BY THE AGENCY, SUPREME COURT SHOULD HAVE CONSIDERED PETITIONERS' REQUEST FOR ATTORNEY'S FEES AS MANDATED BY A 2017 AMENDMENT TO FOIL.

The First Department determined Supreme Court correctly held that the respondent, NYC Dept of Parks & Recreation, was not entitled to the intra-agency materials exemption from the Freedom of Information Law (FOIL) because the respondent did not demonstrate that it retained a third party, "Owens Studio," to prepare the report sought by petitioners. The First Department went on to find that the statute obligated Supreme Court to address their request for attorney's fees: "[R]espondent failed to establish that it retained Owens Studio for purposes of preparing the report, a necessary prerequisite for invocation of the intra-agency materials exemption for documents prepared by an outside consultant ... . The affidavit submitted by respondent on this point is on its face conclusory. The fragmentary documents to which respondent's affiant points demonstrate only that Owens Studio was retained to perform some work. They do not on their face establish that respondent retained Owens Studio to prepare the subject study and report, nor establish what Owens Studio was retained to do, nor, in particular, establish that respondent itself, as opposed to some other entity, retained Owens Studio to prepare the report ... . The attorneys' fees provision of FOIL was amended, effective December 13, 2017, to provide that the court 'shall' award counsel fees where the agency has no basis for denying access to the material sought. The legislative history of

the recent amendment notes that '[o]ften, people simply cannot afford to take a government agency to trial to exercise their right to access public information,"'and that an award of attorney's fees is intended to 'encourage compliance with FOIL and to minimize the burdens of cost and time from bringing a judicial proceeding' ...". ***Matter of Reiburn v. New York City Dept. of Parks & Recreation*, 2019 N.Y. Slip Op. 03295, First Dept 4-30-19**

LABOR LAW-CONSTRUCTION LAW.

QUESTIONS OF FACT WHETHER DEFENDANT WAS A GENERAL CONTRACTOR AND WHETHER DEFENDANT HAD SUPERVISORY AUTHORITY OVER SAFETY CONDITIONS IN THIS LABOR LAW § 240(1) LADDER-FALL CASE.

The First Department determined plaintiff's motion for summary judgment in this Labor Law § 240(1) ladder-fall action was properly denied as against the alleged genera contractor, Edler. There was a question of fact whether Edler was a general contractor and whether Edler had the authority to supervise safety conditions: "To be found a 'general contractor' for purposes of establishing liability pursuant to Labor Law § 240(1), plaintiffs must show that Edler had the ability to control the activity bringing about the injury and the authority to correct unsafe conditions ... . Here, plaintiffs failed to establish, as a matter of law, that Edler had the ability to control [plaintiff's employer's] work at the premises or stop the work. The record reflects that although Edler was hired to 'supervise' the project, Edler did not hire, retain or pay any of the contractors working at the premises ... . Moreover, the homeowner testified that he 'assume[d]' that Edler had safety responsibilities and that it was his understanding that Edler had the authority to stop work on the job site if an unsafe condition arose. However, Edler's principal denies that he had the authority to stop the work at the premises, and the agreement between Edler and the homeowner does not specifically confer upon Edler the authority to stop the work if an unsafe condition was observed ... . Rather, it provides that part of Edler's 'site supervision' responsibilities included supervising 'day to day operations' of the site and trade. An issue of fact remains as to whether this includes supervision of the safety conditions." ***Uzeyiroglu v. Edler Estate Care Inc.*, 2019 N.Y. Slip Op. 03285, First Dept 4-30-19**

LABOR LAW-CONSTRUCTION LAW.

FALL FROM A FOLDED, UNSECURED A-FRAME LADDER AFTER PLAINTIFF RECEIVED AN ELECTRIC SHOCK ENTITLED PLAINTIFF TO SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION, SUPREME COURT REVERSED, TWO-JUSTICE DISSENT.

The First Department, reversing Supreme Court, over a two-justice dissent, determined plaintiff, who fell from a folded, unsecured A-frame ladder after receiving an electric shock, was entitled to summary judgment on his Labor Law § 240(1) cause of action. The majority distinguished a Court of Appeals decision involving a properly opened and locked A-frame ladder which fell over when plaintiff was shocked: "The 'safety device' provided to plaintiff was an unsecured and unsupported A-frame ladder that was inadequate to perform the assigned task. The ladder could not be opened or locked while plaintiff was performing his task, and the only way plaintiff could gain access to his work area on the ceiling at the end of the room was by folding up the ladder and leaning it against the wall. It is undisputed that the ladder was not anchored to the floor or wall. There were no other safety devices provided to plaintiff. Plaintiff's expert opined that had the ladder been supported or secured to the floor or wall by anchoring, it would have remained stable when plaintiff was shocked. He further opined that given the nature of plaintiff's work, which involved cutting pipes and the use of hand tools at an elevated height, plaintiff should have been furnished with a more stable device such as a Baker scaffold or a man lift. ... The fact that the fall was precipitated by an electric shock does not change this fact. This case is distinguishable from Nazario v. 222 Broadway, LLC (28 NY3d 1054 [2016]), relied on by the dissent. The plaintiff in Nazario fell while 'holding the ladder, which remained in an open locked position when it landed' ... . Thus, there was no evidence that the ladder was defective or that another safety device was needed. Here, on the other hand, it is undisputed that the ladder provided was not fully open and locked, nor was it otherwise secured, as plaintiff's expert opined it ought to have been." ***Cutaia v. Board of Mgrs. of the Varick St. Condominium*, 2019 N.Y. Slip Op. 03458, First Dept 5-1-19**

MUNICIPAL LAW, EMPLOYMENT LAW, MILITARY LAW.

PURSUANT TO MILITARY LAW, PETITIONER SHOULD HAVE BEEN DEEMED TO HAVE SUCCESSFULLY COMPLETED HER NYC POLICE-OFFICER PROBATIONARY PERIOD BY VIRTUE OF HER DEPLOYMENT ON MILITARY DUTY DURING THE PROBATIONARY PERIOD.

The First Department, reversing Supreme Court, determined that Military Law controlled and petitioner, a probationary NYC police officer, must be deemed to have satisfactorily completed her probation by virtue of her military deployment while on probationary status: "Under New York City personnel rules, '[s]ubject to the provisions of the [M]ilitary [L]aw,' the computation of a probationary period is based on time the employee is 'on the job in a pay status' (55 RCNY 5.2.2[b]). The personnel rules further provide that, notwithstanding rule 5.2.2, the probationary period will be extended while a probationer 'does not perform the duties of the position' (55 RCNY 5.2.8[b]) for instance, while on limited duty status ... . These rules are expressly subject to Military Law § 243(9), which provides, in pertinent part, that if a probationary employee is deployed on military duty before the expiration of his or her probationary period, 'the time [she] is absent on military duty

shall be credited as satisfactory service during such probationary period.' Military Law § 243(9) is unambiguous in providing that respondents are required to credit the period that probationary officers spend in military service as 'satisfactory service' towards completion of the probationary period. The statute does not distinguish between probationers on restricted or modified duty and those on full duty status at the time of deployment, or give respondents discretion to distinguish between types of probationers ...". ***Matter of Aroca v. Bratton*, 2019 N.Y. Slip Op. 03277, First Dept 4-30-19**

PERSONAL INJURY, EVIDENCE.

THE COMPLAINT ALLEGED THE ICY CONDITION EXISTED BEFORE 10 INCHES OF SNOW FELL, DEFENDANTS DID NOT DEMONSTRATE THEY DID NOT HAVE NOTICE OF THE ICE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Plaintiff alleged the icy condition existed before the snow fell and defendants didn't demonstrate a lack of notice of the icy condition: "Although it is undisputed that about 10 inches of snow fell about two hours before the ... accident, Supreme Court should have denied [defendants'] summary judgment because their submissions failed to address the complaint's allegations that the ice was on the sidewalk before that storm and that they received notice that it was there. Specifically, they failed to present evidence from someone with knowledge as to whether either entity received a complaint about the location before the storm commenced and the area's condition before the new precipitation fell." ***Wolf v. St. Vincent's Catholic Med. Ctrs. of N.Y.*, 2019 N.Y. Slip Op. 03293, First Dept 4-30-19**

NEGLIGENCE, EVIDENCE.

VASTLY DIFFERENT ACCOUNTS OF THE INCIDENT PRECLUDED SUMMARY JUDGMENT, SUPREME COURT REVERSED, EXTENSIVE DISSENT.

The First Department, reversing Supreme Court, over a dissent, determined questions of fact precluded summary judgment. The plaintiff's and defendants' versions of events, which are vastly different, are explained in detail in the decision. Plaintiff, who was in the back of an ambulette with a patient in a wheelchair, alleged that the driver pulled out fast causing plaintiff to fall and causing the wheelchair to tip over onto plaintiff. The driver further alleged he had fastened the wheelchair to the floor of the ambulette and made sure plaintiff was strapped into his seat. He further he drove safely. The driver acknowledged that the wheelchair had tipped over backwards: "We disagree with the dissent's statement that 'defendants have failed to offer any explanation of the proximate cause of the accident.' It is plaintiff's burden as the moving party for summary judgment to establish defendants' negligence as a proximate cause of plaintiff's injuries. Here, defendants adequately rebutted plaintiff's claim of negligence on their part, and thus plaintiff has failed to establish defendants' negligence and proximate cause. If a trier of fact finds defendants' version of events to be credible, then no liability should be imposed on them." ***Bajaha v. Mercy Care Transp., Inc.*, 2019 N.Y. Slip Op. 03457, First Dept 5-2-19**

SECOND DEPARTMENT

CIVIL PROCEDURE, CORPORATION LAW, FIDUCIARY DUTY, JUDGES.

RES JUDICATA APPLIES TO ISSUES WHICH COULD HAVE BEEN RAISED IN A SMALL CLAIMS ACTION, NO NEED TO PIERCE THE CORPORATE VEIL TO BRING A BREACH OF FIDUCIARY DUTY ACTION AGAINST A FORMER PARTNER IN A PROFESSIONAL CORPORATION, JUDGE SHOULD NOT HAVE SEARCHED THE RECORD AND RENDERED SUMMARY JUDGMENT WHERE NEITHER PARTY REQUESTED THAT RELIEF.

The Second Department, modifying Supreme Court, determined: (1) although the Small Claims Act provides that collateral estoppel (issue preclusion) does not apply to fact-findings made in a small claims action, the doctrine of res judicata does apply to any issue which could have been, but was not, raised in the small claims action; (2) a breach of fiduciary duty cause of action does not entail piercing the corporate veil in a proceeding against a former partner in a professional corporation; (3) the judge should not have searched the record to render summary judgment when neither party requested that relief: "'[T]he elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct' ... . Contrary to the Supreme Court's finding, it is not necessary to pierce the corporate veil in order to maintain a cause of action alleging breach of fiduciary duty against former partners in a professional corporation. ... Since ... neither party moved for summary judgment with respect to the counterclaims and none of the issues raised in the first, second, or third counterclaims were litigated in the summary judgment motion, or the small claims action, the Supreme Court should not have, in effect, searched the record and awarded the plaintiff summary judgment dismissing those counterclaims ...". ***Weinberg v. Picker*, 2019 N.Y. Slip Op. 03400, Second Dept 5-1-19**

CONTEMPT, ADMINISTRATIVE LAW, CRIMINAL LAW.

FINDING OF CIVIL CONTEMPT AGAINST THE CHAIR OF THE NYS PAROLE BOARD WAS WARRANTED, ALTHOUGH ORDERED TO CONDUCT A *DE NOVO* HEARING ON PETITIONER-INMATE'S APPLICATION FOR RELEASE ON PAROLE, THE EVIDENCE SUPPORTED THE CONCLUSION THAT THE BOARD DENIED PAROLE BASED ON THE SEVERITY OF THE OFFENSE ALONE, WITHOUT CONSIDERING THE STRONG FACTORS WHICH FAVORED RELEASE.

The Second Department, in a full-fledged opinion by Justice Leventhal, determined that the Chair of the NYS Parole Board was properly held in contempt for failing to comply with an order granting petitioner, in inmate who had served 40 years in prison for murdering a police office, a *de novo* hearing on his application for parole release. The court noted that this is the first time a court had held a parole board chair in contempt. The court found that the Board based its denial of parole solely on the severity of the offense, and did not consider the strong factors favoring release, in violation of the order: "Here, under the unique facts of this particular case, we agree with the Supreme Court's exercise of its discretion in granting the petitioner's motion to hold the appellant ... in civil contempt for the Board's failure to comply with the Supreme Court's judgment dated October 2, 2015. In the judgment dated October 2, 2015, the Supreme Court, after concluding, among other things, that the Board's determination to deny parole release was not supported by an application of the factual record to the statutory factors set forth in Executive Law § 259-i, that the Board's determination was based exclusively on the severity of the petitioner's offense, and that there was no rational support in the record for the Board's determination, remitted the matter to the Board 'to make a de novo determination on petitioner's request for parole release' to be held before a different panel of the Board. As previously noted, the Board did not appeal from that judgment. Rather, it purported to comply with the judgment by rendering a new determination following a de novo interview before a different panel and, in its written decision and in the transcript of the interview, purported to comply with its responsibilities to consider the requisite statutory factors. However, the Supreme Court, after conducting an evidentiary hearing, decided that the Board again denied parole release exclusively on the basis of the underlying conviction without giving consideration to the statutory factors. Consequently, the Supreme Court held that a finding of civil contempt was warranted." ***Matter of Ferrante v. Stanford*, 2019 N.Y. Slip Op. 03334, Second Dept 5-1-19**

CRIMINAL LAW, EVIDENCE.

STATEMENTS MADE BY THE DEFENDANT WHEN HE WAS HANDCUFFED IN THE BACK SEAT OF A POLICE CAR SHOULD HAVE BEEN SUPPRESSED, TANGIBLE EVIDENCE RETRIEVED AS A RESULT OF THE STATEMENTS SHOULD HAVE BEEN SUPPRESSED AS WELL.

The Second Department, reversing defendant's conviction, determined defendant's statements, made when he was handcuffed in the back seat of a police car, should have been suppressed. Defendant had possession of a wallet and had demanded money from the owner of the wallet in exchange for its return. The owner of the wallet went to the police. The police spoke to the defendant on the phone, and he again demanded money for the wallet. The defendant again demanded money for the wallet when the police went to his house. The wallet was retrieved after defendant made the statements in the police car, so the wallet should have been suppressed as well: "Not only was the defendant handcuffed in the back seat of a police vehicle, the detectives testified that the defendant was bargaining with them for his freedom by offering to get the wallet if they would remove the handcuffs and release him. Detective Bookstein specifically testified that the defendant was not free to leave the police vehicle. The record also demonstrates that the statements that the defendant made to the detectives during their conversation with him about the wallet were the result of the functional equivalent of interrogation and should have been suppressed ...". ***People v. Torres*. 2019 N.Y. Slip Op. 03380, Second Dept 5-1-19**

CRIMINAL LAW, EVIDENCE.

THE WARRANTLESS SEARCH OF A HOME TO RETRIEVE A HANDGUN DEFENDANT HAD THROWN UNDER A CHAIR IN THE PRESENCE OF THE POLICE WAS NOT JUSTIFIED UNDER ANY EXCEPTION TO THE WARRANT REQUIREMENT, THE PLAIN VIEW DOCTRINE DID NOT APPLY BECAUSE THE OFFICER DID NOT KNOW WHAT THE DEFENDANT HAD THROWN UNDER THE CHAIR, THE EMERGENCY EXCEPTION DID NOT APPLY BECAUSE THE DEFENDANT WAS IN CUSTODY WHEN THE OFFICER REENTERED THE HOME TO LOOK UNDER THE CHAIR.

The Second Department determined the handgun seized in a warrantless search inside a home should have been suppressed, and subsequent statements made by the defendant should have been suppressed as the fruit of the illegal search. The defendant's psychiatrist had called the police to tell them defendant had a gun and was paranoid. The defendant had previously threatened to shoot police officers. Officer Temple was given permission by defendant's mother to enter the home. Then defendant ran to the back of the house and threw something under a chair. After the defendant was in custody Officer Temple went back into the house, lifted up the chair and seized a handgun from under the chair. Up until that point Officer Temple did not know what the object was, so the plain-view justification for a warrantless search was not available: "Contrary to the People's contention, the consent of the defendant's mother to the police to enter the home to speak with the defendant did not constitute a consent to Officer Temple's search of the living room ... . Moreover, contrary to the People's

contention, the seizure of the firearm does not fall within the plain view exception ... . Officer Temple's testimony as to what he believed the object was, based upon the 911 call, his police experience, and military training, does not meet the requirement of the plain view doctrine, since he testified that he did not know what the object was until he moved the chair ... . The People do not assert on appeal that the seizure was lawful pursuant to the emergency exception and, in any event, any exigency abated once the defendant was detained ... Under the circumstances of this case, the physical evidence that was recovered from the residence must be suppressed, as the search was illegal, and the defendant's subsequent statements to law enforcement officials must be suppressed as fruit of the poisonous tree ...". ***People v. Hickey*, 2019 N.Y. Slip Op. 03364, Second Dept 5-1-19**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

NEGLIGENT SUPERVISION WAS NOT THE PROXIMATE CAUSE OF THE PLAINTIFF-STUDENT'S INJURIES, ANOTHER STUDENT, WHO WAS BEING CHASED BY A DOG WHICH HAD BROKEN LOOSE, RAN INTO PLAINTIFF DURING LACROSSE PRACTICE.

The Second Department determined the plaintiff-student's negligent supervision action against the board of education was properly dismissed. The plaintiff was injured during lacrosse practice when a dog brought into the field area by a nonstudent broke loose and chased a student who ran into plaintiff: "[T]he defendants established ... that they had no specific knowledge of any prior instances of dogs being brought into the field area during sports practices. Furthermore, the act of a student running into the infant plaintiff was a spontaneous, impulsive, and intervening act that could not have been anticipated. Therefore, the defendants established ... that any alleged lack of supervision was not a proximate cause of the infant plaintiff's injuries ...". ***B.J. v. Board of Educ. of the City of N.Y.*, 2019 N.Y. Slip Op. 03325, Second Dept 5-1-19**

FAMILY LAW, ATTORNEYS, APPEALS, SOCIAL SERVICES LAW.

ASSIGNED COUNSEL'S FAILURE TO FILE A NOTICE OF APPEAL IN A NEGLECT PROCEEDING CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, FAMILY COURT TO ISSUE REPLACEMENT ORDER FROM WHICH AN APPEAL MAY BE TAKEN.

The Second Department determined that assigned counsel's failure to file a notice of appeal in a neglect proceeding constituted ineffective assistance: " 'A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel (see Family Ct Act § 262[a][iv]), which encompasses the right to the effective assistance of counsel' ... . '[T]he statutory right to counsel under Family Court Act § 262 affords protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings' ... . Further, 'certain Family Court proceedings, although civil in nature, implicate constitutional due process considerations because they involve issues relating to the custody and welfare of children' ... . Here, the father demonstrated that his assigned counsel's failure to timely file a notice of appeal from the order of fact-finding and disposition constituted ineffective assistance of counsel. Under the circumstances of this case, reversal of the order appealed from is warranted, and we grant the father's motion to vacate the order of fact-finding and disposition and remit the matter to the Family Court ... . Upon remittitur, the court should issue a replacement order of fact-finding and disposition so that the father's time to appeal will run anew." ***Matter of Ricardo T. (Ricardo T.)*, 2019 N.Y. Slip Op. 03347, Second Dept 5-1-19**

FAMILY LAW, EVIDENCE.

EVEN THOUGH THE PRESUMPTION OF LEGITIMACY WAS NOT REBUTTED WITH RESPECT TO MOTHER'S HUSBAND IN THIS PATERNITY PROCEEDING, FAMILY COURT SHOULD HAVE APPLIED THE DOCTRINE OF EQUITABLE ESTOPPEL UNDER A 'BEST INTERESTS OF THE CHILD' ANALYSIS TO ADJUDICATE THE RESPONDENT, WITH WHOM A CHILD-PARENT BOND HAD DEVELOPED, THE FATHER.

The Second Department, reversing Family Court, determined the doctrine of equitable estoppel should have been invoked by Family Court in this paternity proceeding to find it was in the best interests of the child to adjudicate the respondent, Ricardo R. E., father of the child. The petitioner-mother was married to Jorge E. T. at the time the child was conceived and born. Family Court relied on the presumption of legitimacy to adjudicate Jorge E. T. the father. The Second Department agreed with Family Court's finding that the presumption of legitimacy was not rebutted: "Even if the presumption of legitimacy applies, the Family Court must proceed to an analysis of the best interests of the child before deciding whether to order a test ... . To that end, the 'paramount concern' in a proceeding to establish paternity is the best interests of the child, and the Family Court should hold a hearing addressed to that determination ... . Importantly, biology is not dispositive in a court's paternity determination ... . [W]e agree with the Family Court that the petitioner failed to rebut the presumption of legitimacy by clear and convincing evidence ... . Nevertheless, regardless of the applicability of the presumption of legitimacy, the Family Court should not have refused to consider the issue of equitable estoppel raised by the petitioner and Ricardo R. E. in response to the husband's assertion of paternity ... . As relevant here, the doctrine 'is a defense in a paternity proceeding which, among other applications, precludes a man from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man' (... see ... Family Ct Act § 522). It is significant that 'courts impose equitable estoppel to protect the status interests of a child in an already recognized and

operative parent-child relationship' ... . While this doctrine is invoked in a variety of situations, 'whether it is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, [it] is only to be used to protect the best interests of the child' ... . For that reason, this dispute does not involve the equities between or among the adults. The case turns exclusively on the best interests of the child ...". ***Matter of Onorina C.T. v. Ricardo R.E.*, 2019 N.Y. Slip Op. 03345, Second Dept 5-1-19**

FAMILY LAW, EVIDENCE.

DESPITE MOTHER'S VIOLATION OF SIX CONDITIONS OF A SUSPENDED JUDGMENT, TERMINATING HER PARENTAL RIGHTS WAS NOT IN THE BEST INTERESTS OF HER SPECIAL NEEDS CHILD.

The Second Department, reversing Family Court, noting that mother had violated six conditions of a suspended judgment, determined it was not in the best interests of the child to terminate mother's parental rights. The special needs child had been severely neglected by mother (medical neglect). However, mother demonstrated she genuinely loved the child and had learned how to care for him: "The record evidence demonstrated that the mother had learned how to provide the special care that the child needs and that the mother was emotionally attuned to the child's needs ... . Furthermore, the mother obtained stable housing and engaged in counseling ... . While the mother expressed her distrust of the preventive services workers and refused to provide releases for her other children's schools, the evidence demonstrated that the mother never denied the preventive services workers access to her home or to her other children. The mother also made progress in addressing the issues that led to the child being removed from her custody by taking responsibility for the initial neglect that led to the child being removed from her care. Moreover, the mother has cooperated with other services and providers. In addition, the record demonstrates that the mother genuinely loves the child and has shown vigilance in attending to his needs. The testimony at the hearing demonstrated that the mother's interaction with the child was appropriate, the visits were going well, and the interaction between the mother and the child has been positive. The record further demonstrates that the child's siblings are connected to him and desire for him to return to the home. Finally, the mother has a support system in place that she had not had previously." ***Matter of Markel C. (Kwanza H.)*, 2019 N.Y. Slip Op. 03332, Second Dept 5-1-19**

FORECLOSURE, CIVIL PROCEDURE.

THERE IS NO REQUIREMENT THAT A MOTION TO CONFIRM A REFEREE'S REPORT IN A FORECLOSURE PROCEEDING BE MADE BEFORE A JUDGMENT OF FORECLOSURE MAY BE GRANTED.

The Second Department, reversing Supreme Court, determined a plaintiff in a foreclosure action need not make a motion to confirm a referee's report before a judgment of foreclosure can be granted: "[T]he plaintiff moved ... to confirm the referee's report and for a judgment of foreclosure and sale. The court denied the motion without prejudice to renew upon confirmation of the referee's report. The plaintiff appeals. CPLR 4403 authorizes a court to confirm or reject a referee's report and, thereafter, to 'render decision directing judgment in the action.' There is no requirement under the statute that a motion to confirm a referee's report be made before a motion for a judgment of foreclosure and sale may be brought. Accordingly, we remit the matter to the Supreme Court, Queens County, for a determination on the merits of the plaintiff's motion ...". ***Real Estate Mtge. Network, Inc. v. Pretto*, 2019 N.Y. Slip Op. 03390, Second Dept 5-1-19**

FORECLOSURE, EVIDENCE, CIVIL PROCEDURE.

DOCUMENTS RELIED UPON BY PLAINTIFF IN THIS FORECLOSURE ACTION DID NOT MEET THE CRITERIA FOR THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, DOCUMENTS SUBMITTED IN REPLY DID NOT SATISFY PLAINTIFF'S BURDEN TO MAKE OUT A PRIMA FACIE CASE.

The Second Department, reversing Supreme Court, determined the documentary evidence relied upon by plaintiff in this foreclosure action did not meet the criteria for the business records exception to the hearsay rule. Plaintiff's motion for summary judgment should not have been granted. The court noted that documents submitted in reply could not be considered to satisfy the plaintiff's burden of making out a prima facie case: "Although 'the mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records, such records are nonetheless admissible if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business' ... . While [plaintiff's vice president] averred, inter alia, that his affidavit was based on books and records maintained by the plaintiff, he did not state that Bank of America's records were provided to the plaintiff and incorporated into the plaintiff's own records, or that the plaintiff routinely relied upon such records in its business, or that he had personal knowledge of Bank of America's business practices and procedures. Thus, he failed to lay the proper foundation for admission of these records ... . The affidavit and documents submitted by the plaintiff for the first time in reply to the defendants' opposition could not be used to satisfy the plaintiff's prima facie burden." ***Tri-State Loan Acquisitions III, LLC v. Litkowski*, 2019 N.Y. Slip Op. 03398, Second Dept 5-1-19**

PERSONAL INJURY, EVIDENCE, VEHICLE AND TRAFFIC LAW.

QUESTION OF FACT WHETHER DEFENDANT VIOLATED VEHICLE AND TRAFFIC LAW § 1141 BY MAKING A LEFT TURN IN FRONT OF PLAINTIFF'S VEHICLE, DEFENDANT AVERRED PLAINTIFF WAS DRIVING TOO FAST, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff's motion for summary judgment in this intersection traffic accident case should not have been granted. Although plaintiff made out a prima facie case, alleging the defendant, without warning, made a left turn in front of him in violation of Vehicle and Traffic Law § 1141, defendant raised a question of fact about whether she violated the statute by averring plaintiff was driving too fast: "Pursuant to Vehicle and Traffic Law § 1141, '[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard' ... . A violation of this statute constitutes negligence per se ... . The defendant driver averred that, as she approached the intersection, she slowed her vehicle, activated her left hand turn signal, and 'looked to ensure that the roadway was clear.' As she was in the process of turning, she noticed the plaintiff's vehicle for the first time and observed it traveling toward her at such an excessive rate of speed that she was unable to avoid the impact. The foregoing was sufficient to raise a triable issue of fact as to whether, at the time the defendant driver initiated her turn, the plaintiff's vehicle was 'so close as to constitute an immediate hazard' ...". ***Brodney v. Picinic*, 2019 N.Y. Slip Op. 03314, Second Dept 5-1-19**

PERSONAL INJURY, MUNICIPAL LAW.

ABUTTING LANDOWNER HAS NO DUTY TO MAINTAIN A TREE WELL IN THE SIDEWALK, LANDOWNER'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the abutting landowner (Glynton) in this slip and fall case did not have a duty to maintain the sidewalk tree well where plaintiff fell: "Administrative Code of the City of New York § 7-210, which became effective September 14, 2003, shifted tort liability for injuries arising from a defective sidewalk from the City to the abutting property owner ... . However, a tree well does not fall within the applicable Administrative Code definition of 'sidewalk' and, thus, 'section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells' ... . Here, Glynton established its prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff fell due to a condition related to the tree well, not due to any condition concerning the sidewalk, and that it had no duty to maintain the tree well ...". ***Barrios v. City of New York*, 2019 N.Y. Slip Op. 03311, Second Dept 5-1-19**

PERSONAL INJURY, MUNICIPAL LAW.

ALTHOUGH THE TOWN DEMONSTRATED IT DID NOT HAVE WRITTEN NOTICE OF THE DANGEROUS CONDITION IN THIS SIDEWALK SLIP AND FALL CASE, IT DID NOT DEMONSTRATE ITS SNOW REMOVAL EFFORTS DID NOT CREATE THE DANGEROUS CONDITION, THE TOWN'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the town's motion for summary judgment in this sidewalk slip and fall case should not have been granted. Although the town did not have written notice of the dangerous condition, the town did not demonstrate it did not create the dangerous condition by piling snow that melted and re-froze: "... Since the plaintiff alleged that the defendant affirmatively created the allegedly dangerous ice condition through its snow removal operations, the defendant, in addition to establishing that it did not receive prior written notice, was also required, on its motion for summary judgment, to make a prima facie showing that it did not create the condition complained of ... . A municipality's act in piling snow as part of its snow removal efforts, which snow pile then melts and refreezes to create a dangerous ice condition, constitutes an affirmative act excepting the dangerous condition from the prior written notice requirement ... . The defendant's evidence provided information about its general snow removal operations, but failed to show what the sidewalk abutting the accident site looked like immediately after it completed its snow removal operations. The defendant failed to establish, prima facie, that the 6 to 12 inches of snow that the plaintiff observed on the sidewalk, making it impassable, was not the product of its snow removal operations. The defendant also failed to submit any evidence as to what the temperature was from the time that it last performed its snow removal operations on January 24, 2016, and the time of the accident. Given that the defendant's submissions failed to eliminate all triable issues of fact as to whether its snow removal efforts created the ice condition, the defendant's motion for summary judgment dismissing the complaint should have been denied ...". ***Eisenberg v. Town of Clarkstown*, 2019 N.Y. Slip Op. 03319, Second Dept 5-1-19**

THIRD DEPARTMENT

CIVIL PROCEDURE, REAL PROPERTY LAW.

PLAINTIFF'S VERIFIED COMPLAINT WAS NOT 'DOCUMENTARY EVIDENCE' WITHIN THE MEANING OF CPLR 3211, DEFENDANT'S MOTION TO DISMISS SHOULD NOT HAVE BEEN GRANTED BASED UPON ALLEGATIONS IN PLAINTIFF'S VERIFIED COMPLAINT.

The Third Department, reversing Supreme Court, determined that plaintiff's verified complaint in this prescriptive easement action was not "documentary evidence" within the meaning of CPLR 3211 (a)(1) and therefore could not be the basis for granting defendant's motion to dismiss: " 'A motion pursuant to CPLR 3211 (a) (1) to dismiss the complaint as barred by documentary evidence may be properly granted only if the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law. To qualify as documentary evidence, the evidence must be unambiguous and of undisputed authenticity' ... . 'Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deed, contracts, and any other papers, the contents of which are essentially undeniable' ... . Also, as relevant here, '[a] party claiming a prescriptive easement must show, by clear and convincing evidence, that the use of the easement was open, notorious, hostile and continuous for a period of 10 years' ... . Supreme Court, in granting defendant's motion to dismiss, relied solely on plaintiffs' verified complaint in which they admitted that, during the period of time that the right-of-way has been used by their patrons, plaintiffs were aware that defendant owned the subject property ... . Accordingly, the court found that this knowledge rebutted the element of hostility and, as such, voided a necessary element of establishing a prescriptive easement. Although a complaint serves the important purpose of setting forth the plaintiff's allegations, we do not find that it is 'so essentially undeniable as to qualify as documentary evidence that conclusively refutes any claim that [a] plaintiff might have' ... . Further, in a motion to dismiss pursuant to CPLR 3211, a 'court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide [the] plaintiff the benefit of every possible inference' ... ; therefore, the complaint cannot also conclusively refute itself, which is what Supreme Court attempted to do here." ***Koziatek v. SJB Dev. Inc.*, 2019 N.Y. Slip Op. 03419, Third Dept 5-2-19**

CRIMINAL LAW.

THE COURT DID NOT AUTHORIZE THE SECOND SUPERSEDING INDICTMENT PROCURED BY THE PEOPLE AFTER A MISTRIAL, THE SECOND SUPERSEDING INDICTMENT WAS A NULLITY, CONVICTION REVERSED.

The Third Department, reversing defendant's conviction, determined the second superseding indictment, procured after a mistrial, was a nullity: "Before trial commenced, the People obtained a superseding indictment ... . A jury trial on the superseding indictment ensued; however, after the jury was impaneled and sworn, defendant's motion for a mistrial was granted. The People subsequently obtained a second superseding indictment ... . [T]he second superseding indictment is a nullity and assert, therefore, that defendant's conviction must be reversed and the matter remitted for further proceedings on the first superseding indictment. In declaring a mistrial, County Court did not dismiss the superseding indictment or authorize the People to re-present new charges to a grand jury. Accordingly, the People were limited to retrying defendant upon the superseding indictment, and the second superseding indictment was a nullity ... . Where, as here, an indictment is a nullity, 'any action or consequence that flowed from its filing . . . was necessarily a nullity as well'... . Accordingly, the judgment must be reversed." ***People v. Moseley*, 2019 N.Y. Slip Op. 03408, Third Dept 5-2-19**

FAMILY LAW, CONTEMPT.

BY THE TIME OF SENTENCING FOR CONTEMPT FOR FATHER'S WILLFUL VIOLATION OF A SUPPORT ORDER, FATHER HAD PAID ALL THE ARREARS, FAMILY COURT SHOULD NOT HAVE ORDERED HIS INCARCERATION.

The Third Department, reversing Family Court, determined Family Court should not have ordered father incarcerated for 20 days for contempt for willful violation of a support order because, at the time of sentencing, father had paid all the arrears: "Upon finding that a respondent has willfully failed to obey a lawful order of support, Family Court may 'commit the respondent to jail for a term not to exceed six months' (Family Ct Act § 454 [3] [a]). 'Such a sentence is in the nature of a civil contempt, which 'may only continue until such time as the offender, if it is within his or her power, complies with the support order' (... see Family Ct Act § 156 ...). Inasmuch as the father paid his child support arrears in full prior to the imposition of the sentence, Family Court abused its discretion by issuing the order of commitment ...". ***Matter of Marotta v. Casler*, 2019 N.Y. Slip Op. 03417, Third Dept 5-2-19**

FAMILY LAW, CIVIL PROCEDURE, APPEALS.

ORDER ENTERED UPON CONSENT IS NOT APPEALABLE, COERCION ARGUMENT MUST BE RAISED IN A MOTION TO VACATE THE ORDER.

The Third Department, dismissing the appeal in this neglect proceeding, noted that an order entered upon consent is not appealable. The argument that the consent was coerced must be raised in a motion to vacate the order: "Following consultation with her counsel, respondent ... consented on the record to a finding of neglect. Family Court then entered an order that adjudicated the children to be neglected and contained the agreed-upon terms of disposition. Respondent appeals. It is

well settled that an order entered upon consent is not appealable ... . Respondent's claim that her consent was involuntary because she was coerced into accepting the settlement offer should have been raised in Family Court by way of a motion to vacate the order (see Family Ct Act § 1051 [f] ...). As the record does not reveal that any such application was made, the appeal is not properly before this Court." ***Matter of Vicktoriya DD. (Sheryl EE.),* 2019 N.Y. Slip Op. 03411, Third Dept 5-2-19**

FAMILY LAW, CIVIL PROCEDURE, APPEALS.

BECAUSE NO PETITION HAD BEEN FILED IN THIS SUPPORT ENFORCEMENT PROCEEDING, FAMILY COURT DID NOT HAVE SUBJECT MATTER JURISDICTION, A DEFECT THAT MAY BE BROUGHT UP AT ANY TIME.

The Third Department determined Family Court did not have subject matter jurisdiction over the support enforcement proceeding because no petition had been filed. The support magistrate had erroneously treated a request by Florida to register the Florida support judgment in New York as an "enforcement petition:" "The Uniform Interstate Family Support Act (see Family Ct Act art 5-B) provides that '[a] registered support order issued in another state . . . is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state' (Family Ct Act § 580-603 [b]). In New York, proceedings for the violation of a support order 'shall be originated by the filing of a petition containing an allegation that the respondent has failed to obey a lawful [support] order,' and Family Court lacks subject matter jurisdiction to determine a violation claim without that petition (Family Ct Act § 453 ...). DSS was free to, and eventually did, file a petition alleging that the father had failed to comply with the support provisions contained in the 2014 judgment (see Family Ct Act §§ 453 [a]; 580-603 [b]). This proceeding did not arise out of that petition, however, and was not rendered viable by its filing ... . Family Court accordingly lacked subject matter jurisdiction to render the appealed-from order, and 'the claim that a court lacked subject matter jurisdiction 'may be raised at any time and may not be waived' ...". ***Matter of Pudvah v. Pudvah,* 2019 N.Y. Slip Op. 03414, Third Dept 5-2-19**

FAMILY LAW, EVIDENCE.

EVIDENCE OF MOTHER'S FAILURE TO COMPLY WITH CONDITIONS OF A SUSPENDED JUDGMENT WAS INCOMPLETE, AND, ALTHOUGH THE EVIDENCE OF FATHER'S FAILURE TO COMPLY WAS SUFFICIENT, FAMILY COURT DID NOT TAKE THE BEST INTERESTS OF THE CHILDREN INTO CONSIDERATION, TERMINATION OF PARENTAL RIGHTS REVERSED.

The Third Department, reversing Family Court, determined the evidence did not support the alleged violations of a suspended judgment by mother and the termination of father's and mother's parental rights. The decision is fact-specific and cannot be fairly summarized here. In a nutshell the evidence presented by the petitioner with regard to mother's alleged non-compliance with the suspended judgment was incomplete, and Family Court failed to consider the best interests of the child: "With regard to the mother's engagement in services, the caseworker testified that she had not received a return call from Trinity prior to the hearing and, as such, she was not aware whether the mother had engaged in any alcohol and drug treatment. The mother, however, testified that she made an appointment for an intake at Trinity prior to the filing of the subject motion and had thereafter commenced treatment on November 3, 2017. The caseworker also testified that, as she had also not heard back from the mother's Family Services counselor, she had no information as to whether the mother was engaged in either the protective parenting or the domestic violence programs. With regard to mental health counseling, the mother alleged that she had called and made an appointment prior to the filing of the subject motion, and the caseworker confirmed that the mother did attend an initial intake on November 17, 2017; however, the caseworker was unaware if the mother was following up with any recommended treatment as she had not spoken with the mother's Family Services counselor. * * * With regard to the father, although we find that Family Court's determination revoking the suspended judgment is supported by a sound and substantial basis in the record ... , such noncompliance 'does not automatically result in termination of his . . . parental rights' ... . Rather, even at this stage of the proceedings, Family Court was required to consider the best interests of the children ...". ***Matter of Nahlaya MM. (Britian MM.),* 2019 N.Y. Slip Op. 03418, Third Dept 5-2-19**

FREEDOM OF INFORMATION LAW (FOIL), CIVIL RIGHTS LAW.

UNUSUAL INCIDENT REPORTS, USE OF FORCE REPORTS, AND MISBEHAVIOR REPORTS KEPT BY THE DEPARTMENT OF CORRECTIONS AND COMMUNITY SERVICES (DOCCS) RE: INCIDENTS IN PRISONS ARE NOT PERSONNEL RECORDS PURSUANT TO CIVIL RIGHTS LAW § 50-a, THEREFORE PETITIONER WAS ENTITLED TO UNREDACTED COPIES PURUANT TO HIS FREEDOM OF INFORMATION LAW (FOIL) REQUEST.

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Clark, in a matter of first impression, determined that records kept by the Department of Corrections and Community Supervision (DOCCS) regarding incidents in prisons were not personnel records pursuant to Civil Rights Law § 50-a. Therefore petitioner was entitled to unredacted copies pursuant to his Freedom of Information Law (FOIL) request: "[U]nusual incident reports, use of force reports and misbehavior reports have distinct characteristics. However, they share several important commonalities. To begin with,

each category of report is, at its core, a written memorialization of an event that occurred at a DOCCS facility. Additionally, and significantly, each type of report is authored, as a mandatory component of their job duties, by staff members with knowledge of the underlying event. The reports do not arise out of inmate allegations or grievances ... . Nor are they written documentation of disciplinary proceedings or disciplinary action taken against a correction officer ... . Given their factual nature and that each is written by a witness or witnesses with knowledge of the underlying facility event, we find unusual incident reports, use of force reports and misbehavior reports to be more akin to arrest reports, stop reports, summonses, accident reports and body-worn camera footage, none of which is quintessentially 'personnel records' ... . * * * ... [W]hile it is relevant that unusual incident reports and use of force reports may be used in employee performance evaluations, that factor alone is not determinative. Otherwise, any employee work product or record documenting an employee's on-duty actions would classify as a personnel record with the justification that it could be used to evaluate work performance and would, thus, result in a situation in which the exception swallows the rule ... . [W]ith regard to the legislative objective of Civil Rights Law § 50-a, respondents have not demonstrated a 'substantial and realistic potential' for the unredacted reports to be used against the officers in a harassing or abusive manner ...". ***Matter of Prisoners' Legal Servs. of N.Y. v. New York State Dept. of Corr. & Community Supervision*, 2019 N.Y. Slip Op. 03421, Third Dept 5-2-19**

PERSONAL INJURY, EMPLOYMENT LAW, VEHICLE AND TRAFFIC LAW.

QUESTIONS OF FACT WHETHER THE EMPLOYEE WAS DRIVING THE EMPLOYER'S TRUCK WITH THE EMPLOYER'S PERMISSION AND WHETHER THE EMPLOYEE WAS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT WHEN THE TRAFFIC ACCIDENT OCCURRED.

The Third Department determined plaintiff's vicarious liability causes of action against the employer of the driver of a company truck which struck plaintiff's car head-on properly survived summary judgment. The driver, Price, was intoxicated and was convicted of vehicular assault. The employer argued that, because of the company policy prohibiting employees from using drugs and alcohol, Price did not have permission to operate the truck within the meaning of Vehicle and Traffic Law § 388. The employer further argued Price was not acting within the scope of his employment when the accident occurred. The court found there were questions of fact on both issues: "[T]he requirement to drive sober relates more closely to the manner of operation, or how to drive, rather than a restriction on who may operate the vehicle and when and where they may do so ... . As defendants did not establish, as a matter of law, that Price was driving without permission at the time of the accident, they were not entitled to summary judgment on the Vehicle and Traffic Law § 388 claim ... . Price testified that [his employer] gave him a vehicle to use for business purposes, including traveling from home to work, and at the time of the accident he was driving to a job site to begin work for the day. [The employer] arguably derived a benefit from Price's ability to take the vehicle home because the truck contained a tool box for work tools, he used the truck to transport supplies to job sites from home improvement stores, the truck advertised the business by displaying the company name and logo, and he worked at construction job sites rather than a main office, so permitting him to take the vehicle home saved him from having to use work time to pick the company truck up and drop it off at a central location each day ... . Based on this evidence, defendants failed to establish their entitlement to summary judgment, as there was a factual question regarding whether Price was acting within the scope of his employment at the time of the accident ...". ***Williams v. J. Luke Constr. Co., LLC*, 2019 N.Y. Slip Op. 03431, Third Dept 5-2-19**

PERSONAL INJURY, MUNICIPAL LAW.

CITY DID NOT HAVE NOTICE OF THE PROTRUDING SIGN ANCHOR IN THE SIDEWALK AND PLAINTIFF WAS UNABLE TO SHOW THE CONDITION WAS THE IMMEDIATE EFFECT OF ACTION TAKEN BY THE CITY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Third Department, reversing Supreme Court, determined defendant-city's motion for summary judgment in this sidewalk slip and fall case should have been granted. Plaintiff alleged a sign which had been installed in the sidewalk was missing and she tripped over the protruding sign anchor. The city demonstrated it did not have written notice of the condition. And plaintiff was unable to show the condition was the immediate effect of action taken by the city: "[P]laintiff claimed that defendant affirmatively created the defect by improperly installing the sign in 2006 and failing to routinely monitor its condition thereafter. 'However, the affirmative negligence exception to prior written notice statutes applies only where the action of the municipality immediately results in the existence of a dangerous condition' ... . Plaintiff failed to present any proof establishing that defendant engaged in an activity that immediately resulted in the detachment of the sign and sign pole from its anchor ...". ***Harvish v. City of Saratoga Springs*, 2019 N.Y. Slip Op. 03428, Third Dept 5-2-19**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

PLAINTIFF'S SON WAS INJURED WHEN A UTILITY VEHICLE DRIVEN ON PRIVATE PROPERTY BY DEFENDANTS' 14-YEAR-OLD SON OVERTURNED, THE VEHICLE AND TRAFFIC LAW CAUSE OF ACTION SHOULD HAVE BEEN

DISMISSED BECAUSE THE VEHICLE WAS NOT BEING DRIVEN ON A PUBLIC ROAD, HOWEVER THE NEGLIGENT ENTRUSTMENT CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT.

The Third Department, reversing (modifying) Supreme Court, determined the Vehicle and Traffic Law cause of action should have been dismissed, but the negligent entrustment cause of action properly survived summary judgment. Plaintiffs' 16-year-old son was injured when defendants' utility vehicle, driven on private property by defendants' 14-year-old son, overturned: "We find merit in defendants' claim that Supreme Court erroneously concluded that the utility vehicle is not excluded under Vehicle and Traffic Law § 125. Pursuant to Vehicle and Traffic Law § 388 (1), '[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle . . . by any person using or operating the same with the permission, express or implied, of such owner.' For purposes of section 388, vehicle means a motor vehicle, which is defined as '[e]very vehicle operated or driven upon a public highway which is propelled by any power other than muscular power'… . A public highway is '[a]ny highway, road, street, avenue, alley, public place, public driveway or any other public way' (Vehicle and Traffic Law § 134). At the time of the incident, the utility vehicle was being operated on defendants' private property — not a public highway ... . Accordingly, we find that the utility vehicle was not a motor vehicle within the meaning of Vehicle and Traffic Law § 125 ..., and it was error for Supreme Court to conclude otherwise. ... Supreme Court did not err in denying summary judgment on the negligent entrustment cause of action. '[A] parent owes a duty to protect third parties from harm that is clearly foreseeable from the child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control' ... . [The] submissions reveal that [defendant] O'Leary's son was not always required to ask for permission to operate the utility vehicle and fail to show that O'Leary had knowledge of how his son, when out of his presence, operated the vehicle. This proof, together with the clear warnings in the operator's manual, fails to support a determination as a matter of law that defendants could not have 'clearly foreseen' that their 14-year-old son's recreational use of the utility could have exposed others to injury ... ". ***Wright v. O'Leary*, 2019 N.Y. Slip Op. 03424, Third Dept 5-2-19**

FOURTH DEPARTMENT

ANIMAL LAW, LANDLORD-TENANT, PERSONAL INJURY.

LANDLORD'S MOTION FOR SUMMARY JUDGMENT IN THIS DOG-BITE CASE, PLAINTIFF BITTEN BY TENANT'S DOG.

The Fourth Department, reversing Supreme Court, determined the landlord's motion for summary judgment in this dog-bite case should have been granted. The landlord was aware the tenant had a dog, and could have required the removal of the dog, but was not aware whether the dog had vicious propensities. The court noted that theories of common-law negligence are not applicable: "It is well established that ' [t]o recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises[,] (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog' ... . Here, it is undisputed that defendant was aware that a dog was kept on the premises by his tenants and that he could have required them to remove or confine the dog. Nevertheless, defendant met his initial burden on the motion by establishing as a matter of law that he lacked actual or constructive knowledge that his tenants' dog had any vicious propensities ... . Furthermore, to the extent that plaintiff's complaint includes a negligence cause of action, we conclude that the court erred in failing to dismiss that cause of action inasmuch as '[c]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence' .." . ***Toher v. Duchnycz*, 2019 N.Y. Slip Op. 03487, Fourth Dept 5-3-19**

CRIMINAL LAW, APPEALS.

ALTHOUGH THE ARGUMENT WAS NOT PRESERVED, THE APPEAL WAS CONSIDERED IN THE INTEREST OF JUSTICE, DEFENDANT INDICATED HE DID NOT UNDERSTAND THE NATURE OF THE CRIME TO WHICH PLED GUILTY BUT THE JUDGE MADE NO FURTHER INQUIRY, THE PLEA WAS THEREFORE NOT KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED.

The Fourth Department, reversing defendant's conviction in the interest of justice, determined defendant's guilty plea was not knowingly, intelligently and voluntarily entered: "We agree with defendant that his plea was not knowingly, intelligently, and voluntarily entered ... . Although defendant failed to preserve that contention for our review because 'his motion to withdraw his plea was made on grounds different from those advanced on appeal' ... , and this case does not fall within the 'narrow exception' to the preservation rule ... , we exercise our power to review defendant's contention as a matter of discretion in the interest of justice ... . 'A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences' ... . After Supreme Court accepted defendant's

guilty plea, defendant stated that he was confused by the plea proceeding, and the court asked him if he had any questions about the consequences of pleading guilty. Defendant then made a series of remarks from which it became apparent that he did not understand the nature of the crime to which he had entered his guilty plea. Although defendant was 'obviously confused,' the court made no further inquiry whether he understood the plea or its consequences ...". ***People v. Hector*, 2019 N.Y. Slip Op. 03504, Fourth Dept 5-3-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

THERE WAS LEGALLY INSUFFICIENT EVIDENCE DEFENDANT SHARED THE CO-DEFENDANT'S INTENT TO KILL, IN ADDITION, DEFENDANT'S CONVICTION UNDER AN ACCESSORIAL LIABILITY THEORY WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Fourth Department, reversing defendant's conviction and dismissing the indictment, determined there was legally insufficient evidence that the defendant shared the co-defendant's intent to kill, and the verdict was against the weight of the evidence. The co-defendant walked up to the defendant on the street and shot him. The defendant was present at the scene and picked the co-defendant up and drove away after the shooting. The defendant was convicted under an accomplice or accessorial liability theory: "A 'defendant's presence at the scene of the crime, alone, is insufficient for a finding of criminal liability' ... . Indeed, evidence that a defendant was at the crime scene and even assisted the perpetrator in removing evidence of that crime is insufficient to support a defendant's conviction where the People fail to offer evidence from which the jury could rationally exclude the possibility that the defendant was without knowledge of the perpetrator's intent ... . 'An aider and abettor must share the intent or purpose of the principal actor, and there can be no partnership in an act where there is no community of purpose'... . We have no difficulty concluding that there is a valid line of reasoning and permissible inferences by which the jury could have found that defendant intentionally aided the codefendant after the murder, but we cannot conclude that there is legally sufficient evidence to support the inference that defendant shared the codefendant's intent to kill the victim ... . * * * Even assuming, arguendo, that the evidence is legally sufficient, viewing the evidence in light of the elements of the crime as charged to the jury ... , we further conclude that the verdict is against the weight of the evidence ... . A review of the weight of the evidence requires us to first determine whether an acquittal would not have been unreasonable ... . If so, we must ' weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' ... . We conclude that an acquittal would not have been unreasonable in this case and, based on the weight of the evidence, we further conclude that the jury was not justified in finding defendant guilty beyond a reasonable doubt". ***People v. Mcdonald*, 2019 N.Y. Slip Op. 03494, Fourth Dept 5-3-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS, JUDGES.

JUDGE'S SUA SPONTE ASSESSMENT OF POINTS ON A GROUND OF WHICH THE DEFENDANT WAS NOT NOTIFIED VIOLATED DEFENDANT'S DUE PROCESS RIGHT TO NOTICE AND AN OPPORTUNITY TO RESPOND.

The Fourth Department, reversing County Court's SORA risk assessment, determined that the judge's assessing points on a ground of which defendant was not given prior notice was a violation of due process. The issue was considered on appeal in the interest of justice (there was no objection at the SORA hearing): " 'The due process guarantees in the United States and New York Constitutions require that a defendant be afforded notice of the hearing to determine his or her risk level pursuant to SORA and a meaningful opportunity to respond to the risk level assessment' . As a result, '[a] defendant has both a statutory and constitutional right to notice of points sought to be assigned' ... , and 'a court's sua sponte departure from the Board's recommendation at the hearing, without prior notice, deprives the defendant of a meaningful opportunity to respond' ... . Here, neither the Board nor the People requested the assessment of points for a continuing course of sexual misconduct on the ground that defendant engaged in three or more acts of sexual contact with the victim over a period of at least two weeks ... . At the conclusion of the SORA hearing, however, the court proceeded to assign additional points under that category on the ground that the grand jury testimony of the victim's mother established that there was a third uncharged incident of sexual contact. Defendant was never provided any notice that points would be assessed as a result of a third uncharged incident and thus was not given a meaningful opportunity to respond to the court's risk level assessment." ***People v. Chrisley*, 2019 N.Y. Slip Op. 03505, Fourth Dept 5-3-19**

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, EVIDENCE.

THE SEVERE EMOTIONAL DISTRESS ELEMENT OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS DOES NOT REQUIRE OBJECTIVE MEDICAL EVIDENCE.

The Fourth Department, over a dissent, determined it was not necessary to present objective medical evidence to establish the severe emotional distress element of intentional infliction of emotional distress: "On appeal from an order and judgment that awarded plaintiff money damages following a nonjury trial, we reject defendants' contention that the evidence is legally insufficient to establish that plaintiff suffered severe emotional distress. Although severe emotional distress is an

element of the tort of intentional infliction of emotional distress ... , Supreme Court properly concluded that plaintiff was not required to present objective medical evidence in order to establish that element of her cause of action ...". **Fellows v. Rosati, 2019 N.Y. Slip Op. 03508, Fourth Dept 5-3-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF, WHO FELL THROUGH A HOLE IN A HOUSE UNDER CONSTRUCTION, WAS NOT ENGAGED IN CONSTRUCTION WORK COVERED BY LABOR 240 (1) OR 241 (6), PLAINTIFF WAS MEASURING WINDOWS FOR FUTURE INSTALLATION OF WINDOW TREATMENTS.

The Fourth Department, reversing (modifying) Supreme Court, determined that plaintiff, who fell through a hole in a house under construction, was not engaged in an activity covered by Labor Law 240 (1) or 241 (6) when he fell. Plaintiff was measuring windows for future installation of window treatments, which is not construction work. There were questions of fact on the negligence and wrongful death causes of action however: "[T]he work of measuring windows for the future installation of window treatments is not a protected activity under Labor Law § 240 (1). The work did not involve a 'significant physical change to the configuration or composition of the building or structure' ... , was not 'performed in the context of the larger construction project' ... , and was not 'necessary and incidental to the construction of the home' ... . The work being performed by decedent was not protected work under Labor Law § 241 (6) inasmuch as decedent 'was not involved with [any] construction' ... , and the window treatment work was separate and 'distinct from the construction work' ...". ***Acox v. Jeff Petroski & Sons, Inc.*, 2019 N.Y. Slip Op. 03480, Fourth Dept 5-3-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, CIVIL PROCEDURE.

THE HOSPITAL DEFENDANT WAS PROPERLY PRECLUDED FROM PRESENTING THE CPLR ARTICLE 16 DEFENSE AFTER THE OTHER POTENTIALLY LIABLE DEFENDANTS HAD BEEN SEVERED FROM THE ACTION AT THE HOSPITAL DEFENDANT'S REQUEST, AND AFTER THE HOSPITAL DEFENDANT HAD REPRESENTED TO THE COURT THE OTHER POTENTIALLY LIABLE DEFENDANTS WOULD NOT BE PART OF THE TRIAL, TWO JUSTICE DISSENT, THE HOSPITAL DEFENDANT'S REQUEST FOR THE ERROR IN JUDGMENT JURY INSTRUCTION WAS PROPERLY DENIED.

The Fourth Department, over a two-justice dissent, determined defendant hospital was properly precluded from presenting a CPLR article 16 defense (pursuant to the defense, a party deemed 50% liable or less pays only that portion of the damages) in this medical malpractice action. Plaintiff's decedent was first treated at defendant hospital and then at defendant rehabilitation facilities (the Elderwoods). When plaintiff's decedent was treated at the hospital she was given a high dosage of medication, Simvastatin, and that high dosage was continued at the Elderwoods. The dosage was four times higher than plaintiff's decedent's usual dosage. The high dosage caused plaintiff's decedent's extreme suffering and death. Earlier in the litigation, the Elderwoods moved for severance, the defendant opposed and the motion was denied. As the trial approached defendant moved to sever the Elderwoods, and represented to the court that the Elderwoods involvment would not be "a topic in the main action." Then, at the trial, after plaintiff rested, defendant gave notice that it would present evidence of the Elderwoods' negligence and asked to have them included on the verdict sheet pursuant to CPLR article 16. Noting that the plaintiff was not able to address the article 16 defense during the jury selection and trial, the Fourth Department held that the defendant was properly precluded from presenting the defense. The court also held that defendant's request for an error in judgment jury instruction was properly denied: "We agree with defendant that the fact that the third-party action was severed does not extinguish a defendant's article 16 defense. But, in this case, defendant represented before the trial started that the topic of care at the Elderwoods would not be discussed. If defendant had not made this representation, then plaintiff could have preempted or otherwise addressed this anticipated defense through opening statements and plaintiff's own lay and expert witnesses in plaintiff's case in chief, and thus could have suggested that the Elderwoods were not negligent before resting. As plaintiff's counsel asserts, he could have examined his witnesses at trial differently had he known that the topic of the Elderwoods' care, and thus the CPLR article 16 defense, was still on the table. ... It is well settled that 'a doctor may be liable only if the doctor's treatment decisions do not reflect his or her own best judgment, or fall short of the generally accepted standard of care' . An 'error in judgment' charge 'is appropriate only in a narrow category of medical malpractice cases in which there is evidence that defendant physician considered and chose among several medically acceptable treatment alternatives' ... . This case does not fall within that narrow category ... . There was simply no evidence that there was any judgment made by hospital personnel to administer 80 mg/daily of Simvastatin to decedent." ***Mancuso v. Health*, 2019 N.Y. Slip Op. 03520, Fourth Dept 5-3-19**

PERSONAL INJURY.

ALTHOUGH BEING STRUCK BY A MISHIT BALL IS AN INHERENT RISK IN A GOLF GAME WHICH IS SUBJECT TO THE ASSUMPTION OF THE RISK DOCTRINE, THERE WAS EVIDENCE DEFENDANT DELIBERATELY HIT THE BALL IN A MANNER THAT UNREASONABLY INCREASED THE RISK OF STRIKING PLAINTIFF.

The Fourth Department determined defendant golfer's motion for summary judgment was properly denied. There was evidence defendant teed off when plaintiff was within the range of defendant's normal drives. Plaintiff was struck in the head by the ball. This was not a case of a mishit ball which would trigger the assumption of the risk doctrine: "... '[A]lthough the object of the game of golf is to drive the ball as cleanly and directly as possible toward its ultimate intended goal (the hole), the possibility that the ball will fly off in another direction is a risk inherent in the game' ... . Thus, while a golfer owes a duty to use due care in striking a golf ball ... , 'the mere fact that a golf ball did not travel in the intended direction does not establish a viable negligence claim' ... . 'To provide an actionable theory of liability, a person injured by a mishit golf ball must affirmatively show that the golfer failed to exercise due care by adducing proof, for example, that the golfer aimed so inaccurately as to unreasonably increase the risk of harm' ... . [D]efendant's submissions raise an issue of fact whether he unreasonably increased the risk of striking plaintiff with his golf ball by teeing off when plaintiff, who was visible in the fairway on the same hole, was still positioned well within the typical range of defendant's drive ...". ***Krych v. Bredenberg*, 2019 N.Y. Slip Op. 03479, Fourth Dept 5-3-19**