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COURT OF APPEALS

CRIMINAL LAW, EVIDENCE.

THE DEFENSE MADE A PRIMA FACIE SHOWING THAT THE MISSING WITNESS JURY INSTRUCTION WAS APPROPRIATE, THE TRIAL COURT IMPROPERLY PLACED THE BURDEN TO DEMONSTRATE THE WITNESS'S TESTIMONY WOULD NOT BE CUMULATIVE ON THE DEFENDANT, THE PEOPLE DID NOT MEET THEIR BURDEN TO DEMONSTRATE THE TESTIMONY WOULD BE CUMULATIVE.

The Court of Appeals, reversing defendant's conviction, reversing the Appellate Division, in a full-fledged opinion by Judge Feinman, determined that the trial court's analysis of the defense request for a missing witness jury instruction improperly shifted the burden to the defendant to show that the testimony would not be cumulative. The witness, Dees, was with the shooting victim and was shot himself. The witness was the first to see the shooter in a car that passed by and tried to push the shooter away when the shooter approached: "In Gonzalez [68 NY2d 424], we established the analytical framework for deciding a request for a missing witness instruction. The proponent initially must demonstrate only three things via a prompt request for the charge: (1) 'that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case,' (2) 'that such witness can be expected to testify favorably to the opposing party,' and (3) 'that such party has failed to call' the witness to testify ... . The party opposing the charge can defeat the initial showing by accounting for the witness's absence or demonstrating that the charge would not be appropriate ... . 'This burden can be met by demonstrating,' among other things, that 'the testimony would be cumulative to other evidence' … . If the party opposing the charge meets its burden by rebutting the prima facie showing, the proponent retains the ultimate burden to show that the charge would be appropriate ... . We have repeatedly reiterated Gonzalez's specific burden-shifting analysis ... , but we have never required the proponent of a missing witness charge to negate cumulativeness to meet the prima facie burden ... . * * * Given that defendant, as the proponent of the missing witness charge, met his initial burden, the People were required to rebut that showing by establishing why the charge was inappropriate. They failed to do so. The People simply asserted, without explanation, that Dees's testimony on the issue of identification would be cumulative because 'there is absolutely no indication that [Dees] would be able to provide anything that wasn't provided by [the victim].' This conclusory argument was insufficient to satisfy the People's burden in response to defendant's prima facie showing ... . Dees's testimony would not have been 'trivial or cumulative'; due to inconsistencies in the victim's descriptions of the incident and what the shooter was wearing, the issue of identification was 'in sharp dispute . . . and the testimony of the only additional person who was present [during the shooting] might have made the difference' ...". ***People v. Smith*, 2019 N.Y. Slip Op. 04447, CtApp 6-6-19**

CRIMINAL LAW, EVIDENCE, ATTORNEYS, APPEALS.

DEFENDANT'S REQUEST TO REPRESENT HIMSELF WAS PROPERLY DENIED AND THERE WAS SUPPORT IN THE RECORD FOR THE EXISTENCE OF PROBABLE CAUSE TO ARREST.

The Court of Appeals, affirming defendant's conviction, determined the defendant's request to proceed pro se was properly denied and there was support in the record for the existence of probable cause to arrest. The Court of Appeals did not discuss the facts. The link to the Second Department decision is **here**. "The trial court concluded—based upon, among other things, its own observations of defendant's conduct throughout these lengthy proceedings and the testimony of defendant's attending physician—that defendant engaged in malingering insofar as he was competent to proceed but persisted in his efforts to avoid trial. Inasmuch as defendant 'engaged in conduct which would prevent the fair and orderly exposition of the issues,' we conclude that the trial court did not abuse its discretion in denying defendant's request to proceed pro se .... Moreover, the existence of record support for the determination of the courts below that the pursuit of defendant by the police was justified by a 'reasonable suspicion' of criminal activity forecloses our further review of that issue ...". ***People v. Gregory*, 2019 N.Y. Slip Op. 04450, CtApp 6-6-19**

CRIMINAL LAW, VEHICLE AND TRAFFIC LAW.

THE FACTUAL ALLEGATIONS IN THIS COMMON LAW DRIVING WHILE INTOXICATED CASE WERE SUFFICIENT TO ALLEGE DEFENDANT WAS THE OPERATOR OF THE VEHICLE, APPELLATE TERM REVERSED.

The Court of Appeals, reversing the Appellate Term, determined the "factual allegations in the accusatory instrument were sufficient to support the inference that defendant was the operator of the vehicle involved in the accident and, thus, Appellate Term erroneously dismissed the accusatory instrument on that ground." The facts of the case were not described. The Appellate Term decision is: *People v. Esposito (Monique)*, 2018 N.Y. Slip Op. 28245, decided on Aug. 3, 2018, Appellate Term, Second Department. ***People v. Esposito*, 2019 N.Y. Slip Op. 04448, CtApp 6-6-19**

EDUCATION-SCHOOL LAW, ADMINISTRATIVE LAW, ATTORNEYS.

IN THIS COLLEGE DISCIPLINARY ACTION, THE COLLEGE'S REFUSAL OF THE STUDENT'S REQUEST FOR A THREE-HOUR ADJOURNMENT TO ALLOW HIS ATTORNEY TO ATTEND WAS AN ABUSE OF DISCRETION, NEW HEARING ORDERED (CT APP).

The Court of Appeals, reversing the Appellate Division in this college disciplinary action, determined the student's request for a three-hour adjournment to allow his attorney to attend should have been granted. The link to the reversed Second Department decision is **here:** "[T]he petition insofar as it sought to annul respondents' disciplinary determination [is] granted and the matter remitted to the Appellate Division with directions remand to respondents for a new disciplinary hearing. Petitioner, a student enrolled at respondent Purchase College of the State University of New York, was accused of multiple disciplinary violations including sexual assault of another student. Petitioner requested a three-hour adjournment of his scheduled administrative hearing so that his attorney could attend the proceeding. Respondents denied this request. Under the particular circumstances of this case, we find respondents abused their discretion as a matter of law by failing to grant the requested adjournment ...". ***Matter of Bursch v. Purchase Coll. of the State Univ. of N.Y.*, 2019 N.Y. Slip Op. 04449, CtApp 6-6-19**

FIRST DEPARTMENT

CIVIL PROCEDURE, APPEALS, JUDGES.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT AND VACATED THE DEFAULT JUDGMENT, ALTHOUGH A SUA SPONTE ORDER IS NOT APPEALABLE AS OF RIGHT, THE NOTICE OF APPEAL WAS DEEMED A MOTION FOR LEAVE TO APPEAL.

The First Department, reversing Supreme Court, held that Supreme Court should not have, sua sponte, dismissed plaintiff's complaint and vacated the default judgment as untimely, Plaintiff had timely moved for a default judgment. Although sua sponte orders are not appealable as of right, the First Department deemed the notice of appeal as a motion for leave to appeal: "An order issued sua sponte is not appealable as of right (see Sholes v. Meagher, 100 NY2d 333, 335 [2003]). However, given the nature of the motion court's sua sponte relief in dismissing the complaint pursuant to CPLR 3215(c), we deem the notice of appeal to be a motion for leave to appeal, and grant such leave (...CPLR 5701[c]). The record is clear that plaintiff had moved for a default judgment within one year, and thus, the motion court's sua sponte vacature of the judgment and dismissal of the complaint as untimely was in error ... . In view of this decision, the merits of defendant's motion to vacate the default judgment are no longer moot and it is remanded back to the trial court for consideration on the merits." ***New Globaltex Co., Ltd. v. Zhe Lin*, 2019 N.Y. Slip Op. 04456, First Dept 6-6-19**

CRIMINAL LAW, EVIDENCE.

IT WAS REVERSIBLE ERROR TO ADMIT A WITNESS'S GRAND JURY TESTIMONY, THE WITNESS'S CLAIM HE COULD NOT REMEMBER THE EVENTS WAS NOT SO DAMAGING TO THE PEOPLE'S CASE AS TO ALLOW THE GRAND JURY EVIDENCE FOR IMPEACHMENT PURPOSES.

The First Department, reversing defendant's conviction, determined that admitting the grand jury testimony of a witness was reversible error. The witness's testimony at trial that he couldn't remember the events was not so damaging to the People's case as to justify impeachment: "The People concede that the trial court erred in admitting the grand jury testimony of a witness indicating that defendant fired an errant shot that struck a bystander as defendant and a companion fled from another group following a verbal altercation. Specifically, the People acknowledge that the testimony was not admissible under the past recollection recorded exception to the hearsay rule, because the witness did not testify at trial that the grand jury testimony 'correctly represented his knowledge and recollection when made' ... , and was not admissible for impeachment purposes under CPL 60.35 because the witness's trial testimony that he could not remember the relevant events did not 'affirmatively damage[] the case of the party calling him' ...". ***People v. Folk*, 2019 N.Y. Slip Op. 04321, First Dept 6-4-19**

FAMILY LAW, EDUCATION-SCHOOL LAW.

INSUFFICIENT EVIDENCE OF NEGLECT AND DERIVATIVE NEGLECT FOR FAILURE TO PROVIDE ADEQUATE FOOD, CLOTHING AND SHELTER; EVIDENCE SUPPORTED EDUCATIONAL NEGLECT AND DERIVATIVE NEGLECT, DESPITE MOTHER'S HOME-SCHOOLING EFFORTS, TWO-JUSTICE DISSENT.

The First Department reversed Family Court's finding of neglect and derivative neglect for failure to provide adequate food, clothing and shelter, The evidence, i.e., the caseworker's progress notes and the testimony of a police officer based upon a single visit, was deemed insufficient. However, the majority, over a two-justice dissent, found the evidence of educational neglect and derivative neglect sufficient. The older children were not attending school, but the college-educated mother was home-schooling them: "Although the mother's living conditions were unsuitable, the record presents no basis for a conclusion that the children's 'physical, mental or emotional condition ha[d] been impaired or [wa]s in imminent danger of becoming impaired' as a result of their exposure to such environment (Family Court Act § 1012[f][i]). The officer's testimony provided no information about the physical or mental condition of the children at the time of her visit, and petitioner did not introduce the results of the medical examination of the children conducted on the day when they were first removed from the home. ... The court found that the mother did not establish that she was qualified to teach, especially with respect to elementary-school-aged children. The mother admitted that she knew her educational plan was not approved by the Board of Education, yet, she never followed up with an approved individual home instruction plan as required by the Board of Education. The court found that the mother failed to show that her instruction was substantially equivalent to that in public school, and that the children were educated for at least as many hours as provided in public school ... . The court further found that the mother's use of college-level textbooks and testing the children using high school examination tests did not constitute appropriate education for elementary-school-aged children. We defer to these findings of the Family Court." ***Matter of Puah B. (Autumn B.--Hemerd B.)*, 2019 N.Y. Slip Op. 04451, First Dept 6-6-19**

PERSONAL INJURY, LANDLORD-TENANT, EVIDENCE.

OUT-OF-POSSESSION LANDLORD COULD NOT HAVE FORESEEN THAT INFANT PLAINTIFF WOULD MOVE LOGS STACKED AT THE SIDE OF THE PROPERTY AND THEN FALL WHEN JUMPING FROM LOG TO LOG, INFANT PLAINTIFF CREATED THE DANGEROUS CONDITION AND ASSUMED THE RISK.

The First Department determined the out-of-possession landlord's motion for summary judgment in this slip and fall case was properly granted. Infant plaintiff (Deandre) had moved some logs from the side of the property and was jumping from log to log when he fell: "Defendant testified that he had had the tree cut down and the logs stacked along a property fence line several years earlier and had never seen the logs anywhere else on the property. Deandre testified that he and his friends had arranged the logs in a line and were jumping from log to log when he fell. The record shows that no one had complained to defendant, an out-of-possession landlord, about the logs before the accident, and Deandre testified that he had been playing on them for about 10 minutes when he fell. Plaintiffs contend that it was foreseeable that children would move the logs. However, absent evidence of earlier incidents involving the logs or any complaint made to defendant about the logs, the possibility of children playing with them does not render the presence of the logs in the backyard foreseeably dangerous ... . Plaintiffs also failed to raise an issue of fact as to whether Deandre could fully appreciate the risks of jumping onto logs. As Deandre himself created the danger by setting up and jumping on the logs while playing with his friends, plaintiffs cannot show that he was faced with a risk that was unassumed." ***S.-B. v. Radincic*, 2019 N.Y. Slip Op. 04324, First Dept 6-4-19**

UNIFORM COMMERCIAL CODE, DEBTOR-CREDITOR.

PLAINTIFF, WHICH PUT UP ITS EQUITY INTERESTS IN 11 PROPERTIES TO SECURE A $71 MILLION LOAN FROM DEFENDANT, SUED TO DECLARE VOID THE UCC NONJUDICIAL SALE OF THE PROPERTIES BY DEFENDANT, THAT ASPECT OF THE SUIT SHOULD HAVE BEEN DISMISSED.

The First Department, in a full-fledged opinion by Justice Kapnick, determined defendant's cause of action seeking to declare void the Uniform Commercial Code (UCC) sale of plaintiff's property, which was put up as collateral for a loan made to plaintiff by defendant, should have been dismissed. Plaintiff, Atlas, put up its equity interest in 11 properties as collateral for a $71 million loan from defendant, Macquarie. Atlas and Macquarie were unable to agree on an extension of time for repayment of the loan. After a UCC nonjudicial sale held by Macquarie, at which Atlas submitted bids, another buyer outbid Atlas. Atlas sued to void the sale: "Article 9 of the Uniform Commercial Code (UCC) governs the enforcement of a creditor's security interest. 'The underlying purposes and policies of the [UCC] as a whole are to simplify, clarify, and modernize the law governing commercial transactions; to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and to make uniform the law among the various jurisdictions' ... . Here, plaintiff ... (Atlas), the debtor, is asking this Court to unwind a UCC sale of the equity interest in 11 commercial properties, which was collateral for Atlas's $71 million mezzanine loan, borrowed from defendant ... (Macquarie), the secured creditor. It is difficult to see how such an action would simplify the laws governing commercial transactions. Rather, if UCC sales could be unwound, it would only serve to muddy the waters surrounding nonjudicial sales conducted pursuant to article 9 of

the UCC, and to deter potential buyers from bidding in nonjudicial sales, which would, in turn, harm the debtor and the secured party attempting to collect after a default. Moreover ... Atlas's argument does not have support in the plain reading of the UCC nor in existing case law." ***Atlas MF Mezzanine Borrower, LLC v. Macquarie Tex. Loan Holder LLC*, 2019 N.Y. Slip Op. 04495, First Dept 6-6-19**

SECOND DEPARTMENT

CIVIL PROCEDURE.

A DISMISSAL BASED UPON PLAINTIFF'S FAILURE TO APPEAR TO OPPOSE A MOTION TO DISMISS IS NOT A DETERMINATION ON THE MERITS AND THEREFORE HAS NO RES JUDICATA EFFECT.

The Second Department, reversing Supreme Court, noted that the prior dismissal of plaintiff's action because the plaintiff failed to appear in opposition to defendants' motion to dismiss was not a determination on the merits and therefore has no res judicata effect: "The plaintiff had commenced a prior action against, among others, the defendants, and the complaint in that action was dismissed insofar as asserted against them upon the plaintiff's failure to appear in opposition to their motion to dismiss. An order entered upon a party's default in appearing to oppose a motion to dismiss is not a determination on the merits ... . Where a dismissal does not involve a determination on the merits, the doctrine of res judicata does not apply ... . Accordingly, the doctrine of res judicata does not apply to bar the instant action ...". ***Abdelfattah v. Najar*, 2019 N.Y. Slip Op. 04346, Second Dept 6-5-19**

CIVIL PROCEDURE, ADMINISTRATIVE LAW, ZONING, LAND USE.

THE ARTICLE 78 PETITION SEEKING REVIEW OF THE DENIAL OF VARIANCES BY THE ZONING BOARD SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THAT PETITIONER DID NOT PROVIDE A TRANSCRIPT OF THE PROCEEDINGS, UNDER THE CPLR THE RESPONDENT MUST PROVIDE THE TRANSCRIPT.

The Second Department, reversing Supreme Court, determined the petition seeking review of the zoning board's denial of variances should not have been dismissed on the ground that petitioner did not provide a transcript of the proceedings. CPLR 7804 requires that the respondent provide the transcript: "The Supreme Court denied the petition and dismissed the proceeding on the grounds that the petitioner had not provided 'a copy of a transcript from the proceeding, . . . any of the submissions that he may have made in support of the requests, including the applications for any variances themselves' and had 'also not provided an affidavit from a person with knowledge in support of [his] petition.' CPLR 7804(d) permits, but does not require, the petitioner to submit affidavits or other written proof in support of the verified petition. Further, CPLR 7804(e) provides that the respondent, not the petitioner, 'shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court.' " ***Matter of D'Souza v. Board of Appeals of the Town of Hempstead*, 2019 N.Y. Slip Op. 04381, Second Dept 6-5-10**

CIVIL PROCEDURE, CORPORATION LAW.

THE PRESUMPTION OF PROPER SERVICE CREATED BY THE PROCESS SERVER'S AFFIDAVIT WAS REBUTTED BY DEFENDANT'S AFFIDAVIT CLAIMING THAT THE PLACE WHERE SERVICE WAS MADE HAD NO CONNECTION WITH HIM OR HIS BUSINESS, SUPREME COURT SHOULD HAVE HELD A HEARING ON DEFENDANT'S MOTION TO VACATE A DEFAULT JUDGMENT.

The Second Department determined Supreme Court should have held a hearing to determine whether the defendant corporation, Advanced, and its principal, Trimarco, were properly served with the summons and complaint. The presumption of proper service created by the process server's affidavit was rebutted by Trimarco's affidavit stating that the place where service was made, and any person at that location, had no connection to him or the business: "Trimarco submitted an affidavit in which he claimed that both he and Advanced were improperly served at a residence that he had 'sold to an unrelated third party three years ago.' He further averred that, on the date service was purportedly made, he had no relationship with any person at [the residence], and no person at that address was authorized to accept service on behalf of Advanced. ... The Supreme Court should not have, in effect, denied that branch of the defendants' motion which was pursuant to CPLR 5015(a)(4) to vacate the judgment and dismiss the complaint without first conducting a hearing. 'Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service' ... . '[W]here there is a sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence' ... . With respect to service on Advanced, CPLR 311(a)(1) provides that personal service upon a corporation shall be made, among other ways, 'to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service.' Personal service on a corporation must be made to one of the persons authorized by the statute to accept service, and an attempt to serve such person by substitute service pursuant to CPLR 308(2) or (4) will be insufficient to acquire jurisdiction over the corporation ... . With respect to service on Trimarco, CPLR 308(2) provides,

in relevant part, that service may be made upon a natural person 'by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served.' Here, Trimarco's detailed affidavit, in which he claimed that the address where service was made was not his actual place of business, dwelling place, or usual place of abode, was sufficient to rebut the presumption of proper service created by the plaintiff's affidavit of service ...". ***Finnegan v. Trimarco*, 2019 N.Y. Slip Op. 04361, Second Dept 6-5-19**

CIVIL PROCEDURE, EDUCATION-SCHOOL LAW, PERSONAL INJURY.

DISCOVERY OF PRIOR ASSAULTS IN THIS STUDENT ON STUDENT THIRD-PARTY ASSAULT CASE SHOULD NOT HAVE BEEN LIMITED TO PRIOR SEXUAL ASSAULTS AND PRIOR ASSAULTS BETWEEN THE TWO STUDENTS, ASSAULTS OF ANY KIND MAY HAVE PUT THE SCHOOL ON NOTICE.

The Second Department, reversing Supreme Court, determined that discovery in this third-party assault case should not have been restricted to prior sexual assaults in the school and prior assaults between the alleged (student) perpetrator and the (student) plaintiff: "We disagree with the Supreme Court's determination that the defendants were only required to provide records pertaining to 'assaults of a sexual nature' and 'all assaults of any nature between' the infant plaintiff and the student alleged to have sexually assaulted the infant plaintiff. Evidence of prior assaults at the school, particularly any assaults in the stairwell where the subject incident occurred, may be sufficient to establish that the defendants had actual or constructive notice of conduct similar to the subject incident ... . Moreover, evidence of any prior assaults perpetuated by the offending student against students other than the infant plaintiff may be sufficient to establish that the defendants had actual or constructive notice of the offending student's dangerous propensities ...". ***M.C. v. City of New York*, 2019 N.Y. Slip Op. 04372, Second Dept 6-5-19**

CIVIL PROCEDURE, LIEN LAW.

ALTHOUGH THE SUBCONTRACTOR HAD THE RIGHT FILE A SECOND MECHANIC'S LIEN, THE ACTION TO FORECLOSE ON THE LIEN RAISED THE SAME ISSUES THAT WERE RAISED IN A PRIOR BREACH OF CONTRACT AND UNJUST ENRICHMENT ACTION WHICH WAS DISMISSED, THE RES JUDICATA DOCTRINE PRECLUDED THE SECOND ACTION.

The Second Department, reversing Supreme Court, determined that the subcontractor's action seeking to foreclose a mechanic's lien was precluded by the doctrine of res judicata, despite its being based on theories different from those raised in the prior action: " 'Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action'... . '[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' ... . Accordingly, 'a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding' ... . While a subcontractor may have the right to file a second mechanic's lien within the statutory time period, at least to cure an irregularity in a lien first filed, or to reassert a lien when the prior one has been lost by delay in its enforcement ..., a second mechanic's lien is not immune from the doctrine of res judicata. Although the plaintiff framed its causes of action in the 2014 action as breach of contract and unjust enrichment causes of action, and its cause of action in this action as one to foreclose a mechanic's lien, these are merely different theories for the plaintiff's cause of action to recover monies allegedly owed to it under the subcontract." ***County Wide Flooring, Corp. v. Town of Huntington*, 2019 N.Y. Slip Op. 04354, Second Dept 6-5-19**

CIVIL PROCEDURE, WORKERS' COMPENSATION LAW, EMPLOYMENT LAW, PERSONAL INJURY.

INFORMATION PROVIDED FOR THE FIRST TIME IN A REPLY TO OPPOSITION TO A SUMMARY JUDGMENT MOTION CAN NOT BE RELIED UPON TO MAKE OUT A PRIMA FACIE CASE, THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT IN THIS ON THE JOB INJURY CASE ON THE GROUND THAT APPELLANT WAS PLAINTIFF'S GENERAL EMPLOYER AND PLAINTIFF'S ONLY REMEDY WAS WORKERS' COMPENSATION PROPERLY DENIED.

The Second Department determined that information provided for the first time in a reply affidavit could not be relied upon to sustain a movant's prima facie burden for a summary judgment motion. The plaintiff, who was injured on the job, alleged he was hired by the defendant Bright Star Messenger Service, LLC (hereinafter the appellant). In its motion for summary judgment the appellant alleged it was plaintiff's general employer and plaintiff's only remedy was Workers' Compensation. But included in appellant's papers was plaintiff's claim for Worker's Compensation benefits which listed plaintiff's employer as "Bright Star Courier." Therefore the appellant failed to make out a prima facie case that it was plaintiff's employer. The appellant then submitted a reply affidavit stating that Bright Star Courier had changed its name to Bright Star Messenger Center, LLC prior to the accident: "... Contrary to the appellant's contention, it failed to make a prima facie showing that it was the plaintiff's general employer. The appellant submitted the affidavit of a representative of the appellant, who stated that the plaintiff was employed by the appellant on the date of the accident, and that the appellant had procured

workers' compensation insurance for the plaintiff. However, the appellant also submitted Workers' Compensation Board records showing that the plaintiff had filed a claim for benefits that listed the plaintiff's employer as 'Bright Star Courier.' Under these circumstances, the appellant failed to demonstrate, prima facie, that it was the plaintiff's general employer ... . While the appellant submitted a reply affidavit from its representative averring that Bright Star Courier had changed its name to Bright Star Messenger Center, LLC, prior to the accident, a party cannot sustain its prima facie burden by relying on evidence submitted for the first time in its reply papers ... . The appellant's failure to make a prima facie showing of its entitlement to judgment as a matter of law required the denial of its motion, regardless of the sufficiency of the plaintiff's opposition papers ...". ***Matthews v. Bright Star Messenger Ctr., LLC*, 2019 N.Y. Slip Op. 04375, Second Dept 6-5-19**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

THE GYM TEACHER TOLD THE STUDENTS TO RUN AROUND THE PERIMETER OF THE BUILDING; STUDENT PLAINTIFF TRIPPED AND FELL OVER A CHAIN WHICH, SHE ALLEGED, OTHER STUDENTS WERE JUMPING OVER AS THEY RAN; THE SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT IN THIS NEGLIGENT SUPERVISION SLIP AND FALL CASE WAS PROPERLY DENIED.

The Second Department determined that the school district's motion for summary judgment in this negligent supervision action was properly denied. The gym teacher told the students to run around the perimeter of the building and, according to the student-plaintiff, some students were jumping over a chain. The student-plaintiff attempted to jump over the chain when she tripped and fell: "The infant plaintiff testified at her deposition that the gym teacher did not instruct her not to jump over anything, and that approximately 20 students jumped over the chain before she attempted to do so. She initially did not know what the other students were jumping over, and she realized that they were jumping over the chain when she was approximately five feet away from it. The infant plaintiff was still jogging at that point. She did not see the chain until she was very close to it because the chain 'blend[ed] in.' The gym teacher testified at his deposition that the students usually ran on a grassy area around the perimeter of a field. On the day of the accident, however, he instructed the infant plaintiff and her classmates to run around the perimeter of the school building because the grassy area was too wet and muddy. He had never before instructed that class to run around the perimeter of the building. The gym teacher also testified that he instructed the students to avoid the chain, that he ran behind the students, and that, when he reached the chain, he observed students running around it. .. [T]he school district failed to demonstrate, prima facie, that it provided adequate supervision, or that a lack of adequate supervision was not a proximate cause of the infant plaintiff's injuries ...". ***B.T. v. Bethpage Union Free Sch. Dist.*, 2019 N.Y. Slip Op. 04442, Second Dept 6-5-19**

FAMILY LAW.

INHERITED PROPERTY WHICH HAD BEEN COMMINGLED WITH MARITAL PROPERTY SHOULD HAVE BEEN TREATED AS MARITAL PROPERTY AND DIVIDED EQUALLY.

The Second Department determined in this divorce action that the inherited property which was commingled with marital should have been considered marital property and divided equally: "The proceeds from an inheritance are separate property (see Domestic Relations Law § 236[B][1][d][1]...). However, where separate property has been commingled with marital property, for example in a joint bank account, there is a presumption that the commingled funds constitute marital property ... . This presumption may be overcome by evidence that the funds were deposited into the joint account as a matter of convenience, without the intention of creating a beneficial interest ... .Here, by depositing inherited funds into accounts titled jointly with the defendant, the plaintiff created the presumption that the funds were marital ... . Moreover, the plaintiff failed to rebut the presumption that the funds were transmuted into marital property, as she failed to establish that the funds were deposited into the parties' joint accounts only as a matter of convenience without the intention of creating a beneficial interest ...". ***Candea v. Candea*, 2019 N.Y. Slip Op. 04349, Second Dept 6-5-10**

FAMILY LAW, APPEALS, JUDGES, EVIDENCE.

ATTORNEY FOR THE CHILD CAN APPEAL A CHANGE OF CUSTODY TO WHICH THE CHILD IS OPPOSED, THE CHILD IS AGGRIEVED FOR APPELLATE PURPOSES, FAMILY COURT SHOULD NOT HAVE HELD A FULL CUSTODY HEARING WITHOUT FIRST ASSESSING THE ALLEGATIONS OF A CHANGE IN CIRCUMSTANCES, AN APPELLATE COURT CAN TAKE JUDICIAL NOTICE OF PRIOR MODIFICATION PETITIONS, AND FAMILY COURT MUST GIVE DUE CONSIDERATION TO THE CHILD'S WISHES.

The Second Department, reversing Family Court, determined, in a full-fledged opinion by Justice Scheinkman, that mother's petition for a change in custody should not have been granted. The opinion is too comprehensive to be fairly summarized here. Of particular interest is the Second Department's conclusion that Family Court should not have held a full custody hearing without first determining whether the allegations warranted it. The Second Department took judicial notice of two prior petitions for modification which were dismissed, the last petition being very close in time to the instant petition. The opinion is well worth reading in its entirety. It addresses several substantive issues and distinguishes some Fourth Department authority. The Second Department summarized the issues and holdings as follows: "This appeal raises several important issues pertinent to child custody determinations. We conclude that: (a) the attorney for the child has the

authority to pursue an appeal on behalf of the child from an order determining the custody of the child; (b) the child is aggrieved, for appellate purposes, by an order determining custody; (c) the Family Court should not have held a full custody hearing without first determining whether the mother had alleged and established a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were served by the existing custodial arrangement; and (d) the Family Court erred in failing to give due consideration to the expressed preferences of the child, who is a teenager." ***Matter of Newton v. McFarlane*, 2019 N.Y. Slip Op. 04386, Second Dept 6-5-19**

FORECLOSURE, CIVIL PROCEDURE, APPEALS.

SUPREME COURT SHOULD NOT HAVE DISMISSED THE FORECLOSURE ACTION, AN ADMINISTRATIVE ORDER REQUIRING A FORECLOSURE AFFIRMATION AND A CERTIFICATE OF MERIT SHOULD NOT HAVE BEEN APPLIED RETROACTIVELY, A STIPULATION AWARDING SUMMARY JUDGMENT TO THE BANK SHOULD NOT HAVE BEEN IGNORED, THE IMPROPER APPLICATION OF THE ADMINISTRATIVE ORDER RAISED A MATTER OF LAW THAT COULD BE CONSIDERED FOR THE FIRST TIME ON APPEAL.

The Second Department, reversing Supreme Court, over a dissent, determined the plaintiff bank's motion to vacate a dismissal of a foreclosure action should have been granted. Supreme Court had improperly applied an administrative order (AO 548/10) requiring a "Foreclosure Affirmation/Certificate of Merit" that was not in effect at the time the bank made its motion for summary judgment. The parties had entered a stipulation which awarded the bank summary judgment in return for waiver of its right to seek a deficiency judgment. The court noted that the improper retroactive application of AO 548/10 could be raised for the first time on appeal because it is a question of law that could not be avoided if it had been raised at the proper time: " '[A] court may vacate its own judgment for sufficient reason and in the interest of substantial justice'... . 'A foreclosure action is equitable in nature and triggers the equitable powers of the court' ... . 'Once equity is invoked, the court's power is as broad as equity and justice require' ... . Here, equity and justice require vacatur of the dismissal order in the interests of substantial justice ...". ***Countrywide Bank, FSB v. Singh*, 2019 N.Y. Slip Op. 04353, Second Dept 6-5-19**

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

PLAINTIFF'S ACTION TO CANCEL AND DISCHARGE THE MORTGAGE ON THE GROUND THAT THE STATUTE OF LIMITATIONS FOR A FORECLOSURE ACTION HAD EXPIRED SHOULD HAVE BEEN DISMISSED, THE BANK UTTERLY REFUTED THE ALLEGATION WITH DOCUMENTS DEMONSTRATING THE DEBT HAD NEVER BEEN ACCELERATED; CLEAR EXPLANATION OF THE REQUIREMENTS FOR DISMISSAL BASED ON DOCUMENTARY EVIDENCE AND ACCELERATION OF A MORTGAGE DEBT.

The Second Department, reversing Supreme Court, over an extensive dissent, determined that the bank's (Deutsche Bank's) motion to dismiss the plaintiff's RPAPL article 15 action to cancel and discharge the mortgage should have been granted. The bank had started foreclosure proceedings in 2007 and plaintiff alleged in the complaint that the statute of limitations had run. However, the 2007 action had been dismissed because the bank did not have standing at the time it was brought. The Second Department determined the documentary proof of the dismissal of the 2007 action demonstrated, as a matter of law, that the debt had never been accelerated and, therefore, the statute of limitations had never started running. The decision provides a succinct and clear explanation of the requirements for a dismissal based on documentary evidence and the requirements for accelerating a mortgage debt: "[C]ontrary to the plaintiff's contention and the opinion of our dissenting colleague, the commencement of the foreclosure action, which was dismissed on the ground that Deutsche Bank lacked standing, was ineffective to constitute a valid exercise of the option to accelerate the debt since Deutsche Bank did not have the authority to accelerate the debt at that time ... . The plaintiff did not identify the specific time when the mortgage was actually, legally accelerated. Furthermore, the notices of default were nothing more than letters discussing acceleration as a possible future event, which do not 'constitute an exercise of the mortgage's optional acceleration clause' ... . Consequently, the allegations in the complaint that the debt was accelerated as of April 30, 2007, the date when Deutsche Bank commenced the underlying foreclosure action, or prior to April 30, 2007, when the notices of default were sent, are utterly refuted by the documentary evidence submitted by Deutsche Bank, which included the written assignment of the mortgage [dated after April 30, 2007) 'together with the . . . note' and the October 2009 order [dismissing the foreclosure action], in support of that branch of its motion which was pursuant to CPLR 3211(a)(1) to dismiss the complaint ... . Moreover, Deutsche Bank, through the evidence it submitted with its motion, demonstrated that the plaintiff's allegation that the statute of limitations to foreclose the subject mortgage had expired was 'not a fact at all,' and that 'it can be said that no significant dispute exists regarding it,' warranting dismissal of the complaint pursuant to CPLR 3211(a)(7) ...". ***J & JT Holding Corp. v. Deutsche Bank Natl. Trust Co.*, 2019 N.Y. Slip Op. 04366, Second Dept 6-5-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

LABOR LAW § 200 CAUSE OF ACTION, PREMISED ON DEFENDANT'S AUTHORITY TO SUPERVISE OR CONTROL THE PERFORMANCE OF PLAINTIFF'S WORK, SHOULD NOT HAVE BEEN DISMISSED, LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION PROPERLY DISMISSED.

The Second Department, reversing Supreme Court, determined that plaintiff's Labor Law § 200 cause of action should not have been dismissed. Plaintiff was injured when he was attempting to move a light fixture. He was cutting sheetrock in the ceiling with an allegedly improper electric saw when it kicked back and injured him. The Labor Law §§ 240 and 231 causes of action were properly dismissed because an elevation-related hazard was not alleged, nor was an Industrial Code violation: " 'Where a plaintiff's claims implicate the means and methods of the work, an owner or contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability. A defendant has the authority to control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed' ... . Here, as supplemented by the plaintiff's affidavit, the complaint states cognizable causes of action pursuant to Labor Law § 200 and to recover damages for common-law negligence. The plaintiff averred that on the day of the accident, Rapaport [the construction manager] , whom he knew as the 'contractor,' directed the plaintiff to move an overhead light from one place in the ceiling to another and told him to use an electrical saw to cut the sheetrock in the ceiling. These allegations are sufficient to support the statutory and common-law negligence claims against the moving defendants, and the moving defendants' documentary evidence does not utterly refute these allegations ...". ***Soller v. Dahan*, 2019 N.Y. Slip Op. 04441, Second Dept 6-5-19**

LANDLORD-TENANT, CONTRACT LAW, JUDGES.

SUPREME COURT SHOULD NOT HAVE MODIFIED A SO-ORDERED STIPULATION ENTERED BETWEEN LANDLORD AND TENANT REQUIRING MONTHLY USE AND OCCUPANCY PAYMENTS OF OVER $100,000 DURING THE COURT PROCEEDINGS STEMMING FROM THE LANDLORD'S NOTICE OF TERMINATION OF THE LEASE, SUPREME COURT IMPROPERLY REDUCED THE MONTHLY PAYMENTS TO ZERO BASED UPON THE VALUE OF THE PROPERTY TO THE TENANT WHICH WAS ALLEGED TO HAVE BEEN RENDERED WORTHLESS BY THE NOTICE OF TERMINATION, AS OPPOSED TO THE FAIR MARKET RENTAL VALUE OF THE PROPERTY FROM THE LANDLORD'S PERSPECTIVE.

The Second Department, reversing Supreme Court, determined the stipulation entered by plaintiff tenant and defendant landlord, pursuant to a *Yellowstone* Injunction, should not have modified by the judge. The defendant landlord notified plaintiff of several alleged defaults under the lease, and subsequently notified tenant of the termination of the lease. Plaintiff tenant sued defendant landlord and moved for a *Yellowstone* injunction which the court ordered. The parties entered a so-ordered stipulation requiring plaintiff tenant to pay over $100,000 per month for use and occupancy of the property during the court proceedings. More than a year later plaintiff tenant moved to move to modify the stipulation to reduce the monthly use and occupancy payments and the court reduced the payments to zero: "The so-ordered November 2015 stipulation was negotiated by the parties and accepted by the Supreme Court, and, as a result, may be considered a court order ... . 'Although the Supreme Court retains inherent discretionary power to relieve a party from a judgment or order for sufficient reason and in the interest of substantial justice, [a] court's inherent power to exercise control over its judgment is not plenary, and should be resorted to only to relieve a party from judgments taken through [fraud], mistake, inadvertence, surprise or excusable neglect' ... . Nevertheless, '[u]nder almost any given state of facts, where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief' ... . Although the landlord generally has the burden of proving the amount owed by the tenant ... , here, it was the plaintiff's burden, on its motion to modify the 'September 22, 2015 order, as amended,' to demonstrate that the payment of use and occupancy in the amount of $111,041.66 per month was unjust. In concluding that the subject property had no value 'as long as the Notice of Default remains on the property,' the Supreme Court erroneously considered the value to the plaintiff of using and occupying the subject property after the lease was purportedly terminated, instead of considering the fair market rental value of the subject property, namely, the amount that a prospective commercial tenant would be willing to pay to lease the subject property from the defendant ... " ***255 Butler Assoc., LLC v. 255 Butler, LLC*, 2019 N.Y. Slip Op. 04344, Second Dept 6-5-19**

PERSONAL INJURY, EVIDENCE.

THE DEFENDANTS' PAPERS, WHICH INCLUDED PLAINTIFF'S AND DEFENDANT SANTIAGO'S DEPOSITION TESTIMONY, DEMONSTRATED THERE WERE QUESTIONS OF FACT ABOUT THE EXISTENCE OF ICE ON THE DRIVEWAY AND SANTIAGO'S NOTICE OF IT, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants, the property owners, were not entitled to summary judgment in this slip and fall case. The defendants submitted plaintiff's deposition testimony that the ice formed sometime between the middle of the day on the 16th and 7 a.m. on the 17th when he fell. The property owner, Santiago, testified he saw no ice on the afternoon of the 16th and saw no ice when he returned to the property at 11 a.m. on the 17th.

The defendants' papers, therefore, demonstrated there were questions of fact: "In support of their motion, the defendants submitted the transcript of the deposition testimony of the plaintiff, who testified that on February 16, 2016, precipitation had fallen, that it stopped sometime after he picked up his children at their school at noon, that when he returned to the subject property, the driveway was not icy, and that the neighbor whom the defendants had retained to plow the driveway had done so after the precipitation stopped but did not apply any salt. The plaintiff also testified that, on February 17, 2016, at approximately 7:00 a.m., he slipped and fell on thick ice that was cloudy and dirty in appearance and which covered the entire driveway. He further testified that the ice started forming on February 16, 2016, either sometime in the middle of the day, or sometime between 9:00 p.m. and 7:00 a.m. the next day. The defendants also submitted the transcript of the deposition testimony of the defendant Christian Santiago, who testified that the tenants did not have any responsibilities with respect to snow or ice removal from the driveway. He also testified that he visited the subject property to inspect ongoing renovation work in one of the apartments in the morning or early afternoon of February 16, 2016, that it was not snowing or raining at that time, and that he did not observe any ice on the driveway. Santiago further testified that, when he returned to the property the following day, at approximately 11:00 a.m. or noon, he observed a snowbank measuring anywhere from four-to-five feet or six-to-seven feet high at the end of the driveway created by the plow the day before, that he did not see any ice on the driveway, and that he noticed that there was salt on the concrete landing but not on the driveway. ... The defendants failed to submit any meteorological data for either February 16 or 17, 2016, or evidence of the condition of the driveway subsequent to it being plowed by the neighbor or within a reasonable time prior to the incident ... . [T]he evidence submitted by the defendants showed the existence of triable issues of fact and did not suffice to establish a prima facie case for summary judgment ...". ***Ghent v. Santiago*, 2019 N.Y. Slip Op. 04362, Second Dept 6-5-19**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DRIVER'S CLAIM HE COULDN'T STOP BECAUSE HIS CAR SKIDDED ON WET METAL GRATING DID NOT ESTABLISH THE REAR-END COLLISION WAS UNAVOIDABLE, PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that plaintiffs were entitled to summary judgment in this rear-end collision case. The defendants' claim that the defendant driver, Flippen, couldn't stop because the skidded on wet metal grating did not raise a question of fact: " '[A] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence' ... . Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law on the issue of liability, as the evidence submitted in support of their motion demonstrated that the injured plaintiff's vehicle was stopped when it was struck in the rear by the defendants' vehicle ... . In opposition, the defendants failed to raise a triable issue of fact. The defendants' contention that Flippen applied his brakes but was unable to stop because his vehicle skidded on a wet metal grating on the roadway was insufficient to rebut the inference of negligence arising from the rear-end collision because they failed to demonstrate that Flippen's skid on known road conditions was unavoidable ...". ***Morgan v. Flippen*, 2019 N.Y. Slip Op. 04377, Second Dept 6-5-19**

PERSONAL INJURY, EVIDENCE.

THE MOVEMENT OF THE COMMON CARRIER'S VAN WAS NOT UNUSUAL OR VIOLENT, THE PERSONAL INJURY ACTION BROUGHT BY A PASSENGER SHOULD HAVE BEEN DISMISSED.

The Second Department determined that the common carrier's motion for summary judgment in this personal injury case should have been granted. Plaintiff alleged injury caused when defendant's van hit an expansion joint in the highway: " 'To establish a prima facie case of negligence against a common carrier for injuries sustained by a passenger as a result of the movement of the vehicle, the plaintiff must establish that the movement consisted of a jerk or lurch that was unusual [and] violent' ... . There must be evidence that the movement of the vehicle was 'of a different class than the jerks and jolts commonly experienced in city bus travel,' and, therefore, attributable to the negligence of defendant ... . Here, the defendant established its prima facie entitlement to judgment as a matter of law through its submission of the deposition testimony of the plaintiff, who testified that the van in which he was a passenger was constantly jostled up and down, and that when the van hit one of the expansion joints in the highway, he heard something in his neck snap. The plaintiff admitted that his body was not physically moving up and down, and that the bumps and jolts of the van were only putting pressure on his lower back. Thus, the evidence established that the movement of the van at issue was not unusual and violent ...". ***Petrie v. Golden Touch Transp. of NY, Inc.*, 2019 N.Y. Slip Op. 04431, Second Dept 6-5-19**

PERSONAL INJURY, EVIDENCE.

PLAINTIFF TRIPPED OVER THE LEG OF A PERSON SITTING IN A CHAIR IN THE RECEPTION AREA OF DEFENDANT'S MEDICAL PRACTICE, THE HAZARD WAS NOT OPEN AND OBVIOUS AS A MATTER OF LAW.

The Second Department, reversing Supreme Court, determined the hazard which caused plaintiff to slip and fall was not open and obvious as a matter of law. Plaintiff tripped over the leg of a person sitting in a chair in the reception area of defendant's medical practice: " 'Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances' ... . 'A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted' ... . Here, contrary to the Supreme Court's determination, the defendant failed to establish, prima facie, that any hazard due to the placement of chairs in a passageway leading from the reception area of the medical practice to the bathroom was open and obvious, i.e., readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident ...". ***Shermazanova v. Amerihealth Med., P.C.*, 2019 N.Y. Slip Op. 04437, Second Dept 6-5-19**

TRUSTS AND ESTATES. EVIDENCE.

SURROGATE'S COURT PROPERLY DENIED THE ADMINISTRATOR'S PETITION FOR AUTHORITY TO CONDUCT A SHORT SALE OF DECEDENT'S REAL PROPERTY WHICH WAS WORTH SUBSTANTIALLY LESS THAN THE MORTGAGE WHICH ENCUMBERED THE PROPERTY, CONCLUSORY ASSERTIONS IN THE PETITION INSUFFICIENT.

The Second Department determined Surrogate's Court properly denied the petition by the administrator of decedent's estate seeking authority to conduct a "short sale" of real property that was worth substantially less than the mortgage which encumbered the property. Surrogate's Court determined the proof offered in support of the petition fell short in several respects: "A decedent's personal property is the primary source for the payment of the decedent's debts, and land cannot be used as a source of funds unless the personalty has been exhausted ... . However, the primary source for payment of a mortgage debt is the mortgaged premises (...EPTL 3-3.6). To obtain court authorization to sell real property to satisfy a decedent's debts, including mortgage debts, a personal representative must demonstrate that the decedent's personal property is insufficient to satisfy the debts (see SCPA 1902[3] ...). A Surrogate has 'the right to decree intelligently, and upon equitable principles, and to order [executors' and administrators'] conduct upon principles of justice and of reason,' and may not 'rubber stamp' an application without examining its basis ... . Here, we agree with the Surrogate's Court's determination that, without other evidence, the petitioner's conclusory assertions regarding the extent of the decedent's personal property and debts, the existence and status of the mortgage, and the identities of potential distributees were insufficient to support the relief he sought." ***Matter of Kahn*, 2019 N.Y. Slip Op. 04384, Second Dept 6-5-19**

THIRD DEPARTMENT

ARBITRATION, CONTRACT LAW, EMPLOYMENT LAW, EVIDENCE.

ARBITRATOR EXCEEDED HIS AUTHORITY PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT (CBA) BY RELYING ON EVIDENCE WHICH WAS NOT PART OF THE HEARING EVIDENCE TO DETERMINE WHETHER THE RESPONDENT HAD PROBABLE CAUSE TO SUSPEND THE PETITIONER.

The Third Department, reversing Supreme Court, determined the arbitrator in this employment dispute covered by a collective bargaining agreement (CBA), exceeded his authority by relying on the information in the notice of suspension, as opposed to the hearing evidence, to determine whether the employee, who was suspended without pay, was entitled to back pay: "Respondents' sole contention on appeal is that the arbitrator's award of back pay for the period of interim suspension exceeded his authority. We agree. 'Judicial review of arbitral awards is extremely limited. Pursuant to CPLR 7511 (b) (1), a court may vacate an award when it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power' ... . Moreover, 'although an arbitrator's interpretation of contract language is generally beyond the scope of judicial review, where a benefit not recognized under the governing CBA is granted, the arbitrator will be deemed to have exceeded his or her authority'... . Therefore, 'if the arbitrator imposes requirements not supported by any reasonable construction of the CBA, then the arbitrator's construction[,] in effect, made a new contract for the parties, which is a basis for vacating the award' ... . Here, the arbitrator's award of back pay for the period of interim suspension was based upon a determination that DOCCS lacked probable cause to suspend petitioner. As relevant here, section 33.4 (c) (1) of the CBA states that '[s]uspensions without pay . . . shall be reviewable by a disciplinary arbitrator . . . to determine whether the [respondent] had probable cause.' This Court has previously held that hearing evidence should be considered by the arbitrator in determining probable cause (see Matter of Livermore-Johnson ... . However, the decision makes clear that the arbitrator did not rely on the hearing evidence to reach this determination ... " ***Matter of Czerwinski (New York State Dept. of Corr. & Community Supervision)*, 2019 N.Y. Slip Op. 04526, Third Dept 6-6-19**

CIVIL PROCEDURE, LIMITED LIABILITY COMPANY LAW, EVIDENCE.

PLAINTIFF DID NOT SUBMIT SUFFICIENT PROOF OF COMPLIANCE WITH THE SERVICE OF PROCESS REQUIREMENTS OF THE LIMITED LIABILITY COMPANY LAW (SERVICE UPON THE SECRETARY OF STATE).

The Third Department, reversing Supreme Court, determined plaintiffs did not demonstrate compliance with the service of process requirements of the Limited Liability Company Law: " 'The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process' ... . Proof of service, often in the form of an affidavit of service (see CPLR 306 [d]), must include 'the papers served, the person who was served and the date, time [and] address [of such service], . . . and set forth facts showing that the service was made by an authorized person and in an authorized manner' ... . Additionally, '[b]ecause service of process is necessary to obtain personal jurisdiction over defendants, courts require strict compliance with the statutory methods of service' ... . As relevant here, '[s]ervice of process on the secretary of state as agent of a domestic limited liability company . . . shall be made by personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, . . . duplicate copies of such process together with the statutory fee' ... . Although plaintiffs proffered an unsigned receipt of service purportedly generated by the Office of the Secretary of State, that receipt did not set forth the papers served, whether duplicate copies of those papers were delivered to the Secretary of State, the time of service or facts showing that service was made by an authorized person (see Limited Liability Company Law § 303 [a]; CPLR 306 [a], [d])." ***Cedar Run Homeowners' Assn., Inc. v. Adirondack Dev. Group, LLC*, 2019 N.Y. Slip Op. 04528, Third Dept 6-6-19**

CRIMINAL LAW.

A SUPERIOR COURT INFORMATION (SCI) IS NOT AN APPROPRIATE CHARGING DOCUMENT AFTER AN INDICTMENT HAS COME DOWN; IN ADDITION THE SCI HERE WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT INCLUDE THE ORIGINAL CHARGE OR A LESSER INCLUDED OFFENSE.

The Third Department, reversing County Court and dismissing the Superior Court Information (SCI), determined the SCI was an improper vehicle for defendant's guilty plea because the grand jury had already handed down an indictment. In addition the SCI was jurisdictionally defective because it did not include the original charge or a lesser included offense: "CPL 195.10 (2) (b) provides that a defendant may waive indictment and consent to be prosecuted by a SCI in 'the appropriate superior court, at any time prior to the filing of an indictment by the grand jury.' However, 'waiver of indictment attempted after a [g]rand [j]ury actually indicts is generally invalid under CPL 195.10 (2) (b) because the plain words of the statute require a waiver be made prior to the filing of an indictment' ... . It is well settled that the general purpose and objectives of constitutional and statutory boundaries with respect to the waiver of indictment are to permit a defendant 'to go directly to trial without waiting for a grand jury to hand up an indictment, [thereby] affording a defendant the opportunity for a speedier disposition of charges [and] eliminating unnecessary [g]rand [j]ury proceedings' ... . When the grand jury has already acted, and those motivations are no longer present, waiver of indictment is not authorized, even where defendant has consented to the devised procedure ... . Here, an indictment had been filed — to which defendant pleaded guilty — prior to defendant agreeing to be prosecuted by way of an SCI. Although the indictment was subsequently dismissed, the dismissal was not due to any defect requiring such dismissal (see CPL 210.20), County Court did not authorize resubmission of the charge to the grand jury (see CPL 210.45 [9]) and a new felony complaint was never filed. Therefore, defendant was not placed on a formal preindictment procedural track ...". ***People v. Eggleston*, 2019 N.Y. Slip Op. 04497, Second Dept 6-6-19**

CRIMINAL LAW.

THE SENTENCING COURT DID NOT FOLLOW THE CORRECT PROCEDURE FOR DETERMINING WHETHER DEFENDANT WAS ELIGIBLE FOR YOUTHFUL OFFENDER STATUS; EVEN WHERE THE DEFENDANT COMMITTED AN ARMED FELONY, WHICH CAN DISQUALIFY A DEFENDANT FROM THE STATUS, THE STATUTORY FACTORS WHICH WOULD NONETHELESS ALLOW YOUTHFUL OFFENDER STATUS MUST BE CONSIDERED AND PLACED ON THE RECORD.

The Third Department determined Supreme Court did not follow the correct procedure with respect to whether the defendant should be afforded youthful offender status. Although the defendant pled guilty to an armed felony, which can render him ineligible for youthful offender status, the court was required to consider the factors which would render him eligible despite the armed felony and to do so on the record: "... [T]he Court of Appeals has held that, 'when a defendant has been convicted of an armed felony . . ., and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3). The court must make such a determination on the record 'even where the defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request' pursuant to a plea bargain'... . If the court determines that the offender is not an eligible youth, the inquiry is at an end; however, 'if the court determines that the defendant is an eligible youth based on the presence of one or more of the CPL 720.10 (3) factors, . . . [t]he court [then] must exercise its discretion a second time to determine whether the eligible youth should be granted youthful offender treatment pursuant to CPL 720.20 (1)' ... . The record before us does not conclusively establish that Supreme Court reached a determination, as required by CPL 720.10, regarding defendant's eligibility for youthful of-

fender treatment in the first instance. The court made no mention of the factors set forth in CPL 720.10 (3) and, instead of first determining defendant's eligibility for youthful offender treatment pursuant to that statute, appears to have moved to the second step and determined that youthful offender treatment was inappropriate under CPL 720.20." ***People v. Colon*, 2019 N.Y. Slip Op. 04498, Third Dept 6-6-19**

CRIMINAL LAW.

THE SUPERIOR COURT INFORMATION (SCI) DID NOT INCLUDE THE TIME OF THE OFFENSE AND WAS THEREFORE JURISDICTIONALLY DEFECTIVE.

The Third Department reversed defendant's conviction and dismissed the Superior Court Information (SCI) because there was no reference to the time of the offense: "A waiver of indictment must be executed in strict compliance with the requirements of CPL 195.20, which provides, as pertinent here, that it shall include the 'approximate time . . . of each offense to be charged in the [SCI]' ... . Although courts may read both [the SCI and the waiver of indictment] together, as a single document, to satisfy the requirements of CPL 195.20,' it is undisputed that here neither contained any reference to the time of the offense ... . Further, this is not a case 'where the time of the offense is unknown, or, perhaps, unknowable so as to excuse the absence of such information' ... . Indeed, a specific time was provided in the felony complaint." ***People v. Vaughn*, 2019 N.Y. Slip Op. 04500, Third Dept 6-6-19**

CRIMINAL LAW.

COUNTY COURT SHOULD NOT HAVE DETERMINED THE INTEGRITY OF THE GRAND JURY WAS COMPROMISED BY THE PROSECUTOR'S FAILURE TO INQUIRE FURTHER INTO THE POTENTIAL BIAS OF A GRAND JUROR, A TEACHER, WHO HAD TAUGHT THE DEFENDANT TEN YEARS BEFORE, INDICTMENT REINSTATED.

The Third Department, reversing County Court, determined, on the People's appeal, that the integrity of the grand jury was not affected by the prosecutor's alleged failure to inquire about the potential bias of a grand juror. One of the grand jurors was a teacher and the defendant had been his student 10 years before: " 'Dismissal of an indictment pursuant to CPL 210.35 (5) is a drastic, exceptional remedy and should thus be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the grand jury' . 'The likelihood of prejudice turns on the particular facts of each case, including the weight and nature of the admissible proof adduced to support the indictment and the degree of inappropriate prosecutorial influence or bias' ... . Prejudice may arise based upon a close relationship between a grand juror and a witness ... . The record discloses that one of the grand jurors knew one of the testifying witnesses. The grand juror, who used to be a teacher and had been retired for 10 years, stated that the witness was a former student and that he had not seen the witness since the student left his class. The grand juror was then asked whether there was anything else that would affect his ability to be fair and impartial, to which he responded, 'No.' In our view, the relationship between the grand juror and the witness was not a close relationship so as to give rise to the possibility of prejudice ... . Furthermore, although the prosecutor's voir dire of the grand juror was brief, we are satisfied that, based upon his unequivocal response thereto, the grand juror's impartiality was not compromised ...". ***People v. Henriquez*, 2019 N.Y. Slip Op. 04503, Third Dept 6-6-19**

CRIMINAL LAW, ATTORNEYS, APPEALS.

THE *PARKER* WARNINGS DID NOT SPECIFICALLY WARN DEFENDANT HIS SENTENCE WOULD BE ENHANCED IF HE WERE ARRESTED BETWEEN THE PLEA AND SENTENCING, DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE ENHANCED SENTENCE ON THAT GROUND, MATTER REMITTED FOR SENTENCING TO THE AGREED TERM OR FOR AN OPPORTUNITY FOR DEFENDANT TO WITHDRAW HIS PLEA.

The Third Department, reversing County Court, determined the *Parker* warnings (notifying defendant of the enhanced sentencing consequences of misconduct between the plea and the sentencing) were inadequate and defendant's counsel was ineffective for not raising the issue. Defendant's sentence was five years longer than the sentence promised at the time of the plea because he was rearrested. The *Parker* warnings did not clearly inform defendant his sentence would be enhanced if he was rearrested. The failure to preserve the error was excused because of the ineffective assistance. The *Parker* warnings, in relevant part, were as follows: "COURT: Don't get in any trouble at the jail, don't get rearrested, don't get involved with contraband, or break the law, or anything like that in jail, you can do that? DEFENDANT: Yes, sir COURT: Thirdly, the [P]robation [D]epartment is going to be in to see you. They are going to do a presentence report. I ask you to be cooperative with them and honest with them and continue to express the remorse that you show here today because if you don't cooperate with them, and if you are not honest with them, or if you don't continue to accept remorse and responsibility for what you did then your plea will stand and I will be free to impose a sentence of 25 years to life and say things to make sure that you never see parole, so, please, cooperate with your probation officer:" "... [C]ounsel was ineffective for failing to challenge the enhanced sentence on the ground that County Court did not insure that defendant was fully aware of the consequences of

being rearrested prior to sentencing. A successful challenge to the enhanced sentence would have resulted in County Court having to either impose the agreed-upon sentence or provide defendant with an opportunity to withdraw his plea ...". ***People v. Hunter*, 2019 N.Y. Slip Op. 04496, Third Dept 6-6-19**

CRIMINAL LAW, ATTORNEYS, JUDGES.

DEFENDANT WAS NOT ADEQUATELY INFORMED OF THE RISKS OF CONTINUING TO BE REPRESENTED BY DEFENSE COUNSEL IN THE PLEA PROCEEDINGS AFTER THE JUDGE AND DEFENSE COUNSEL WERE INFORMED DEFENSE COUNSEL'S FORMER AND CURRENT CLIENTS WOULD BE WITNESSES AT DEFENDANT'S TRIAL, DEFENDANT WAS THEREBY DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The Third Department determined the judge did not adequately inform defendant of the risks of continuing to be represented by defense counsel in the plea proceedings after defense counsel and the judge had been informed of a conflict of interest should the matter go to trial. Several persons who would be called as witnesses by the People were former or current clients of defense counsel: "Once informed of the conflict, County Court had a duty to inquire whether defendant understood the risks of defense counsel's continued representation and, knowing those risks, was choosing to waive the conflict ... . However, the court did not make such an inquiry. Rather, the court merely informed defendant, while simultaneously reiterating the plea agreement that defense counsel had secured for him, that defense counsel would 'probably' have a conflict if the matter continued. Therefore, defense counsel's conflicted representation of defendant, absent a proper and informed waiver, deprived defendant of his right to the effective assistance of counsel ...". ***People v. Marshall*, 2019 N.Y. Slip Op. 04499, Third Dept 6-6-19**

CRIMINAL LAW, ATTORNEYS, JUDGES.

THE COURT SHOULD HAVE HELD A HEARING TO DETERMINE WHETHER DEFENDANT WAS INFORMED BY DEFENSE COUNSEL OF A PLEA OFFER WHICH WAS MORE LENIENT THAN THE OFFER TO WHICH HE PLED.

The Third Department, reversing County Court, determined that the court should have held a hearing to determine whether defendant was informed of a plea offer by defense counsel. Defendant argued the failure to inform him of the plea offer, which was more lenient than the offer to which he pled, constituted ineffective assistance of counsel: "To make out 'an ineffective assistance of counsel claim based upon the defense counsel's failure to adequately inform the defendant of a plea offer,' a defendant must show 'that the People made the plea offer, that the defendant was not adequately informed of the offer, that there was a reasonable probability that the defendant would have accepted the offer had counsel adequately communicated it to him [or her], and that there was a reasonable likelihood that neither the People nor the court would have blocked the alleged agreement' ... . There is no dispute that the People made a preindictment plea offer more lenient than the one that defendant later accepted — an offer that the People presumably extended 'in a fair and honest manner' and believed would pass muster with County Court ... — and that the offer was rejected and withdrawn. Defendant averred that he did not know about this offer and would have accepted it." ***People v. Nitchman*, 2019 N.Y. Slip Op. 04501, Third Dept 6-6-19**

CRIMINAL LAW, JUDGES.

ALTHOUGH DEFENDANT WAS WARNED HE WOULD BE SENTENCED EVEN IF HE DIDN'T APPEAR AT SENTENCING, THE JUDGE SHOULD NOT HAVE SENTENCED DEFENDANT IN ABSENTIA WITHOUT FIRST INQUIRING INTO THE REASON AND WHETHER DEFENDANT COULD BE LOCATED.

The Third Department, vacating the defendant's sentence, determined defendant should not have been sentenced in absentia: "Defendant had a waivable right to be present at sentencing, and he was indisputably informed of that right 'and of the consequences for failing to appear, including the fact that the proceedings would go forward in his . . . absence' ... . Nevertheless, 'before proceeding in the absence of a defendant who fails to appear, the court must conduct an inquiry into the reason for the absence and consider whether the defendant could be located within a reasonable period of time' ... . County Court did not make that inquiry and, indeed, rejected defense counsel's request for an adjournment to look into the reasons for defendant's absence. Thus, County Court erred in sentencing defendant in absentia ...". ***People v. Cutler*, 2019 N.Y. Slip Op. 04504, Third Dept 6-6-19**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER WAS MISINFORMED ABOUT WHETHER HE COULD REQUEST WITNESSES, AND, IF THEY REFUSED TO TESTIFY, WHETHER PETITIONER WAS ENTITLED TO A REFUSAL FORM OR EXPLANATION, NEW HEARING ORDERED.

The Third Department determined petitioner was entitled to a new hearing because he was misinformed about whether he could request the presence of two witnesses who had refused to testify, and, if they again refused, whether petitioner was entitled to a refusal form or explanation: "The record reflects that, prior to the disciplinary hearing, petitioner asked his employee assistant to secure the testimony of three inmate witnesses — Franklin, Figueroa and Forrest. The assistance form indicates that although Forrest agreed to testify, the remaining two inmates refused. At the disciplinary hearing, the Hearing Officer advised petitioner that, because Franklin and Figueroa had been requested as witnesses prior to the start of the hearing, neither a witness refusal form nor an explanation for their refusal to testify was required. Specifically, the Hearing Officer explained that 'when it comes to assistance . . . they only ask you yes or no, there are no witness forms required.' The Hearing Officer further explained, 'If you ask for [an] *additional* witness that is not on this list and that person says no[,] I don't want to testify[,] then a form would have to be done in that instance' (emphasis added). In response, petitioner indicated that he wished to call additional witnesses, but did not again request Franklin or Figueroa. Respondent concedes that the Hearing Officer's explanation incorrectly suggested that petitioner could request additional witnesses but not the two who had already refused. This error was significant as petitioner could still have requested Franklin and Figueroa and, if they again refused, a refusal form or explanation would have been required ...". ***Matter of Getfield v. Annucci*, 2019 N.Y. Slip Op. 04523, Third Dept 6-6-19**

FAMILY LAW.

THE THIRD DEPARTMENT, REVERSING FAMILY COURT, DETERMINED IT WAS IN THE BEST INTERESTS OF THE CHILD (BORN 2003) TO ORDER A DNA TEST FOR PETITIONER, IN PART BECAUSE NOT KNOWING WHO HER BIOLOGICAL FATHER IS A SOURCE OF TURMOIL.

The Third Department, reversing Family Court, determined it was in the child's best interests that petitioner undergo a paternity test: "In light of [the] evidence, as well as evidence revealed at the Lincoln hearing, we disagree with Family Court's determination that equitable estoppel applies and find that it is in the child's bests interests for DNA testing to occur. The record is clear that the child understands that William P. is her 'legal' father and that there is a significant chance that petitioner is her biological father. Although testing could possibly impact the child's relationship with William P., the record reveals that this relationship is already tumultuous and that some of this tumult may stem from the child's uncertainty as to whether petitioner is in fact her biological father. Indeed, it is evident from the record that if the child learns that William P. is her biological father, this information would positively benefit their relationship. The record also reveals that communication between petitioner and the child has occurred, possibly in violation of a court order, but that communication nevertheless occurred and it has had a clear effect on the child that cannot be mitigated by refusing to order a DNA test. In fact, DNA testing can mitigate the turmoil in the child's life that presently exists because she does not know who her biological father is. Although we are certainly mindful of the inherent inequities in allowing a DNA test to occur given the child's age [born 2003], our analysis must turn exclusively on the best interests of the child ... . To that end, we are also mindful that, if petitioner is found to be the child's biological father, given his lengthy incarceration, the child will not be able to enjoy a 'traditional' parent-child relationship with him. However, petitioner and the child would be able to communicate by way of letters, telephone contact and potentially through visitation at the prison." ***Matter of Stephen N. v. Amanda O.*, 2019 N.Y. Slip Op. 04510, Third Dept 6-6-19**

LABOR LAW-CONSTRUCTION LAW, MUNICIPAL LAW, IMMUNITY, APPEALS, PERSONAL INJURY.

PLAINTIFF WAS ENGAGED IN ROUTINE MAINTENANCE SO HIS FALL FROM A LADDER WAS NOT ACTIONABLE PURSUANT TO LABOR LAW 230 (1), A MUNICIPALITY'S MAINTENANCE OF LIGHT POLES IS A PROPRIETARY FUNCTION TO WHICH THE DOCTRINE OF IMMUNITY DOES NOT APPLY, THE MUNICIPALITY'S 'LACK OF WRITTEN NOTICE' DEFENSE COULD NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

The Third Department, reversing Supreme Court, determined that plaintiff was engaged in routine maintenance when he was injured, which is not actionable pursuant to Labor Law § 240(1). The Third Department further determined that a municipality's maintenance of light poles is a proprietary function subject to ordinary standards of negligence which is not protected by the doctrine of governmental immunity. The court further held that the "lack of written notice" defense was not a question of law which the municipality could raise for the first time on appeal. The plaintiff was repairing burned out lights which were on strands of decorative lights attached to a light pole. The strands of decorative lights were not fixtures within the meaning of the Labor Law: "... Merchants [a non-profit which had wrapped decorative lights around city light poles] hired plaintiff, as an independent contractor, to replace light strands located on 36 light poles because many of the

light bulbs had become inoperable. Plaintiff was injured when he fell from a 16-foot aluminum-rung extension ladder when the pole that it was leaning on suddenly fell over. ... [R]replacement of the light strands, which was necessary because numerous bulbs had burned out, constituted routine maintenance that is outside the protection of Labor Law § 240 (1) ... . [A]lthough replacement of a light fixture on a lighting pole is a repair within the protection of Labor Law § 240 (1) ... , under the facts herein, the light strands cannot be considered a fixture. ...Although a municipality may enjoy qualified immunity from liability arising from highway planning and design decisions ... , that doctrine does not shield a municipality from liability arising from negligent maintenance." ***Gutkaiss v. Delaware Ave. Merchants Group, Inc.*, 2019 N.Y. Slip Op. 04527, Third Dept 6-6-19**

MUNICIPAL LAW, CIVIL PROCEDURE, ENVIRONMENTAL LAW.

THE COMMISSIONER OF AGRICULTURE AND MARKETS PROPERLY ENFORCED A TOWN RESOLUTION WHICH PROHIBITED CONNECTING A WATER MAIN SERVICING AN AGRICULTURAL AREA TO A NEW RESIDENTIAL SUBDIVISION; THE DEVELOPERS WERE 'INTERESTED PERSONS' AND WERE PROPERLY ALLOWED TO INTERVENE IN THE COMMISSIONER'S ARTICLE 78 ACTION TO ENFORCE THE TOWN RESOLUTION.

The Third Department, reversing Supreme Court, determined petitioner, the Commissioner of Agriculture and Markets, had the authority to enforce a 2004 Town Board resolution which restricted the use of water provided by a water main to existing residential uses and agricultural uses. In 2016 the Town Board passed a resolution allowing a connection with the water main to service a new residential subdivision. The Commissioner brought an Article 78 proceeding to enforce the 2004 resolution and the developers of the residential subdivision were properly allowed to intervene: "Supreme Court did not abuse its discretion in permitting the developers to intervene. Petitioner may well be correct that the developers do not have standing to bring suit to challenge his determination, but '[t]he bases for permissive intervention are broader than they are for standing to originate the proceeding' ... . The developers have property interests that will be impacted should petitioner succeed ... and all share the view of the Town and respondent Town Supervisor that petitioner lacks authority to enforce restrictions on water main access that the Town Board later attempts to vitiate. In our view, this is sufficient to render them 'interested persons' who can at least intervene with regard to that portion of the petition/complaint founded upon CPLR article 78 ... . A local government enjoys broad autonomy under 'the 'home rule' provision of the New York Constitution,' but that autonomy does not extend to actions 'that conflict with the State Constitution or any general law' (... see NY Const, art IX, § 2 [c] [ii]; Municipal Home Rule Law § 10 [1]). Among the general laws of New York is Agriculture and Markets Law article 25-AA, which 'was enacted upon a finding that many of the agricultural lands in New York state are in jeopardy of being lost for any agricultural purposes due to local land use regulations inhibiting farming, as well as various other deleterious side effects resulting from the extension of nonagricultural development into farm areas' ... . Petitioner was ... within his rights to order the Town to comply with the 2004 resolution following an investigation and, upon the Town's failure to seek review of his determination and refusal to comply with it, commence the present enforcement litigation ...". ***Matter of Ball v. Town of Ballston*, 2019 N.Y. Slip Op. 04519, Third Dept 6-6-19**

REAL ESTATE, CONTRACT LAW.

PLAINTIFFS BREACHED THE CONTRACT TO PURCHASE THE HOME BUILT BY DEFENDANTS BY CLEARLY INDICATING THEY COULD NOT GO THROUGH WITH THE PURCHASE (ANTICIPATORY REPUDIATION); HOWEVER, DEFENDANTS WERE NOT ENTITLED TO THE FULL AMOUNT PLAINTIFFS HAD ALREADY PAID DEFENDANTS, OVER $220,000, AS DAMAGES FOR THE BREACH, DAMAGES TRIAL ORDERED.

The Third Department, reversing (modifying) Supreme Court, determined that plaintiffs breached the contract to purchase the home built by defendants by a clear expression that they did not intend to go through with the purchase (anticipatory repudiation). The plaintiffs had paid defendants about $220,000 toward the purchase price of about $322,000. After the plaintiffs repudiated the contract the builder sold the property to his daughter fore $269,000. Supreme Court allowed the defendants to keep the entire $220,000 paid by plaintiffs as damages. The Third Department determined the damages were excessive in ordered a trial to determine the appropriate amount of damages: "Having determined that plaintiffs breached the contract, the issue distills to whether Supreme Court correctly determined that, as a result thereof, they forfeited, as a matter of law, the $222,241 in payments made to defendants prior to their cancellation of the contract. Defendants argue that we must apply the well-settled rule set forth by the Court of Appeals over a century ago in Lawrence v. Miller (86 NY 131 [1881]), which was later reaffirmed in Maxton Bldrs. v. Lo Galbo (68 NY2d 373 [1986]), 'that a vendee who defaults on a real estate contract without lawful excuse[ ] cannot recover his or her down payment' ... . However, we find that forfeiture of the payments made by plaintiffs in this case, which constitute approximately 69% of the total contract amount, represents, on its face, a damages award disproportionally higher than the actual damages incurred by defendants ... , such that defendants have failed to establish, as a matter of law, their entitlement to a damages award equivalent to all payments made by plaintiffs ... . Accordingly, Supreme Court should have denied this portion of defendants' motion. As a result, a trial is required

to determine the appropriate amount of defendants' damages. ***Burns v. Reiser Bros., Inc.*, 2019 N.Y. Slip Op. 04522, Third Dept 6-6-19**

REAL ESTATE, CONTRACT LAW.

THE HOME-BUILDER'S CONTRACT WAS INVALID BECAUSE IT DID NOT COMPLY WITH THE GENERAL BUSINESS LAW, THE HOMEOWNERS' BREACH OF CONTRACT COUNTERCLAIM SHOULD NOT HAVE BEEN DISMISSED ON THAT GROUND HOWEVER; CONTRACTOR ENTITLED TO RECOVER IN QUANTUM MERUIT IF, UPON REMITTAL, IT IS DETERMINED THE CONTRACTOR'S BREACH, IF ANY, WAS NOT SUBSTANTIAL.

The Third Department, reversing (modifying) Supreme Court, determined the plaintiff contractor's breach of contract cause of action against defendants-homeowners was properly dismissed because the contract to build the home did not comply with General Business Law § 771. The defendants-homeowners refused to make the final payment of approximate $39,000 upon completion of the home, alleging the home was not complete and was not up to code. The homeowners' counterclaim for breach of contract should not have been dismissed because General Business Law 771 applies only to contractors. The contractor's quantum meruit cause of action was not precluded by the contractor's failure to comply with the General Business Law. The agreed price of the work in the "contract" was evidence of the value of the work done by the contractor, even though the contract itself was invalid. The matter was sent back for determination of the homeowners' breach of contract cause of action, and a determination of whether the contractor committed a substantial breach of the contract, which would preclude the quantum meruit cause of action: " 'The elements of a cause of action sounding in quantum meruit are (1) performance of services in good faith, (2) acceptance of services by the person to whom they are rendered, (3) expectation of compensation therefor, and (4) reasonable value of the services rendered' ... . Defendants' argument centers around plaintiff's failure to establish the fourth element. In its decision, the court stated that, '[a]lthough there was no direct evidence presented regarding the reasonable value of the work performed, the parties' agreement can furnish evidence of such value.' We discern no error in the court so holding, as 'an unenforceable writing may provide evidence of the value of services rendered in quantum meruit' ... . [O]n remittal, should the court find that plaintiff breached the contract, it must then also decide if the breach was substantial, and, if so, plaintiff is precluded from recovering in quantum meruit ... . Conversely, if the court finds that plaintiff's breach of contract was not substantial, plaintiff is not precluded from quantum meruit recovery, and the damages due to defendants for plaintiff's breach of the contract must be offset by plaintiff's award ...". ***Grey's Woodworks, Inc. v. Witte*, 2019 N.Y. Slip Op. 04525, Third Dept 6-6-19**

FOURTH DEPARTMENT

CIVIL PROCEDURE, TRADE SECRETS.

NOTE OF ISSUE AND CERTIFICATE OF READINESS CONTAINING INCORRECT INFORMATION (I.E., DISCOVERY WAS COMPLETE) SHOULD HAVE BEEN VACATED; STIPULATION OF CONFIDENTIALITY WAS SUFFICIENT TO PROTECT TRADE SECRETS.

The Fourth Department determined the motion to vacate the note of issue and a certificate of readiness because the information therein was not correct (discovery was not complete). The court further determined that the confidentiality stipulation was sufficient to protect trade secrets during discovery: "... [C]ontrary to the statements on the certificate of readiness, discovery was incomplete when the note of issue and certificate of readiness were filed. Thus, 'a material fact in the certificate of readiness [was] incorrect,' and the note of issue and certificate of readiness must be vacated ... . [D]efendants requested that the court issue a protective order that included the designation of a third-party neutral expert and an 'attorney and expert eyes only' designation for disclosure. The court denied defendants' request, and directed the parties to execute a confidentiality stipulation and order and to proceed with discovery pursuant to Rule 11-g of the Rules of the Commercial Division of the Supreme Court (see 22 NYCRR 202.70). The confidentiality stipulation and order provides, inter alia, that 'Confidential Information shall be utilized by the Receiving Party and its Counsel only for purposes of this litigation and for no other purposes. Any violation of this Stipulation and Order may be enforced as a contempt of Court.' We conclude that the court provided defendants with adequate protection of their intellectual property and trade secrets." ***Backer & Assoc., LLC v. PPB Eng'g & Sys. Design, Inc.*, 2019 N.Y. Slip Op. 04541, Fourth Dept 6-7-19**

CRIMINAL LAW.

CONSECUTIVE SENTENCES FOR THE SALE OF SMALL AMOUNTS OF COCAINE UNDULY HARSH, CONCURRENT SENTENCES IMPOSED.

The Fourth Department determined the consecutive sentences for the sale of small amounts of cocaine was unduly harsh and imposed concurrent sentences. The defendant had been promised concurrent sentences of four years prior to trial. After trial consecutive seven-year sentences were imposed: "Here, the record establishes that defendant was 35 years old at the

time of these events, and that his only prior record consisted of misdemeanor offenses. He was convicted in Oneida County Court of a similar offense to these crimes, arising from an incident that occurred contemporaneously with these crimes, and he was sentenced to a determinate term of two years' incarceration plus two years' postrelease supervision on that conviction. The crimes at issue involved sales of small amounts of cocaine, and the record contains no indication that defendant is a large-scale drug dealer. Although prior to trial the court had agreed that, if defendant pleaded guilty, it would impose a sentence of four years' incarceration on each count to run concurrent with each other and the Oneida County sentence, after the trial the court imposed determinate terms of seven years' incarceration plus two years' postrelease supervision on each count, to run consecutively to each other." ***People v. Reid*, 2019 N.Y. Slip Op. 04565, Fourth Dept 6-7-19**

CRIMINAL LAW, APPEALS.

APPEAL OF THE STATUTORY SPEEDY TRIAL ISSUE FORECLOSED BY THE GUILTY PLEA AND THE WAIVER OF APPEAL; THE STATEMENT-SUPPRESSION ISSUE FORECLOSED BY THE WAIVER OF APPEAL; THE CONSTITUTIONAL SPEEDY TRIAL ISSUE WAS ABANDONED.

The Fourth Department noted: (1) the statutory speedy trial issue is foreclosed by defendant's guilty plea; (2) the statutory speedy trial issue is foreclosed by the waiver of appeal; (3) the statement-suppression issue is foreclosed by the waiver of appeal; and (4) because defendant pled guilty before Supreme Court decided the constitutional speedy trial issue that issue was abandoned. ***People v. Hardy*, 2019 N.Y. Slip Op. 04555, Fourth Dept 6-7-19**

CRIMINAL LAW, APPEALS.

IF A DEFENDANT IS NOT SENTENCED AS A PREDICATE FELON THE MINIMUM SENTENCE MUST BE ONE-THIRD OF THE MAXIMUM, NOT ONE-HALF AS IT WAS HERE, AN APPELLATE COURT CAN NOT LET AN ILLEGAL SENTENCE STAND.

The Fourth Department noted that, where a defendant is not sentenced as a predicate felon, the minimum sentence is one-third of the maximum, not one-half of the maximum: "We note, however, that the court imposed an illegal sentence of 3½ to 7 years' imprisonment on defendant's conviction for CPW in the third degree. Because defendant was not sentenced as a predicate felon, the minimum period of her indeterminate sentence on this conviction must be one-third of the maximum period, not one-half as fixed by the court (see Penal Law § 70.00 [3] [b]). 'Although the issue is not raised by either party, we cannot allow an illegal sentence to stand' ... . We therefore modify the judgment by reducing defendant's sentence on that count to an indeterminate term of 2⅓ to 7 years' imprisonment." ***People v. Simpson*, 2019 N.Y. Slip Op. 04538, Fourth Dept 6-7-19**

CRIMINAL LAW, APPEALS, EVIDENCE.

COUNTY COURT'S DETERMINATION THE EVIDENCE BEFORE THE GRAND JURY WAS LEGALLY SUFFICIENT IS NOT REVIEWABLE AFTER A CONVICTION BASED UPON LEGALLY SUFFICIENT EVIDENCE.

The Fourth Department noted that appellate review of a court's determination of the sufficiency of the evidence presented to the grand jury is not reviewing upon appeal of a conviction based upon legally sufficient trial evidence: "Defendant's contention regarding the legal sufficiency of the evidence with respect to the operability of the stun gun is not preserved for our review inasmuch as her motion for a trial order of dismissal was not ' specifically directed' at [that] alleged' deficiency in the proof ... . In any event, the evidence, which included the testimony of a firearms examiner who tested the device at issue, viewed in the light most favorable to the People ... , is legally sufficient to support the conviction. ... County Court's determination with respect to the legal sufficiency of the evidence before the grand jury is 'not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence' (CPL 210.30 [6] ...)". ***People v. Washington*, 2019 N.Y. Slip Op. 04553, Fourth Dept 6-7-19**

CRIMINAL LAW, ATTORNEYS, JUDGES,

DEFENDANT COMPLAINED THAT HIS ATTORNEY HAD NOT FILED OMNIBUS MOTIONS BUT DEFENSE COUNSEL SAID HE HAD FILED THEM AND THE COURT SAID IT HAD RECEIVED THEM; IN FACT, HOWEVER NO MOTIONS HAD BEEN FILED; DEFENDANT'S COMPLAINTS ABOUT HIS ASSIGNED COUNSEL WARRANTED FURTHER INQUIRY BY THE COURT; DEFENDANT WAS DEPRIVED OF HIS RIGHT TO COUNSEL, NEW TRIAL ORDERED.

The Fourth Department, reversing defendant's conviction and ordering a new trial, determined that defendant's complaints about his assigned counsel were sufficient to warrant further inquiry by the court: "... [D]efendant 'articulated complaints about his assigned counsel that were sufficiently serious to trigger the court's duty to engage in an inquiry regarding those complaints'... At a pretrial appearance, defendant requested that the court assign him new counsel because, among other things, defense counsel had failed to file discovery demands and omnibus motions. After defendant's request, defense

counsel erroneously stated, '[t]hose were filed already,' and the court stated, 'I have them here. I'm holding them in my hand.' However, the People concede that, although certain discovery demands were served on the People, defense counsel never filed any omnibus motions. Upon being told that omnibus motions had been filed, defendant informed the court that he had never received them. The court replied, 'Well, that's a different issue, okay? So you've got to get a copy of your paperwork, all right? What else?' The court never conducted an inquiry into defendant's serious complaint that defense counsel failed to file any omnibus motions and, instead, proceeded under the mistaken belief that they had been filed. Although '[t]he court might well have found upon limited inquiry that defendant's request was without genuine basis, . . . it could not so summarily dismiss th[at] request' based on a mistaken belief that omnibus motions had been filed ... . Thus, we conclude that the court violated defendant's right to counsel by failing to make a minimal inquiry concerning his serious complaint, and we therefore reverse the judgment and grant a new trial ...". ***People v. Edwards*, 2019 N.Y. Slip Op. 04537, Fourth Dept 6-7-19**

CRIMINAL LAW, CONSTITUTIONAL LAW.

BOTH THE FEDERAL AND STATE CONSTITUTIONS REQUIRE THE SAME *BLOCKBURGER* TEST FOR DOUBLE JEOPARDY.

The Fourth Department determined the test for double jeopardy under the state constitution is the same as under the federal constitution: " 'Under the Federal Constitution, double jeopardy arises only upon separate prosecutions arising out of the same offence' ... . The United States Supreme Court employs a 'same-elements' test, also known as the Blockburger test (Blockburger v. United States, 284 US 299 [1932]), that 'inquires whether each offense contains an element not contained in the other; if not, they are the same offence and double jeopardy bars additional punishment and successive prosecution' ... . Here, the elements of DWI (see Vehicle and Traffic Law § 1192 [2], [3]) and leaving the scene of a property damage incident without reporting (see § 600 [1] [a]) are not the same; among other things, a person does not need to be intoxicated to be found guilty of leaving the scene of a property damage incident without reporting, and does not need to cause property damage to be found guilty of DWI. ... [T]he Court of Appeals has held that '[t]he Double Jeopardy Clauses in the State and Federal Constitutions are nearly identically worded, and we have never suggested that state constitutional double jeopardy protection differs from its federal counterpart' ... , the Court of Appeals set forth the Blockburger test, not the same conduct test, when analyzing a defendant's claim that the double jeopardy clauses of both the Federal and State Constitutions barred a subsequent prosecution. We therefore conclude that the constitutional double jeopardy analysis is the same under federal and state law, and that there is no constitutional double jeopardy violation here ...". ***Matter of McNerlin v. Argento*, 2019 N.Y. Slip Op. 04554, Fourth Dept 6-7-19**

CRIMINAL LAW, EVIDENCE.

BLOCKING THE CAR IN WHICH DEFENDANT WAS A PASSENGER WAS A JUSTIFIABLE LEVEL TWO INTRUSION, THE SUBSEQUENT LEVEL THREE INTRUSION WAS JUSTIFIED BY THE INFORMATION KNOWN TO THE POLICE AT THE TIME THE DEFENDANT STARTED TO GET OUT OF THE CAR AS THE POLICE APPROACHED.

The Fourth Department determined the blocking of the car in which defendant was a passenger by parking at the entrance to the driveway was only a permissible level two intrusion: "The charges against defendant arose after the police, who were investigating a recent stabbing, encountered defendant in a vehicle matching the description and anticipated location of the stabbing suspect's vehicle given in a police dispatch. We conclude that the police conduct was justified in its inception and at every subsequent stage of the encounter leading to defendant's arrest ... . Contrary to defendant's contention, the police action in pulling up behind the subject vehicle, which had parked in defendant's driveway after passing the officers' patrol car, constituted only a level two intrusion ... despite the fact that a police vehicle blocked the subject vehicle's egress from the driveway ... . The police at that point had the requisite founded suspicion to justify the level two intrusion. The police escalated the encounter to a level three intrusion when they approached defendant, who had begun to exit the vehicle, and ordered him to remain in the vehicle ... . Evaluating the totality of the circumstances ... , we conclude that the police conduct was justified by the officers' reasonable suspicion that defendant was the suspect described in the dispatch ... . The officers found defendant less than two miles away from the scene of the stabbing, which had occurred approximately 20 minutes earlier. Defendant's gender, race, height, and weight matched the description of the stabbing suspect. Furthermore, witnesses at the scene of the stabbing informed the police that the suspect left the scene in a small silver vehicle driven by a black female and that the vehicle may have been headed toward a residence on Mark Avenue. Defendant was a passenger in a silver vehicle driven by a black female, and the driveway in which the driver parked the vehicle was 50 to 75 yards from Mark Avenue." ***People v. Pettiford*, 2019 N.Y. Slip Op. 04620, Fourth Dept 6-7-19**

CRIMINAL LAW, EVIDENCE.

ALTHOUGH THE DEFENDANT WAS HANDCUFFED AND SITTING ON THE BACKSEAT OF A POLICE CAR WHEN HE WAS ASKED QUESTIONS, INCLUDING WHETHER HE HAD BEEN DRINKING, BY THE OFFICER WHO MADE THE TRAFFIC STOP, THE DEFENDANT WAS NOT IN CUSTODY WHEN THE QUESTIONS WERE ASKED.

The Fourth Department determined defendant, although handcuffed and seated on the backseat of a police car, was not in custody such that his answers to questions, including whether he had anything to drink, should be suppressed. The officer observed defendant commit several traffic infractions, then the defendant got out of the car, staggering. The defendant would not stop and go back to his car when the officer told him to. When the officer caught up to him he smelled alcohol. The officer then handcuffed the defendant and had him sit on the backseat of the police car with his feet outside the car on the ground: "Contrary to defendant's contention, we conclude that his answers to the sergeant's questions were not the product of a custodial interrogation requiring Miranda warnings. ' It is well established that not every forcible detention constitutes an arrest' ... and, under the circumstances noted above, we agree with the court that the sergeant's use of handcuffs did not transform the detention into a de facto arrest. Rather, the sergeant's use of the handcuffs to effect the detention was warranted in light of the threat that defendant might take additional evasive action ... . We further conclude that seating defendant on the back seat of the police vehicle did not transform the sergeant's questioning into a custodial interrogation. The sergeant lawfully, although forcibly, detained defendant for investigatory purposes based on his observation of defendant committing several traffic infractions ... . Given defendant's visible intoxication, staggering gait, and prior evasive actions, a ' less intrusive means of fulfilling the police investigation' than seating defendant partially in the police vehicle ' was not readily apparent' ... . Here, the sergeant's 'action fell short of the level of intrusion upon defendant's liberty and privacy that constitutes an arrest' ... . In addition, the sergeant's questions were investigatory rather than custodial in nature ...". ***People v. Mcdonald*, 2019 N.Y. Slip Op. 04546, Fourth Dept 6-7-19**

CRIMINAL LAW, EVIDENCE.

COUNTY COURT PROPERLY FOUND THAT DEFENDANT USED HIS RELATIONSHIP WITH A WITNESS TO PRESSURE HER NOT TO TESTIFY, THE WITNESS'S GRAND JURY TESTIMONY WAS PROPERLY ADMITTED IN EVIDENCE.

The Fourth Department determined County Court properly determined the defendant pressured a witness to refuse to testify at trial. Therefore the witness's grand jury testimony was properly admitted in evidence: "Defendant contends that County Court erred in determining, following a *Sirois* hearing, that the People presented clear and convincing evidence that defendant 'wrongfully made use of his relationship with the victim in order to pressure her to violate her duty to testify' ... . The People presented evidence that the missing witness was ready and willing to testify while defendant was in jail during the grand jury proceedings but became reluctant after defendant was released and the trial date drew closer. Days prior to the trial, the witness's mother observed the witness leave with defendant and their child for several hours. When the witness returned to the mother's home, the witness 'started talking about the subpoena that she had received. Started saying things like they can't do anything to me if I don't show up. The subpoena wasn't served properly. There's nothing that they can do if I don't show up to court. Things of that nature.' The mother reported to the prosecutor that she had never heard the witness use legal terminology like that before. ... Defendant's relative also observed the witness in defendant's home during the time in which law enforcement officers were attempting to locate her on a material witness warrant. Further, although the prosecution never informed the witness of the updated trial schedule following the witness's failure to appear, the witness appeared at court two days after the Sirois hearing 'at the perfect moment to save defendant from the impending admission of her damning grand jury testimony' ...". ***People v. Haile*, 2019 N.Y. Slip Op. 04547, Fourth Dept 6-7-19**

CRIMINAL LAW, EVIDENCE, VEHICLE AND TRAFFIC LAW.

A FOUNDED SUSPICION OF CRIMINALITY WAS NOT A SUFFICIENT GROUND FOR A PAT SEARCH; HOWEVER THE SMELL OF MARIJUANA, ABOUT WHICH THE OFFICER TESTIFIED, WOULD JUSTIFY A SEARCH; BECAUSE THE SUPPRESSION COURT DID NOT RULE ON THE MARIJUANA-SMELL ISSUE, THE MATTER WAS REMITTED FOR A RULING.

The Fourth Department determined that, although the suppression court determined the police officer had a founded suspicion of criminality when he ordered defendant out of the car, a founded suspicion of criminality did not justify ordering the defendant to place his hands on the patrol car in preparation for a pat search. However. the officer testified he smelled marijuana, which would justify and search. Because the court did not rule on that issue, the matter was sent back for a ruling: "Upon approaching the vehicle, the officer observed that there were two occupants, one of whom, i.e., defendant, was moving around in the backseat and putting his hands in his front pocket as if he was 'stuffing something either in his coat or in his pants as if to conceal it from [the officer].' ... The officer asked the driver and defendant for identification and

thereafter learned that the driver's license of the driver had been revoked and that defendant did not have a driver's license. The officer directed defendant to exit the vehicle and place his hands on the patrol car so that the officer could conduct a pat search. Defendant exited the vehicle as directed but thereafter fled, discarding components of a 9 millimeter Glock semiautomatic pistol as he ran. ... Because the driver pulled over of his own volition before the officer activated his emergency lights to initiate a traffic stop, the officer needed only an articulable basis to lawfully approach the occupants of the vehicle and request information ... . That basis was supplied by the officer's observation that the vehicle was being operated in violation of Vehicle and Traffic Law § 375 (2) (a) (1) ... . Thus, the officer's conduct 'was justified in its inception' ... . The court determined that the officer had a founded suspicion of criminality prior to ordering defendant to exit the vehicle for the pat search. A founded suspicion of criminality standing alone, however, was insufficient to justify the officer's conduct in ordering defendant to place his hands on the patrol car in preparation for a pat search ... . Nevertheless, in making its determination, the court credited the officer's testimony that he smelled fresh marihuana emanating from the vehicle and was experienced in detecting marihuana. It is well settled that '[t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants' ...". ***People v. Green*, 2019 N.Y. Slip Op. 04608, Fourth Dept 6-7-19**

CRIMINAL LAW, EVIDENCE, VEHICLE AND TRAFFIC LAW.

MATTER SENT BACK FOR A DETERMINATION WHETHER THE PEOPLE PRESENTED NEW EVIDENCE TO THE SECOND GRAND JURY AFTER A 'NO BILL,' THE PEOPLE WERE GRANTED PERMISSION TO RE-PRESENT ON THE GROUND THAT NEW EVIDENCE WAS AVAILABLE.

The Fourth Department sent the case back for a ruling on a portion of defendant's omnibus motions. The grand jury had returned a "no bill" on the leaving the scene of a serious injury accident. The People sought to re-present the charges to a new grand jury alleging that a witness who had given false testimony had agreed to testify truthfully. Defendant, in her omnibus motion, asked to court to compare the testimony given to both grand juries to see if new evidence was actually presented at the second grand jury: "CPL 190.75 (3) provides that where, as here, charges have been dismissed by the grand jury, they 'may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the [P]eople to resubmit such charge[s] to the same or another grand jury.' 'Leave may be granted only once, and the [People are] required to justify resubmission' ... . '[T]here should not be a resubmission unless it appears, for example, that new evidence has been discovered since the former submission; that the [g]rand [j]ury failed to give the case a complete and impartial investigation; or that there is a basis for believing that the [g]rand [j]ury otherwise acted in an irregular manner' ... . '[W]e cannot deem the court's failure to rule on [that part of] the . . . motion as a denial thereof'... . We therefore hold the case, reserve decision, and remit the matter to Supreme Court for a determination whether the People, in fact, presented new evidence to the second grand jury and, if not, whether dismissal of the indictment is warranted on that ground ...". ***People v. Ballowe*, 2019 N.Y. Slip Op. 04566, Fourth Dept 6-7-19**

CRIMINAL LAW, JUDGES.

THE JUDGE SHOULD HAVE ALLOWED DEFENDANT TO EXPLAIN HIS CLAIM THAT HE WAS RECEIVING INEFFECTIVE ASSISTANCE OF COUNSEL AND HIS REQUEST FOR NEW COUNSEL, PLEA VACATED.

The Fourth Department, vacating defendant's guilty plea, determined defendant should have been given the opportunity to explain his reasons for requesting a new attorney: "[D]uring the plea colloquy, defendant attempted to inform the court that he was pleading guilty only because he was not receiving effective assistance of counsel. Although vague and conclusory complaints about counsel generally are insufficient to trigger the court's duty to make an inquiry ... , the court here 'failed to provide defendant with an opportunity to explain his complaints' ... . The court refused to accept defendant's pro se letter regarding the matter and did not otherwise allow defendant to expand upon his claim of ineffective assistance of counsel. Defendant's 'request may well have been a frivolous delaying tactic' ... . Nevertheless, we conclude that the court had 'no basis to completely cut off the discussion without hearing any explanation' … . A 'defendant must at least be given an opportunity to state the basis for his [or her] application' ...". ***People v. Jones*, 2019 N.Y. Slip Op. 04543, Fourth Dept 6-7-19**

EDUCATION-SCHOOL LAW, NEGLIGENCE, EVIDENCE.

PLAINTIFF-STUDENT WAS INJURED BY AN OUTWARD-SWINGING BATHROOM DOOR WHICH OPENED INTO THE HALLWAY, THE SCHOOL DISTRICT'S MOTION TO SET ASIDE THE PLAINTIFF'S NEGLIGENCE VERDICT PROPERLY DENIED.

The Fourth Department determined the motion to set aside the negligence verdict against the school district was properly denied. Plaintiff student was injured by a bathroom door which opened outward into the hallway on the side of the hallway the students were instructed to use: "[The] evidence, which we have evaluated in light of the unchallenged jury instructions given by the court ... , included testimony from the school's principal that it would have been safer for students walking in

the hallway to have the door open inward and that the likelihood of the door opening into someone's path was increased because the students were instructed to walk on the right side of the hallway next to the door. In addition, the director of facilities for defendant Williamsville Central School District at the time of the incident testified that it was very possible that the outward-swinging door could strike someone walking down the hallway, that he did not know of any reason why the door opened outward, and that the door could have been modified by his staff in a short time at minimal expense. The jury was also able to consider trial exhibits including oversized photographs and architectural schemata to help it determine whether, in light of all the circumstances ... , the bathroom door was, as charged by the court, 'reasonably safe.' Thus, even apart from the testimony of the expert, there is legally sufficient evidence from which the jury could conclude, based on common sense and the ordinary experience and knowledge possessed by laypersons ... , that the outward-opening door was not reasonably safe." ***Douglas F. v. Williamsville Cent. Sch. Dist.*, 2019 N.Y. Slip Op. 04536, Fourth Dept 6-7-19**

EMINENT DOMAIN. EVIDENCE, CIVIL PROCEDURE, APPEALS.

PORTIONS OF THE RESPONDENTS' APPRAISAL REPORT IN THIS CONDEMNATION PROCEEDING SHOULD NOT HAVE BEEN STRUCK BECAUSE THE PROPER VALUATION METHOD WAS USED; THE EVIDENTIARY RULING ON THE MOTION IN LIMINE IS APPEALABLE BECAUSE THE RULING AFFECTS THE SCOPE OF THE TRIAL ISSUES.

The Fourth Department, reversing (modifying) Supreme Court, determined that the portions of motion in limine seeking to strike parts of respondents' appraisal report in this condemnation proceeding should not have been granted. The court noted that the evidentiary ruling was appealable because it limited the scope of the trial issues. The court further noted that the proof of valuation offered at trial must be limited to the valuation method(s) described in the appraisal report: "Where, as here, 'the highest and best use is the one the property presently serves and that use is income-producing, then the capitalization of income is a proper method of valuation' ... . In our view, the stricken portion of respondents' appraisal report, although titled 'investment valuation,' applied an income capitalization approach using the standard income capitalization formula, i.e., value equals net income divided by a capitalization rate ... , and applied factors that, according to respondents' appraiser, accurately reflect the property's value and would make the property more appealing to prospective purchasers. To the extent that petitioner contends that certain factors considered by respondents' appraiser in valuing the property do not accurately reflect market value, '[t]he fact that some aspects of the valuation methodology [of respondents' appraiser] may be subject to question goes to the weight to be accorded the appraisal[],' not its admissibility ...". ***Matter of Rochester Genesee Regional Transp. Auth. v. Stensrud*, 2019 N.Y. Slip Op. 04612, Fourth Dept 6-7-19**

ENVIRONMENTAL LAW, MUNICIPAL LAW, EMINENT DOMAIN.

THE TOWN RESOLUTION ALLOWING THE CONSTRUCTION OF A SEWER LINE ALONG A NATURE TRAIL WAS ANNULLED BY THE FOURTH DEPARTMENT, THE TOWN BOARD DID NOT TAKE THE REQUIRED 'HARD LOOK' AT THE EFFECTS OF THE SEWER-LINE CONSTRUCTION ON CERTAIN RARE ANIMAL AND PLANT SPECIES, AS WELL AS THE EFFECTS UPON SURFACE WATERS.

The Fourth Department annulled the determination allowing an easement to install a sewer line along a nature trail. The Fourth Department held that the Town Board did not take the required "hard look" (required by the State Environmental Quality Review Act [SEQRA]) at the effect of the sewer line on certain endangered and rare animal and plant species, as well as the effects on surface water: "[T]he New York State Department of Environmental Conservation (DEC) made respondent aware that its database indicated the presence of certain endangered, threatened, or rare animal and plant species on the project site. Those species included the northern long-eared bat, the imperial moth, and the northern bog violet. In addition, the database indicated the presence of inland salt marsh. The DEC recommended that respondent conduct a survey of the professional literature and determine whether the project site contains habitats favorable to such species and, if so, that respondent conduct a field survey to determine whether the species are present. The DEC instructed that, if respondent determined that such species are present, modifications should be considered to minimize impact. There is no indication that respondent conducted such a survey. [With the exception of the Indiana bat. the species'] presence was merely noted..., along with the bare conclusion that there would be no significant impact on those species. ... [R]espondent merely set forth general practices for avoiding significant adverse impacts on surface water and stream corridors without providing a reasoned elaboration that, by implementing such practices in this particular project, respondent would successfully avoid any significant adverse impacts on surface water." ***Matter of Frank J. Ludovico Sculpture Trail Corp. v. Town of Seneca Falls*, 2019 N.Y. Slip Op. 04621, Fourth Dept 6-7-19**

FAMILY LAW.

COURTS HAVE THE DISCRETION TO DECLINE TO IMPUTE INCOME TO A PARENT WHO HAS VOLUNTARILY REDUCED HIS OR HER INCOME FOR A COMPELLING REASON, HERE, ALTHOUGH FATHER TOOK A LOWER PAYING JOB IN NORTH CAROLINA BECAUSE HIS WIFE TOOK A HIGHER PAYING JOB IN NORTH CAROLINA, FATHER'S CHILD SUPPORT OBLIGATION WAS NOT REDUCED, RATHER THE COURT IMPUTED A PORTION OF THE WIFE'S NEW HIGHER INCOME TO KEEP FATHER'S OBLIGATION AT THE SAME LEVEL.

The Fourth Department determined the court had the discretion to reduce father's child support payments, even though father voluntarily took a lower paying job in North Carolina where his wife had found a job which increased her income by $30,000. The court's conclusion it did not have the authority to reduce father's child support obligation in this circumstance was itself deemed an abuse of discretion by the Fourth Department. However the Fourth Department didn't change father's obligation, rather it imputed some of the wife's new higher income to the father: "[C]ourts may decline to impute income when a parent has a voluntary reduction in income and a legitimate and reasonable basis for such a reduction ... . Indeed, the general rule that 'a parent who voluntarily quits a job will not be deemed without fault in losing such employment . . . should not be inflexibly applied where a parent quits a job *for a sufficiently compelling reason*' ... . We thus agree with the father that the court erred when it stated that it was not *permitted* to reduce the father's child support obligation even if his decision to take a lower-paying job was reasonable. ... It was undisputed that the entire reason the father left his higher-paying job in New York was so that his wife could accept a higher-salaried position in North Carolina, which resulted in a net increase in the income of his new family unit. Inasmuch as the father's voluntary decision to leave his lucrative position for a lesser-paying position 'unquestionably improved [his overall] financial condition' ... , we conclude that we may impute some portion of the wife's higher salary to the father ...". ***Matter of Montgomery v. List*, 2019 N.Y. Slip Op. 04560, Fourth Dept 6-7-19**

FAMILY LAW, APPEALS, JUDGES, EVIDENCE.

WHEN A PARTY'S ATTORNEY APPEARS THE PARTY IS NOT IN DEFAULT AND MAY THEREFORE APPEAL, FAMILY COURT SHOULD NOT HAVE AWARDED CUSTODY TO NONPARENTS ABSENT A HEARING DEMONSTRATING EXTRAORDINARY CIRCUMSTANCES AND THE BEST INTERESTS OF THE CHILD.

The Fourth Department determined mother was not in default, because her attorney had appeared, and therefore mother can appeal the award of custody to the nonparent petitioners. The Fourth Department further determined Family Court should have held a hearing to determine whether extraordinary circumstances justified awarding custody to nonparents. The prior consent order of custody in favor of the nonparents does not demonstrate extraordinary circumstances: " 'A parent's right to be heard on a matter of child custody is fundamental and not to be disregarded absent a convincing showing of waiver' ... . Moreover, '[i]t is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' ... and further establishes that an award of custody to the nonparent is in the best interests of the child ... . 'The burden of proving extraordinary circumstances rests on the nonparent, and the mere existence of a prior consent order of custody in favor of the nonparent is not sufficient to demonstrate extraordinary circumstances'... . Inasmuch as the court erred in depriving the mother of custody without conducting the requisite evidentiary hearing ... , we reverse and remit the matter to Family Court for a hearing on the custody petition." ***Matter of Hilton v. Hilton*, 2019 N.Y. Slip Op. 04572, Fourth Dept 6-7-19**

FAMILY LAW, CONTRACT LAW.

THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO) OBTAINED BY STIPULATION OF SETTLEMENT MUST BE ENFORCED AS WRITTEN, BECAUSE NO PROVISION WAS MADE FOR GAINS OR LOSSES AFTER THE DIVORCE PROCEEDINGS COMMENCED, SUPREME COURT SHOULD NOT HAVE TRANSFERRED THE AGREED AMOUNT PLUS THE GAINS THAT HAD ACCRUED.

The Fourth Department, reversing Supreme Court, determined the qualified domestic relations order (QDRO) obtained pursuant to a stipulation of settlement must be enforced as written. Because the stipulation made no provision for the transfer of gains which accrued after the divorce action started, Supreme Court erred by transferring the agreed amount plus the gains: " 'A QDRO obtained pursuant to a [stipulation of settlement] can convey only those rights which the parties [agreed to] as a basis for the judgment' ... . Thus, 'a court errs in granting a domestic relations order encompassing rights not provided in the underlying stipulation' ... . A stipulation of settlement that is incorporated, but not merged, into the judgment of divorce ' is a contract subject to the principles of contract construction and interpretation' ... . If the stipulation of settlement is ' complete, clear, and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms' ... . Here, the stipulation of settlement clearly and unambiguously made no provision for plaintiff to receive gains or losses on the amount that the stipulation of settlement specified would be transferred to her. Thus, plaintiff is not entitled

to any gains on that amount that accrued after the divorce action commenced ...". ***Reber v. Reber*, 2019 N.Y. Slip Op. 04557, Fourth Dept 6-7-19**

FAMILY LAW, EVIDENCE.

THE EVIDENCE DID NOT SUPPORT THE FINDING THAT FATHER ABANDONED THE CHILD, THE PERMANENT NEGLECT FINDING, HOWEVER, WAS SUPPORTED BY THE EVIDENCE.

The Fourth Department, reversing (modifying) Family Court determined the evidence did not support the finding that father abandoned the child, but the evidence did support a finding of permanent neglect. The criteria for permanent neglect, not summarized here, are described in some depth in the decision. The matter was sent back for a dispositional hearing or a waiver of the hearing: " 'An order terminating parental rights may be entered upon the ground that a child's parent abandoned such child for the period of six months immediately prior to the date on which the petition is filed in the court' ' ... . A child is deemed abandoned 'if the parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency' ' ... . 'Parents are presumed able to visit and communicate with their children and, although incarcerated parents may be unable to visit, they are still presumed able to communicate with their children absent proof to the contrary' ... . Here, the record establishes that the father—following up on a prior attempt to establish paternity that he had initially failed to adequately pursue—definitively established his paternity, while incarcerated, less than two months into the six-month period preceding the filing of the petition ... . Thereafter, throughout the relevant period, the father initiated communications with the child's caseworker; sent the caseworker at least four letters inquiring about the child and included a card and drawing for the child in at least one of those letters; and participated in a service plan review. We conclude that the father's contacts 'were not minimal, sporadic, or insubstantial' ...". ***Matter of Jarrett P. (Jeremy P.)*, 2019 N.Y. Slip Op. 04609. Second Dept 6-7-19**

INSURANCE LAW.

DEFENDANT INSURANCE AGENT WAS NOT UNDER A DUTY TO NOTIFY THE INSURER OF THE INSURED'S DEATH OR TO MAKE SURE ADDITIONAL INSUREDS WERE NAMED ON THE POLICY AFTER THE INSURED'S DEATH; THE DECEDENT'S DAUGHTER CONTINUED TO PAY THE HOUSE INSURANCE PREMIUMS AFTER HER MOTHER'S DEATH, WHEN THE HOUSE WAS DESTROYED BY FIRE THE INSURER DISCLAIMED COVERAGE BECAUSE ONLY THE DECEDENT WAS NAMED ON THE POLICY.

The Fourth Department, reversing Supreme Court, determined that defendant insurance agent did not owe a duty to decedent's daughter, Tomaino, or the estate, with respect to the insurance on decedent's home. Decedent was the only person named on the house insurance policy. Decedent died in 2010. Tomaino continued to pay the premium to defendant after her mother's death. When the place was destroyed by fire in 2014 decedent was the only named insured. Allstate disclaimed coverage. Tomaino alleged defendant owed her and the estate a duty to notify the insurer of decedent's death and to make sure additional insured were named in the policy. The Fourth Department that no such duty was owed, even if defendant was aware of the death of Tomaino's mother. "Defendant met his initial burden of establishing as a matter of law that he owed no duty to plaintiff, Tomaino, or decedent's estate inasmuch as he demonstrated that none was a client. Indeed, defendant's submissions established that decedent, alone, was his client and that, after her death, no one represented the estate until September 2014, approximately eight months after the fire and four years after her death. .,,, [E]ven assuming, arguendo, that Tomaino was a client of defendant, we conclude that defendant established his entitlement to summary judgment as a matter of law. Defendant established that he had no common-law duty to advise, guide, or direct her to obtain insurance coverage for additional insureds in light of decedent's death ... , and he further established that he did not ' assume or acquire duties in addition to those fixed at common law' ... . Here, defendant demonstrated that there were no payments made to him beyond the alleged premium payments, that there was no interaction with Tomaino regarding questions of coverage, and that no special relationship was formed between himself and Tomaino .... Indeed, defendant submitted the deposition testimony of Tomaino, in which she testified that there was no discussion with defendant about any need for changes to the policy and that she was not asked for a copy of any death certificate, thus establishing the absence of any interaction regarding questions of coverage. Additionally, even assuming, arguendo, that Tomaino was a client of defendant and that she informed him of decedent's death and made premium payments to him in 2012 and 2013, we conclude that such events are insufficient to raise a triable issue of fact whether defendant owed a duty to her to notify Allstate of decedent's death and to ensure that the property was properly insured ...". ***Gatto v. Allstate Indem. Co.*, 2019 N.Y. Slip Op. 04618, Fourth Dept 6-7-19**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERT'S AFFIDAVIT DID NOT DEMONSTRATE A CAUSAL RELATIONSHIP BETWEEN THE ALLEGED DEVIATION FROM THE STANDARD OF CARE AND PLAINTIFF'S INJURY WITH RESPECT TO ONE OF THE DEFENDANT DOCTORS, THE DOCTOR'S SUMMARY JUDGMENT MOTION SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing (modifying) Supreme Court, over a two-justice dissent, determined that the medical malpractice action against defendant Dr. Dietz and his employer should have been granted because plaintiff's expert did not raise a question of fact about whether the alleged departure from the standard of care had a causal relationship with the plaintiff's injury. The majority concluded the expert's affidavit was sufficient to raise a question of fact with respect a second defendant, Dr. Pedersen, but the dissent argued the affidavit with respect to Dr. Pedersen was conclusory and did not demonstrate a causal relationship: "[P]laintiff's expert did not opine that Dr. Dietz caused the iliac vein injury and instead opined that Dr. Dietz deviated from the standard of care by insufficiently examining or testing the iliac vein following Dr. Pedersen's repair. Inasmuch as plaintiff's expert did not indicate the possible results of any such examination or testing, whether those results should have prompted a different course of treatment, or how Dr. Dietz's alleged departure from the standard of care otherwise caused plaintiff's injury, plaintiff failed to raise an issue of fact as to causation regarding Dr. Dietz ...". ***Dickinson v. Bassett Healthcare*, 2019 N.Y. Slip Op. 04610, Fourth Dept 6-7-19**

MUNICIPAL LAW, NEGLIGENCE, EMPLOYMENT LAW.

THE COMPLAINT ALLEGING THE COUNTY WAS VICARIOUSLY LIABLE (RESPONDEAT SUPERIOR) FOR THE NEGLIGENT ACTIONS OF A CORONER SHOULD NOT HAVE BEEN DISMISSED, THE CORONER ALLEGEDLY TRANSFERRED A PORTION OF THE REMAINS OF PLAINTIFF'S SON TO A VOLUNTEER FIRE DEPARTMENT FOR THE TRAINING OF CADAVER DOGS.

The Fourth Department, reversing Supreme Court, determined the complaint against the county, based upon the alleged negligence of a county employee, should not have been dismissed. It was alleged that a coroner (Jackman) employed by the county transferred human remains (plaintiff's son) to a volunteer fire company for the purpose of train cadaver dogs: "Although it is generally a question for the jury whether an employee is acting within the scope of employment ... , an employer is not liable as a matter of law 'if the employee was acting solely for personal motives unrelated to the furtherance of the employer's business' ... . Here, there is evidence that Jackman's decision to transfer a portion of the remains of plaintiffs' son (decedent) to defendant Vincent Salerno, the Fire Chief of Cambria, was driven by a work-related purpose, rather than Jackman's own personal interests ... . Furthermore, there are issues of fact whether it was foreseeable that Jackman, in performing his obligations as a county coroner, might negligently remove, transport, or even transfer decedent's remains. '[F]or an employee to be regarded as acting within the scope of his [or her] employment, the employer need not have foreseen the precise act or the exact manner of the injury as long as the general type of conduct may have been reasonably expected' ... . An employee's '[m]ere . . . deviation from the line of . . . duty does not relieve [the] employer of responsibility' ... . [W]e reject plaintiffs' contention that the court erred in granting Cambria's motion. The unrefuted evidence showed that Cambria's employee, Salerno, had only personal motives for requesting decedent's remains from Jackman, i.e., to further his own interest in training dogs to locate cadavers ... . Salerno had no official duties that required him to train cadaver dogs or obtain human remains to train such dogs." ***Dunn v. County of Niagara*, 2019 N.Y. Slip Op. 04530, Fourth Dept 6-7-19**

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

THE RECKLESS DISREGARD STANDARD APPLIED TO DEFENDANT POLICE OFFICER WHO WAS RESPONDING TO AN EMERGENCY WHEN THE TRAFFIC ACCIDENT OCCURRED, THE OFFICER TOOK PRECAUTIONARY MEASURES AND THEREFORE HIS CONDUCT DID NOT RISE TO THE LEVEL OF RECKLESS DISREGARD OF THE SAFETY OF OTHERS.

The Fourth Department, reversing (modifying) Supreme Court, determined "reckless disregard" standard for the operation of a police car in an emergency situation applied to the facts, and further found that the officer's conduct did not rise to the level of "reckless disregard:" "We agree with defendants that the court erred in determining that the defendant officer's conduct was not measured by the 'reckless disregard' standard of care under Vehicle and Traffic Law § 1104 (e) ... . That standard of care 'applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b)' ... and, if applicable, the driver is 'shielded from liability unless [he or she] is shown to have acted with reckless disregard' of the safety of others' ... . Here, there is no dispute that the defendant officer was operating an 'authorized emergency vehicle' and was 'involved in an emergency operation' at the time of the accident (§ 1104 [a]). Furthermore, defendants' submissions in support of their motion established as a matter of law that the defendant officer was performing exempted conduct when he 'proceed[ed] past a steady red signal . . . , but only after slowing]down as may be necessary for safe operation' ... . Here, the defendant officer's uncontroverted testimony established that he was responding to a disturbance call that was '[p]riority 1,' i.e., the

highest priority level, and that he took several precautions before proceeding into the intersection against the red light. Specifically, he slowed his vehicle to an almost complete stop, looked to his right and left, and then slowly proceeded into the intersection at a speed of about five miles per hour. When plaintiffs' vehicle came into the defendant officer's peripheral vision, he 'slammed' his brake and attempted to avoid colliding with plaintiffs' vehicle. Where, as here, a defendant officer takes precautionary measures before engaging in exempted conduct under Vehicle and Traffic Law § 1104 (b), the police officer does not act with reckless disregard for the safety of others ...". ***Levere v. City of Syracuse*, 2019 N.Y. Slip Op. 04613, Fourth Dept 6-7-19**

PERSONAL INJURY, CIVIL PROCEDURE, TOXIC TORTS.

DEFENDANTS DID NOT DEMONSTRATE WHEN THE CAUSE OF ACTION FOR LEAD-PAINT EXPOSURE ACCRUED, THEREFORE THE SUMMARY JUDGMENT MOTION SHOULD NOT HAVE BEEN GRANTED ON THE GROUND THAT THE STATUTE OF LIMITATIONS HAD EXPIRED.

The Fourth Department, reversing (modifying) Supreme Court, determined that defendant's failed to demonstrate when the lead-paint-exposure cause of action accrued. Therefore the motion for summary judgment on the ground that the statute of limitations had passed should not have been granted: "In moving to dismiss the complaint on statute of limitations grounds, each defendant had 'the initial burden of establishing prima facie that the time in which to sue ha[d] expired . . . and thus was required to establish, inter alia, when the plaintiff[s'] cause of action accrued' ... Here, neither defendant established the relevant accrual date of plaintiffs' claims for injury caused by the latent effects of lead paint exposure and, in the absence of such evidence, neither defendant made a prima facie showing that the applicable limitations period had expired on those claims ... . Supreme Court thus erred in granting defendants' respective motions to that extent. We note that, at oral argument in these appeals, plaintiffs conceded that their claims for patent injuries arising from such exposure were properly dismissed as time-barred." ***Chaplin v. Tompkins*, 2019 N.Y. Slip Op. 04562, Fourth Dept 6-7-19**

PERSONAL INJURY, EVIDENCE.

THE POND INTO WHICH THE 96-YEAR-OLD PLAINTIFF'S DECEDENT APPARENTLY SLID WAS OPEN AND OBVIOUS AND THE FACT THAT THE BANK OF THE POND IS SLIPPERY IS INCIDENTAL TO ITS NATURE AND LOCATION, PLAINTIFF'S EXPERT DID NOT SUPPORT THE ASSERTION THAT THE POND WAS DEFECTIVE AND UNSAFE, DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED.

The Fourth Department determined defendant property owners' motion for summary judgment in this wrongful death case was properly granted. Plaintiff's decedent was 96 years old and resided in defendants' senior citizen facility. Plaintiff's decedent was found dead in a pond on the property. The medical examiner concluded plaintiff's decedent may has slipped on the sloping bank of the pond and slid into the water where he died of drowning: "... '[A] landowner has no duty to protect or warn against an open and obvious condition that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it' ... . Here, defendants met their initial burden on the motion by establishing that the pond, including its sloping bank, was an open and obvious condition inherent or incidental to the nature of the property and that it was known to decedent prior to the accident .... 'A slippery condition on a [pond's bank] is necessarily incidental to its nature and location near a body of water' ... . [T]he engineering expert's affidavit that plaintiff submitted fails to indicate that it was based on any studies, regulations, codes, or statutes, 'nor is the expert's conclusion that the [retention pond] was defective and unsafe . . . supported by foundational facts, such as a deviation from industry standards or statistics showing the frequency of injuries caused by' the lack of safety measures proposed by the expert ...". ***Preston v. Castle Pointe, LLC*, 2019 N.Y. Slip Op. 04617, Fourth Dept 6-7-19**

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