CasePrepPlus

September 20, 2019

An advance sheet service summarizing recent and significant New York appellate cases

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COURT OF APPEALS

CIVIL PROCEDURE, NEGLIGENCE, PRIVILEGE.

PLAINTIFF WAIVED THE PHYSICIAN-PATIENT PRIVILEGE BY PLACING THE CONDITION OF HER KNEES INTO CONTROVERSY IN THIS ACCIDENT CASE, APPELLATE DIVISION REVERSED.

The Court of Appeals, reversing the Appellate Division, determined plaintiff had placed the condition of her knees into controversy in this accident case and defendants were therefore entitled to discovery re: prior treatment of her knees. The facts were not discussed: "Plaintiff affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages ... . Under the particular circumstances of this case, plaintiff therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought by authorizations pertaining to the treatment of plaintiff's knees is 'material and necessary' to defendants' defense of the action (CPLR 3101 [a]). Accordingly, Supreme Court erred in denying defendants' motion to compel plaintiff to provide discovery related to the prior treatment of her knees." ***Brito v. Gomez*, 2019 N.Y. Slip Op. 06452, CtApp 9-10-19**

PRODUCTS LIABILITY, NEGLIGENCE, EVIDENCE.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED ON THE GROUND THAT PLAINTIFF'S DEPOSITION TESTIMONY CONTRADICTED THE CONCLUSIONS OF PLAINTIFF'S EXPERT.

The Court of Appeals, reversing the Appellate Division, over two dissents, determined summary judgment should not have been granted to defendants in this personal injury case stemming from a potholder catching fire. The Appellate Division had reversed because plaintiff's deposition testimony conflicted with the conclusions of plaintiff's expert. The facts were not discussed: "The courts below erred in granting defendants' motions for summary judgment on the basis that plaintiff failed to raise a triable issue of fact sufficient to defeat the motions. Although the plaintiff's deposition testimony partially contradicted the factual conclusions reached by her expert witnesses, the expert opinions were based upon other record evidence and were neither speculative nor conclusory. Insofar as plaintiff raised genuine issues of fact on the element of causation, summary judgment should not have been granted on that ground ... . We remit for Supreme Court to consider the alternative grounds for summary judgment defendants raised in their motions and neither Supreme Court nor the Appellate Division reached. ... Judges Rivera, Stein, Fahey and Wilson concur. Chief Judge DiFiore and Judges Garcia and Feinman dissent and vote to affirm for reasons stated in the Appellate Division memorandum decision (Salinas v. World Houseware Producing Co., Ltd., 166 AD3d 493 [1st Dept 2018])." ***Salinas v. World Houseware Producing Co.*, 2019 N.Y. Slip Op. 06537, CtApp 9-12-19**

FIRST DEPARTMENT

DEBTOR-CREDITOR, CIVIL PROCEDURE.

THE DEPOSIT OF FULL PAYMENT OF JUDGMENTS IN A COURT MONITORED ESCROW ACCOUNT DID NOT STOP THE ACCRUAL OF POST-JUDGMENT INTEREST.

The First Department determined the deposit of full payment of judgments placed in a court monitored escrow account were subject to the accrual of post-judgment interest: "Defendants' deposit of full payment on the judgments entered against it to a court monitored escrow account (the Monitorship Account) was not unconditional, such that it did not stop the accrual of post-judgment interest ... . Although the Monitorship Order expressly directed the Monitor to collect the judgment amounts and expressly provides for the collection of 'pre- and post-judgment interest,' such funds could not be further transferred until further order of the court. Moreover, the Monitorship Order reflects that the parties were not waiving "any rights, defenses or claims not set forth in the agreed order' by stipulating to the appointment of such Monitor. Accordingly, defendants' payment to the Monitorship Account was conditioned on defendants preserving both their defenses to plaintiff's claims, and defendants' direct claims to those funds. Contrary to defendants' arguments, the payment to the Monitorship Account was not a 'deposit to the court,' as it was not 'pursuant to an order of the court, made upon motion' (CPLR 5021[a][3]). Rather under the circumstances, the Monitorship Account functioned simply as an escrow account while the defen-

dants continued to oppose plaintiff's claims and pursue their own." ***Triadou SPV S.A. v. CF 135 Flat LLC*, 2019 N.Y. Slip Op. 06453, First Dept 9-10-19**

EMPLOYMENT LAW, LABOR LAW.

PLAINTIFF STATED CAUSES OF ACTION STEMMING FROM UNDERPAYMENT OF WAGES FOR MANUAL LABOR PURSUANT TO THE LABOR LAW; PLAINTIFF WAS PAID BI-WEEKLY; THE LABOR LAW REQUIRES PAYMENT WEEKLY.

The First Department determined plaintiff stated causes of action under the Labor Law stemming from her employer's paying her bi-weekly, rather than weekly, for manual labor, in violation of Labor Law § 191. Plaintiff sought liquidated damages, interest and attorney's fees pursuant to Labor Law § 198(1-a). The bi-weekly payments were deemed "underpayment" and the Labor Law provided plaintiff with a private right of action: "... [T]he term underpayment encompasses the instances where an employer violates the frequency requirements of section 191(1)(a) but pays all wages due before the commencement of an action. 'In the absence of any controlling statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts' in determining the meaning of a word or phrase' ... . The word underpayment is the noun for the verb underpay; underpay is defined as 'to pay less than what is normal or required' ... . The moment that an employer fails to pay wages in compliance with section 191(1)(a), the employer pays less than what is required. ... In interpreting the liquidated damages provisions of the Fair Labor Standards Act of 1938 (FLSA), the Supreme Court has held that, regardless of whether an employee has been paid wages owed before the commencement of the action, the statute provides a liquidated damages remedy for the 'failure to pay the statutory minimum on time,' ... Labor Law § 198(1-a), although not identical to the FLSA liquidated damages provision (29 USC § 216[b]), has 'no meaningful differences, and both are designed to deter wage-and-hour violations in a manner calculated to compensate the party harmed' ... . Labor Law § 198(1-a) expressly provides a private right of action for a violation of Labor Law § 191. Defendant's position that no private right of action exists is dependent on its erroneous assertion that the late payment of wages is not an underpayment of wages. Furthermore, even if Labor Law § 198 does not expressly authorize a private action for violation of the requirements of Labor Law § 191, a remedy may be implied since plaintiff is one of the class for whose particular benefit the statute was enacted, the recognition of a private right of action would promote the legislative purpose of the statute and the creation of such a right would be consistent with the legislative scheme ...". ***Vega v. CM & Assoc. Constr. Mgt., LLC*, 2019 N.Y. Slip Op. 06459, First Dept 9-10-19**

LABOR LAW-CONSTRUCTION LAW.

PLAINTIFF FELL FROM AN UNGUARDED ELEVATED PLATFORM; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE LABOR LAW § 200 CAUSE OF ACTION SHOULD HAVE BEEN DENIED.

The First Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted, and defendants' motion for summary judgment on the Labor Law § 200 cause of action should not have been granted in this "fall from an elevated platform" case: "Plaintiff electrician was injured when he fell from an elevated concrete platform on his work site that did not have safety rails or stairs, and over which he was repeatedly required to traverse to access an electrical panel to do his work. This accident falls within the ambit of Labor Law § 240(1), because plaintiff's injuries were the direct consequence of a failure to provide adequate protection, such as a guardrail or stairs, to prevent the risk posed by the physically significant elevation differential ... . Since plaintiffs' Labor Law § 200 claim is premised upon [defendant's] alleged notice and failure to remedy the dangerous condition of materials stored haphazardly on the platform where plaintiff fell, it should have been sustained ...". ***Coombes v. Shawmut Design & Constr.*, 2019 N.Y. Slip Op. 06455. 9-10-19**

SECOND DEPARTMENT

CIVIL PROCEDURE.

FAILURE TO TIMELY MAIL THE SUMMONS AND COMPLAINT AFTER SERVICE AT DEFENDANT'S BUSINESS AS REQUIRED BY CPLR 308(2) IS A JURISDICTIONAL DEFECT WHICH IS NOT CURED BY LATE MAILING.

The Second Department determined plaintiff's failure to timely mail a copy of the summons and complaint after serving the documents at defendant's place of business was a jurisdictional defect which was not cured by late mailing: "A mailing sent within the wrong time frame, like a mailing sent by the wrong method , increases the likelihood that a party will not receive proper notice of a legal proceeding. The first 20-day window set forth in CPLR 308(2) serves an important function. If the delivery and mailing required ... that statute are not made within a short time of one another, there is a greater likelihood that one or both sets of pleadings will be mislaid, or, at the very least, that confusion will arise as to how much time the defendant has to respond—both of which appear to have occurred here. Further, the requirement that an affidavit of service

be filed within 20 days of the delivery or mailing, whichever is effected later, also serves an important function. Timely filing of the affidavit of service is designed to give notice as to the plaintiff's claim of service and permit the defendant to calculate the time to answer. Where the affidavit of service claims that delivery but not mailing occurred within the 20-day period, yet the plaintiff intends to later claim that a timely mailing did occur, additional confusion is created, a defendant may be prejudiced by reliance upon the publicly filed affidavit which only partially disclosed the plaintiff's claim of service, and such prejudice may preclude the prospect that the failure to file the affidavit could be cured ...'. ***Estate of Norman Perlman v. Kelley*, 2019 N.Y. Slip Op. 06475, Second Dept 9-11-19**

CIVIL PROCEDURE.

DEFENDANT ALLEGED HE WAS NOT SERVED WITH THE SUMMONS AND COMPLAINT WITHIN 120 DAYS OF FILING AND PLAINTIFF DID NOT FILE AN AFFIDAVIT OF SERVICE WITH THE CLERK, DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION PROPERLY GRANTED.

The Second Department determined defendant's motion to dismiss the complaint for lack of personal jurisdiction was properly granted. Defendant alleged he was not served with the summons and complaint within 120 days of filing and plaintiff had not filed an affidavit of service with the clerk of the court: "While the failure to timely file an affidavit of service with the clerk of the court as required by CPLR 308(4) may, in the absence of prejudice, be corrected by court order pursuant to CPLR 2004 ... , in this case, the plaintiff failed to seek such relief, and the Supreme Court declined to extend this time sua sponte ... . Accordingly, we agree with the court's determination to grant that branch of his motion which was pursuant to CPLR 3211(a)(8) to dismiss the complaint insofar as asserted against him on the ground of lack of personal jurisdiction ...". ***Zheleznyak v. Gordon & Gordon, P.C.*, 2019 N.Y. Slip Op. 06536, Second Dept 9-11-19**

CIVIL PROCEDURE, FORECLOSURE.

THE PROCESS SERVER WAS AWARE DEFENDANT IN THIS FORECLOSURE ACTION WAS IN THE MILITARY; THE "AFFIX AND MAIL" METHOD OF SERVICE DID NOT OBTAIN JURISDICTION OVER DEFENDANT.

The Second Department determined personal jurisdiction was not obtained over defendant in this foreclosure action. The process server, who used the "affix and mail" method of service, was aware defendant was in the military: "After the hearing, the Supreme Court determined that the plaintiff had not established personal jurisdiction over the defendant. Service pursuant to CPLR 308(4), known as "affix and mail" service, 'may be used only where service under CPLR 308(1) or 308(2) cannot be made with due diligence' ... . 'While the precise manner in which due diligence is to be accomplished is not rigidly prescribed, the requirement that due diligence be exercised must be strictly observed, given the reduced likelihood that a summons served pursuant to [CPLR 308(4)] will be received'... . A mere showing of several attempts at service at either a defendant's residence or place of business may not satisfy the 'due diligence' requirement before resort to affix and mail service ... . ' [D]ue diligence' may be satisfied with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times' ... . According to the affidavit of service and the process server's in-house work order sheet, however, the process server knew that the defendant was in active military service. Since the process server was aware that the defendant was engaged in active military service at the time the process server attempted service at the address, the process server's four attempts at service prior to resorting to affix-and-mail service were not made when the defendant 'could reasonably be expected to be found at such location' ...". ***Mid-Island Mtge. Corp. v. Drapal*, 2019 N.Y. Slip Op. 06488, Second Dept 9-11-19**

CIVIL PROCEDURE, FORECLOSURE, APPEALS.

THE CONDITIONAL ORDER OF DISMISSAL WAS NOT AUTHORIZED BECAUSE ISSUE HAD NOT BEEN JOINED AT THE TIME THE ORDER WAS MADE; THE BANK'S MOTION TO VACATE THE CONDITIONAL ORDER IN THIS FORECLOSURE ACTION SHOULD HAVE BEEN GRANTED; AN UNAUTHORIZED SUPPLEMENTAL RECORD ON APPEAL TO WHICH THE PARTIES STIPULATED WAS NOT CONSIDERED.

The Second Department determined the conditional order upon which dismissal of the complaint was based was not authorized because issue had not been joined at the time the order was made. Therefore the bank's motion to vacate the conditional order in this foreclosure action should have been granted. However, because of the two year delay in moving to vacate the order, the bank is not entitled to interest, late charges, fees, costs and attorney's fees incurred after the date of the 2014 conditional order. An unauthorized supplemental record on appeal, which was stipulated to by the parties, contained material that was not in the record and was not considered by the Second Department: "A pleading cannot be dismissed pursuant to CPLR 3216(a) 'unless a written demand is served upon the party against whom such relief is sought' in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him for unreasonably neglecting to proceed' ... . While a conditional order of dismissal may have 'the same effect as a valid 90-day notice pursuant to CPLR 3216' ... , the conditional order here was defective in that it did not state that the plaintiff's failure to comply with the notice will serve as a basis for a motion by the court to dismiss the complaint for failure to prosecute ... . Additionally, it appears that the complaint was ministerially dismissed,

without a motion, and without the entry of any formal order by the court dismissing the complaint ... ". ***U.S. Bank Natl. Assn. v. Spence*, 2019 N.Y. Slip Op. 06529, Second Dept 9-11-19**

CIVIL PROCEDURE, JUDGES.

JUDGE SHOULD NOT, SUA SPONTE, HAVE RAISED ISSUES ABOUT THE ADEQUACY OF SERVICE BY MAIL WHICH WERE NOT RAISED OR ADDRESSED BY THE PARTIES; DEFENDANTS' MOTION TO DISMISS THE ORIGINAL COMPLAINT FOR LACK OF JURISDICTION SHOULD NOT HAVE BEEN GRANTED; AMENDED COMPLAINT, FOR WHICH LEAVE OF COURT WAS NOT SOUGHT, WAS A NULLITY.

The Second Department, reversing (modifying) Supreme Court, determined that the judge should not have raised, sua sponte, issues not raised by the parties in granting defendants' (the Wirths') motion to dismiss the complaint for lack of personal jurisdiction. The process server filed an affidavit stating that the summons and complaint had been timely mailed to defendants. The affidavit did not state that the envelope was marked "personal and confidential" or that the envelope indicated it was from an attorney. There was no proof the envelope was not properly marked and the defendants had not raised these issues. The defendants merely asserted they never received the mailing. The Second Department also determined the amended complaint, adding additional parties, was a nullity because the court did not grant leave to amend: "Given that the Wirths argued that they did not receive the summons and complaint in the mail, the Supreme Court should not have determined, sua sponte, that jurisdiction was not acquired over the Wirths because the process server did not attest that the mailed copies of the summons and complaint were contained in an envelope bearing the legend 'personal and confidential' and not indicating on the outside thereof that the communication is from an attorney or concerns an action against the person to be served (see CPLR 308[2] ...). Courts are 'not in the business of blindsiding litigants,' who expect the courts to decide issues on rationales advanced by the parties, not arguments that were never made ... . By raising the CPLR 308(2) envelope requirement on its own, the court deprived the plaintiffs of the opportunity to show compliance with that requirement. ... CPLR 3025(a) provides that a 'party may amend his [or her] pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.' A plaintiff's failure to seek leave pursuant to CPLR 1003 to add a new defendant is a jurisdictional defect, and an amended complaint that is not filed in accordance with CPLR 1003 and 3025 is a legal nullity ...". ***Hulse v. Wirth*, 2019 N.Y. Slip Op. 06483, Second Dept 9-11-19**

CIVIL PROCEDURE, LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

JUDGES IN THE SECOND DEPARTMENT HAVE THE DISCRETION TO ORDER UNIFIED PERSONAL INJURY TRIALS WHERE THE ISSUES OF LIABILITY AND THE INJURIES ARE INTERTWINED AS THEY WERE IN THIS CONSTRUCTION ACCIDENT CASE; DEFENSE VERDICT SET ASIDE AND A NEW UNIFIED TRIAL ORDERED.

The Second Department, in a full-fledged opinion by Justice Scheinkman, setting aside the defense verdict on liability and ordering a new trial, determined that the trial judge had the discretion to order (and should have ordered) a unified trial (both liability and damages) in this Labor Law §§ 240(1), 241(6), 200 and common law negligence action. Plaintiff (Castro) alleged the elevated work platform he was on collapsed and he fell 6 or 7 feet to the ground. There were no witnesses to the incident. Plaintiff alleged brain, head, shoulder and spine injuries. The defense alleged plaintiff was injured moving planks and did not in fact fall. Evidence of any brain injury was excluded from the trial. Because the evidence of brain injury was consistent with a fall, and inconsistent with moving planks, the exclusion of that evidence affected the fairness of the trial. The opinion makes it clear that judges in the Second Department have the discretion to order unified trials in personal injury cases: "Here, by any standard, a unified trial was warranted. Labor Law § 240(1) 'imposes on owners or general contractors and their agents a nondelegable duty, and absolute liability for injuries proximately caused by the failure to provide appropriate safety devices to workers who are subject to elevation-related risks' ... . [Defendants] disputed the plaintiffs' claim that Castro fell from a scaffold and contended that the accident resulted not from an elevation-related risk, but from Castro's action in lifting wooden planks. Evidence relating to Castro's brain injuries, which would not have occurred from lifting wooden planks, was probative in determining how the incident occurred ... . Thus, the nature of the injuries had an important bearing on the issue of liability. The Supreme Court did not exercise its available discretion in denying the plaintiffs' motion for a unified trial. The court's determination was predicated upon its perception that a bifurcated trial was strictly required by the Second Department's 'rules.' However, neither the statewide rule nor the governing precedent absolutely requires that the trial of a personal injury action be bifurcated. Although bifurcation is encouraged in appropriate settings, bifurcation is not an absolute given and it is the responsibility of the trial judge to exercise discretion in determining whether bifurcation is appropriate in light of all relevant facts and circumstances presented by the individual cases. ... Because the issues of liability and Castro's injuries were so intertwined, the court's insistence upon bifurcation and its ensuing limitations on the scope of the medical evidence that could be elicited by the plaintiffs deprived them of a fair trial." ***Castro v. Malia Realty, LLC*, 2019 N.Y. Slip Op. 06466, Second Dept 9-11-19**

CIVIL PROCEDURE, PERSONAL INJURY.

MOTION TO SET ASIDE THE DAMAGES VERDICT IN THIS TRAFFIC ACCIDENT CASE AS INADEQUATE SHOULD HAVE BEEN GRANTED; NEW TRIAL ORDERED UNLESS DEFENDANT STIPULATES TO INCREASED AWARDS FOR PAST AND FUTURE PAIN AND SUFFERING.

The Second Department determined the motion to set aside the damages verdict as inadequate in this traffic accident case should have been granted. The Second Department ordered a new trial unless the defendant stipulates to an increased award of damages for past pain and suffering from $25,000 to $150,000 and for future pain and suffering from $0 to $100,000: " 'While the amount of damages to be awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference' ... , it may be set aside if the award deviates materially from what would be reasonable compensation (see CPLR 5501[c] ...). 'Although prior damage awards in cases involving similar injuries are not binding upon the courts, they guide and enlighten them with respect to determining whether a verdict in a given case constitutes reasonable compensation' ... . Under the circumstances of this case, where the plaintiff was required to undergo an anterior cervical discectomy and fusion surgery as a result of the accident, the jury's award for past pain and suffering was inadequate to the extent indicated ... . Further, since it was undisputed that the cervical fusion, inter alia, permanently reduced the plaintiff's cervical range of motion, the jury's failure to award any damages for future pain and suffering was not based upon a fair interpretation of the evidence ... , and was inadequate to the extent indicated ...". ***Chung v. Shaw*, 2019 N.Y. Slip Op. 06468, Second Dept 9-11-19**

CORPORATION LAW, JUDGES.

SUPREME COURT SHOULD NOT HAVE IGNORED THE NOTICE REQUIREMENTS IN THE BUSINESS CORPORATION LAW AND SHOULD NOT HAVE DISSOLVED THE CLOSELY HELD CORPORATION WITHOUT A HEARING.

The Second Department determined Supreme Court should not have ignored the statutory notice requirements in this action to dissolve a closely held corporation (VJN) and should not have dissolved the corporation without a hearing: "Business Corporation Law § 1106(a) provides, inter alia, that, upon the filing of a petition for dissolution of a corporation, 'the court shall make an order requiring the corporation and all persons interested in the corporation to show cause before it . . . why the corporation should not be dissolved.' The statute further provides, in relevant part, that '[a] copy of the order to show cause shall be published as prescribed therein, at least once in each of the three weeks before the time appointed for the hearing thereon, in one or more newspapers, specified in the order,' and that a copy of the order be served upon the New York State Tax Commission … . Here, it is undisputed that the petitioner's order to show cause contained a provision providing for its publication; however, that provision was stricken, and therefore, the order to show cause ultimately was not published. It is also undisputed that the order to show cause was never served on the Tax Commission. ... [W]e disagree with the Supreme Court's determination that the petitioner established his entitlement to the dissolution of VJN. The affidavit submitted by the respondent in opposition to the petition raised questions of fact regarding the merits of the petition and the appropriate remedy ... . Indeed, there is no indication that the court gave any consideration as to whether a remedy other than dissolution would have been appropriate ... . Under these circumstances, the court should not have ordered the dissolution of VJN and the sale of the subject property without conducting a hearing ...". ***Matter of Nicastro v. VJN Real Estate Corp.*, 2019 N.Y. Slip Op. 06495, Second Dept 9-11-19**

CRIMINAL LAW, EVIDENCE.

A SMALL AMOUNT OF COCAINE IN PLAIN VIEW IN DEFENDANT DRIVER'S POCKET DID NOT PROVIDE PROBABLE CAUSE TO SEARCH THE TRUNK OF DEFENDANT'S CAR AFTER A TRAFFIC STOP.

The Second Department, on an appeal by the People, determined finding a small amount of cocaine on defendant driver's person did not provide probable cause to believe drugs would be in the trunk. Therefore the weapon and drugs found in the trunk, as well as defendant's statements about searching the trunk, were properly suppressed: "... County Court concluded that the recovery of a small quantity of what appeared to be cocaine, along with a cut straw, in plain view on the defendant's person, was insufficient to give the police probable cause to believe that additional contraband would be found in the vehicle's trunk, particularly after a search of the passenger compartment revealed nothing. This Court has, in a factually similar case, reached the same conclusion ... . Under the facts of this case, we decline to disturb the court's finding as to lack of probable cause. Contrary to the People's contention, cases in which there is circumstantial evidence of recent drug use within the passenger compartment, such as when the police, during a routine traffic stop, detect the odor of burning marijuana ... are distinguishable, since such evidence provides good reason to believe that the unseen drugs may be located somewhere within the vehicle. By contrast, the fact that a small quantity of drugs is found on the defendant's person, with no other drugs being found in the passenger compartment of the vehicle, does not, without more, provide probable cause to believe that additional drugs may be found in the trunk of the vehicle ...". ***People v. Garcia*, 2019 N.Y. Slip Op. 06509, Second Dept 9-11-19**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE PEOPLE DID NOT SUBMIT SUFFICIENT PROOF THAT A PERIOD OF TIME SHOULD BE EXCLUDED FROM THE STATUTORY SPEEDY TRIAL CALCULATION, APPEAL HELD IN ABEYANCE AND MATTER SENT BACK FOR A HEARING AND REPORT.

The Second Department, sending the matter back for a hearing on defendant's statutory speedy-trial motion to dismiss, determined defendant had met his burden to show a delay greater that six months but the People did not present sufficient evidence that a period of time should be excluded from the speedy trial calculation: "... [T]he defendant sustained his initial burden on the motion by alleging that a period of unexcused delay in excess of six months had elapsed since the date that he was arraigned on the felony complaint (see CPL 30.30[1][a]). In opposition, the People failed to conclusively demonstrate with 'unquestionable documentary proof' that any periods within that time should be excluded (CPL 210.45[5][c] ...). Moreover, the 'court action sheet' provided to this Court on appeal, of which we may take judicial notice ... , contained only an ambiguous notation purportedly regarding the defendant's alleged waiver of his CPL 30.30 rights from May 5, 2014, to July 8, 2014 ... . Accordingly, the matter must be remitted to the Supreme Court, Queens County, for a hearing and thereafter a report on the defendant's motion ...". ***People v. Perkins*, 2019 N.Y. Slip Op. 06516, Second Dept 9-11-19**

CRIMINAL LAW, JUDGES, APPEALS.

THE JURY NOTES SHOULD HAVE BEEN READ VERBATIM TO COUNSEL, NOT PARAPHRASED BY THE JUDGE; THIS MODE OF PROCEEDINGS ERROR REQUIRES REVERSAL.

The Second Department, reversing Supreme Court, determined the jury notes should have been read verbatim to counsel, not paraphrased: "... [T]he jury submitted a note stating, 'We would like to see the difference between first and second degree murder. (Powerpoint).' The Supreme Court informed counsel, the defendant, and the codefendant that the jurors 'want to be recharged on first degree and second degree.' ... The jury submitted another note which read, 'Phone Records Between Jimmy & Ragene — When Did Communication Start?' During a discussion on the record, the Supreme Court mentioned that the jurors 'want to know when did the communications start. And the communications started on June 11. And the stipulation covers it. So we'll read back the stipulation.' The record reveals that the Supreme Court did not read the entire contents of these two jury notes into the record, and there was no indication that the entire contents of the notes otherwise were shared with counsel ... . Rather, the court improperly paraphrased the notes ... . Counsel's awareness of the existence of a note does not effectuate the court's proper discharge of its statutory duty ... . Although defense counsel may have been made aware of the existence and gist of the second note during an off-the-record discussion, this is insufficient to establish that counsel had been made aware of the precise contents of the note ... . Where a trial transcript does not show compliance with O'Rama's procedure, it cannot be assumed that the omission was remedied at an off-the-record conference to which the transcript does not refer ... . As such, the Supreme Court committed a mode of proceedings error when it failed to provide counsel with meaningful notice of the precise contents of substantive juror inquiries, and therefore, reversal is required ...". ***People v. Copeland*, 2019 N.Y. Slip Op. 06507, Second Dept 9-11-19**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

DOWNWARD DEPARTURE FROM LEVEL TWO TO LEVEL ONE WAS APPROPRIATE; DEFENDANT PARTICIPATED IN THE SEX TRAFFICKING CONSPIRACY WHILE SHE HERSELF WAS A VICTIM OF SEX TRAFFICKING.

The Second Department, lowering defendant's risk assessment from a lever two to level one, determined that defendant was herself a victim of sex trafficking and her participation in the conspiracy occurred at the same time that she was being exploited: "... [T]he circumstances identified and proven by the defendant ... are not accounted for by the SORA Guidelines and tend to demonstrate a lower likelihood of reoffense and danger to the community. The defendant's evidence showed that she was exploited by the commercial sex industry when she was a minor, and that, while she later took on some 'management' responsibilities by 'training' other girls, answering phones, and making appointments, at the same time, she continued to be exploited by that industry as she simultaneously served as a sex worker. There was no evidence or indication that the defendant recruited the identified victim, or any victims, or that she engaged in any acts or conduct to coerce the victim, or any victims, to engage in prostitution ... . Indeed, the defendant's level of responsibility in the sex trafficking conspiracy can be gauged by the federal sentencing court's decision to sentence the defendant to time served. Finally, under these circumstances, we find that a departure to a level one risk designation is warranted as a matter of discretion 'to avoid an [overassessment] of the defendant's dangerousness and risk of sexual recidivism' ...". ***People v. Snyder*, 2019 N.Y. Slip Op. 06521, Second Dept 9-11-19**

FAMILY LAW, CRIMINAL LAW.

FAMILY COURT FAILED TO COMPLY WITH THE FAMILY COURT ACT AND PENAL LAW REQUIREMENTS IN THIS JUVENILE DELINQUENCY PROCEEDING, PETITION DISMISSED.

The Second Department, reversing Family Court in this juvenile delinquency proceeding, determined the court failed to comply with the notice provisions and the plea allocution requirements of the Family Court Act, as well as the proof re-

quirements of the Penal Law. It was alleged the appellant either recklessly or intentionally broke a window: "Although the Family Court, Ulster County, advised the appellant of her rights prior to accepting an admission, the court failed to obtain an allocution from a parent or a person legally responsible for the appellant with regard to their understanding of any rights the appellant may be waiving as a result of her admission (see Family Ct Act § 321.3[1] ...). The appellant appeared telephonically even though there is no provision under article 3 of the Family Court Act authorizing the appearance by telephone of a minor in a juvenile delinquency proceeding, and the only persons in court that day were the appellant's attorney and the attorney representing the Ulster County Attorney's Office. ... Since the provisions of Family Court Act § 321.3 may not be waived, and the record does not support the determination of the court that a 'reasonable and substantial effort' was made to notify the appellant's mother or guardian about the ... proceeding ... . [T]he plea allocution also failed to comport with the sufficiency requirements of Family Court Act § 321.3(1), which mandates that the court ascertain through allocution of the appellant that she 'committed the act or acts to which [s]he is entering an admission' ... . The appellant's allocution to breaking a window failed to establish the elements of criminal mischief in the fourth degree under subdivision 3 of Penal Law § 145.00, which requires evidence that the appellant '[r]ecklessly damage[d] property of another person in an amount exceeding two hundred and fifty dollars' ... The petition did not allege any monetary amount as to the cost of the damage to the window, and no evidence as to the value of the window was adduced at the proceeding ... . In fact, the invoice attached to the petition indicates that the cost of replacing the window, including labor, totaled $225, an amount less than the requisite jurisdictional predicate. Even if the petition was liberally construed to have charged the appellant with the intentional conduct subdivision of criminal mischief, Penal Law § 145.00(1), rather than the subdivision that was charged, which pertains to reckless conduct ... , dismissal of the petition is warranted ... . The appellant's allocution to breaking the window failed to show that she intentionally broke the window ...". ***Matter of P.*, 2019 N.Y. Slip Op. 06497, Second Dept 9-11-19**

FAMILY LAW, EVIDENCE.

BOTH PARENTS ACKNOWLEDGED A CHANGE IN THE CUSTODY ARRANGEMENT WAS NEEDED, FAMILY COURT SHOULD NOT HAVE DISMISSED MOTHER'S PETITION.

The Second Department, reversing Family Court, determined mother's petition for modification of the custody arrangement should not have been dismissed. The matter was remitted for a continued hearing: "... [A]ccepting the mother's evidence as true and affording her the benefit of every favorable inference, the mother presented sufficient evidence to establish a prima facie case of showing a change of circumstances which might warrant modification of custody in the best interests of the children ... . The mother testified at the hearing that the parties had orally agreed to alter the custody arrangement so as to have the children alternate between the parents' homes every two weeks, instead of every week as provided in the January 2015 order. This testimony was consistent with the father's statements in his answer. That both parents acknowledged that an adjustment to the original custody arrangement was needed, together with information derived from the in camera interviews and other evidence in the record that the weekly shifting between parental homes could be adversely impacting the children, was sufficient to warrant a full inquiry into what arrangement was in the children's best interests. 'In addition, while not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstances' ...". ***Matter of Morales v. Goicochea*, 2019 N.Y. Slip Op. 06494, Second Dept 9-11-19**

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

THE 2008 FORECLOSURE ACTION WAS DISMISSED BECAUSE THE BANK DID NOT HAVE STANDING; THEREFORE THE DEBT WAS NOT ACCELERATED IN 2008 AND THE STATUTE OF LIMITATIONS FOR FORECLOSURE DID NOT START RUNNING; PLAINTIFF'S ACTION TO CANCEL AND DISCHARGE THE MORTGAGE PROPERLY DISMISSED.

The Second Department determined plaintiff's action to cancel and discharge a mortgage on the ground the statute of limitations for a foreclosure action had expired was properly dismissed. Although the bank had attempted to foreclose in 2008, that action was dismissed for lack of standing. Therefore the debt was not accelerated by the 2008 foreclosure proceedings: "Pursuant to RPAPL 1501(4), a person having an estate or an interest in real property subject to a mortgage can seek to cancel and discharge that encumbrance where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose the mortgage has expired, provided that the mortgagee or its successor was not in possession of the subject real property at the time the action to cancel and discharge the mortgage was commenced ... . An action to foreclose a mortgage is governed by a six-year statute of limitations (see CPLR 213[4]). "[E]ven if a mortgage is payable in installments, once a mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire debt" ... . However, 'an acceleration of a mortgaged debt, by either written notice or the commencement of an action, is only valid if the party making the acceleration had standing at that time to do so' ... . Here, the evidence submitted in support of the defendants' motion, including the order dated December 13, 2011, demonstrated that while CitiGroup purported to accelerate the mortgage debt in the complaint served in the action to foreclose the mortgage in January 2008, that acceleration was a nullity, inasmuch as CitiGroup lacked standing to commence that foreclosure action ... . Therefore, the plaintiff's allegation in this action that the statute of limitations to enforce the mortgage had expired was not a fact at

all, and it can be said that no significant dispute exists regarding it ...". ***Q & O Estates Corp. v. US Bank Trust Nat'l Assoc.*, 2019 N.Y. Slip Op. 06524, Second Dept 9-11-19**

FORECLOSURE, CIVIL PROCEDURE, UNIFORM COMMERCIAL CODE (UCC).

PRODUCTION OF THE ORIGINAL NOTE AND ENDORSEMENTS WAS "MATERIAL AND NECESSARY" TO THE DETERMINATION WHETHER THE BANK HAS STANDING TO BRING THE FORECLOSURE ACTION, DEFENDANT'S MOTION TO COMPEL DISCOVERY SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion pursuant to CPLR 3124 to compel the bank in this foreclosure action to produce the original note and endorsements should have been granted. Defendant had challenged the bank's standing to bring the foreclosure action and the production of the original note and endorsements was "material and necessary" to resolve the standing question: "It is undisputed that a copy of the underlying note was annexed to the complaint. However, it cannot be ascertained from the copy of the note provided by the plaintiff whether the separate page that bears the endorsement in blank was stamped on the back of the note, as alleged by the plaintiff, or on an allonge, and if on an allonge, whether the allonge was 'so firmly affixed as to become a part thereof,' as required under UCC 3-202(2). Since the answers to these questions are "material and necessary" to the defense of lack of standing, the Supreme Court should have granted that branch of the defendant's motion which was pursuant to CPLR 3124 to compel the plaintiff to produce the original note and endorsements ...". ***Bayview Loan Servicing, LLC v. Charleston*, 2019 N.Y. Slip Op. 06463, Second Dept 9-11-19**

FORECLOSURE, CONTRACT LAW, EVIDENCE.

PLAINTIFF DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE OF DEFAULT PROVISION OF THE MORTGAGE; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IN THIS FORECLOSURE ACTION SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined that the plaintiff did not demonstrate compliance with the notice of default provision in the mortgage. Therefore, the plaintiff's motion for summary judgment in this foreclosure action should not have been granted: "... [T]he plaintiff failed to establish, prima facie, that it complied with the condition precedent contained in section 22 of the mortgage agreement regarding the notice of default. The plaintiff's submissions did not establish that the notice was sent by first class mail or actually delivered to the notice address if sent by other means, as required by the terms of the mortgage agreement ...". ***PNMAC Mtge. Opportunity Fund Invs., LLC v. Torres*, 2019 N.Y. Slip Op. 06523, Second Dept 9-11-19**

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

BANK DID NOT SUBMIT SUFFICIENT EVIDENCE OF ITS STANDING, ITS COMPLIANCE WITH CONDITIONS PRECEDENT IN THE MORTGAGE, OR ITS COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE RPAPL, THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined plaintiff bank was not entitled to summary judgment in this foreclosure action because it presented: (1) insufficient proof of standing; (2) insufficient proof of compliance with the notice provisions of the mortgage; and (3) insufficient proof of compliance with the RPAPL notice requirements: "... [T]he plaintiff failed to establish, prima facie, its standing because it did not show that it was a holder of the note at the time the action was commenced. The affidavits of Melissa Guillote and Myrna Moore, both vice presidents of loan documentation of the plaintiff's loan servicer, nonparty Wells Fargo Bank, N.A. (hereinafter the loan servicer), that were submitted by the plaintiff in support of its motion, conflict as to whether the plaintiff or the loan servicer possessed the note on the date the action was commenced. Moreover, neither affidavit attaches any admissible document to show that the plaintiff possessed the note endorsed in blank prior to the commencement of this action (see CPLR 4518[a] ...). The affidavits also fail to show that either Guillote or Moore possessed personal knowledge of whether the plaintiff possessed the note prior to commencement of the action. ... The plaintiff also failed to establish, prima facie, that it complied with the conditions precedent contained in sections 15 and 22 of the mortgage, which provide that required notice to the defendants is considered given when it is mailed by first class mail or when it is actually delivered to the defendants' notice address if sent by any other means ... . The plaintiff also failed to show, prima facie, that it strictly complied with RPAPL 1304. Proper service of the RPAPL 1304 notice containing the statutorily mandated content is a condition precedent to the commencement of a foreclosure action ... . The plaintiff did not submit an affidavit of service or proof of mailing by the post office demonstrating that it properly served the defendants as prescribed by the statute ...". ***HSBC Bank USA, Natl. Assn. v. Dubose*, 2019 N.Y. Slip Op. 06481, Second Dept 9-11-19**

FORECLOSURE, EVIDENCE.

BANK'S PROOF OF DEFENDANT'S DEFAULT INSUFFICIENT AT BOTH THE SUMMARY JUDGMENT AND TRIAL STAGES IN THIS FORECLOSURE ACTION.

The Second Department determined plaintiff bank was not entitled to summary judgment in this foreclosure action because it did not submit sufficient proof of defendant's default. At trial Supreme Court properly held that plaintiff bank did not meet its prima facie burden because the proper foundation for the admission of business records was not provided: "... [P]laintiff failed to submit evidence establishing her default. Wilson [Wells Fargo vice president] failed to attach or incorporate any of Wells Fargo's business records to her affidavit. Accordingly, her affidavit constituted inadmissible hearsay and lacked probative value ... . 'A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures' ... . At the trial in this case, Wiggins [Wells Fargo loan verification officer] testified only that he had access to Wells Fargo's computerized records. He did not testify that he was familiar with Wells Fargo's practices in making those records, and he failed to state that he had any knowledge regarding the plaintiff's records. Moreover, the plaintiff did not attempt to introduce any of the relevant records into evidence. Thus, Wiggins failed to establish an evidentiary basis for his statement that the subject loan was in default ...". ***HSBC Bank USA, Natl. Assn. v. Green*, 2019 N.Y. Slip Op. 06482, Second Dept 9-11-19**

FORECLOSURE, EVIDENCE.

THE REFEREE'S REPORT RELIED ON HEARSAY AND SHOULD NOT HAVE BEEN CONFIRMED.

The Second Department, reversing Supreme Court, determined plaintiff bank did not prove the amount due the plaintiff and therefore the referee's report should not have been confirmed: "... [W]ith respect to the amount due to the plaintiff, the referee based his findings on an affidavit of Theresa Robertson, an employee of the plaintiff, who averred, based on her review of the plaintiff's business records, that the defendant defaulted by failing to make the payment due on May 1, 2010, and 'all subsequent payments.' However, as the defendant correctly contends, Robertson's assertions in that regard constituted inadmissible hearsay ... , since the records themselves were not provided to the referee ... . Moreover, even if the records had been provided, '[a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures' ... . Nothing in Robertson's affidavit, in which she averred that the plaintiff received the original note on May 13, 2013, indicated that the plaintiff was the maker of the records relating to the defendant's alleged initial default in May 2010 and her alleged failure to make payments for some period of time thereafter. Robertson also did not aver that the records provided by the maker were incorporated into the plaintiff's records and routinely relied upon by the plaintiff in its own business ... . Therefore, the plaintiff failed to lay a proper foundation for the business records on which Robertson relied with respect to the amount due to the plaintiff. Contrary to the plaintiff's contention, under the circumstances presented, the Supreme Court's error in relying on the hearsay evidence was not harmless ...". ***Nationstar Mtge., LLC v. Durane-Bolivard*, 2019 N.Y. Slip Op. 06502, Second Dept 9-11-19**

INSURANCE LAW, CONTRACT LAW, PERSONAL INJURY.

ALTHOUGH PLAINTIFF'S COUNSEL SENT A LETTER TO THE INSURED SHORTLY AFTER PLAINTIFF WAS INJURED IN THE INSURED'S HOME REQUESTING THAT THE INSURED NOTIFY HER INSURER, THE INSURER WAS NOT NOTIFIED UNTIL IT RECEIVED THE SUMMONS AND COMPLAINT SIX MONTHS AFTER THE INCIDENT; THE INSURER PROPERLY DISCLAIMED COVERAGE ON THE GROUND IT HAD NOT BEEN TIMELY NOTIFIED.

The Second Department determined defendant insurance company (State Farm) properly disclaimed coverage on the ground it was not notified of the underlying incident (plaintiff was injured in an altercation in the insured's home) until six months after it occurred. Plaintiff was awarded $715,000 after a non-jury trial. Plaintiff then brought a declaratory judgment action against State Farm: "By letter dated October 31, 2007, the plaintiffs' counsel requested that [defendant] direct her insurance carrier to contact the plaintiffs' counsel to discuss the subject occurrence. ... In February 2008, the injured plaintiff, and his wife suing derivatively, commenced a personal injury action (hereinafter the underlying action) against, among others, [the insured] to recover damages arising from the September 2007 occurrence. On or about March 13, 2008, State Farm received a copy of the summons and complaint filed in the underlying action. By letter dated April 3, 2008, State Farm disclaimed coverage to [the insured] on the ground, among others, that notice of the occurrence was untimely. ... '[A]n insurer has the right to demand that it be notified of any loss or accident that is covered under the terms of the insurance policy. The purpose of such a requirement is to afford the insurer an opportunity to protect itself by, for example, investigating claims soon after the underlying events' ... . Where, as here, an insurance policy requires that notice of an occurrence or loss be given 'as soon as practicable,' such notice constitutes a condition precedent to coverage, and notice must be provided within a reasonable time in view of all of the circumstances ... . 'Where there is no excuse or mitigating factor, the issue [of reasonableness] poses a legal question for the court, rather than an issue for the trier of fact' ... . State Farm established its prima facie entitlement to judgment as a matter of law declaring that it is not obligated to pay the judgment in the underlying action by demonstrating that it did not receive notice of the occurrence giving rise to the underlying action until approximately six months after the occurrence ... . In opposition, the plaintiffs failed to raise a triable issue of fact, including

as to whether they made a reasonably diligent effort to ascertain the identity of [defendant's] insurer ...". ***Henaghan v. State Farm Fire & Cas. Co.*, 2019 N.Y. Slip Op. 06480, Second Dept 9-11-19**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

QUESTIONS OF FACT PRECLUDED SUMMARY JUDGMENT ON MOST (BUT NOT ALL) OF THE CAUSES OF ACTION IN THIS LABOR LAW §§ 240(1), 241(6), 200, COMMON-LAW NEGLIGENCE AND INDEMNIFICATION ACTION STEMMING FROM A FALL INVOLVING A MAKESHIFT PLATFORM PLAINTIFF WAS USING TO INSTALL SPRINKLERS; THE DECISION HAS GOOD SUMMARIES OF THE ELEMENTS OF ALL OF THE CAUSES OF ACTION.

The Second Department, in a substantive decision which explains the elements of Labor Law §§ 240(1), 241(6), 200, common-law negligence and indemnification causes of action, determined questions of fact precluded summary judgment on most of the causes of action. Plaintiff was installing sprinklers and fell when he was attempting to position a plank he was using as a platform to stand on. With respect to Labor Law § 240(1), the court wrote: "Here, the [defendants] failed to demonstrate, prima facie, that the plaintiff was the sole proximate cause of his fall and subsequent injuries ... . Although they submitted evidence that there were ladders at the site and available to the plaintiff, and that the plaintiff used one such ladder in order to climb to the top of the wall, they also submitted the plaintiff's deposition testimony, which demonstrated the existence of triable issues of fact as to whether the plaintiff was recalcitrant or whether he was following his supervisor's instructions and performing the work in the only way possible. In addition, the plaintiff and [defendant] employees testified at their respective depositions that, although [defendant] was aware that the dropped ceiling grids had been installed prior to the sprinklers, no one from [defendant], which had the authority to stop any unsafe work practices, sought to stop the plaintiff from working as he did. Thus, we agree with the Supreme Court's determination denying those branches of the motions of [defendants] which were for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1) ... . However, we agree with the Supreme Court that the plaintiff failed to demonstrate his prima facie entitlement to judgment as a matter of law on the issue of liability on the cause of action alleging a violation of Labor Law § 240(1) ... . Triable issues of fact exist as to whether the [defendants] should have provided safety devices or whether the plaintiff's act in erecting and using a scaffolding board was a recalcitrant act which was the sole proximate cause of his injury." ***Graziano v. Source Bldrs. & Consultants, LLC*, 2019 N.Y. Slip Op. 06477, Second Dept 9-11-19**

MEDICAL MALPRACTICE, EVIDENCE, CIVIL PROCEDURE, PERSONAL INJURY.

HEARSAY STATEMENTS ATTRIBUTED TO PLAINTIFF'S DECEDENT IN THIS MEDICAL MALPRACTICE ACTION NOT ADMISSIBLE AS ADMISSIONS OR BUSINESS RECORDS; THE DEAD MAN'S STATUTE PROHIBITED TESTIMONY ABOUT THE HEARSAY STATEMENTS; DEFENSE VERDICT REVERSED, NEW TRIAL ORDERED.

The Second Department, reversing the defense verdict in this medical malpractice case and ordering a new trial, determined that hearsay statements to the effect that plaintiff's decedent had signed an "against medical advice [AMA]" form when he allegedly refused treatment at defendant hospital were not admissible under the Dead Man's Statute or as statements against interest or admissions, or as business records: "A hearsay entry in a hospital record is admissible under the business records exception to the hearsay rule if the entry is germane to the diagnosis or treatment of the patient' (... see CPLR 4518[a]). Here, although the entries were germane to the decedent's diagnosis and treatment, the defendants failed to offer foundational testimony under CPLR 4518(a) or certification under CPLR 4518(c) ... . If an entry in the medical records 'is inconsistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to the diagnosis or treatment, as long as there is evidence connecting the party to the entry' ... . Here ... the entry clearly states that the decedent's primary care physician, not the decedent himself, was the source of the information ... . Pursuant to CPLR 4519, otherwise known as the Dead Man's Statute, '[u]pon the trial of an action . . . a party or a person interested in the event . . . shall not be examined as a witness in his [or her] own behalf or interest . . . against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person . . . concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his [or her] own behalf, of the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication.' Here, both [witnesses] were defendants at the time they gave deposition testimony, making them interested parties under the statute ... [and] they both testified to transactions or communications with the decedent and sought to offer that testimony against the decedent's estate. ... The defendants argue that the plaintiff waived the protections of the Dead Man's Statute by eliciting the communications at issue. However, '[t]he executor does not waive rights under the statute by taking the opponent's deposition' ... . Contrary to the defendants' contention, the declaration of the decedent did not fall within the declaration against interest exception to the hearsay rule because the defendants failed to establish that the subject statement was against the decedent's interest when made ... . Moreover, where the Dead Man's Statute renders a witness's testimony inadmissible, 'the fact that the testimony would fall within an exception to the hearsay rule is simply irrelevant' ...". ***Grechko v. Maimonides Med. Ctr.*, 2019 N.Y. Slip Op. 06478, Second Dept 9-11-19**

MUNICIPAL LAW, PERSONAL INJURY.

PLAINTIFF ALLEGED DEFENDANT WAS LIABLE FOR HER BABY'S BRAIN DAMAGE BECAUSE DEFENDANT'S AMBULANCE BROKE DOWN ON THE WAY TO THE HOSPITAL, CAUSING A DELAY IN DELIVERY; DEFENDANT MUNICIPALITY, WHICH PROVIDED THE AMBULANCE, WAS ENGAGED IN A GOVERNMENTAL FUNCTION AND THERE WAS NO SPECIAL RELATIONSHIP WITH PLAINTIFF; THE MUNICIPALITY CAN NOT BE HELD LIABLE.

The Second Department determined the complaint against the airport emergency medical service alleging liability for a delay in getting plaintiff to the hospital was properly dismissed. Plaintiff suffered complications giving birth which were alleged to have resulted in the baby suffering brain damage. The ambulance provided by defendant broke down and plaintiff was transferred to another ambulance. The defendant was deemed to have been engaged in a governmental function and there was no special relationship between the plaintiff and the municipal defendant. Therefore the defendant could not be held liable: " 'Protecting health and safety is one of municipal government's most important duties' ... , and emergency medical services 'have widely been considered one of government's critical duties' ... . [D]efendant could not be held liable to the plaintiffs unless it owed them a special duty ... . One way to prove the existence of a special duty is by showing that the defendant assumed a 'special relationship' with the plaintiff beyond the duty that is owed to the public generally ... . 'The plaintiff has the heavy burden of establishing the existence of a special relationship by proving all of the following elements: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking' ... . Of the four factors, the "justifiable reliance" element is particularly 'critical' because it 'provides the essential causative link between the special duty assumed by the municipality and the alleged injury' ...". ***Halberstam v. Port Auth. of N.Y. & N.J.*, 2019 N.Y. Slip Op. 06479, Second Dept 9-11-19**

PERSONAL INJURY, CIVIL PROCEDURE.

PROPERTY OWNER PROPERLY FOUND NEGLIGENT IN FAILING TO MOP UP TRACKED IN SNOW AND WATER IN THIS SLIP AND FALL CASE; DEFENDANT'S MOTION TO SET ASIDE THE VERDICT SHOULD NOT HAVE BEEN GRANTED.

The Second Department determined defendant property owner (a school) was properly found negligent in failing to mop up tracked in snow and water in this slip and fall case. Defendant's motion to set aside the verdict should not have been granted: "Although a defendant is not required to 'provide a constant remedy to the problem of water being tracked into a building during inclement weather, and has no obligation to cover all of its floors with mats or to continuously mop up all moisture resulting from tracked-in precipitation' ... , a defendant may be held liable for an injury proximately caused by a dangerous condition created by water, snow, or ice tracked into a building if it either created the hazardous condition, or had actual or constructive notice of the condition and a reasonable time to undertake remedial action ... . Here, evidence was presented at trial demonstrating that the defendant had actual notice of the wet condition in the area where the plaintiff fell approximately an hour before the accident, yet failed to remedy it. ... Accordingly, viewing the evidence in the light most favorable to the plaintiff, and affording her every favorable inference which may properly be drawn from the facts presented, there is a valid line of reasoning and permissible inferences could lead rational individuals to the jury's conclusion that the defendant was negligent in failing to maintain the premises in a reasonably safe condition and that its negligence was a substantial factor in causing the plaintiff's accident ...". ***Allen v. Federation of Jewish Philanthropies of N.Y.*, 2019 N.Y. Slip Op. 06462, Second Dept 9-11-19**

THIRD DEPARTMENT

CRIMINAL LAW, APPEALS.

THE PEOPLE'S APPEAL FROM THE DENIAL OF ITS MOTION FOR RECONSIDERATION OF COUNTY COURT'S DISMISSAL OF THE INDICTMENT WAS NOT AUTHORIZED BY STATUTE AND MUST THEREFORE BE DISMISSED.

The Third Department determined the People's appeal from dismissal of the indictment and the denial of their motion for reconsideration, which was not authorized by statute, must be dismissed. County Court had determined the victim's testimony at the grand jury was unsworn and could not be considered. The People then made a motion for reconsideration with proof the victim had been properly sworn: "... [D]efendant, an inmate at Greene County Correctional Facility, was charged by indictment with aggravated harassment of an employee by an inmate, stemming from an April 2016 incident wherein defendant was transported to Columbia Memorial Hospital for medical treatment and thereafter allegedly drank his own urine and spat it in the face of a correction officer (hereinafter the victim). The parties thereafter entered into a stipulation in lieu of motions and, pursuant thereto, County Court reviewed, among other things, the grand jury minutes to determine whether there was legally sufficient evidence to support the indictment. In December 2016, County Court dismissed the indictment, determining that the evidence before the grand jury was legally insufficient inasmuch as the People's sole witness — the victim — had not been administered the correct oath and, as such, had presented unsworn testimony to the grand

jury. The People thereafter moved for reconsideration, averring that the court reporter had erroneously omitted reference to the correct oath which had, in fact, been appropriately given by the jury foreperson to the victim, and the People affixed to the motion a corrected copy of the grand jury minutes reflecting same. ... [I]t is well settled that 'no appeal lies from a determination made in a criminal [action] unless specifically provided for by statute' ... . Here, the People's underlying motion purports to be one for "reconsideration"; however, even construing such motion as a motion to reargue and/or renew, there is no statute authorizing the People to appeal from the denial of such a motion in a criminal action ...". ***People v. Overbaugh*, 2019 N.Y. Slip Op. 06546, Third Dept 9-12-19**

CRIMINAL LAW, EVIDENCE.

EVIDENCE OF THE CHILD VICTIM'S REPUTATION FOR UNTRUTHFULNESS SHOULD HAVE BEEN ADMITTED IN THIS SEXUAL OFFENSES CASE; THE RELIABILITY OF THE EVIDENCE, A QUESTION OF LAW, WAS ESTABLISHED, THE CREDIBILITY OF THE EVIDENCE IS A JURY QUESTION.

The Third Department, reversing defendant's conviction of predatory sexual assault against a child, criminal sexual act in the first degree and endangering the welfare of a child, determined defendant should have been allowed to present evidence of the child-victim's reputation for untruthfulness. The court noted the two-pronged analysis for such character evidence: (1) the reliability of the evidence (a question of law); and (2) the credibility of the evidence (a question of fact): " 'Once the party seeking admission of reputation evidence has laid the proper foundation, it is for the jury to evaluate the credibility of the character witnesses who testify, and to decide how much weight to give the views reported in their testimony. While a reasonable assurance of reliability is necessary for a proper foundation, such reasonable assurance exists where the testifying witnesses report the views of a sufficient number of people, and those views are based on sufficient experience with the person whose character is in question. Reputation evidence may be reliable . . ., but still questionable from a credibility standpoint. This possibility, however, is not a proper basis for exclusion of reputation evidence. Reliability — whether a character witness has established a proper basis for knowing a key opposing witness' general reputation for truth and veracity — is a question of law for the court. By contrast, the credibility of such character witness — whether that witness is worthy or unworthy of belief or is motivated by bias — is a factual question for the jury. We caution that a trial court should not use reliability as a ground for excluding evidence it believes is not credible' ... . [D]efendant proffered a proposed witness who was prepared to testify that she had known the victim since birth, that they were members of the same large extended family and that many members of the extended family knew the victim. Further, the proposed witness was prepared to testify that she was aware of the victim's bad reputation for truthfulness among the extended family. ... County Court erred when it determined that the proposed testimony failed to establish a proper foundation for admission of testimony regarding the victim's bad reputation for truthfulness; in fact, the offer of proof contained each element required by People v. Fernandez (17 NY3d at 76-77)." ***People v. Youngs*, 2019 N.Y. Slip Op. 06540, Third Dept 9-12-19**

EDUCATION-SCHOOL LAW, CIVIL PROCEDURE.

DEFENDANT'S AFFIRMATIVE DEFENSES SHOULD HAVE BEEN CONSIDERED IN ITS MOTION FOR SUMMARY JUDGMENT; PLAINTIFF'S ACTION AGAINST DEFENDANT BASED UPON HER DISMISSAL FROM A NURSING PROGRAM SHOULD HAVE BEEN BROUGHT IN AN ARTICLE 78 PROCEEDING WAS THEREFORE TIME-BARRED.

The Third Department, reversing Supreme Court, determined the court should have considered defendant's affirmative defenses, including the statute of limitations defense, in determining defendant's summary judgment motion. Plaintiff brought fraud, breach of contract and prima facie tort causes of action against defendant. Plaintiff was enrolled in defendant's licensed practical nurse (LPN) program and was dismissed by defendant based upon plaintiff's performance in a clinical setting. The Third Department held that the action should have been brought in an Article 78 proceeding and was time-barred: "Supreme Court should have considered defendant's affirmative defenses on the summary judgment motion. Although the notice of motion did not cite CPLR 3211 (a), it did seek dismissal of the complaint in its entirety, as well as 'such other and further relief' as the court deemed just and proper, and defendant's memorandum of law, submitted with the motion, addressed dismissal based on the statute of limitations and failure to exhaust administrative remedies, thereby providing plaintiff with adequate notice of these bases for the motion. ... A defendant may raise an affirmative defense listed in CPLR 3211 (a) in a pre-answer motion to dismiss or, for most of those grounds, 'may instead choose to raise that defense in its answer, and either move on that ground later in a motion for summary judgment, or wait until trial to have it determined' ... . * * * Plaintiff's separate causes of action sounding in breach of contract, fraud and prima facie tort are all, at their core, challenges to defendant's actions in dismissing her from the LPN program in a manner that allegedly was not in good faith and was without a sound factual basis, rendering her dismissal arbitrary and capricious. Thus, she should have brought her challenge in a CPLR article 78 proceeding. Although courts generally possess the authority to convert a plenary action to a CPLR article 78 proceeding if jurisdiction of the parties has been obtained (see CPLR 103 [c]), conversion is not

appropriate where the claims are barred by the four-month statute of limitations governing CPLR article 78 proceedings ...". ***Meisner v. Hamilton, Fulton, Montgomery Bd. of Coop. Educ. Servs.*, 2019 N.Y. Slip Op. 06558, Third Dept 9-12-19**

EDUCATION-SCHOOL LAW, EVIDENCE.

SUSPENSION OF COLLEGE STUDENT FOR THREE YEARS BASED UPON A FINDING THE STUDENT WAS RESPONSIBLE FOR SEXUAL VIOLENCE AS DEFINED IN THE STUDENT CONDUCT MANUAL UPHELD.

The Third Department upheld the college's finding that petitioner was responsible for sexual violence within meaning of the provisions of the Student Conduct Manual and was properly suspended from the State University of New York (SUNY) at Plattsburgh for three years. The charges were based upon the female student's inability to consent or her lack of consent to sexual intercourse: "SUNY's determination was based upon its finding that the reporting individual could not affirmatively consent to sexual activity with petitioner because she was asleep or unconscious and, therefore, 'incapacitated during the time period in question.' In that respect, the reporting individual stated that, over a roughly four-hour period, she had consumed three or four 24-ounce cans of malt liquor, as well as an unknown quantity of alcohol from a friend's drink. Statements made by petitioner, both at the hearing and during an interview conducted by respondent Butterfly Blaise, SUNY's Title IX Coordinator, as reflected in a written summary of that interview, corroborated the reporting individual's account that she had been drinking prior to and during her encounter with petitioner. In fact, as reflected in the interview summary, petitioner recalled observing the reporting individual stumbling in the hallway and mumbling her words. Additionally, the reporting individual asserted that she had significant gaps in her memory regarding her encounter with petitioner, stating that she remembered certain parts but that 'other parts fe[lt] 'black'.' " ***Matter of Jacobson v. Blaise*, 2019 N.Y. Slip Op. 06549, Third Dept 9-12-19**

EDUCATION-SCHOOL LAW, PERSONAL INJURY.

QUESTIONS OF FACT WHETHER NEGLIGENT SUPERVISION OF PLAINTIFF KINDERGARTEN STUDENT IN GYM CLASS WAS THE PROXIMATE CAUSE OF HER INJURY.

The Third Department determined there were questions of fact whether the school was negligent in supervision plaintiff kindergarten student in gym class. Infant plaintiff was instructed to jump but her feet did not leave the ground and she fell forward on her arm. Infant plaintiff had an individualized accommodation plan (504 plan) of which the gym teacher was aware: "Defendant submitted evidence demonstrating that the gym teacher was aware of the infant's 504 plan and that there were no specific accommodations therein for physical education. The physical therapist who worked with the infant testified that she did not have any safety concerns for the infant regarding physical education. Defendant's expert stated in an affidavit that defendant provided a safe environment for the students, and the gym teacher explained the safety rules and taught proper techniques to the students. The expert thus opined that the infant's alleged injuries were not proximately caused by any inadequate supervision by defendant. Meanwhile, the infant gave conflicting accounts as to whether a mat was located on the floor where she landed after jumping. The infant also testified in her hearing pursuant to General Municipal Law § 50-h that she explained to the gym teacher how she jumped at the time of the accident and, when the teacher told her that her explanation was incorrect, the infant responded that she jumped how she was instructed to do so by him. Plaintiff's expert stated in an affidavit that the infant's physical limitations impaired her ability to function in class and engage in physical education activities. The expert opined that, when taking into account the class size and the activities performed, defendant negligently supervised the infant by allowing her to jump without having a teacher in close proximity to her." ***Jaquin v. Canastota Cent. Sch. Dist.*, 2019 N.Y. Slip Op. 06555, Third Dept 9-12-19**

PERSONAL INJURY, LANDLORD-TENANT.

OUT-OF-POSSESSION LANDLORD NOT LIABLE FOR A SLIP AND FALL ON ICE ON THE RENTAL PROPERTY, SUPREME COURT REVERSED.

The Third Department, reversing Supreme Court, determined defendant out-of-possession landlord did not have a contractual duty to remove ice and snow and did not have actual or constructive notice of the icy condition on the rental property in this slip and fall case: " 'As a general rule, an out-of-possession landlord is not responsible for dangerous conditions existing upon leased premises after possession of the premises has been transferred to the tenant. Exceptions to this rule include situations where the landlord retains control of the premises, has specifically contracted to repair or maintain the property, has through a course of conduct assumed a responsibility to maintain or repair the property or has affirmatively created a dangerous condition thereon' ... . 'W]hen a landowner and one in actual possession have committed their rights and obligations with regard to the property to a writing, [courts] look not only to the terms of the agreement but to the parties' course of conduct . . . to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law' ... . However, the fact that a landlord 'retain[s] the right to visit the premises, or even to approve alterations, additions or improvements, is insufficient to establish the requisite degree of control necessary

for the imposition of liability with respect to an out-of-possession landlord' ... . '[W]ithout notice of a specific dangerous condition, an out-of-possession landlord cannot be faulted for failing to repair or otherwise rectify it' ... . 'Accordingly, the [ultimate] burden is on the plaintiff to prove actual or constructive notice and a reasonable opportunity to repair or remedy the dangerous condition' ...". ***Rose v. Kozak*, 2019 N.Y. Slip Op. 06559, Third Dept 9-12-19**

UNEMPLOYMENT INSURANCE.

PATIENT ADVOCATES WHO ACCOMPANY THE CLIENTS OF PERSONAL INJURY LAW FIRMS TO INDEPENDENT MEDICAL EXAMINATIONS ARE EMPLOYEES ENTITLED TO UNEMPLOYMENT INSURANCE BENEFITS.

The Third Department determined claimants were employees of IME, which paid claimants (patient advocates) to accompany clients of personal injury law firms during independent medical examinations. Therefore claimants were entitled to unemployment insurance benefits: "IME advertised for patient advocates, who were required to submit resumés and to be interviewed. IME then imposed very specific requirements governing nearly every aspect of the work of the patient advocates that it hired. An official handbook set forth detailed instructions specifying the procedures that advocates were expected to follow during patient examinations, including instructions to immediately call the IME office upon arrival or if the examining physician required intake paperwork. The handbook also contained a script that advocates were expected to read to physicians at the beginning of every examination and specified the precise content of the reports that were required to be prepared. IME exercised control over work assignments by determining which patient advocates would be offered the opportunity to attend any particular examination, by assigning specific patient advocates in response to customer requests and by arranging for replacements when a patient advocate was unable to report to an assigned examination. IME staff reviewed all reports that were submitted. In response to complaints that it had received from customers, IME sent a memorandum to patient advocates describing common errors and admonishing them to follow the prescribed protocol and thereafter conducted a mandatory meeting regarding the required content and format of the reports." ***Matter of Bloomfield (IME Watchdog, Inc.)*, 2019 N.Y. Slip Op. 06556, Third Dept 9-12-19**

WORKERS' COMPENSATION.

AMENDMENT OF THE WORKERS' COMPENSATION LAW TO REMOVE THE REQUIREMENT THAT A CLAIMANT DEMONSTRATE ATTACHMENT TO THE LABOR MARKET TO BE ENTITLED TO PERMANENT PARTIAL DISABILITY PAYMENTS DID NOT APPLY RETROACTIVELY TO CLAIMANT.

The Third Department determined claimant was deemed to have involuntarily retired and no longer attached to the labor market in August 2015, well before the amendment of the Workers' Compensation Law which removed the requirement that a claimant demonstrate attachment to the labor market to be entitled to permanent partial disability payments. The amendment did not apply to claimant retroactively: "... [T]he amendment states, in pertinent part, that in some cases of permanent partial disability, '[c]ompensation . . . shall be payable during the continuance of such permanent partial disability, without the necessity for the claimant who is entitled to benefits at the time of classification to demonstrate ongoing attachment to the labor market' (Workers' Compensation Law § 15 [3] [w] ...). In sum, the amendment relieves some claimants who have been classified as permanently partially disabled of the burden of having to demonstrate ongoing attachment to the labor market in order to continue to receive wage replacement benefits ... . * * * ... [C]laimant was classified as permanently partially disabled in July 2014, and proceedings were conducted before the WCLJ in August 2014 on the issues of claimant's labor market attachment and voluntary withdrawal. The WLCJ concluded that claimant did not voluntarily retire and was not attached to the labor market, and the Board affirmed the WCLJ's decision in August 2015. ... [T]he Board's August 2015 decision was issued well before the effective date of the amendment and, as such, this is not a situation in which retroactive application of the amendment is appropriate. Given that the Board declined to apply the amendment retroactively so as to relieve claimant of his obligation to demonstrate ongoing attachment to the labor market in order to continue to receive permanent partial disability benefits, we decline to disturb the Board's decision." ***Matter of Pryer v. Incorporated Vil. of Hempstead*, 2019 N.Y. Slip Op. 06561, Third Dept 9-12-19**

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