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COURT OF APPEALS

CONSUMER LAW, INSURANCE LAW, CONTRACT LAW.

GENERAL BUSINESS LAW CAUSES OF ACTION ALLEGING DECEPTIVE PRACTICES AND FALSE ADVERTISING WERE SUFFICIENTLY ALLEGED AGAINST AN INSURER PROVIDING HEALTH INSURANCE TO NEW YORK CITY EMPLOYEES; PLAINTIFF, A RETIRED POLICE OFFICER, ALLEGED DECEPTIVE AND FALSE MARKETING BY THE INSURER INDUCED HIM TO CHOOSE THE INSURER'S PLAN.

The Court of Appeals, in a full-fledged opinion by Judge Stein, determined General Business Law sections 349 and 350 applied to a health insurance plan offered to New York City employees. Plaintiff, a retired NYC police officer brought the action in federal court alleging the insurer (GHI) engaged in "deceptive practices" and "false advertising." The Third Circuit asked the Court of Appeals to rule on whether the General Business Law causes of action were applicable to plaintiff who was a third-party beneficiary of the insurance contract which had been negotiated by sophisticated parties. The insurer argued a contract between sophisticated parties did not raise a "consumer-oriented" issue: "We have explained that, to state a claim under sections 349 or 350, 'a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct, that is (2) materially misleading, and that (3) the plaintiff suffered injury as a result of the allegedly deceptive act or practice' ... . Thus, a plaintiff claiming the benefit of either section 349 or 350 'must charge conduct of the defendant that is consumer-oriented' or, in other words, 'demonstrate that the acts or practices have a broader impact on consumers at large' ... . * * * Here, although there was an underlying insurance contract negotiated by sophisticated entities—only one of which is a party to this action—neither plaintiff, nor any of the other hundreds of thousands of employees and retirees who participated in the GHI Plan, were participants in its negotiation and, critically, that negotiation was followed by an open enrollment period, which exposed City employees and retirees to marketing resembling a traditional consumer sales environment. During the open enrollment period, the employees and retirees could select only one of 11 previously-negotiated health insurance plans offered as part of their compensation and retirement packages from the City, and the insurers were able to market their health care plans directly to the employees and retirees. Significantly, it is the allegedly misleading summary materials that are the subject of plaintiff's case—not the contract between the City and GHI, which purportedly was never provided to City employees and retirees." ***Plavin v. Group Health Inc.*, 2020 N.Y. Slip Op. 02025, CtApp 3-24-2020**

CRIMINAL LAW, EVIDENCE CONSTITUTIONAL LAW.

TESTIMONY SUPPORTING THE ADMISSION OF DNA PROFILES WAS HEARSAY WHICH VIOLATED THE CONFRONTATION CLAUSE.

The Court of Appeals, reversing defendant's conviction, over a concurrence, determined the testimony which formed the basis for the admission in evidence of DNA profiles was hearsay which violated the Confrontation Clause: "In People v. John, we held that, when confronted with testimonial DNA evidence at trial, a defendant is entitled to cross-examine 'an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data' (27 NY3d 294, 315 [2016]). In People v. Austin, we reiterated that a testifying analyst who did not participate in the generation of a testimonial DNA profile satisfies the Confrontation Clause's requirements only if the analyst 'used his or her independent analysis on the raw data to arrive at his or her own conclusions' (30 NY3d 98, 105 [2017] ...). The records before us do not establish that the testifying analyst had such a role in either case. Accordingly, because the analyst's hearsay testimony as to the DNA profiles developed from the post-arrest buccal swabs 'easily satisfies the primary purpose test' for determining whether evidence is testimonial ... , we conclude that her testimony and the admission of those DNA profiles into evidence, over defendants' objections, violated defendants' confrontation rights." ***People v. Tsintzelis*, 2020 N.Y. Slip Op. 02026, CtApp 3-24-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION LAW (SORA).

NEW JERSEY CONVICTION FOR LEWDNESS, ALTHOUGH NOT A REGISTRABLE OFFENSE IN NEW JERSEY, IS THE EQUIVALENT OF ENDANGERING THE WELFARE OF A CHILD; IT IS APPROPRIATE TO CONSIDER THE CONDUCT UNDERLYING THE FOREIGN OFFENSE IN ADDITION TO THE ELEMENTS OF THE OFFENSE; 30 POINT ASSESSMENT BASED ON THE NEW JERSEY CONVICTION WAS CORRECT.

The Court of Appeals, in a full-fledged opinion by Judge Feinman, over a concurrence and a two-judge dissent, determined defendant was properly assessed 30 points based upon his prior New Jersey conviction for lewdness. The New Jersey offense, based upon defendant's repeatedly exposing himself to the 12-year-old victim, was deemed the equivalent of New York's endangering the welfare of a child: "At the SORA court hearing, defendant challenged the assessment of 30 points under risk factor 9, asserting that his New Jersey lewdness conviction was neither a registrable offense in New Jersey nor did the comparable offense under New York law—public lewdness (a misdemeanor)—subject defendant to SORA registration in New York ... . * * * At the outset, we must resolve whether reliance on the underlying conduct of a prior foreign conviction is appropriate as a matter of law for purposes of assessing points under risk factor 9 when conducting a SORA risk-level determination. Under these circumstances, we hold that it is. * * * Our analysis of the New Jersey conviction starts with North v. Board of Examiners of Sex Offenders of State of New York, wherein we considered whether the defendant was required to register as a sex offender as a result of his federal conviction for possession of child pornography (8 NY3d 745 [2007]). That question turned on the 'essential elements' provision in SORA, which defines 'sex offense,' in relevant part, as 'a conviction of an offense in any other jurisdiction which includes all of the essential elements of any [registrable sex offense in New York listed in section 168-a (2) of the Correction Law]' ... . We concluded that, with respect to registrable offenses, the 'essential elements' provision 'requires registration whenever an individual is convicted of criminal conduct in a foreign jurisdiction that, if committed in New York, would have amounted to a registrable New York offense' ... . In the SORA registration context ... we [have held] that the strict equivalency standard was 'not the optimal vehicle to effectuate SORA's remedial purposes' and it was thus appropriate to utilize a more flexible approach that allowed consideration of the underlying conduct of a foreign conviction in addition to comparing the essential elements of the foreign and New York offense ...". ***People v. Perez*, 2020 N.Y. Slip Op. 02096, CtApp 3-26-20**

PERSONAL INJURY, EVIDENCE.

NON-MANDATORY STANDARDS FOR THE GAP BETWEEN A SUBWAY TRAIN AND THE PLATFORM PROPERLY ADMITTED IN THIS SLIP AND FALL CASE; HOWEVER THE EVIDENCE OF PRIOR GAP-RELATED ACCIDENTS SHOULD NOT HAVE BEEN ADMITTED; NEW TRIAL ORDERED.

The Court of Appeals, ordering a new trial, in a brief memorandum with no description of the facts, determined evidence of prior accidents involving the gap between the subway train and the platform should not have been admitted because there was no showing the conditions were the same. However the evidence of the non-mandatory gap standards were properly admitted: "In these circumstances, the trial court properly admitted plaintiff's expert testimony regarding non-mandatory gap standards promulgated by the American Public Transit Association and the Public Transportation Safety Board ... . However, Supreme Court abused its discretion as a matter of law by admitting evidence of prior accidents at New York City subway stations involving the gap between the train car and platform in the absence of a showing that the relevant conditions of those accidents were substantially the same as plaintiff's accident ...". ***Daniels v. New York City Tr. Auth.*, 2020 N.Y. Slip Op. 02027, CtApp 3-24-20**

UNEMPLOYMENT INSURANCE.

CLAIMANT, A COURIER, WAS AN EMPLOYEE ENTITLED TO UNEMPLOYMENT BENEFITS.

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, reversing the Appellate Division, over a concurrence and a two-judge dissent, determined the claimant courier was an employee of Postmates and was therefore entitled to unemployment benefits: "Postmates is a delivery business that uses a website and smartphone application to dispatch couriers to pick-up and deliver goods from local restaurants and stores to customers in cities across the United States—deliveries that are, for the most part, completed within an hour. Postmates solicits and hires its couriers, who undergo background checks before being approved to work by Postmates. Once they are approved, the couriers decide when to log into the application and which delivery jobs to accept. Once a courier accepts a delivery job made available through the application, the courier receives additional information about the job from Postmates, including the destination for the delivery. After completing a job, Postmates pays the couriers 80% of the delivery fees charged to customers, and payments are made by the customer directly to Postmates, which pays its couriers even when the fees are not collected from customers. Couriers' pay and the delivery fee are both nonnegotiable. * * * Postmates exercises more than 'incidental control' over its couriers—low-paid workers performing unskilled labor who possess limited discretion over how to do their jobs. That the couriers retain some independence to choose their work schedule and delivery route does not mean that they have actual control over their work or the service Postmates provides its customers; indeed, there is substantial evidence for the Board's conclusion that Postmates dominates the significant aspects of its couriers' work by dictating to which customers they can deliver, where to

deliver the requested items, effectively limiting the time frame for delivery and controlling all aspects of pricing and payment." ***Matter of Vega (Postmates Inc.--Commissioner of Labor)*, 2020 N.Y. Slip Op. 02094, CtApp 3-24-20**

WORKERS' COMPENSATION, APPEALS.

WORKERS' COMPENSATION BOARD DEPARTED FROM ITS PRECEDENT WITHOUT AN EXPLANATION, MATTER REMANDED TO THE BOARD.

The Court of Appeals, in a full-fledged opinion by Judge Rivera, remanding the matter to the Workers' Compensation Board, determined the Court could not rule on the appeal because the Board did not place on the record its reasons for departing from its own precedent. Claimant retired after she was injured and the Board held that she did not have to demonstrate efforts to get work in order to obtain benefits: "... [T]he Board now maintains that it departed from its administrative precedent by applying a discretionary inference in favor of claimant as permitted by Matter of Zamora v New York Neurologic Assoc. (19 NY3d 186 [2012]), without first requiring claimant to present evidence of her efforts to obtain work or get retrained. All parties agree that pursuant to Zamora the Board may, but need not, infer from the fact that a claimant involuntarily retired due to claimant's permanent partial disability that the claimant's reduced post-accident earnings resulted from that disability ... . All parties also agree that once initially so classified, a claimant entitled under Workers' Compensation Law ('WCL') § 15 (3) (w) to compensation for the disability-related loss of wage-earning capacity need not demonstrate ongoing efforts to work or retrain for work after classification under the 2017 amendment to that provision. Given the parties' agreement on the applicable law, and the Board's representation that it departed from its purported precedent without explanation, we reverse and remit so that the Board may clarify its rationale and issue a decision in accordance with Zamora, which should include an explanation if it chooses to depart from an evidentiary requirement imposed on similarly situated claimants in prior proceedings." ***Matter of O'Donnell v. Erie County*, 2020 N.Y. Slip Op. 02095, CtApp 3-24-20**

FIRST DEPARTMENT

CIVIL PROCEDURE, PRODUCTS LIABILITY, NEGLIGENCE, EVIDENCE.

IN THIS DESIGN DEFECT PRODUCTS LIABILITY CASE, THE LOSS OF THE SPECIFIC PRODUCT WHICH CAUSED THE INJURY DID NOT PREVENT DEFENDANT-MANUFACTURER FROM PRESENTING A DEFENSE; THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED ON SPOLIATION GROUNDS.

The First Department, reversing (modifying) Supreme Court, determined defendant-manufacturer (Doka) of an allegedly defective ratchet was not entitled to dismissal of the complaint on the ground that plaintiff could not produce the ratchet (spoliation). The ratchet was used to move heavy concrete forms into place along a track. Allegedly the ratchets broke when extra pressure was placed on them when the forms became "bound" on the track. Plaintiff alleged he was injured when he used his foot to increase the pressure on the ratchet when the form became bound. Because this was a design-defect case, and because the ratchets allegedly had broken before under similar circumstances, the defendant-manufacturer could present a defense and, therefore, the loss of the ratchet did not warrant dismissal of the complaint: "In cases like this, where the claim is based on a design defect (as opposed to a manufacturing defect), the absence of the product is not necessarily fatal to the defendant. As this Court has observed, a product's design 'possibly might be evaluated and the defect proved circumstantially' ... . Circumstantial evidence could, one would imagine, be the testimony of someone involved in the design process, and plans or photographs of the product before it entered the stream of commerce. It could also, assuming that the missing product was one of multiple units manufactured using the same design, be another one of those units. * * * Doka does not, in any meaningful way, argue why its inability to inspect the exact ratchet that plaintiff was using would prevent it from defending against the products liability claim." ***Rossi v. Doka USA, Ltd.*, 2020 N.Y. Slip Op. 02098, First Dept 3-26-20**

SECOND DEPARTMENT

ATTORNEYS, EDUCATION-SCHOOL LAW, EMPLOYMENT LAW, CONTRACT LAW.

AN ATTORNEY REPRESENTING A SCHOOL-EMPLOYEE-UNION-MEMBER IN DISCIPLINARY PROCEEDINGS PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT CAN NOT BE LIABLE IN MALPRACTICE TO THE UNION MEMBER.

The Second Department determined the attorney (Guerra) who represented a union can not be held liable in malpractice to individual union members in disciplinary proceedings: "Pursuant to CPLR 3211(a)(2), a party may move to dismiss a cause of action on the ground that the court lacks subject matter jurisdiction as the cause of action is preempted by federal law ... . Here, we agree with the Supreme Court's determination that the complaint insofar as asserted against Guerra is preempted by section 301 of the Federal Labor Management Relations Act, and that attorneys such as Guerra who perform services for and on behalf of a union may not be held liable in malpractice to individual grievants such as the plaintiff where the services performed constitute part of the collective bargaining process ...". ***Klingsberg v. Council of Sch. Supervisors & Adm'rs-Local 1*, 2020 N.Y. Slip Op. 02083, Second Dept 3-25-20**

CIVIL PROCEDURE, EVIDENCE.

PLAINTIFF'S MOTION FOR A DIRECTED VERDICT SHOULD NOT HAVE BEEN GRANTED, CRITERIA EXPLAINED.

The Second Department, reversing Supreme Court, determined plaintiff's motion for a directed verdict should not have been granted and explained the criteria: " 'A motion for judgment as a matter of law pursuant to CPLR 4401 may be granted where the trial court determines that, upon the evidence presented, there is no rational process by which the [trier of fact] could base a finding in favor of the nonmoving party' ... . 'In considering such a motion, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in light most favorable to the nonmovant' ... . Here, the Supreme Court, in announcing its decision, stated that it expressly considered and relied on the defendants' evidence. This was error, as it was improper for the court to consider, on a motion for a directed verdict made before the moving party had rested and the opposing party had an opportunity to present rebuttal evidence, the evidence introduced by the moving party ... . Thus, in the context of a motion for a directed verdict, the Supreme Court should not have accorded the defendants' expert's testimony more weight than that of the plaintiff's expert. In determining a motion for a directed verdict, the trial court 'must not engage in a weighing of the evidence, nor may it direct a verdict where the facts are in dispute, or where different inferences may be drawn or the credibility of witnesses is in question' ...". ***Boriello v. Loconte*, 2020 N.Y. Slip Op. 02035, Second Dept 3-25-20**

CIVIL PROCEDURE, JUDGES, CONDOMINIUMS.

JUDGE SHOULD NOT HAVE, SUA SPONTE, APPOINTED A RECEIVER BECAUSE THAT RELIEF WAS NOT REQUESTED BY A PARTY.

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, appointed a receiver and should not have referred an issue to a court attorney referee in this dispute between plaintiff condominium boards and homeowners association and their management company and attorney. The complaint alleged breach of contract and negligence: "The Supreme Court improvidently exercised its discretion in, sua sponte, appointing a receiver to manage the plaintiff entities, since the complaint did not seek the appointment of a receiver, no 'person having an apparent interest' in the plaintiff entities sought such relief, and there is no evidence that such a drastic remedy was warranted (CPLR 6401[a] ...). The Supreme Court should not have referred the issue of which Board of Managers and/or which management company shall be implemented to manage the affairs of the plaintiffs to a court attorney referee to hear and report, since the defendants lack standing to challenge the alleged violations of the plaintiffs' bylaws in the elections of new board members (see N-PCL 618 ...). Further, the reference of the issue of attorney's fees was premature ...". ***Board of Mgrs. of Golfview Condominium I v. Island Condo Mgt. Corp.*, 2020 N.Y. Slip Op. 02070, Second Dept 3-25-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

CRIMINALLY NEGLIGENT HOMICIDE CONVICTION ARISING FROM A TRAFFIC ACCIDENT WAS AGAINST THE WEIGHT OF THE EVIDENCE.

The Second Department, reversing defendant's conviction, over a two-justice dissent, determined the conviction for criminally negligence homicide was against the weight of the evidence. The passenger in defendant's car was killed when defendant's car went off the road, apparently after colliding with other cars defendant was attempting to pass. The decision described all of the witness's testimony in detail and concluded the conflicting testimony was not a sufficient basis for a conviction: " 'A person is guilty of criminally negligent homicide when, with criminal negligence, he [or she] causes the death of another person' (Penal Law § 125.10). A person acts with criminal negligence when 'he [or she] fails to perceive a substantial and unjustifiable risk that such result will occur or that such [a] circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation' (Penal Law § 15.05[4]). The defendant's conduct must rise to a level of carelessness where its 'seriousness would be apparent to anyone who shares the community's . . . sense of right and wrong' ... . Moreover, the conduct must create the risk, rather than simply not perceive the risk ... . In cases concerning charges of criminally negligent homicide arising out of automobile accidents involving excess rates of speed, 'it takes some additional affirmative act by the defendant to transform speeding into dangerous speeding' ... . Here, the People failed to establish, beyond a reasonable doubt, that the defendant 'fail[ed] to perceive a substantial and unjustifiable risk' (Penal Law § 15.05[4]) which caused the death of his passenger." ***People v. Derival*, 2020 N.Y. Slip Op. 02072, Second Dept 3-25-20**

DISCIPLINARY HEARINGS (INMATES).

PETITIONER REQUESTED AND WAS ENTITLED TO AN EMPLOYEE ASSISTANT TO HELP PREPARE A DEFENSE; DETERMINATION ANNULLED.

The Second Department, annulling the determination, held that petitioner was denied due process because an employee assistant was not assigned to help him prepare his defense to the allegation he harassed prison staff: "The petitioner was wrongly denied an employee assistant to help him prepare his defense ... . 'A prisoner charged with violating a prison

regulation which could result in the loss of good time' credit is entitled to minimal due process protections' ... . Prior to his disciplinary hearing, the petitioner was confined to administrative segregation and was, therefore, unable to prepare his defense ... . Contrary to the respondents' contention, 7 NYCRR 251-4.1(a) makes no distinction between a tier II and a tier III disciplinary hearing with regard to an inmate's right to an employee assistant ... . The petitioner had a right to assistance in connection with his disciplinary proceeding pursuant to the Due Process Clause of the Fourteenth Amendment ... and state regulations governing inmate disciplinary proceedings ... . Accordingly, where the petitioner was not provided with assistance and the record reflects that he requested such assistance, the hearing officer's determination must be annulled and the matter remitted for a new disciplinary hearing and a new determination thereafter ...". ***Matter of Campbell v. Lorde-Gray*, 2020 N.Y. Slip Op. 02036, Second Dept 3-25-20**

FAMILY LAW, EVIDENCE.

MOTHER PRESENTED SUFFICIENT EVIDENCE OF A CHANGE IN CIRCUMSTANCES TO JUSTIFY AWARDING HER SOLE CUSTODY OF THE CHILDREN.

The Second Department, reversing Family Court, determined there was sufficient evidence of a change of circumstances to award mother sole custody of the children: "... [T]he Family Court's determination, in effect, that there had been no change in circumstances requiring a transfer of legal custody to the mother and a modification of the father's parental access lacks a sound and substantial basis in the record ... . The record reflects that the children's relationship with the father has deteriorated since the issuance of the custody order ... , that the father had threatened to strike the children with a belt, and that the father denigrated the mother in the presence of the children ... . Moreover, the children, who were 11 and 13 years old at the time of the hearing, indicated a strong preference to reside with the mother ...". ***Matter of Georgiou-Ely v. Ely*, 2020 N.Y. Slip Op. 02049, Second Dept 3-25-20**

FAMILY LAW, JUDGES.

JUDGE EXHIBITED BIAS AGAINST MOTHER AND INTERFERED EXCESSIVELY IN THE CUSTODY HEARING; NEW HEARING ORDERED BEFORE A DIFFERENT JUDGE.

The Second Department, reversing Family Court, determined the judge was biased against mother and excessively interfered in the custody hearing: "The record of the proceedings supports the mother's contention that the Family Court was biased against her, depriving her of a fair and impartial hearing. … Here, the record demonstrates that the court predetermined the outcome of the case during the hearing and took an adversarial stance against the mother by, among other things, interjecting itself into the proceedings by cross-examining the mother on matters irrelevant to a determination of custody, including referring to the mother as 'emotionally excessive' and inquiring as to how many online dating web sites the mother utilized at the time she met the father and as to when the mother and the father became intimate. The court also asked the mother, 'so you were looking to start a relationship with someone?' and then commented, 'And so you were married at the time?' Although the father was also married to someone when he began his relationship with the mother, no such questions or comments were directed to him by the court. The court's inquiry of the mother exceeded 30 pages of transcript over the course of the two-day hearing. Although the court also questioned the father, the first inquiry related to setting up a parental access schedule for the father while the hearing was pending and the second set of inquiries appeared designed to elicit testimony from the father that was unfavorable to the mother, including one instance where the court intimated that the mother was practicing 'extortion' against the father in order to gain an advantage in the proceedings ...". ***Matter of Siegell v. Iqbal*, 2020 N.Y. Slip Op. 02084, Second Dept 3-25-20**

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

PLAINTIFF BANK DID NOT DEMONSTRATE COMPLIANCE WITH THE NOTICE REQUIREMENTS OF RPAPL 1304 AND DID NOT PRESENT NON-HEARSAY EVIDENCE OF STANDING IN THIS FORECLOSURE ACTION, CRITERIA EXPLAINED IN SOME DETAIL.

The Second Department, in an extensive decision explaining the relevant issues and analysis in some depth, determined plaintiff bank did not demonstrate compliance with the notice requirements of Real Property Actions and Proceedings Law (RPAPL) 1304 did not demonstrate standing to bring the foreclosure action: "... [T]he plaintiff failed to submit an affidavit of mailing or proof of mailing by the United States Postal Service evidencing that it properly mailed notice to the defendant pursuant to RPAPL 1304. Instead, the plaintiff relied on an affidavit of Rashad Blanchard, who was employed as a loan analyst by the parent company of the plaintiff's loan servicer, and copies of the purported notices. The plaintiff submitted only one letter that purported to constitute the statutorily required 90-day notice of default ... . Although the letter contained the statement 'sent via certified mail,' with a 20-digit number below it, no receipt or corresponding document issued by the United States Postal Service was submitted proving that the letter was actually sent by certified mail more than 90 days prior to commencement of the action. The plaintiff also failed to submit any documentary evidence that notice was sent by first-class mail. Further, Blanchard did not aver that the notice was sent in the manner required pursuant to RPAPL 1304,

i.e., by certified mail and first-class mail. Moreover, since he did not aver that he personally mailed the notice, or that he was familiar with the mailing practices and procedures of American Home Mortgage Servicing, Inc., the entity that purportedly sent the notices, he did not establish proof of a standard office practice and procedure designed to ensure that items are properly addressed and mailed ... . * * * [Vice President] Reyes's affidavit failed to establish a sufficient foundation for the admission of a business record pursuant to CPLR 4518(a) because, although he recited that the records upon which he relied were 'regularly maintained by [the plaintiff] in the ordinary course of its business,' he 'did not indicate that they were made by their author (or authors, whoever they might be) pursuant to an established procedure for the routine, habitual, systematic making of records that would qualify them as trustworthy accounts,' or that they 'were the records regularly relied on in the business' ... . Reyes also failed to indicate 'that the record [was] made at or about the time of the event being recorded—essentially, that recollection [was] fairly accurate and the habit or routine of making the entries assured' ... . [T]o the extent that Reyes's purported knowledge of the date the plaintiff received the original note was based upon his review of unidentified business records maintained by the plaintiff, '[his] affidavit constituted inadmissible hearsay and lacked probative value' ...". ***Deutsche Bank Natl. Trust Co. v. Dennis*, 2020 N.Y. Slip Op. 02039, Second Dept 3-25-20**

INSURANCE LAW, CONTRACT LAW.

QUESTION OF FACT WHETHER FLOODING, AS OPPOSED TO WIND, CAUSED THE PROPERTY DAMAGE PRECLUDED SUMMARY JUDGMENT IN FAVOR OF THE INSURER BASED UPON POLICY EXCLUSIONS.

The Second Department, reversing Supreme Court, determined there were questions of fact whether the exclusions in the homeowner's policy applied to damage caused during Superstorm Sandy. The expert opinion evidence did not demonstrate flooding, as opposed to wind, was the predominant cause of the damage: "The Homeowners Policy contains three exclusions which Allstate has raised here: the flood exclusion, the 'weather conditions' exclusion, and the 'predominant cause' exclusion. The Homeowners Policy states that Allstate does not cover losses caused by '[f]lood, including, but not limited to surface water, waves, tidal water or overflow of any body of water, or spray from any of these, whether or not driven by wind.' The 'weather conditions' exclusion states that Allstate does not cover losses caused by 'Weather Conditions that contribute in any way with a cause of loss excluded in this section to produce a loss.' The 'predominant cause' exclusion states that Allstate will not cover loss to a covered property when 'there are two or more causes of loss to the covered property' and 'the predominant cause(s) of loss is (are) excluded' under other provisions of the Policy." ***Ain v. Allstate Ins. Co.*, 2020 N.Y. Slip Op. 02042, Second Dept 3-25-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANT DID NOT DEMONSTRATE WHEN THE AREA WHERE PLAINTIFF ALLEGEDLY SLIPPED AND FELL WAS LAST INSPECTED OR CLEANED; DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined there was a question of fact whether defendant had constructive notice of the condition which allegedly caused plaintiff's slip and fall: " 'A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a sufficient length to afford the defendant a reasonable opportunity to discover and remedy it' ... . To meet its burden on the issue of lack of constructive notice, a defendant is required to offer evidence as to when the accident site was last cleaned or inspected before the accident ... . 'Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice'... . Here, the defendant failed to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition. While the affidavit of the building superintendent referenced general inspection and cleaning practices, the defendant failed to submit evidence regarding specific cleaning or inspection of the area in question relative to the time when the plaintiff's accident occurred ...". ***Griffin v. PMV Realty, LLC*, 2020 N.Y. Slip Op. 02068, Second Dept 3-25-20**

PERSONAL INJURY, LANDLORD-TENANT, EVIDENCE.

DEFENDANT PROPERTY OWNER DID NOT DEMONSTRATE IT WAS AN OUT-OF-POSSESSION LANDLORD AND DEFENDANTS FAILED TO ELIMINATE QUESTIONS OF FACT ON THE DUTY OF CARE AND KNOWLEDGE ELEMENTS OF A SLIP AND FALL CASE; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendants' motion for summary judgment in this slip and fall case should not have been granted. Defendant property owner did not demonstrate it was an out-of-possession landlord. And defendants failed to eliminate questions of fact re: several elements of a slip and fall action: "... [T]he defendants failed to eliminate triable issues of fact as to whether they had a duty to maintain in a reasonably safe condition the area of the parking lot where the plaintiff allegedly slipped ... . They further failed to eliminate triable issues of fact as to whether they, or anyone on their behalf, caused, created, or exacerbated the ice condition upon which the plaintiff allegedly slipped and fell ... , and whether they lacked constructive notice of the alleged ice condition ...". ***Pinck-Jafri v. Marsh Realty, LLC*, 2020 N.Y. Slip Op. 02082, Second Dept 3-25-30**

ZONING, LAND USE, CIVIL PROCEDURE.

VILLAGE BOARD WAS NOT REQUIRED TO CONSIDER AN APPLICATION FOR THE AMENDMENT OF A ZONING ORDINANCE WHICH IS A LEGISLATIVE FUNCTION NOT SUBJECT TO AN ARTICLE 78 REVIEW.

The Second Department, reversing Supreme Court, determined the village board properly declined to consider an application to rezone the subject property, which was an exercise of a legislative function: " '[T]he amendment of a zoning ordinance is a purely legislative function' ... . The Village Board is vested with discretion to amend its zoning ordinance, and it is not required to consider and vote upon every application for a zoning change (see Village Law § 7-708 ...). Thus, in the present case, the Village Board's determinations not to consider the plaintiffs/petitioners' applications were a legislative function not subject to review under CPLR article 78 ...". ***Matter of Hampshire Recreation, LLC v. Village of Mamaroneck*, 2020 N.Y. Slip Op. 02062, Second Dept 3-25-20**

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