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Editor: **Bruce Freeman**

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FIRST DEPARTMENT

FAMILY LAW, EVIDENCE.

FAMILY COURT SHOULD NOT HAVE RELIED SOLELY ON THE IN CAMERA INTERVIEW WITH THE EIGHT-YEAR-OLD CHILD IN THIS MODIFICATION OF CUSTODY CASE, MATTER REMITTED.

The First Department, reversing Family Court and remanding the case, determined the evidence did not support a finding that there had been a change in circumstance sufficient to warrant awarding sold custody to father. The court noted that Family Court should not have relied solely on the in camera interview with the eight-year-old child: "The court based its finding solely on an in camera interview with the child, then eight years old, and the hearsay testimony of the father. The transcript of the in camera interview shows that the child made inconsistent statements about where he spent the majority of his time. However, even if he had made a definitive declaration, the Court of Appeals has admonished that courts should 'not use any information, which has not been previously mentioned and is adverse to either parent, without in some way checking on its accuracy during the course of the open hearing,' because 'there are grave risks involved in these private interviews. A child whose home is or has been torn apart is subjected to emotional stresses that may produce completely distorted images of its parents and its situation. Also, its feelings may be transient indeed, and the reasons for its preferences may indicate that no weight should be given the child's choice. Without a full background on the family and the child, these interviews can lead the most conscientious Judge astray' ... . In fact, this admonition is well taken in this case, where the record provides a substantial basis for concluding that either or both parents spoke to the child about the proceeding before his interview with the court." ***Matter of Edwin E.R. v. Monique A.-O.*, 2020 N.Y. Slip Op. 06347, First Dept 11-5-20**

PERSONAL INJURY, CONTRACT LAW.

QUESTIONS OF FACT WHETHER THE BUILDING MANAGEMENT COMPANY WAS LIABLE, PURSUANT TO *ESPINAL* FACTORS, FOR INFANT PLAINTIFF'S FALL INTO THE ELEVATOR SHAFT.

The First Department, reversing Supreme Court, determined there were questions of fact whether the building manager, Synoptic, was liable in this elevator accident case. The elevator was subject to a code violation because a "drop key" was available to tenants which allowed the elevator door to be opened when the elevator cab was not at that floor. Infant plaintiff fell into the open shaft after her nanny opened the door. The contract between Synoptic and the building owner raised questions of fact whether *Espinal* factors imposed liability on Synoptic: "A contracting party may not be liable in tort to a noncontracting third-party for its negligent performance unless it launches a force or instrument of harm by creating or exacerbating an unreasonable risk of harm, the noncontracting third party detrimentally relies on its performances, or it completely displaces the other party's duty to maintain premises safely ... . Whether Synoptic made the repairs itself or was qualified to do so is irrelevant as to whether it owed plaintiff a duty. Rather its duty arises from its contractual obligation under the comprehensive management agreement obligating it to, inter alia, maintain the property and cause needed repairs to the elevator ... . Here, issues of fact exist as to whether plaintiffs detrimentally relied on Synoptic to perform its contractual duties to maintain, cause repairs to be made to, and correct violations regarding the elevator ... , and whether Synoptic launched a force of harm by providing residents access to the drop key to use the freight elevator ... . According to ... deposition, [testimony] Synoptic had notice that residents were using the drop key to access the freight elevator. Further, at the very least, issues of fact exist as to whether it had notice that the repairs to address the violation were never completed." ***XX v. Dunwell El. Elec. Indus., Inc.*, 2020 N.Y. Slip Op. 06376, First Dept 11-5-20**

PERSONAL INJURY, EVIDENCE.

IN A COMPREHENSIVE DECISION ANALYZING THE ELEMENTS OF PROOF IN A SLIP AND FALL CASE, INCLUDING EXPERT OPINION EVIDENCE, THE 1ST DEPARTMENT DETERMINED THE DEFENDANT STORE DEMONSTRATED IT DID NOT HAVE CONSTRUCTIVE OR ACTUAL KNOWLEDGE OF A PUDDLE OF WATER IN FRONT OF AN ICE MACHINE.

The First Department, in an unusually detailed and comprehensive decision, went through all the factors relevant to slip and fall cases, including expert opinion evidence, and determined defendant store was entitled to summary judgment. Plaintiff allegedly slipped and fell on water in front of an ice machine. The defendant demonstrated the area had been in-

spected an hour and a half before the fall and no one had complained about water on the floor. Therefore defendant did not have constructive or actual notice of the condition: "Defendants ... established that the water was not on the floor for a sufficient period of time to charge them with having constructive notice that it was there. The porter averred that she inspected the area at about 8:23 a.m., or about an hour and a half before the accident and did not record any hazards. The deposition testimony of both plaintiff and his wife establish that the water puddle that caused plaintiff's fall was clear and without any footprints or marks ... . Defendants sustained their burden of making a prima facie showing that they had no actual notice of the water on the floor before the accident. Defendant store manager Luisi testified that he was unaware of any complaints about the area which were made before the accident. Plaintiff's expert affidavits failed to raise a triable issue of fact as to whether defendants were negligent. First, the standards cited are couched in advisory terms and there is no evidence that they are an adopted and implemented industry standard or a generally accepted safety practice ... . Although evidence of industry practice and standards is admissible to establish a duty of care, the expert affidavit fails to raise a triable issue of fact because it contains nothing more than conclusory opinions with respect to a deviation from an alleged industrywide practice of placing cones and absorbent rubber mats or carpets in front of ice freezers ...". ***Velocci v. Stop & Shop*, 2020 N.Y. Slip Op. 06372, First Dept 11-5-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE, FRAUD, JUDGES.

DEFENDANT'S MOTION TO VACATE THE DEFAULT JUDGMENT IN THIS FORECLOSURE ACTION GRANTED IN THE INTERESTS OF SUBSTANTIAL JUSTICE; THE EVIDENCE SUGGESTED DEFENDANT WAS THE VICTIM OF A SCHEME TO DEFRAUD; SUPREME COURT, HOWEVER, SHOULD NOT HAVE, SUA SPONTE, DISMISSED THE COMPLAINT.

The Second Department determined defendant's decedent's (Renda's) motion to vacate a default judgment in this foreclosure action should have been granted in the interests of substantial justice. There was evidence Renda was the victim of a scheme to defraud and foreclosure triggers the equitable powers of the court. Supreme Court should not have, sua sponte, dismissed the complaint, however: "... [W]e find that the defendant is entitled to vacatur of her default in the interests of substantial justice. 'In addition to the grounds set forth in section 5015(a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice' ... . 'A foreclosure action is equitable in nature and triggers the equitable powers of the court' ... . 'Once equity is invoked, the court's power is as broad as equity and justice require' ... . Here, the evidence submitted strongly suggests that Renda was the victim of a scheme to defraud ... . [T]he Supreme Court erred in, sua sponte, directing dismissal of the complaint. Here, there were no extraordinary circumstances warranting the sua sponte dismissal, and there is no indication that the court gave the parties an opportunity to be heard regarding the dismissal of the complaint ...". ***Caridi v. Tanico*, 2020 N.Y. Slip Op. 06236, Second Dept 11-4-20**

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

PLAINTIFF BANK MOVED FOR AN ORDER OF REFERENCE WITHIN ONE YEAR; DESPITE THE WITHDRAWAL OF THE MOTION, THE COMPLAINT SHOULD NOT HAVE BEEN DISMISSED, SUA SPONTE, PURSUANT TO CPLR 3215.

The Second Department, reversing Supreme Court, determined the complaint in this foreclosure action should have been, sua sponte, dismissed for failure to take steps to procure a default judgment within one year. Plaintiff moved for an order of reference within one year. It doesn't matter that the motion was withdrawn: "Pursuant to CPLR 3215(c), '[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.' It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c) ... . 'Rather, it is enough that the plaintiff timely takes 'the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference' to establish that it 'initiated proceedings for entry of a judgment within one year of the default,' for the purposes of satisfying CPLR 3215(c)' ... . Here, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference in May 2010, within one year of the defendants' default ... . In such cases, the complaint should not be dismissed pursuant to CPLR 3215(c), even if, as here, the plaintiff's motion is later withdrawn ...". ***Deutsche Bank Natl. Trust Co. v. Hasan*, 2020 N.Y. Slip Op. 06243, 11-4-20**

CIVIL PROCEDURE, TRUSTS AND ESTATES, FIDUCIARY DUTY.

THE TRUSTEES DID NOT DEMONSTRATE THE AVAILABILITY OF THE STATUTE OF LIMITATIONS OR LACHES DEFENSES TO THE ACTION SEEKING AN ESTATE ACCOUNTING; THE TRUSTEES DID NOT OPENLY REPUDIATE THEIR FIDUCIARY OBLIGATIONS AND, THEREFORE, THE TIME DID NOT BEGIN TO RUN FOR EITHER DEFENSE.

The Second Department, reversing Surrogate's Court, determined the action seeking an estate accounting should not have been dismissed as untimely because the statute of limitations had not been triggered by an open repudiation of the trustees'

fiduciary obligations. A similar open repudiation is necessary for a laches defense as well: "A proceeding to compel an accounting by a fiduciary is governed by a six-year statute of limitations (see CPLR 213[1]). 'It is well settled that the statutory clock begins to run when the trustee openly repudiates his [or her] fiduciary obligations' or there is a judicial settlement of the fiduciary's account ... . 'For a trustee to invoke a Statute of Limitations defense, a mere lapse of time is insufficient without proof of an open repudiation'... . There must be proof of a repudiation by the fiduciary "which is clear and made known to the beneficiaries' ... , 'viewed in the light of the circumstances of the particular case' ... . The party seeking the benefit of the statute of limitations defense bears the burden of proof on the issue of open repudiation ... . 'Where there is any doubt on the record as to the conclusive applicability of a Statute of Limitations defense, the motion to dismiss the proceeding should be denied' ...". ***Matter of Eisdorfer*, 2020 N.Y. Slip Op. 06258, Second Dept 11-4-20**

CONSTITUTIONAL LAW, CRIMINAL LAW.

PETITIONERS, INMATES AT A CORRECTIONAL FACILITY, RAISED ALLEGATIONS COGNIZABLE IN HABEAS CORPUS REGARDING THE FACILITY'S RESPONSE TO COVID-19; SUPREME COURT SHOULD NOT HAVE REFUSED TO ISSUE AN ORDER TO SHOW CAUSE WHY THE PETITIONERS SHOULD NOT BE RELEASED.

The Second Department, reversing Supreme Court, determined the petitioners, inmates at Otis Correctional Facility, had made allegations with respect to the facility's response to COVID-19 which were cognizable in habeas corpus. Therefore Supreme Court should not have refuse to issue an order to show cause why the inmates should not be released: "... [T]he petition alleged that the inmates were being unlawfully imprisoned in violation of the Eighth Amendment of the United States Constitution because, in light of certain physical conditions and attributes specific to them as well as unalterable conditions of incarceration at Otisville, there were no measures that could be taken to protect them from the grave risk of death or serious illness posed by the COVID-19 virus while they were incarcerated in that facility. Thus, the petitioner alleged, the only remedy to cure the illegality of the inmates' detention would be their immediate release. Contrary to the respondents' contention and the conclusion of the Supreme Court, these allegations are properly cognizable in habeas corpus ... . Accordingly, the court should not have refused to issue an order to show cause why the inmates should not be released (see CPLR 7003[a])." ***People ex rel. Tse v. Barometre*, 2020 N.Y. Slip Op. 06280, Second Dept 11-4-20**

CONTRACT LAW, ARBITRATION.

IN THIS WRONGFUL DEATH ACTION AGAINST DEFENDANT RESIDENTIAL CARE FACILITY, PLAINTIFF'S DECEDENT DID NOT SIGN THE ADMISSION AGREEMENT AND DECLINED TO HAVE IT READ TO HER; PLAINTIFF'S DECEDENT'S SON, WHO HAD POWER OF ATTORNEY, REFUSED TO SIGN THE AGREEMENT; THE FACILITY CAN NOT ENFORCE THE ARBITRATION CLAUSE IN THE AGREEMENT.

The Second Department, reversing Supreme Court, determined the arbitration clause in the defendant residential care facility's (Richmond Center's) admission agreement could not be enforced on behalf of plaintiff's decedent. Plaintiff's decedent was unable to sign the admission agreement and blinked twice for "no" when asked if she wanted the agreement read to her. Her son, William, had power of attorney but refused to sign the agreement. The facility therefore could not enforce the arbitration clause of the admission agreement in this wrongful death action: " '[A]n arbitration clause in a written agreement is enforceable, even if the agreement is not signed, when it is evident that the parties intended to be bound by the contract' ... . 'The manifestation or expression of assent necessary to form a contract may be by word, act, or conduct which evinces the intention of the parties to contract' ... . 'A party to an agreement may not be compelled to arbitrate its dispute with another unless the evidence establishes the parties' clear, explicit and unequivocal agreement to arbitrate' ... . Here, Richmond Center failed to demonstrate that the resident, or William as her representative, by word, act, or conduct evinced an intention to be bound by the terms of the arbitration agreement. Since the evidence failed to show a clear, explicit, and unequivocal agreement to arbitrate, the plaintiff may not be compelled to arbitrate ...". ***Pankiv v. Richmond Ctr. for Rehabilitation & Specialty Healthcare*, 2020 N.Y. Slip Op. 06279, Second Dept 11-4-20**

COURT OF CLAIMS, CIVIL PROCEDURE, NEGLIGENCE.

THE NOTICE OF INTENTION TO FILE A CLAIM DID NOT SUFFICIENTLY IDENTIFY THE LOCATION OF THE SLIP AND FALL, RENDERING THE FILING OF THE CLAIM UNTIMELY.

The Second Department determined the Court of Claims properly dismissed the claim in this slip and fall case. The notice of intention to file a claim did not sufficiently identify the location of the slip and fall: "A claim to recover damages for personal injuries shall be filed and served upon the Attorney General within 90 days after the claim accrued, unless within 90 days, the claimant serves upon the Attorney General a written notice of intention to file a claim, in which event the claim shall be filed and served upon the Attorney General within two years after the accrual of such claim (see Court of Claims Act § 10[3] ...). The Court of Claims Act requires a claim to specify, among other things, 'the time when and place where' the claim arose (Court of Claims Act § 11[b] ...). A notice of intention to file a claim must also include a statement as to when and where the claim arose ... . [T]he notice of intention to file a claim failed to describe the location of the alleged accident with sufficient specificity to satisfy the requirements of Court of Claims Act § 11(b) as the generalized description did not give notice as to where on the path the accident occurred ... . Moreover, '[t]he State is not required to go beyond a claim or notice

of intention in order to investigate an occurrence or ascertain information which should be provided pursuant to Court of Claims Act § 11' ... . Further, lack of prejudice to the State is immaterial ... . As the notice of intention was deficient, it did not serve to extend the claimant's time to file and serve a claim beyond the 90-day statutory period (see Court of Clams Act § 10[3] ...). Therefore, the claimant's claim, which was filed approximately one year after accrual of the claim, was untimely ...". ***Criscuola v. State of New York*, 2020 N.Y. Slip Op. 06241, Second Dept 11-4-20**

CRIMINAL LAW, APPEALS.

THE FEDERAL OFFENSE DID NOT REQUIRE THAT THE FIREARM BE OPERABLE BUT THE NEW YORK OFFENSE DOES; THEREFORE THE FEDERAL OFFENSE IS NOT A PREDICATE OFFENSE FOR SENTENCING PURPOSES; THE DEFENDANT SHOULD NOT HAVE BEEN SENTENCED AS A SECOND FELONY OFFENDER; ALTHOUGH THE ISSUE WAS NOT PRESERVED, IT WAS CONSIDERED ON APPEAL IN THE INTEREST OF JUSTICE.

The Second Department, reversing (modifying) Supreme Court, determined the federal felony was not equivalent to a New York felony and therefore could not serve as a predicate offense. Defendant, therefore, should not have been sentenced as a second felony offender. Although the issue was not preserved, it was considered on appeal in the interest of justice: "The defendant's contention that his prior federal conviction of unlawful possession of a firearm in violation of 18 USC § 922(g)(l) did not qualify as a predicate New York felony pursuant to Penal Law § 70.06 is unpreserved for appellate review ... . However, we reach the issue in the exercise of our interest of justice jurisdiction ... . 'An out-of-state felony conviction qualifies as a predicate felony under Penal Law § 70.06 only if it is for a crime whose elements are equivalent to those of a felony in New York' ... . Here, the defendant's predicate crime does not require as one of its elements that the firearm be operable (see 18 USC § 922[g][1] ...) and, thus, does not constitute a felony in New York for the purpose of enhanced sentencing ...". ***People v. Cabassa*, 2020 N.Y. Slip Op. 06282, Second Dept 11-4-20**

CRIMINAL LAW, EVIDENCE,

THE IMPOUNDMENT AND SEARCH OF DEFENDANT'S CAR, WHICH WAS LEGALLY PARKED AT THE TIME OF DEFENDANT'S ARREST, WERE ILLEGAL; THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

The Second Department, reversing Supreme Court, determined the impoundment of defendant's car, which was legally parked car at the time of defendant's arrest, was illegal. The subsequent search of the car was not a valid inventory search. The seized evidence should have been suppressed: "... [T]he Supreme Court should have granted that branch of the defendant's omnibus motion which was to suppress the physical evidence recovered from his vehicle. The People failed to establish the lawfulness of the impoundment of the defendant's vehicle and subsequent inventory search ... . At the suppression hearing, the arresting officer testified that the defendant's vehicle was legally parked at the time of the defendant's arrest, and there was no testimony regarding posted time limits pertaining to the parking space. Further, although the officer testified that he impounded the defendant's vehicle for 'safekeeping,' the People presented no evidence demonstrating any history of burglary or vandalism in the area where the defendant had parked his vehicle. Thus, the People failed to establish that the impoundment of the defendant's vehicle was in the interests of public safety or part of the police's community caretaking function ... . Moreover, while the arresting officer testified that '[t]here is [an] NYPD procedure when someone is arrested and you have to take the car into safekeeping,' the People failed to present evidence of what such a procedure required or whether the arresting officer complied with such a procedure when he impounded the defendant's vehicle ...". ***People v. King*, 2020 N.Y. Slip Op. 06288, Second Dept 11-4-20**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

RISK ASSESSMENT REDUCED FROM TWO TO ONE; DEFENDANT WAS CONVICTED OF STATUTORY RAPE WHEN HE WAS 22; THE VICTIMS, WHO WERE 15 AND 16, INITIATED THE CONSENSUAL ENCOUNTER.

The Second Department, reducing defendant's risk assessment to level one, determined the Louisiana statutory rape conviction did not warrant a 25 point assessment. The defendant was 22 at the time and the victims, who initiated the consensual encounter, were 15 and 16: " 'In cases of statutory rape, the Board has long recognized that strict application of the Guidelines may in some instances result in overassessment of the offender's risk to public safety. The Guidelines provide that '[t]he Board or a court may choose to depart downward in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points in this category [risk factor 2, for sexual contact with the victim] results in an over-assessment of the offender's risk to public safety' ... . Considering all of the circumstances present here, including that this offense is the only sex-related crime in the defendant's history, the defendant accepted responsibility for his crimes and was sentenced minimally in Louisiana, the assessment of 25 points under risk factor 2 results in an overassessment of the defendant's risk to public safety ...". ***People v. Brocato*, 2020 N.Y. Slip Op. 06295, Second Dept 11-4-20**

INSURANCE LAW, CONTRACT LAW, FRAUD, NEGLIGENCE, CIVIL PROCEDURE.

PLAINTIFFS FOUND OUT WELL INTO THE CONTRACT FOR GAS-MAIN WORK THAT THE REQUESTED INSURANCE COVERAGE HAD NOT BEEN PROVIDED; THE DECLARATORY JUDGMENT CAUSE OF ACTION WAS PROPERLY DISMISSED BECAUSE IT DEPENDED ON A CIRCUMSTANCE THAT MAY NOT OCCUR; THE NEGLIGENT PROCUREMENT CAUSE OF ACTION WAS PROPERLY DISMISSED FOR LACK OF DAMAGES; THE BREACH OF CONTRACT CAUSE OF ACTION WAS SUPPORTED BY NOMINAL DAMAGES; THE FRAUD AND NEGLIGENT MISREPRESENTATION CAUSES OF ACTION WERE SUPPORTED BY A SPECIAL RELATIONSHIP WITH THE INSURANCE BROKER AND DETRIMENTAL RELIANCE.

The Second Department, reversing (modifying) Supreme Court, determined the plaintiffs' causes of action for declaratory relief and negligent procurement were properly dismissed but the causes of action for breach of contract and fraud and negligent misrepresentation should not have been dismissed. Plaintiffs contracted with Con Ed to work on a gas main and requested insurance coverage for the project from defendants. Well into the project plaintiffs learned that they were not insured and they procured coverage elsewhere for a much higher premium. The declaratory judgment cause of action sought a declaration that defendants would be responsible if plaintiffs are sued for damage done when plaintiffs were uninsured. Because that circumstance may never occur the declaratory judgment cause of action was properly dismissed. The negligent procurement cause of action was properly dismissed because there were no damages. The breach of contract cause of action should not have been dismissed because nominal damages will support it. The fraud and negligent misrepresentation causes of action should not have been dismissed because a special relationship between plaintiffs and the insurance broker had been sufficiently alleged: " 'Nominal damages allow vindication of those rights' ... . '[A]ctual damages are not an essential element' of a breach of contract cause of action ... . 'Where a special relationship develops between the broker and client, [the] broker may be liable . . . for failing to advise or direct the client to obtain additional coverage' ... . '... [T]hree 'exceptional situations' ... may give rise to such a special relationship: '(1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on' ... . The plaintiffs, at a minimum, claim to have suffered damages when they, on two occasions, made bids for long-term contracts to perform gas main repair work for Con Ed that were priced, in part, based on the defendants' alleged misrepresentations as to the price of insurance coverage for that work." ***AB Oil Servs., Ltd. v. TCE Ins. Servs., Inc.*, 2020 N.Y. Slip Op. 06232, Second Dept 11-4-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANT HOTEL PROPERLY FOUND NEGLIGENT FOR FAILING TO PROVIDE ADEQUATE SECURITY IN THIS THIRD-PARTY ASSAULT CASE; HOWEVER THE HOTEL SHOULD NOT HAVE BEEN APPORTIONED 100% OF THE FAULT.

The Second Department determined the evidence supported plaintiff's verdict in this third-party assault action, but the defendant hotel should not have been found 100% at fault for failure to provide adequate security. 35% of the fault should have been apportioned to the shooter. Plaintiff was in a car in the hotel parking lot when he was shot by third-party defendant Williams: "... [The plaintiff made out a prima facie case of negligence at trial, and the jury's finding in this regard was not against the weight of the evidence. The plaintiff established that the defendants employed almost no security measures in the parking lot where the shooting took place, and that in light of the history of criminal activity in the parking lot, the defendants should have been aware of the 'likelihood of conduct on the part of third [parties]' that would 'endanger the safety' of visitors to the parking lot ... . However, the apportionment of 100% of the fault in the happening of the shooting to the defendants was not supported by a fair interpretation of the evidence ... . An apportionment of 65% of the fault to the defendants and 35% of the fault to Williams better reflects a fair interpretation of the evidence ...". ***Carter v. BMC-HOJO, Inc.*, 2020 N.Y. Slip Op. 06237, Second Dept 11-4-20**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW, CIVIL PROCEDURE.

INFANT PLAINTIFF WAS A PASSENGER ON DEFENDANTS' ALL TERRAIN VEHICLE (ATV), DRIVEN BY DEFENDANTS' DECEDENT, WHO WAS INTOXICATED, WHEN THE ATV CRASHED INTO A TREE; THE NEGLIGENT SUPERVISION CAUSE OF ACTION PROPERLY SURVIVED SUMMARY JUDGMENT; THERE IS NO COMMON LAW "NEGLIGENT PROVISION OF ALCOHOL TO A MINOR" CAUSE OF ACTION IN NEW YORK; SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED ON THE NEGLIGENCE CAUSE OF ACTION BASED ON THE VIOLATION OF THE VEHICLE AND TRAFFIC LAW; CAUSES OF ACTION FIRST ADDRESSED IN PLAINTIFFS' REPLY PAPERS PROPERLY DISMISSED.

The Second Department, reversing (modifying) Supreme Court, determined: (1) there is no common law cause of action in New York for negligent provision of alcohol to a minor; (2) summary judgment should have been granted on the negli-

gence cause of action against the estate of the infant driver and owner of the all terrain vehicle (ATV); and (3) the negligent supervision cause of action properly survived summary judgment. Infant plaintiff was a passenger on the ATV driven by defendants' decedent, who was intoxicated, when the ATV struck a tree. The court noted that the two causes of action which plaintiffs addressed only in their reply papers were properly dismissed: "... [T]he Supreme Court should have granted the plaintiffs' cross motion for summary judgment on the issue of the liability of Nicola Trivigno [ATV owner} and Frankie's [defendants' decedent's] estate. A plaintiff is no longer required to show freedom from comparative fault in order to establish his or her prima facie entitlement to judgment as a matter of law on the issue of liability ... . A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law ... Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law by presenting evidence that Frankie operated the ATV while intoxicated in violation of the Vehicle and Traffic Law (see Vehicle and Traffic Law § 1192). Frankie's negligence is imputed to Nicola Trivigno, who was the owner of the ATV which was being driven by Frankie with Nicola Trivigno's permission ...". ***Abtey v. Trivigno*, 2020 N.Y. Slip Op. 06233, Second Dept 11-4-20**

THIRD DEPARTMENT

APPEALS, ENVIRONMENTAL LAW.

THE APPEAL WAS MOOT BECAUSE THE PETITION SOUGHT TO HALT THE CONSTRUCTION OF A MINING SHAFT APPROVED BY THE DEPARTMENT OF ENVIRONMENTAL CONSERVATION (DEC) AND THE SHAFT HAD BEEN COMPLETED AT THE TIME OF THE APPEAL.

The Third Department determined the appeal was moot because the action sought to halt the construction of a mining shaft approved by the Department of Environmental Conservation (DEC) but the shaft had already been constructed at the time of the appeal: " '[T]he doctrine of mootness is invoked where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy' ... . Whether the controversy has become moot requires the consideration of various factors, including how far the construction work has progressed towards completion, whether the work was undertaken in bad faith or without authority and whether the substantially completed work cannot be readily undone without substantial hardship ... . A chief consideration to be assessed is whether the challenger to the construction work 'fail[ed] to seek preliminary injunctive relief or otherwise preserve the status quo to prevent construction from commencing or continuing during the pendency of the litigation' ... . This Court has been advised that, during the pendency of the underlying proceeding and this appeal, the construction of the surface shaft has been completed to the point that it cannot be safely halted and that substantial construction costs have been incurred. Furthermore, there is no indication that petitioners promptly sought injunctive relief to maintain the status quo ... or that [respondent] proceeded with the construction in bad faith or without the authority to do so ... . Based on the foregoing, petitioners' appeal is moot ...". ***Matter of City of Ithaca v. New York State Dept. of Envtl. Conservation*, 2020 N.Y. Slip Op. 06322, Third Dept 11-5-20**

BATTERY, MEDICAL MALPRACTICE, CIVIL PROCEDURE, NEGLIGENCE, EVIDENCE.

THE ALLEGATION THAT DEFENDANT SURGEONS PERFORMED A CHIROPRACTIC PROCEDURE DURING SPINAL FUSION SURGERY SOUNDED IN BATTERY, NOT MEDICAL MALPRACTICE, AND WAS TIME-BARRED; PLAINTIFF'S EXPERT, A CHIROPRACTOR, WAS NOT QUALIFIED TO OFFER AN OPINION ABOUT DEFENDANTS' SURGERY.

The Third Department determined plaintiff's allegation the defendant doctors derotated her pelvis (a chiropractic procedure) during spine fusion surgery sounded in battery, not medical malpractice, because the claim alleged intentional, not negligent, conduct. Therefore the one-year statute of limitations applied and the action was time-barred. Plaintiff's expert, a chiropractor, was not qualified to offer an opinion about the surgery performed by the defendants: "... [A]ny claim that defendants derotated plaintiff's pelvis as a separate procedure from the surgery to which she consented is necessarily an allegation that they acted intentionally. Despite the fact that plaintiff's complaint alleges only negligence, 'when a patient agrees to treatment for one condition and is subjected to a procedure related to a completely different condition, there can be no question but that the deviation from the consent given was intentional' ... . As such, this claim is subject to the one-year statute of limitations for the intentional tort of battery — that is, 'intentional physical contact with another person without that person's consent' — rather than the 2½-year period applicable to medical malpractice claims ...". ***Young v. Sethi*, 2020 N.Y. Slip Op. 06330, Third Dept 11-5-20**

CIVIL PROCEDURE, APPEALS.

THE DENIAL OF A MOTION TO RESETTLE WHICH IMPROPERLY SOUGHT THE MODIFICATION OF A SUBSTANTIVE PART OF AN ORDER, AS OPPOSED TO MERELY THE CORRECTION OF A MISTAKE, IS NOT APPEALABLE.

The Third Department determined the denial of the motion to resettle was not appealable and explained the criteria. The motion sought the modification of a substantive part of an order, which is not available pursuant to a motion to resettle: " 'Resettlement of an order is a procedure designed solely to correct errors or omissions as to form, or for clarification. It may

not be used to effect a substantive change in or to amplify the prior decision of the court' ... . 'Under established precedent, no appeal lies from the denial of a motion to resettle or clarify a substantive portion of an order' . [The instant] ... motion does not seek to amend or clarify the prior order, but seeks to modify a substantive portion of the prior order.... As such, the denial of said motion is not appealable ...". ***Hutchings v. Garrison Lifestyle Pierce Hill, LLC*, 2020 N.Y. Slip Op. 06327, Third Dept 11-5-20**

CIVIL PROCEDURE, INSURANCE LAW, PERSONAL INJURY, APPEALS.

SUBPOENA SEEKING 1099 FORMS SHOWING THE INSURER'S PAYMENTS TO TWO DOCTORS WHO PERFORM MEDICAL EXAMS FOR THE INSURER IN PERSONAL INJURY CASES SHOULD NOT HAVE BEEN QUASHED; WITH RESPECT TO THE SUBPOENA FOR THE MEDICAL RECORDS ASSOCIATED WITH THE EXAMS, THAT ISSUE WAS NOT ADDRESSED BY SUPREME COURT AND CAN NOT, THEREFORE, BE ADDRESSED ON APPEAL. The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Garry addressing a matter of first impression in the Third Department, determined the plaintiffs' subpoena seeking 1099 forms (encompassing several years) issued by the insurer to the two doctors (Seigel and Hughes) who performed the medical examination of the plaintiff in this traffic accident case should not have been quashed. The payment records may provide information relevant to the doctors' bias in favor denying coverage. However the subpoena for the medical records for the examinations conducted by the two doctors was not addressed by the motion court and therefore could not be addressed on appeal: "The CPLR extends 'full disclosure of all matters material and necessary in the prosecution or defense of an action' to nonparties (CPLR 3101 [a] [4] ...). 'The words, 'material and necessary,' are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason' ... . 'A subpoena will be quashed only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant to any proper inquiry' ... . [T]he 1099 forms that plaintiffs seek would disclose the amount of compensation that Siegel and Hughes received for performing evaluations on defendant's behalf and, with questioning, may reveal a financial incentive that the physicians have in testifying. A financial incentive is a relevant consideration in 'ascertain[ing] any possible bias or interest on the part of [the physicians]' ... . Given the liberal interpretation afforded the terms 'material and ... necessary' used in the CPLR ... , and the general acceptance of testing a witness for bias and interest , we thus find that the financial records are discoverable ...". ***Loiselle v. Progressive Cas. Ins. Co.*, 2020 N.Y. Slip Op. 06325, Third Dept 11-5-20**

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