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CasePrepPlus

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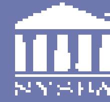

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FIRST DEPARTMENT

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

THE DEFENDANT SURGEON'S TESTIMONY DID NOT MEET THE CRITERIA FOR HABIT EVIDENCE; THEREFORE THE DEFENSE EXPERT, WHO RELIED ON THE INSUFFICIENT HABIT EVIDENCE, DID NOT MAKE OUT A PRIMA FACIE CASE; EVEN IF SUFFICIENT, HABIT EVIDENCE ONLY RAISES AN INFERENCE FOR THE JURY TO CONSIDER, IT DOES NOT ESTABLISH WHAT PROCEDURE WAS FOLLOWED AS A MATTER OF LAW; NEW EVIDENCE RAISED IN REPLY PAPERS SHOULD NOT HAVE BEEN CONSIDERED.

The First Department, reversing Supreme Court, in full-fledged opinion by Justice Gische, determined: (1) the defendant surgeon's (Dr. Fielding's) testimony did not meet the criteria for habit or custom evidence; (2) habit evidence, even when sufficient, gives the jury the basis for an inference, but does not demonstrate what was done as a matter of law; and (3) a new theory raised in the reply papers should not have been considered. Dr. Fielding had no independent recollection of the operation on plaintiff. Defendant's motion for summary judgment should not have been granted: "In order to lay a foundation for [the] admission [of habit evidence], Dr. Fielding needed to establish that the practice of palpitating the bowel for perforations was routinely done by him in his open bariatric surgeries, and that it did not vary from patient to patient. He did not do so. He failed to offer testimony or provide any other proof regarding the number of times he had followed such a procedure during the hundreds of bariatric surgeries he had performed ... . Nor did Dr. Fielding describe the LAP-Band procedure as being routine, without variation from patient to patient. Since Dr. Fielding did not lay a proper evidentiary foundation for his testimony based on custom and practice, and the expert's opinion was made in reliance on that testimony, defendants did not satisfy their burden of proving a prima facie case entitling them to summary judgment ... . [E]ven if an appropriate foundation was laid for the habit testimony that defendants' expert relied on, the motion for summary judgment still should have been denied. Where habit evidence is admitted, it only establishes that the claimed behavior or conduct was persistent and repeated in similar circumstances ... . Evidence of habit only provides a basis for the jury to draw an inference, but it cannot be the basis for judgment as a matter of law ...". ***Guido v. Fielding*, 2020 N.Y. Slip Op. 06391, First Dept 11-10-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF STEPPED INTO A TRENCH WHICH HAD BEEN FILLED WITH SOFT SOIL AND SANK DOWN TO ABOVE HIS KNEE; SUMMARY JUDGMENT ON PLAINTIFF'S LABOR LAW § 240(1) CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined plaintiff's motion for summary judgment on the Labor Law § 240(1) cause of action should have been granted. Plaintiff stepped into a trench that had been filled with soft soil and sank into the soil past his knee: "It is undisputed that no safety devices were provided to plaintiff to protect him against the gravity-related risk of descending a significant distance into the trench. Thus, plaintiff established prima facie his entitlement to partial summary judgment on the Labor Law § 240(1) claim ... . The elevation differential between the ground level and the lower level to which plaintiff's foot and leg sank is analogous to the risk that a worker standing on a platform on a body of water would fall into the water, which we have found to be covered by Labor Law § 240 ... . Defendants failed to submit evidence that no safety devices could have prevented the accident ...". ***Sunun v. Klein*, 2020 N.Y. Slip Op. 06471, First Dept 11-12-20**

PERSONAL INJURY.

THE EMERGENCY DOCTRINE PROTECTED THE TRANSIT AUTHORITY FROM LIABILITY IN THIS BUS-PASSENGER INJURY CASE; THE DRIVER TESTIFIED HE BRAKED SLIGHTLY WHEN A CAR WAS IN FRONT OF THE BUS MAKING A RIGHT TURN.

The First Department, affirming Supreme Court but on different grounds, determined the New York City Transit Authority's (NYCTA's) motion for summary judgment in this bus-passenger injury case. Plaintiff alleged he fell when the bus stopped in an unusual and violent manner. The First Department applied the emergency doctrine to affirm summary judgment in favor of the NYCTA. The bus driver testified he slightly touched the brake when a car was in front of the bus mak-

ing a right turn: “The emergency doctrine recognizes that when an actor is faced with a sudden, unexpected circumstance leaving little or no time for deliberation, ‘the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context’ ... . Under the doctrine, a person faced with an emergency ‘cannot reasonably be held to the same accuracy of judgment or conduct as one who has had full opportunity to reflect, even though it later appears that the actor made the wrong decision’ ... . Further, ‘[w]hile it is often a jury question whether a person’s reaction to an emergency was reasonable, summary resolution is possible when the individual presents sufficient evidence to support the reasonableness of his or her actions and there is no opposing evidentiary showing sufficient to raise a legitimate issue of fact on the issue’ ... . [P]laintiff failed to submit any evidence tending to show that Williams [the bus driver] created the emergency or could have avoided plaintiff’s fall by other means than slightly stepping on the brake ...”. ***Castillo v. New York City Tr. Auth.*, 2020 N.Y. Slip Op. 06447, First Dept 11-12-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANT TRIPPED OVER A PIECE OF PIPE STICKING OUT OF THE FLOOR AND FELL INTO THE UNGUARDED ELEVATOR MECHANISM; THE DEFECT WAS NOT TRIVIAL AS A MATTER OF LAW AND DEFENDANT’S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The First Department, reversing Supreme Court, determined defendant’s (19 Realty’s) motion for summary judgment should not have been granted on the ground that the piece of pipe sticking out of the floor, over which plaintiff tripped, was a trivial defect. The pipe stub was near unguarded elevator mechanisms in the elevator room of an apartment building. Plaintiff fell into the mechanism and the injuries to his hand required amputation. The court noted that the size of a defect is not the proper criteria for determining whether a defect is trivial, and further noted the defendant had notice of the defect because it had been there since 2007: “ ‘[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury’ ... . ‘A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact’ ... . Moreover, ‘there is no minimal dimension test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable,’ and therefore ‘granting summary judgment to a defendant based exclusively on the dimension[s] of the . . . defect is unacceptable’ … . The cases recognize that ‘a holding of triviality [must] be based on all the specific facts and circumstances of the case, not size alone’ ... . Here, 19 Realty failed to meet its prima facie burden of establishing that the pipe stub defect was trivial and nonactionable, given that the surrounding circumstances included the unguarded and exposed hoist and moving cables of the elevator cars, which magnified the risk the pipe stub posed and rendered the raised pipe stub more dangerous than it might otherwise have been. Moreover, both 19 Realty and the court below improperly relied almost exclusively on the size of the pipe stub, which the Court of Appeals has held is not the proper analysis (see Hutchinson, 26 NY3d at 77) ...”. ***Arpa v. 245 E. 19 Realty LLC*, 2020 N.Y. Slip Op. 06444, First Dept 11-12-20**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE.

THE ORDER DISMISSING THE COMPLAINT FOR FAILURE TO PROSECUTE DID NOT DESCRIBE THE SPECIFIC CONDUCT CONSTITUTING NEGLECT BY THE PLAINTIFF AS REQUIRED BY CPLR 3216; PLAINTIFF’S MOTION TO VACATE THE ORDER SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff’s motion to vacate the order dismissing the complaint for failure to prosecute should have been granted because the conditions required by CPLR 3216 were not met: “A court may not dismiss a complaint for want of prosecution pursuant to CPLR 3216 on its own initiative unless certain conditions precedent have been complied with, including the requirement that ‘where a written demand to resume prosecution of the action is made by the court . . . ‘the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation’ ... . Here, the Supreme Court should have granted the plaintiff’s motion, among other things, to vacate the ... order, as that order failed to set forth the specific conduct constituting neglect by the plaintiff ...”. ***Wells Fargo Bank, N.A. v. Brown*, 2020 N.Y. Slip Op. 06576, Second Dept 11-12-20**

CIVIL PROCEDURE, FORECLOSURE.

PLAINTIFF'S MOTION TO EXTEND THE TIME TO SERVE THE DEFENDANT PURSUANT TO CPLR 306-B SHOULD HAVE BEEN GRANTED IN THE INTEREST OF JUSTICE; IF A PLAINTIFF IS NOT ENTITLED TO EXTEND TIME FOR GOOD CAUSE, THE COURT SHOULD GO ON TO CONSIDER WHETHER THE MOTION SHOULD BE GRANTED IN THE INTEREST OF JUSTICE.

The Second Department, reversing Supreme Court, determined plaintiff's motion to extend the time to serve defendant should have been granted in the interest of justice. The court described the difference between the "good cause" and "interest of justice" analyses and indicated that if a court finds relief is not warranted for good cause, the interest of justice analysis should then be considered: "Pursuant to CPLR 306-b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service of the summons and complaint for good cause shown or in the interest of justice ... . 'Good cause' and 'interest of justice' are two separate and independent statutory standards' ... . 'To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service' … . If good cause for an extension is not established, the court must consider the broader interest of justice standard of CPLR 306-b ... . In considering the interest of justice standard, 'the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statutes of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant'" ... . Although the plaintiff failed to establish good cause for an extension of time to serve the defendant under CPLR 306-b, it established that an extension of time to serve the defendant was warranted in the interest of justice. The plaintiff established, among other things, that it has a potentially meritorious cause of action, that it promptly moved for an extension of time to serve the summons and complaint after the defendant challenged service on the ground that it was defective, and that there was no demonstrable prejudice to the defendant as a consequence of the delay in service ...". ***Wells Fargo Bank, N.A. v. Ciafone*, 2020 N.Y. Slip Op. 06580, Second Dept 11-12-20**

CONTRACT LAW, CIVIL PROCEDURE, EVIDENCE.

FEDERAL TAX RETURNS AND EMAILS DID NOT CONSTITUTE DOCUMENTARY EVIDENCE WITHIN THE MEANING OF CPLR 3211(a)(1); THE MOTION TO DISMISS BASED ON DOCUMENTARY EVIDENCE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss based upon documentary evidence pursuant to CPLR 3211(a)(1) should not have been granted. Defendants submitted federal income tax returns to demonstrate the amount owed under the contract at issue: "In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(1), 'the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law' ... . Further, where a court considers evidentiary material in the context of a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint may only be dismissed when 'it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said to that no significant dispute exists regarding it' ... . {The business's] federal income tax return, submitted by the defendants in support of their motion to dismiss, was insufficient to utterly refute [the] allegation that [the business's] 2016 profits exceeded the sum reported therein as 'ordinary business income,' and to prove that this allegation was 'not a fact at all.' Among other things, ... the accuracy of the tax return [was disputed] ... . While the defendants additionally submitted certain email correspondence ... , these emails were not "documentary evidence" within the intendment of CPLR 3211(a)(1) ...". ***Lessin v. Piliaskas*, 2020 N.Y. Slip Op. 06515, Second Dept 11-12-20**

CONTRACT LAW, LIEN LAW, CIVIL PROCEDURE.

PLAINTIFF HOME IMPROVEMENT CONTRACTOR DID NOT ALLEGE HE WAS LICENSED IN ROCKLAND COUNTY; DEFENDANT'S MOTION TO DISMISS THE CAUSES OF ACTION TO FORECLOSE ON A MECHANIC'S LIEN AND BREACH OF CONTRACT FOR FAILURE TO STATE A CAUSE OF ACTION SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's motion to dismiss the breach of contract action brought by defendant home improvement contractor should have been granted because the complaint did not allege plaintiff was licensed as a home improvement contractor: "... [The plaintiff commenced this action against the defendant, alleging that the parties had cohabited and shared an intimate relationship over a period of approximately two years, and that the plaintiff had performed extensive home improvement contracting work on the defendant's residence in Rockland County during that period in reliance on the defendant's promise that he would be reimbursed for the work following the impending sale of the residence. Claiming that the defendant had subsequently reneged on their arrangement, the plaintiff sought to foreclose a mechanic's lien he had filed against the residence, to recover damages for breach of contract, to recover in quantum meruit, and to impose a constructive trust over the residence. The defendant thereafter moved, inter alia, pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action on the ground, among others, that the plaintiff was not a licensed home improvement contractor in Rockland County. ... We reject the plaintiff's contention that the licensing requirement of CPLR 3015(e) did not apply herein. According to the plaintiff's allegations, he clearly engaged

in home improvement contracting work, and he conceded that the cause of action to foreclose a mechanic's lien could not survive the defendant's challenge pursuant to CPLR 3211(a)(7) because he was not a licensed home improvement contractor in Rockland County. Moreover, the complaint did not allege that he was duly licensed in Rockland County during the relevant time period (see Code of the County of Rockland, chapter 286, § 3), and the plaintiff never disputed that he did not possess the necessary license. Thus, the causes of action to foreclose a mechanic's lien, to recover damages for breach of contract, and to recover in quantum meruit should have been dismissed pursuant to CPLR 3211(a)(7) ...". ***Cunningham v. Nolte*, 2020 N.Y. Slip Op. 06493, Second Dept 11=12=20**

CONTRACT LAW, REAL PROPERTY LAW.

ALLEGED CONTRACTS FOR THE SALE OF REAL PROPERTY DID NOT SATISFY THE STATUTE OF FRAUDS.

The Second Department, reversing Supreme Court, determined the alleged agreements to sell real property did not satisfy the statute of frauds: " 'Pursuant to General Obligations Law § 5-703(2), a contract for the sale of real property 'is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing' ... . 'A writing satisfies the statute of frauds if it identifies the parties to the transaction, describes the properties to be sold with sufficient particularity, states the purchase price and the down payment required, and is subscribed by the party to be charged' ... . Moreover, 'a memorandum evidencing a contract and subscribed by the party to be charged must designate the parties, identify and describe the subject matter, and state all of the essential terms of a complete agreement' ... . 'In a real estate transaction, the essential terms of a contract typically include the purchase price, the time and terms of payment, the required financing, the closing date, the quality of title to be conveyed, the risk of loss during the sale period, and adjustments for taxes and utilities'... . ... [T]he alleged contract did not satisfy the statute of frauds, as it did not contain the essential terms typically included in a contract for the sale of real property, including the purchase price, the time and terms of payment, the required financing, the closing date, the risk of loss during the sale period, and adjustments for taxes and utilities ... . Additionally, the alleged contract was not signed by the defendant Michael Israel, and it indicated that several of the properties were co-owned by other individuals who also were not signatories to the document ... . Further, the emails relied upon by the plaintiff to demonstrate that the parties reached a complete agreement were between the parties' attorneys, and there was neither an allegation in the complaint nor any evidence in the record that the attorneys were authorized in writing to bind the parties to a contract of sale ...". ***Ehrenreich v. Israel*, 2020 N.Y. Slip Op. 06499, Second Dept 11-12-20**

CRIMINAL LAW.

THE COURT WAS NOT AUTHORIZED TO SENTENCE DEFENDANT AS A SECOND VIOLENT FELONY OFFENDER BECAUSE DEFENDANT WAS CONVICTED OF AN A FELONY; THE LENGTH OF DEFENDANT'S SENTENCE, HOWEVER, IS NOT AFFECTED.

The Second Department noted the court was not authorized to sentence defendant as a second violent felony offender because he was convicted of an A felony: "... [T]he Supreme Court was not authorized to adjudicate the defendant a second violent felony offender, as the instant conviction was for a class A felony rather than a class B, C, D, or E felony (see Penal Law §§ 70.02[1]; 70.04[1][a]). Therefore, we vacate the defendant's adjudication as a second violent felony offender. "However, since the statutory sentencing parameters for a second violent felony offender do not include any specifications as to proper sentences for a class A felony because that crime is more serious than the crimes specified in those parameters, the error could not have affected the sentence imposed to the defendant's detriment" ... . Furthermore, contrary to the defendant's contention, the sentencing limitations provided in Penal Law § 70.30(1)(e) do not apply where the two or more crimes include, as here, a class A felony (see Penal Law § 70.30[1][e][i] ...)." ***People v. Bell*, 2020 N.Y. Slip Op. 06540, Second Dept 11-12-20**

CRIMINAL LAW.

INCLUSORY CONCURRENT COUNTS DISMISSED; POSSESSION OF A WEAPON SENTENCE SHOULD BE CONCURRENT WITH THE ATTEMPTED MURDER AND ASSAULT SENTENCES.

The Second Department determined three inclusory concurrent counts must be dismissed and the possession of a weapon sentence should run concurrently with the attempted murder and assault sentences: "... [T]he defendant's convictions of assault in the second degree under Penal Law § 120.05(1) and (2) must be dismissed as lesser included concurrent counts of assault in the first degree under Penal Law § 120.10(1) (see CPL 300.40[3][b] ...). Additionally, the conviction of burglary in the second degree under Penal Law § 140.25(2) must be dismissed as a lesser included concurrent count of burglary in the first degree under Penal Law § 140.30(4) ... , and the conviction of criminal possession of a firearm under Penal Law § 265.01-b(1) must be dismissed as a lesser included concurrent count of criminal possession of a weapon in the second degree under Penal Law § 265.03(1)(b) ... . We agree with the defendant that the resentence imposed on the conviction of criminal possession of a weapon in the second degree under count 8 of the indictment must run concurrently with the resentences imposed on the convictions of attempted murder in the second degree and assault in the first degree, which related to the

same complainant ... . The People's theory under count 8 of the indictment pertained specifically to that complainant, and the jury was charged accordingly ...". ***People v. Mahon*, 2020 N.Y. Slip Op. 06550, Second Dept 11-12-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

DNA FOUND ON THE MURDER VICTIM'S BODY WAS LINKED TO THE DEFENDANT WHO WAS ARRESTED TWO YEARS AFTER THE MURDER; THERE WAS NO OTHER EVIDENCE CONNECTING DEFENDANT TO THE VICTIM OR TO THE AREA WHERE THE VICTIM WAS FOUND; THE SECOND DEPARTMENT, OVER AN EXTENSIVE DISSENT, FOUND THE EVIDENCE LEGALLY INSUFFICIENT TO SUPPORT THE CONVICTION.

The Second Department, reversing defendant's murder conviction, over an extensive dissent, determined the evidence was legally insufficient. Defendant was arrested two years after the victim's death based upon DNA found on the victim. No evidence placing defendant near the scene of the crime was presented: "On the morning of October 3, 2013, the 23-year-old victim, who had a history of drug use, was found dead in a wooded area known as Froehlich Farms, in Suffolk County. The victim's injuries, as well as the condition in which her body was found, indicated that she had been sexually assaulted and killed by strangulation within 12 hours to a day before her body was found. More than two years after her death, the defendant was charged with murder in the second degree after his DNA profile was matched to a single source partial profile generated from various swab samples taken as part of a sexual assault kit performed on the victim. At the trial, the People presented no evidence placing the defendant at or near the scene of the crime, or linking him in any way to the victim, during the critical time frame in which the murder was believed to have occurred. Nor did the People offer any evidence showing that the sexual contact between the defendant and the victim occurred at or near the time of the murder. At most, the DNA evidence established, beyond a reasonable doubt, that the defendant had sexual contact with the victim at some unspecified time and place." ***People v. Romualdo*, 2020 N.Y. Slip Op. 06559, Second Dept 11-12-20**

EMPLOYMENT LAW, HUMAN RIGHTS LAW, CIVIL PROCEDURE.

PLAINTIFF ALLEGED SHE WAS FIRED AFTER REJECTING THE SEXUAL ADVANCES OF HER MANAGER IN THIS HUMAN RIGHTS LAW EMPLOYMENT DISCRIMINATION ACTION; PLAINTIFF WAS ENTITLED TO DISCLOSURE OF THE RECORDS OF OTHER EMPLOYEES WHO ENGAGED IN THE CONDUCT FOR WHICH PLAINTIFF WAS OSTENSIBLY FIRED (TARDINESS).

The Second Department, reversing Supreme Court, determined plaintiff in this New York State and New York City Human Rights Law action (alleging plaintiff was terminated after rejecting the sexual advances of her manager) was entitled to the records of other employees who engaged in the conduct for which plaintiff was ostensibly fired (tardiness): " 'A plaintiff can establish a prima facie case of discrimination in employment by showing that '(1) [he or] she is a member of a protected class; (2) [he or] she was qualified to hold the position; (3) [he or] she was terminated from employment . . .; and (4) the discharge . . . occurred under circumstances giving rise to an inference of discrimination' ... . 'A showing of disparate treatment—that is, a showing that the employer treated plaintiff less favorably than a similarly situated employee outside [of] his protected group—is a recognized method of raising an inference of discrimination for purposes of making out a prima facie case' ... . 'Whether two employees are similarly situated ordinarily presents a question of fact for the jury' ... . When plaintiffs seek to draw inferences of discrimination by showing that they were similarly situated in all material respects to the individuals to whom they compare themselves, their circumstances need not be identical, but there should be a reasonably close resemblance of facts and circumstances' ... . The key is that they be 'similar in significant respects' ... . Since the plaintiff alleges disparate treatment and seeks to raise an inference of discrimination, she is entitled to discovery of documents regarding other employees who engaged in conduct similar to that for which she was terminated, as such documents may indicate that some or all of those employees were not terminated and may have been disciplined less severely or not at all ...". ***Diaz v. Minhas Constr. Corp., LLC*, 2020 N.Y. Slip Op. 06496, Second Dept 11-12-20**

FAMILY LAW, CONTRACT LAW.

PLAINTIFF FAILED TO DEMONSTRATE THE SEPARATION AGREEMENT WAS UNCONSCIONABLE AS A MATTER OF LAW; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff failed to demonstrate the separation agreement was unconscionable as a matter of law and plaintiff's motion for summary judgment, therefore, should not have been granted. The court outlined the analytical criteria for unconscionability in this context: " 'A separation agreement or stipulation of settlement which is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or ... . However, because of the fiduciary relationship existing between spouses, a marital agreement should be closely scrutinized and may be set aside upon a showing that it is unconscionable or the result of fraud or where it is shown to be manifestly unjust because of the other spouse's overreaching ...' . 'In general, an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforc[ea]ble because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party' ... . 'This definition reveals two major elements which have been labeled by commentators, procedural and substantive unconscionability.

The procedural element of unconscionability concerns the contract formation process and the alleged lack of meaningful choice; the substantive element looks to the content of the contract, per se' ... . A reviewing court examining a challenge to a separation agreement 'will view the agreement in its entirety and under the totality of the circumstances' ...". ***Eichholz v. Panzer-Eichholz*, 2020 N.Y. Slip Op. 06500, Second Dept 11-12-20**

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

THE BANK'S PROOF OF COMPLIANCE WITH THE NOTICE PROVISIONS OF RPAPL 1304 WAS SUFFICIENT, BUT THE BANK'S PROOF OF STANDING TO BRING THE FORECLOSURE ACTION WAS NOT SUFFICIENT; THE BANK'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the bank's proof of compliance with Real Property Actions and Proceedings Law (RPAPL) 1304 was sufficient, but the bank's proof of standing to bring the foreclosure action was insufficient: "… [T]he plaintiff demonstrated, prima facie, that it complied with RPAPL 1304 ... . The plaintiff submitted the affidavit of a person employed by the plaintiff as a business operations analyst, who described the procedure by which mailings were documented in a correspondence log, and laid a foundation for consideration of business records he submitted. Annexed to the affidavit was a copy of excerpts of the correspondence log, which indicated that notices pursuant to RPAPL 1304 were sent to the defendant by certified and first-class mail. The plaintiff also submitted, inter alia, a copy of an envelope addressed to the defendant bearing a USPS certified mail barcode, and a copy of an envelope addressed to the defendant bearing a USPS first-class mail barcode, along with copies of the RPAPL 1304 notices sent to the defendant. ... [T]he plaintiff submitted a copy of the note, along with a paper, which was labeled an allonge, containing an endorsement in blank. However, the plaintiff did not submit evidence to indicate that the purported allonge was so firmly affixed to the note so as to become a part thereof, as required under UCC 3-202(2) ... . Moreover, at the time the action was commenced, the plaintiff appended a copy of the note to the complaint, but the plaintiff did not append a copy of the purported allonge ... . The affidavits submitted by the plaintiff do not eliminate triable issues of fact as to whether the plaintiff was in possession of the note at the time the action was commenced. Therefore, the plaintiff failed to establish, prima facie, that it had standing to commence the action ...". ***Citimortgage, Inc. v. Ustick*, 2020 N.Y. Slip Op. 06489, Second Dept 11-12-20**

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

IN THIS LABOR LAW §§ 240(1), 241(6) AND 200 TRIAL, THE DEFENDANTS' MOTION FOR A JUDGMENT AS A MATTER OF LAW ON THE LABOR LAW §§ 240(1) AND 241(6) CAUSES OF ACTION BASED UPON THE HOMEOWNER'S EXEMPTION SHOULD NOT HAVE BEEN GRANTED, THE BETTER PRACTICE WOULD HAVE BEEN TO RESERVE ON THE MOTION AND LET THE MATTER GO TO THE JURY; AND PLAINTIFF'S MOTION TO SET ASIDE THE LABOR LAW 200 VERDICT SHOULD HAVE BEEN GRANTED BECAUSE THE VERDICT WAS INCONSISTENT; NEW TRIAL ORDERED.

The Second Department, reversing Supreme Court, determined defendants' motion for a judgment as a matter of law pursuant to CPLR 4401 should have been denied and plaintiff's motion to set aside the verdict pursuant to CPLR 4404 (a) in this Labor Law §§ 240(1), 241(6) and 200 scaffold-fall case should have been granted. The defendants' motion to dismiss the Labor Law § 240(1) and 241(6) causes of action were because the court found defendants exempt pursuant to the homeowner exemption. Plaintiff moved to set aside the verdict because the jury found the defendant homeowner (Nielson) was negligent in striking the scaffold with a Bobcat, but also illogically found the negligence was not the proximate cause of the accident: "Contrary to the Supreme Court's determination, we conclude that different inferences could be drawn from the evidence on the issue of whether Nielson had authority to or exercised authority to direct or control the work. Affording the plaintiff the benefit of every favorable inference and considering the evidence in the light most favorable to the plaintiff, there was a rational process by which a jury could find that the defendants were not exempt from liability by reason of the homeowner exemption under Labor Law §§ 240(1) and 241(6), and could find that they were liable under Labor Law § 200 ... . We note that, in the interest of judicial economy, the better practice would have been for the Supreme Court to reserve determination on the motion for a directed verdict on the Labor Law causes of action, and allow those causes of action to go to the jury. 'There is little to gain and much to lose by granting the motion for judgment as a matter of law after . . . the evidence has been submitted to the jury and before the jury has rendered a verdict. If the appellate court disagrees, there is no verdict to reinstate and the trial must be repeated' ... . Assuming that Nielson struck the scaffold with the Bobcat, which was the only theory of common-law negligence presented by the plaintiff, then it is logically impossible under the circumstances to find that such negligence was not a substantial factor in causing the accident. Thus, the issues of negligence and proximate cause were so inextricably interwoven as to make it logically impossible to find Nielson negligent without also finding proximate cause." ***Brewer v. Ross*, 2020 N.Y. Slip Op. 06483, Second Dept 11-12-20**

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

WHERE A LADDER SHIFTS OR SLIDES FOR NO APPARENT REASON A VIOLATION OF LABOR LAW § 240(1) IS ESTABLISHED; DEFENDANT'S MOTION TO SET ASIDE THE VERDICT IN THIS LADDER-FALL CASE SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined the plaintiff's verdict in this Labor Law § 240(1) action should not have been set aside. Plaintiff used a ladder which kicked out from under him. The Second Department included a clear explanation of when a fall from a ladder is actionable under Labor Law § 240(1). If for example plaintiff merely loses his or her balance and falls off a stable ladder, the incident is not actionable. However, if the ladder shifts or slides for no apparent reason, the incident is actionable: "To establish a violation under Labor Law § 240(1), '[t]here must be evidence that the ladder was defective or inadequately secured and that the defect, or the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries' ... . Where, for instance, the plaintiff falls from a ladder because the plaintiff lost his or her balance, and there is no evidence that the ladder was defective or inadequate, liability pursuant to Labor Law § 240(1) does not attach ... . By contrast, where a ladder slides, shifts, tips over, or otherwise collapses for no apparent reason, the plaintiff has established a violation ... .[W]we disagree with the Supreme Court's determination to set aside the jury verdict and direct judgment as a matter of law on the ground that the plaintiff was the sole proximate cause of the accident. At the trial, the parties presented conflicting evidence as to whether adequate safety devices—namely, the CTS [the employer's] ladders and/or the scissor lift—were available, whether the plaintiff knew that he was expected to use those devices, and, if so, whether he had a good reason for choosing instead to use the non-CTS ladder ... . [C]onstruing the trial evidence in the light most favorable to the plaintiffs, there was a valid line of reasoning and permissible inferences which could have led a rational jury to conclude that the plaintiff was neither a recalcitrant worker nor the sole proximate cause of his injuries ...". ***Cioffi v. Target Corp.*, 2020 N.Y. Slip Op. 06487, Second Dept 11-12-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

THE MAJORITY FOUND PLAINTIFF'S EXPERT'S AFFIDAVIT, ALLEGING PLAINTIFF'S DECEDENT WAS GIVEN TOO MUCH MORPHINE, WAS SPECULATIVE AND CONCLUSORY; TWO DISSENTERS DISAGREED; THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN THIS MEDICAL MALPRACTICE ACTION WAS PROPERLY GRANTED.

The Second Department, affirming Supreme Court, over a two-justice partial dissent, determined the defendants' motion for summary judgment in this medical malpractice action was properly granted. The dissenters argued there was a question of fact about whether plaintiff's decedent was given too much morphine, but the majority found plaintiff's expert's affidavit speculative and conclusory on that issue: "... [T]he plaintiff relied upon the opinion of her expert that the decedent was negligently administered an overdose of morphine that caused or contributed to his death. The Supreme Court properly concluded that the expert's unsupported and speculative opinion that an overdose caused or contributed to the decedent's death was insufficient to raise a triable issue of fact, and we respectfully disagree with our dissenting colleagues' contrary conclusion. More specifically, neither the medical records nor the autopsy report indicated that the decedent suffered a morphine overdose. Further, neither the autopsy report nor the death certificate listed morphine as a cause of or contributing factor in the decedent's death. It is unclear that the plaintiff's expert even reviewed the death certificate and autopsy report, but, in any event, he did not address them or their conclusions that the decedent's death was caused by septic shock brought about by other conditions. The plaintiff's expert also failed to address the conclusion of the hospital's expert that the decedent's drop in blood pressure was related to his intra-abdominal process rather than the administration of medication. Indeed, although the plaintiff's expert noted that morphine 'can decease blood pressure and cause difficulty breathing,' he did not affirmatively state that the morphine actually caused these effects in the decedent, who was on a ventilator. Given the decedent's multiple infirmities and severely compromised condition upon his admission to the hospital, and the failure of the plaintiff's expert to address the conclusions reached in the death certificate, autopsy report, and affirmations of the defendants' experts, the opinion of the plaintiff's expert that a morphine overdose caused or contributed to the decedent's death was speculative and conclusory ...". ***Jacob v. Franklin Hosp. Med. Ctr.*, 2020 N.Y. Slip Op. 06506, Second Dept 11-12-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

STATEMENTS THAT PLAINTIFF'S DECEDENT SIGNED AN "AGAINST MEDICAL ADVICE" FORM BEFORE REFUSING TREATMENT WHICH WERE INCLUDED IN MEDICAL RECORDS AND IN THE DEPOSITIONS OF THE DOCTORS IN THIS MEDICAL MALPRACTICE ACTION WERE NOT ADMISSIBLE AS BUSINESS RECORDS, AS ADMISSIONS, AS DECLARATIONS AGAINST INTEREST, OR PURSUANT TO THE DEAD MAN'S STATUTE; DEFENSE VERDICT REVERSED AND NEW TRIAL ORDERED.

The Second Department, reversing the defendants' verdict and ordering a new trial in this medical malpractice case, determined the statements in the medical records and in depositions that plaintiff's decedent signed an "against medical advice" (AMA) form and refused admission to the hospital constituted inadmissible hearsay and were not admissible pursuant to the Dead Man's Statute (CPLR 4519): "The defendants argue that the entries in the ... Hospital records were admissible

under the business records exception to the hearsay rule. Generally, '[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]). However, 'where the source of the information on the hospital or doctor's record is unknown, the record is inadmissible' ... . This is because 'each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception' ... . Here, although the entries were germane to the decedent's diagnosis and treatment, because the record does not reflect that the source of the information in the entries was known, it cannot be established whether the source had a duty to make the statement or whether some other hearsay exception applied ... . [W]e disagree with the Supreme Court's determination that the deposition testimony of {the doctors] was admissible. 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 [doctors] were defendants at the time they gave deposition testimony, making them interested parties under the statute .... Moreover, they both testified to transactions or communications with the decedent and sought to offer that testimony against the decedent's estate." ***Grechko v. Maimonides Med. Ctr.*, 2020 N.Y. Slip Op. 06504, Second Dept 11-12-20**

MENTAL HYGIENE LAW, APPEALS.

CYNTHIA G SHOULD NOT HAVE BEEN INVOLUNTARILY CONFINED BASED UPON A FINDING SHE WAS MENTALLY ILL IN THE ABSENCE OF A HEARING; THE FINDING WAS MADE BASED SOLELY UPON CYNTHIA G'S BEHAVIOR IN THE COURTROOM; ALTHOUGH CYNTHIA G HAS BEEN RELEASED THE APPEAL WAS HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE.

The Second Department, reversing Supreme Court, determined Supreme Court should not have ruled Cynthia G was mentally ill based solely on her behavior in the courtroom without holding a hearing. Although Cynthia G has been released from the involuntary confinement ordered by Supreme Court, the appeal was heard as an exception to the mootness doctrine because situation is likely to reoccur: "On June 20, 2019, Cynthia G. was involuntarily confined to the Hospital pursuant to Mental Hygiene Law § 9.27. On June 27, 2019, Cynthia G. made an application pursuant to Mental Hygiene Law § 9.31 for a hearing on the question of need for involuntary care and treatment. While the parties appeared in court for the hearing, the Supreme Court did not hold the hearing. Rather, Cynthia G. was escorted out of the courtroom based on her behavior, which included 'yelling and screaming,' acting 'verbally aggressive,' and making 'threatening movements.' Over the objection of Cynthia G.'s counsel, the court determined that it could not proceeded with a hearing due to Cynthia G.'s behavior. The court indicated that it would deny Cynthia G.'s application for release, finding that her courtroom behavior in and of itself constituted clear and convincing evidence that she suffered from a mental illness which was likely to result in serious harm to herself or others. By order dated July 2, 2019, the Supreme Court denied Cynthia G.'s application pursuant to Mental Hygiene Law § 9.31 to compel the Hospital to release her from involuntary confinement. ... [T]he Supreme Court erred in failing to hold a hearing pursuant to Mental Hygiene Law § 9.31(c), and in determining, in effect, that Cynthia G. was mentally ill, in need of further care or treatment, and posed a substantial threat of physical harm to herself or others, without taking any testimony or evidence by either Cynthia G. or the Hospital ...". ***Matter of G.*, 2020 N.Y. Slip Op. 06525, Second Dept 11-12-20**

PERSONAL INJURY, EVIDENCE.

DEFENDANT GROCERY STORE'S MOTION FOR SUMMARY JUDGMENT IN THIS SLIP AND FALL CASE SHOULD NOT HAVE BEEN GRANTED; DEFENDANT POINTED TO GAPS IN PLAINTIFF'S PROOF INSTEAD OF AFFIRMATIVELY SHOWING IT DID NOT CREATE THE CONDITION (WATER ON THE FLOOR IN FRONT OF A VEGETABLE DISPLAY WITH MELTING ICE).

The Second Department, reversing Supreme Court, determined defendant grocery store's motion for summary judgment in this slip and fall case should not have been granted. Defendant did not affirmatively demonstrate the water on the floor did not come from melted ice in adjacent vegetable display. A defendant cannot win summary judgment by pointing to gaps in the plaintiff's proof in opposition which will not even be considered until the moving party makes out a prima facie case: "A defendant moving for summary judgment in a slip-and-fall case has the initial burden of establishing that it neither created the hazardous condition that allegedly caused the fall, nor had actual or constructive notice of that condition for a sufficient length of time to discover and remedy it ... . A defendant moving for summary judgment dismissing a complaint cannot satisfy its initial burden merely by pointing to gaps in the plaintiff's case ... . Here, the defendants failed to establish, prima facie, that they did not create the allegedly dangerous condition that caused the plaintiff's accident ... . The defendants' submissions in support of their motion failed to affirmatively demonstrate that the wet condition on the floor was

not created by water and melted ice leaking from an asparagus display, which was adjacent to the location of the plaintiff's fall." ***Lauzon v. Stop & Shop Supermarket*, 2020 N.Y. Slip Op. 06513, Second Dept 11-12-20**

PERSONAL INJURY, EVIDENCE, CIVIL PROCEDURE.

INFANT PLAINTIFF WAS IN THE ZONE OF DANGER AND WITNESSED A TRUCK STRIKE AND KILL HER BROTHER; SHE ALLEGED SEVERE EMOTIONAL TRAUMA; DEFENDANT'S DISCLOSURE DEMANDS FOR THE FACEBOOK, SNAPCHAT AND INSTRAGRAM ACCOUNTS, AS WELL AS THE PHONE NUMBERS AND ADDRESSES, OF INFANT PLAINTIFF'S FRIENDS SHOULD HAVE BEEN GRANTED.

The Second Department, reversing Supreme Court, determined defendant's disclosure demand for the Facebook, Snapchat and Instagram accounts of infant plaintiff's friends, as well and the last known addresses and phone numbers of infant plaintiff's friends should have been granted. Infant plaintiff was crossing the street with her brother when he was struck and killed by a truck allegedly owned by defendant. Infant plaintiff claimed psychological injuries based upon her being in the zone of danger and witnessing her brother's death: "... [T]he defendant demonstrated that records from the infant plaintiff's Facebook, Snapchat, and Instagram accounts were 'reasonably likely to yield relevant evidence' regarding the alleged emotional and mental trauma that the infant plaintiff suffered from as a result of the subject accident, which allegedly was, in part, evidenced by her social isolation and withdrawal ... . In addition, the defendant demonstrated that its request for the last known addresses and phone numbers of three of the infant plaintiff's friends was reasonably calculated to lead to the discovery of information bearing on the infant plaintiff's claimed mental and emotional trauma. In response, the plaintiffs do not contend that the requested disclosure was unduly burdensome, overbroad, or otherwise improper. The Supreme Court erred in finding that disclosure of the last known addresses and phone numbers of the infant plaintiff's three friends was improper because they would provide evidence that was cumulative of other evidence previously exchanged during discovery. Therefore, under the circumstances, the court improvidently exercised its discretion in denying that branch of the defendant's motion which was to compel the plaintiffs to produce the last known addresses and phone numbers of three friends of the infant plaintiff, and authorizations to obtain records from the infant plaintiff's Facebook, Snapchat, and Instagram accounts." ***Abedin v. Osorio*, 2020 N.Y. Slip Op. 06478, Second Dept 11-12-20**

PERSONAL INJURY, LANDLORD-TENANT, COURT OF CLAIMS.

THE STATE, AS AN OUT-OF-POSSESSION LANDLORD, FAILED TO DEMONSTRATE THE INDEPENDENT CONTRACTOR HIRED TO DO RENOVATIONS DID NOT CREATE THE DANGEROUS CONDITION WHICH INJURED CLAIMANT; THE STATE'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED.

The Second Department, reversing the Court of Claims, determined the defendant (New York State) was an out-of-possession landlord with respect to a public restroom at a state park. Plaintiff alleged a heavy trash receptacle fell from the wall. The Court of Claims had granted the state's motion for summary judgment. Bit the Second Department held there was a question of fact whether the independent contractor hired by the state to renovate the restroom created the dangerous condition: " 'While an out-of-possession landowner is generally not responsible for injuries that occur on its premises unless the landowner has retained control over the premises and is contractually or statutorily obligated to repair or maintain the premises or has assumed a duty to repair or maintain the premises by virtue of a course of conduct, liability may attach to an out-of-possession owner who has affirmatively created a dangerous condition or defect' ... . Here, the defendant failed to establish its prima facie entitlement to judgment as a matter of law dismissing so much of the claim as alleged negligence because it failed to submit evidence showing that the independent contractor that the defendant hired to renovate the subject restroom did not cause the alleged dangerous condition ...". ***Cintron v. State of New York*, 2020 N.Y. Slip Op. 06486, Second Dept 11-12-20**

PERSONAL INJURY, VEHICLE AND TRAFFIC LAW.

VEHICLE AND TRAFFIC LAW § 388(1), WHICH IMPOSES VICARIOUS LIABILITY ON THE OWNER OF A VEHICLE, DOES NOT PERMIT A NEGLIGENT DRIVER TO SUE THE VEHICLE OWNER FOR THE DRIVER'S OWN NEGLIGENCE.

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Chambers, determined defendant vehicle-owner's motion to dismiss the complaint should have been granted. The deceased driver's estate sued the owner of the car under the vicarious liability statute, Vehicle and Traffic Law § 388(1). The Second Department held that the statute does not permit a negligent driver to recover against the vehicle-owner for the driver's own negligence: "Vehicle and Traffic Law § 388(1) provides that '[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.' The predecessor of this provision—section 282-e of the Highway Law, which was enacted in 1924 ...—was intended to alleviate the harshness of the common law rule whereby the owner of a vehicle who merely permitted another to drive it could not be held liable for the driver's negligence unless the driver was the owner's employee or agent and was using the vehicle as part of the owner's business ... . Thus, the purpose of the new legislation was to ensure that persons injured by a negligent driver had access to 'a financially responsible insured person against whom to recover for injuries' ... . In other words, while

the driver's own negligence remained grounded in common law, the new statute simply made owners vicariously liable for injuries caused by the driver's negligence, so long as the driver was operating the vehicle with the owner's express or implied permission ... . The Legislature 'did not otherwise change any of the rules of liability,' and 'may not be presumed to make any innovation upon the common law further than is required by the mischief to be remedied' ... . In light of the history and purpose of Vehicle and Traffic Law § 388, we hold that the statute does not permit a negligent driver (or, in this case, the driver's estate) to recover damages against the owner for injuries resulting from the driver's own negligence ...". ***Shepard v. Power*, 2020 N.Y. Slip Op. 06568, Second Dept 11-12-20**

REAL PROPERTY LAW.

THE SATISFACTION OF MORTGAGE ON RECORD WHEN DEFENDANT BANK ISSUED A LOAN SECURED BY THE PROPERTY WAS FORGED AND THEREFORE VOID; DEFENDANT BANK, THEREFORE, WAS NOT PROTECTED AS A BONA FIDE ENCUMBRANCER FOR VALUE PURSUANT TO REAL PROPERTY LAW § 266.

The Second Department, reversing Supreme Court, determined Flagstar Bank was not protected as a bona fide encumbrancer for value under Real Property Law § 266. The satisfaction of mortgage that was on record when Flagstar issue a loan secured by the property was forged and therefore void, not voidable: "We disagree with the Supreme Court's determination that Flagstar's interest in the subject property was protected by its status as a bona fide encumbrancer for value under Real Property Law § 266, since the satisfaction of mortgage executed and recorded before Flagstar's issuance of a loan with respect to the subject property was determined to have been forged and was void, not merely voidable. A discharge or satisfaction of a mortgage is void at its inception when it is executed and recorded by one who has no interest in the mortgage ... . Accordingly, the forged satisfaction of mortgage in this case was not entitled to any legal effect, and Flagstar's encumbrance based on it is not protected ...". ***JPMorgan Chase Bank, N.A. v. Aspilaire*, 2020 N.Y. Slip Op. 06510, Second Dept 11-12-20**

THIRD DEPARTMENT

WORKERS' COMPENSATION.

WORKERS' COMPENSATION LAW § 35 PROVIDES A SAFETY NET FOR WORKERS WHO HAVE REACHED THE LIMIT OF WEEKS OF INDEMNITY PAYMENTS PURSUANT TO WORKERS' COMPENSATION LAW § 15.

The Third Department, reversing the Workers' Compensation Board, determined Workers' Compensation Law § 35 provides a safety net for workers who have reached the limit of weeks of indemnity payments pursuant to Workers' Compensation Law § 15: "As part of the comprehensive reforms of the Workers' Compensation Law in 2007, the Legislature amended Workers' Compensation Law § 15 (3) (w) ... . 'The amendment, in a concession to insurance carriers, capped the number of weeks that a person is eligible to receive benefits for a non-schedule permanent partial disability' ... . The 2007 legislative reforms also included the enactment of Workers' Compensation Law § 35 ... , which is 'intended to create a possible safety net for claimants who sustain a permanent partial disability and have not returned to work after they have reached their limit on weeks of indemnity payments' ... . Pursuant to Workers' Compensation Law § 35 (2), '[n]o provision of this article shall in any way be read to derogate or impair current or future claimants' existing rights to apply at any time to obtain the status of total industrial disability under current case law.' Given the plain language of this statute that a claimant's right to seek total industrial disability status at any time remains, notwithstanding other statutory provisions of article two of the Workers' Compensation Law, as well as the clear legislative intent of Workers' Compensation Law § 35 'to establish a safety net for permanent partial disability claimants who surpass their number of maximum benefit weeks' ...". ***Matter of Minichiello v. New York City Dept. of Homeless Servs.*, 2020 N.Y. Slip Op. 06433, First Dept 11-12-20**

FOURTH DEPARTMENT

ADMINISTRATIVE LAW, EDUCATION-SCHOOL LAW.

UNIVERSITY STUDENTS WERE CHARGED WITH VIOLATIONS OF THE CODE OF CONDUCT STEMMING FROM THE RELEASE OF VIDEO CLIPS DEPICTING SKITS PERFORMED AT A ROAST HELD BY A FRATERNITY; THE SKITS INCLUDED RACIAL AND RELIGIOUS SLURS AND SIMULATED SEXUAL ACTIVITY AND VIOLENCE; THE 4TH DEPARTMENT HELD THAT THE DISCIPLINARY PROCEDURES COMPORTED WITH THE RULES, THE CODE VIOLATIONS WERE SUPPORTED BY THE EVIDENCE AND THE SANCTIONS DID NOT SHOCK ONE'S SENSE OF FAIRNESS; A STRONG DISSENT ARGUED THE CODE PROVISION PURPORTING TO PROHIBIT SPEECH WHICH "THREATENS" THE "MENTAL HEALTH" OF A PERSON IS SO VAGUE THAT IT CAN NOT SUPPORT A CONVICTION.

The Fourth Department, over a dissent, affirmed Supreme Court in this Article 78 proceeding contesting the disciplinary procedures used by Syracuse University (respondent), the disciplinary provisions of the respondent's Code of Student Conduct, and the punishment imposed by respondent on the petitioners (students). The petitioners participated in a roast held by their fraternity which was videotaped. The videotaped skits "included dialogue in which students professed hatred

for persons of certain races, ethnicities, and religions while using slurs to refer to those groups, and depictions of simulated sexual activity and sexual violence directed at persons imitating women and a disabled individual." Eventually portions of the video were made public. Petitioners were afforded a group hearing and were found to have violated the charged code provisions. Sanctions which included one or two-year suspensions were imposed. After noting that private colleges are not held to constitutional free speech and due process standards, the Fourth Department determined the disciplinary procedures substantially complied with the code provisions, the evidence supported the charged code violations and the sanctions did not shock one's sense of fairness. The dissent focused on one of the charged code provisions which prohibits "[c]onduct—whether physical, verbal or electronic, oral, written or video—which threatens the mental health, physical health, or safety of any person or persons including, but not limited to hazing, drug or alcohol abuse, bullying or other forms of destructive behavior:" FROM THE DISSENT: "... [T]here is one aspect of this case that I cannot reconcile with the applicable law, namely, respondent's decision to convict petitioners of violating Section 3 of the Code. ... Section 3 empowers respondent to punish any student for "[a]ssistance, participation in, promotion of, or perpetuation of conduct—whether physical, verbal[,] electronic, oral, written or video—which *threatens* the *mental health* . . . of any person or persons" ... . * * * ... [D]oes that provision create any distinction between speech that merely offends and speech that truly harms another person's psychological, psychiatric, or neuro-cognitive functioning? ... [H]ow does Section 3 channel the factfinder's discretion so as to punish only the latter and not the former? ... [T]he staggering breadth of the provision is matched only by its indefiniteness, and it effectively serves as a systemic instrument for the suppression of any viewpoint that falls outside the zone of permissible opinion decreed by the most strident and self-righteous of the campus community. To convict petitioners under such a vague and standardless diktat is, to my mind, the very embodiment of arbitrary and capricious administrative decision-making that should be annulled under CPLR article 78 ...". ***Matter of John Doe 1 v. Syracuse Univ.*, 2020 N.Y. Slip Op. 06586, Fourth Dept 11-13-20**

ARBITRATION, CONTRACT LAW, JUDGES.

THE DISTINCTION BETWEEN DETERMINING THE VALIDITY OF AN AGREEMENT TO ARBITRATE, THE COURT'S ROLE, AND THE INTERPRETATION OF A PROVISION IN THE AGREEMENT, THE ARBITRATOR'S ROLE, EXPLAINED; THE MOTION TO COMPEL ARBITRATION SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the motion to compel arbitration should have been granted. Among several substantive issues (not summarized here) the court explained the difference between determining the validity of the arbitration agreement, the court's role, and interpreting a provision in the agreement, the arbitrator's role: "The only challenge … that plaintiff could raise in opposition to that part of defendants' motion seeking to compel arbitration is whether a valid arbitration agreement exists, which is for a court to determine ... . The challenge must be directed 'specifically to the agreement to arbitrate' … . The validity and enforceability of arbitration agreements is governed by the rules applicable to contracts generally ... . '[A] party may resist enforcement of an agreement to arbitrate on any basis that could provide a defense to or grounds for the revocation of any contract, including fraud, unconscionability, duress, overreaching conduct, violation of public policy, or lack of contractual capacity' ... . [P]laintiff failed to raise any challenge to the validity of the agreement to arbitrate. ... [P]laintiff relied on a provision in the arbitration agreement that stated that it would not apply 'to any employee represented by a labor organization ... ' which plaintiff contends shows that there was no valid agreement to arbitrate. ... [P]laintiff's contention conflates the issue of whether there is a valid agreement to arbitrate, which is for a court to decide, with the issue of the arbitrability of the dispute, which is for the arbitrator to determine. The arbitrability issue includes the interpretation of any contract provision, such as the provision exempting union employees from the arbitration agreement under certain circumstances ...". ***Basile v. Riley*, 2020 N.Y. Slip Op. 06600, Fourth De[pt 11-13-20**

CONTRACT LAW, REAL ESTATE.

ALTHOUGH CONSEQUENTIAL DAMAGES (MORTGAGE PAYMENTS, TAXES, INSURANCE, ETC.) ARE NOT USUALLY AVAILABLE WHEN A BUYER BREACHES A REAL ESTATE PURCHASE AGREEMENT BECAUSE THE SELLER REMAINS IN THE HOUSE AND THOSE COSTS ARE NOT CAUSED BY THE BREACH, THE SAME IS NOT TRUE FOR A COMMERCIAL SELLER WHO DOES NOT RESIDE IN THE HOUSE AND MUST MAKE SIMILAR PAYMENTS.

The Fourth Department, reversing Supreme Court, determined consequential damages were available to the commercial developer in this breach of a real estate purchase agreement case. Usually when a buyer breaches a purchase agreement consequential damages are not available because the seller remains in the house and the mortgage and other costs of living there have nothing to do with the breach. However, where, as here, the seller does not live in the house, the expenses association with the maintenance and care of the home after the breach are financial losses: "As a general rule, consequential damages are not available to a seller of residential real estate when the purchaser breaches the contract ... . That is because, typically, the seller 'retain[s] ownership, use and enjoyment of the premises,' and it cannot be said that the 'mortgage interest expenses, repairs or utilities paid postbreach' are proximately caused by the breach ... . Where, however, the seller is a commercial developer, the seller does not live in the home and never intends to do so. Upon the purchaser's breach, the developer begins to incur costs that reduce the profit margin. Such carrying costs may include, among other things, main-

tenance and utility costs as well as real property taxes. Whereas the ordinary residential seller, by living in the home after the purchaser's breach, receives value for the carrying costs until the subsequent sale, the commercial developer does not receive such value. Instead, the carrying costs are nothing but a financial loss." ***Chrisanntha, Inc. v. deBaptiste*, 2020 N.Y. Slip Op. 06607, Fourth Dept 11-13-20**

CIVIL PROCEDURE, EVIDENCE, MEDICAID.

A CRUCIAL DOCUMENT SUBMITTED TO PROVE THE AMOUNT OF A MEDICAID LIEN SHOULD NOT HAVE BEEN ADMITTED AS A BUSINESS RECORD; THE DOCUMENT WAS NOT CERTIFIED BY AN EMPLOYEE FAMILIAR WITH THE BUSINESS PRACTICES OF THE ENTITY WHICH PROVIDED THE DATA COLLECTED IN THE DOCUMENT.

The Fourth Department, reversing Supreme Court, determined a crucial document needed to determine the amount of a Medicaid lien should not have been admitted as a business record pursuant to CPLR 4518 and 2307. The Department of Social Services (DSS) introduced a State Department of Health (SDOH) document, a claim detail report (CDR), which collected data provided by another entity (CSRA), but the certification was not made by someone familiar with the business record-keeping practices of CSRA: "DSS sought to lay the requisite foundation for admission of the CDR as a business record by way of the certification of an SDOH employee (see CPLR 2307, 4518 [c]). The certification stated, in relevant part, 'that the annexed [CDR] is a true and accurate copy of the original [CDR], which was generated from data contained in the Adjudicated Claim File. The Adjudicated Claim File, a comprehensive computer data file, is created, maintained and transported in the form of magnetic media to the [SDOH] by CSRA, Inc. [(CSRA)], a fiscal intermediary which contracts with the [SDOH].' Thus, the certification clearly states that the data sought to be admitted in evidence via the CDR was 'created' and 'maintained' by CSRA, a third-party entity. The SDOH employee who certified the CDR did not, however, work for CSRA, i.e., the entrant of the information upon which the CDR is based. Further, although the certification stated that the CDR was 'produced' in the regular course of SDOH's business and that the data entries were 'transported' to SDOH 'at or about the time that such data [was] received and incorporated into the Adjudicated Claim File,' the SDOH employee did not establish that CSRA, as 'entrant[,] was under a business duty to obtain and record the' data reflected in the Adjudicated Claim File ... , or that he was familiar with the record-keeping practices of CSRA and that SDOH generally relied upon CSRA's records ... . At best, the certification demonstrated only that SDOH filed and retained the data created and maintained by CSRA, which fails to establish the requisite foundation ...". ***Matter of Joseph M.W. (Blake)*, 2020 N.Y. Slip Op. 06583, Fourth Dept 11-13-20**

CRIMINAL LAW, EVIDENCE.

DEFENDANT'S PRESENCE NEAR A SUSPECTED DRUG HOUSE IN A HIGH CRIME AREA GAVE RISE TO ONLY A GROUNDED SUSPICION; THE ATTEMPT TO STOP THE CAR IN WHICH DEFENDANT WAS A PASSENGER WAS NOT JUSTIFIED BY REASONABLE SUSPICION; THE MOTION TO SUPPRESS THE SEIZED EVIDENCE AND THE SHOWUP IDENTIFICATION SHOULD HAVE BEEN GRANTED; DEFENDANT'S GUILTY PLEA, WHICH ENCOMPASSED AN UNRELATED OFFENSE, WAS VACATED IN ITS ENTIRETY.

The Fourth Department, reversing Supreme Court's denial of a suppression motion and vacating defendant's guilty plea, determined defendant's presence near a suspected drug house gave rise only to a founded suspicion which would justify an approach and a common inquiry by the police. Instead, the police attempted to stop the car in which defendant was a passenger and arrested defendant after he ran into his residence. Cocaine and heroin were seized from the defendant. The Fourth Department held that all the seized evidence and the showup identification should have been suppressed. In addition, the court vacated the entire guilty plea which encompassed an unrelated offense: "A detective who could see only the front area of the residence to be searched observed multiple people whom he suspected to be customers arrive at and depart from the back area of the residence through the driveway. The detective also twice saw defendant come to the front yard of the residence to smoke a cigarette then return to the back area. Defendant eventually left the residence as a passenger in a vehicle. The detective conveyed the vehicle's plate number and direction of travel to an officer in a 'take down' car, who followed defendant and attempted to effect a stop of the vehicle by activating the patrol vehicle's lights. The vehicle in which defendant was a passenger slowed and defendant jumped out and fled on foot into his own residence, where he was arrested soon after and found to be in possession of cocaine and heroin. ... Based on defendant's proximity to a suspected drug house and his otherwise innocuous behavior ... , the officer had, at most, a 'founded suspicion that criminal activity [was] afoot,' which permitted him to approach defendant and make a common-law inquiry ... . The mere fact that defendant was located in an alleged high crime area 'does not supply that requisite reasonable suspicion, in the absence of 'other objective indicia of criminality' . . . , and no such evidence was presented at the suppression hearing' ... . [A]lthough defendant's conviction of a second count of criminal possession of a controlled substance in the fifth degree arises from a separate incident, his plea of guilty 'was expressly conditioned on the negotiated agreement that [he] would receive con-

current sentences on the separate counts to which he pleaded,' and thus the plea must be vacated in its entirety ...". ***People v. Martinez-Gonzalez*, 2020 N.Y. Slip Op. 06593, Fourth Dept 11-13-20**

CRIMINAL LAW, EVIDENCE.

THE POLICE CAR FOLLOWED DEFENDANT, FIVE FEET BEHIND HIM, AS HE WALKED THROUGH A NARROW PASSAGEWAY; THE POLICE WERE NOT IN PURSUIT (?) AND THE HANDGUN DISCARDED BY THE DEFENDANT WAS PROPERLY SEIZED.

The Fourth Department determined the police, who followed defendant in a police car as he walked through a narrow passageway (a cut-through) between two streets, were not in pursuit of defendant. Therefore the weapon discarded by the defendant was properly seized: "The evidence at the suppression hearing established that a police officer responding to the sound of gunshots observed a person walking towards him a few blocks away from the location of the incident. The officer lost sight of the person before he was able to speak with him to determine whether the person had heard the gunshots, but he relayed over the police radio a generic physical description of the person he had encountered and that person's location. Shortly thereafter, a second police officer encountered defendant not far from the radioed position. The second officer engaged defendant in a brief conversation from her patrol vehicle, after which defendant entered a nearby cut-through—i.e., a pedestrian pathway that connected two streets. When defendant first entered the cut-through, the second officer did not consider him a suspect in the shooting and he was not engaged in any unlawful activity. Nonetheless, the second officer, still in her patrol vehicle and now accompanied by another officer in a separate patrol vehicle, followed defendant along the pathway, maintaining a distance of about five feet from defendant. The cut-through was so narrow at one point that the officers would not have been able to open the doors of their patrol vehicles. When defendant reached the end of the cut-through, he removed a handgun from his pocket and ran. As he ran, defendant discarded the handgun and was thereafter arrested. * * * The police did not activate their vehicles' overhead lights or sirens, exit their vehicles, or significantly limit defendant's freedom of movement along the pedestrian path ... . Indeed, defendant remained free to keep walking down the path, even if at one point on the path he could not have turned around and traveled in the opposite direction." ***People v. Allen*, 2020 N.Y. Slip Op. 06594, Fourth Dept 11-13-20**

CRIMINAL LAW, EVIDENCE.

THE OFFICER WHO STOPPED THE CAR IN WHICH DEFENDANT WAS A PASSENGER AFTER HEARING GUN SHOTS DID NOT HAVE THE REASONABLE SUSPICION NEEDED FOR THE SEIZURE OF A VEHICLE; THE SEIZED EVIDENCE SHOULD HAVE BEEN SUPPRESSED; INDICTMENT DISMISSED.

The Fourth Department, reversing Supreme Court and dismissing the indictment, determined the police did not have reasonable suspicion justifying the stop of the car in which defendant was a passenger. The seized evidence should have been suppressed. The officer who stopped the car had heard gunshots, drove in the direction of the shots, passed two intersecting streets, and then saw defendant's car moving slowly: "Considering the 'totality of the circumstances' here ... , we conclude that the People failed to establish the legality of the police conduct ... . As noted, the People established that the police stopped the vehicle less than two minutes after hearing the shots fired, the incident occurred in the early morning hours, the police did not see any pedestrian or vehicular traffic other than the subject vehicle after the shots were fired, and the vehicle was found in proximity to the location of the shots fired. The police, however, were not given a description of the vehicle involved or even informed whether there was a vehicle involved ... , the officer did not give any testimony regarding whether he saw any pedestrian or vehicle traffic before hearing the shots fired ... , and the vehicle was not fleeing from the area where shots were fired ... . Rather, the subject vehicle was simply a vehicle that was in the general vicinity of the area where shots were heard ... . As the officer correctly recognized, the police had a founded suspicion that criminal activity was afoot to justify a common-law right to inquire ... , but they did not have the required reasonable suspicion to justify the seizure of the vehicle." ***People v. Fitts*, 2020 N.Y. Slip Op. 06654, Fourth Dept 11-13-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE PROOF DEFENDANT USED THE CONCRETE SIDEWALK AS A DANGEROUS INSTRUMENT WAS NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE; DEFENDANT PUNCHED THE VICTIM WHEN THE VICTIM WAS STANDING, THE VICTIM FELL TO THE SIDEWALK, AND DEFENDANT CONTINUED TO PUNCH THE VICTIM, CAUSING THE VICTIM'S DEATH.

The Fourth Department, reversing the reckless assault conviction, determined the allegation the defendant used the concrete sidewalk as a dangerous instrument was not supported by legally sufficient evidence: "Defendant appeals from a judgment convicting him, after a nonjury trial, of two counts of assault in the second degree (Penal Law § 120.05 [1] [intentional assault], [4] [reckless assault]), arising from an altercation during which he punched the victim in the face approximately three times, causing the victim to fall and hit his head on the concrete sidewalk, then continued to punch the victim

while he was lying on the ground unconscious. The victim died as a result of his injuries. * * * Although a sidewalk or concrete surface can be 'used' as a dangerous instrument ... , the testimony of the eyewitnesses establishes that the blows to the victim, which were delivered using a cross-wise motion, were not executed in such a way as to establish that defendant consciously disregarded a substantial and unjustifiable risk that the victim's head would have contact with the concrete ... . Under the circumstances presented, there is no 'valid line of reasoning and permissible inferences from which a rational [person]' could conclude that defendant recklessly used the sidewalk as a dangerous instrument ...". ***People v. Desius*, 2020 N.Y. Slip Op. 06611, Fourth Dept 11-13-20**

CRIMINAL LAW, EVIDENCE, APPEALS.

THE ROBBERY CONVICTION WAS AGAINST THE WEIGHT OF THE EVIDENCE; THE STOP AND FRISK OF DEFENDANT WAS NOT JUSTIFIED; THE SHOWUP IDENTIFICATION SHOULD HAVE BEEN SUPPRESSED.

The Fourth Department, reversing defendant's conviction after trial and dismissing the indictment, in a full-fledged opinion by Justice Troutman, over a concurring opinion, determined the robbery conviction was against the weight of the evidence and the showup identification should have been suppressed. The opinion is comprehensive, well worth study, and cannot be fairly summarized here: "... [T]here is considerable objective evidence supporting defendant's innocence. Defendant was found standing in a driveway half a mile from the crime scene only seven minutes after it occurred, wearing clothing different from the clothing worn by the gunman. He was not in possession of the fruits of the crime or of a firearm. There was no testimony that he was out of breath or that he displayed other signs of having recently run a distance. To the contrary, his boots were not even laced. The possibility that he changed clothes and hid the items in his companion's residence across the street was questionable in the first instance given the timing of the events, and was severely undercut by the fact that the police obtained permission to search the residence and did so without finding anything linking defendant to the crime. Furthermore, the police investigation established that a person other than defendant possessed the fruits of the robbery, particularly the victim's cell phone, and that person's act in fleeing from the police when the phone alarm sounded was indicative of consciousness of guilt ... . Other objective evidence, particularly the dog tracking, established that the gunman never turned west off of Genesee Street toward the place where defendant was found, but continued to run down Genesee Street in a southerly direction. * * * The testimony of the officer who initiated this street encounter established that he explored only 'one of' several side streets in a residential neighborhood and seized the first young black man in a hooded sweatshirt who he found. It must be plainly stated—the law does not allow the police to stop and frisk any young black man within a half-mile radius of an armed robbery based solely upon a general description. FROM THE CONCURRENCE: In my view, reversal is required here solely on the ground that Supreme Court erred in refusing to suppress the showup identification testimony because it was not sufficiently attenuated from the police officer's unlawful stop and detention of defendant ...". ***People v. Miller*, 2020 N.Y. Slip Op. 06667, Fourth Dept 11-13-20**

MEDICAL MALPRACTICE, PERSONAL INJURY, EVIDENCE.

PLAINTIFF'S EXPERTS' AFFIDAVITS WERE CONCLUSORY AND SPECULATIVE WITH RESPECT TO ONE DEFENDANT IN THIS MEDICAL MALPRACTICE ACTION; AND A SECOND DEFENDANT'S EXPERTS WERE QUALIFIED TO OFFER OPINIONS IN AREAS OUTSIDE THEIR PARTICULAR FIELDS OF SPECIALIZATION.

The Fourth Department, reversing Supreme Court in this medical malpractice action, determined plaintiff's experts' affidavits were conclusory and speculative with respect to defendant Neurological Associates and defendant Radiology Associates' experts were qualified to offer their opinions. The complaint alleged plaintiff's decedent's brain tumor was not timely detected and treated: "... [P]laintiff's experts 'failed to provide any factual basis for [their] conclusion[s]' that Neurological Associates deviated from the standard of care in surgically resecting the tumor, documenting the resection, and advising decedent as to post-operative radiation and, therefore, the experts' affidavits "lacked probative force and [were] insufficient as a matter of law to overcome" the motion with respect to those claims ... . [P]laintiff's submissions are insufficient to raise a triable issue of fact whether any ... deviation was a proximate cause of decedent's injuries ... and offered only conclusory and speculative assertions that earlier detection of recurrence and additional treatment would have produced a different outcome for decedent ... . Radiology Associates' experts, who were board certified neurosurgeons, were qualified to offer opinions on the emergency department radiology services provided to decedent ... , inasmuch as the experts 'possessed the requisite skill, training, knowledge and experience to render . . . reliable opinion[s]' in this case ... . It is well settled that '[a] physician need not be a specialist in a particular field to qualify as a medical expert and any alleged lack of knowledge in a particular area of expertise goes to the weight and not the admissibility of the testimony' ...". ***Martingano v. Hall*, 2020 N.Y. Slip Op. 06618, Fourth Dept 11-13-20**

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

DOCUMENTARY EVIDENCE SUBMITTED BY DEFENDANT SUBCONTRACTOR DEMONSTRATED IT DID NOT HAVE THE AUTHORITY TO SUPERVISE OR CONTROL THE WORK THAT CAUSED PLAINTIFF'S INJURY; THEREFORE THE LABOR LAW §§ 240(1) AND 200 CAUSES OF ACTION WERE PROPERLY DISMISSED AND THE COMMON LAW NEGLIGENCE CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED.

The Fourth Department, modifying Supreme Court, determined the documentary evidence submitted by defendant subcontractor in this Labor Law §§ 240(1), 200 and common law negligence action conclusively established defendant did not have the authority to supervise of control the work which caused plaintiff's injury. Defendant's motion to dismiss pursuant to CPLR 3211 was properly granted re the Labor Law §§ 240(1) and 200 causes of action and should have been granted re the common law negligence cause of action: "... [T]he court properly granted defendant's motion insofar as it sought to dismiss the Labor Law causes of action because defendant submitted documentary evidence 'conclusively establish[ing]' ... that, 'as a subcontractor, it did not have the authority to supervise or control the work that caused the plaintiff's injury and thus cannot be held liable under Labor Law §§ 200 . . . or 241 (6)' ... . [T]he documentary evidence belies plaintiff's allegation that he is a third-party beneficiary of the contract between his employer and defendant ... . [G]iven the documentary evidence submitted in support of defendant's motion, ... the court should have also granted the motion insofar as it sought to dismiss the common-law negligence cause of action against defendant ...". ***Eberhardt v. G&J Contr., Inc.*, 2020 N.Y. Slip Op. 06627, Fourth Dept 11-13-20**

MUNICIPAL LAW, NEGLIGENCE, IMMUNITY.

THE COUNTY DEMONSTRATED THERE WAS NO SPECIAL RELATIONSHIP WITH PLAINTIFF'S DECEDENT, THE DEFENDANTS' ACTIONS WERE DISCRETIONARY AND THEREFORE PROTECTED BY GOVERNMENTAL FUNCTION IMMUNITY, AND THERE IS NO CAUSE OF ACTION IN NEW YORK FOR NEGLIGENT INVESTIGATION; PLAINTIFF'S WRONGFUL DEATH ACTION BASED UPON THE DEFENDANTS' ALLEGED FAILURE TO PROTECT PLAINTIFF'S DECEDENT FROM ABUSE BY FAMILY MEMBERS DISMISSED.

The Fourth Department, reversing Supreme Court, determined the county's and the sheriff's motions for summary judgment in this wrongful death case should have been granted. Plaintiff alleged the defendants were aware that plaintiff's decedent was being abused by her half brother and mother and did not act to protect her. The Fourth Department held: (1) there was no special relationship between the county and plaintiff; (2) governmental immunity protected the defendants because their actions involved the exercise of discretion; (3) there is no cause of action in New York for negligent investigation or prosecution: " '[A]t the heart of most of these 'special duty' cases is the unfairness that the courts have perceived in precluding recovery when a municipality's voluntary undertaking has lulled the injured party into a false sense of security and has thereby induced him [or her] either to relax his [or her] own vigilance or to forego other available avenues of protection' ... . Here, [plaintiff's decedent's brother] did not in fact relax his own vigilance inasmuch as he made two follow-up calls to the ... caseworker asking her to reopen the investigation, and he was not induced to forego other avenues of relief ... . * * * Defendants established that the actions of the ... caseworkers 'resulted from discretionary decision-making' ... . While the caseworkers may have been negligent, they were exercising their discretion throughout the investigations ... . * * * ... '[A] claim for negligent training in investigative procedures [against the Sheriff] is akin to a claim for negligent investigation or prosecution, which is not actionable in New York' ... . Further, inasmuch as the allegations of negligent hiring, training, and supervision against the Sheriff all involved conduct requiring the exercise of the Sheriff's discretion and judgment, the Sheriff established his entitlement to the governmental function immunity defense ...". ***Maldovan v. County of Erie*, 2020 N.Y. Slip Op. 06595, Fourth Dept 11-13-20**

PERSONAL INJURY, CORPORATION LAW, CIVIL PROCEDURE, EVIDENCE.

PIERCING THE CORPORATE VEIL AND AGENCY ALLEGATIONS SUFFICIENTLY PLED VICARIOUS LIABILTY FOR NEGLIGENCE ON THE PART OF THE NURSING HOME DEFENDANTS FOR AN ASSAULT BY A RESIDENT ON PLAINTIFF'S DECEDENT; THE COMPLAINT ALSO SUFFICIENTLY ALLEGED PUBLIC HEALTH LAW VIOLATIONS; PLAINTIFF'S MOTION TO SERVE AN AMENDED COMPLAINT SHOULD HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined the complaint adequately stated negligence and Public Health Law causes of action against a nursing home facility stemming from an assault on plaintiff's decedent by another resident. The Fourth Department found the complaint adequately alleged the criteria for piercing the corporate veil, the criteria for an agency relationship among the defendants, and for a Public Health Law cause of action. The court further found plaintiff's motion to serve an amended complaint should have been granted: "... Plaintiff alleges that the ... defendants were operated in such a way 'as if they were one by commingling them on an interchangeable basis or convoluted separate properties, records or control.' Significantly, plaintiff alleged that the corporate formalities were conduits to avoid obligations to the facility's residents, and thus the allegations are sufficient to state a cause of action for negligence under a theory of pierc-

ing the corporate veil or alter ego ... . [P]laintiff's claims in the negligence cause of action that defendants are vicariously liable under theories of agency and joint venture are ... sufficiently stated. 'The elements of a joint venture are an agreement of the parties manifesting their intent to associate as joint venturers, mutual contributions to the joint undertaking, some degree of joint control over the enterprise, and a mechanism for the sharing of profits and losses' ... . 'Agency . . . is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act' ... . Plaintiff alleges in the first amended complaint that defendants acted as agents for one another and, as relevant here, that they ratified the acts of one another regarding, inter alia, operation of the facility, allocation of resources, and mismanagement of the facility. ... Plaintiff alleged that in addition to residential care, the facility provided 'health-related services,' including specialized dementia care, dietary supervision, hygiene and on-site medical and psychological care. Accepting those facts as alleged in the first amended complaint as true, and affording every possible favorable inference to plaintiff, we conclude plaintiff sufficiently alleged facts to overcome defendants' argument that the facility is an assisted living facility and not subject to those sections of the Public Health Law ...". ***Cunningham v. Mary Agnes Manor Mgt., L.L.C.*, 2020 N.Y. Slip Op. 06582, Fourth Dept 11-13-20**

PERSONAL INJURY, COURT OF CLAIMS.

50% FAULT SHOULD NOT HAVE BEEN APPORTIONED TO PLAINTIFF IN THIS WET-FLOOR SLIP AND FALL CASE; THE WATER ON THE FLOOR WAS NOT OPEN AND OBVIOUS AND THE WARNING SIGN WAS NOT VISIBLE.

The Fourth Department, modifying the Court of Claims, determined there was no basis for apportioning 50% liability to the plaintiff in this wet-floor slip and fail case. The water on the floor was not open and obvious and the warning sign was not visible. Therefore plaintiff was not at fault for walking briskly, looking forward and not using the mats on the floor: "... [P]eople are 'bound to see what by the proper use of [their] senses [they] might have seen' and act accordingly ... . Here, however, the evidence at trial established that the wet condition of the floor was not open and obvious ... and that the sign warning of a wet floor was not readily observable to claimant as he exited the elevator and proceeded, in a group, toward the front door ... . As a result, there was nothing that would have alerted claimant to any danger in walking briskly, looking forward, and walking on the bare floor instead of the available mats. ... [W]e remit the matter to the Court of Claims to direct the entry of judgment in favor of claimant in accordance with the apportionment of 100% liability to defendant." ***Smiley v. State of New York*, 2020 N.Y. Slip Op. 06635, Fourth Dept 11-13-20**

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