Decisions of Interest 2010

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Accessory Apartments; Owners Of Single Family Dwelling May Obtain Accessory Apartment Permit From Town If They Agree To Inspections By Director Of Department Of Public Safety To Determine Compliance; Subject Homeowner With Permit Found To Be In Violation Of Town Code; Town's Accessory Apartment Bureau Without Jurisdiction To Try Violation; District Court Has Jurisdiction

Matter of Stoffer v Department of Pub. Safety of the Town of Huntington (77 AD3d 305 [Aug. 17, 2010; Leventhal, Opinion; Miller, Chambers, Lott, Concurring])

This Court held that the Town of Huntington's Accessory Apartment Bureau (hereinafter the AAB), a quasi-judicial tribunal set up by the Town, did not have jurisdiction to adjudicate a violation of the Town Code of the Town of Huntington (hereinafter the Town Code) and to revoke the petitioner's accessory apartment permit on such basis. The Town's Accessory Apartment Law allowed single-family homeowners to obtain accessory apartment permits to maintain certain features on their property generally associated with multi-family dwellings. As a condition of the permit's issuance, however, homeowners, such as the petitioners, were required to agree that their premises may be inspected by the Town's Department of Public Safety (hereinafter the Department) for the purpose of determining whether the apartment is in compliance with all applicable codes, rules, and regulations. The petitioners were brought before the AAB to determine whether their permit should be revoked due to a violation of the Town Code and their unwillingness to allow the Department to further inspect the premises for compliance. Following a hearing, the AAB revoked the petitioners' permit based upon their failure to comply with the Town Code.

The Supreme Court granted the petitioners' CPLR article 78 petition and annulled the AAB's determination on the ground that the Town could not condition the use of an accessory apartment upon the requirement that a homeowner consent to a warrantless search of his or her residence. This Court affirmed, but on the alternate ground that the Town was not authorized under the New York State Constitution to create its own quasi-judicial tribunal, the AAB, to adjudicate violations of its zoning law. The Court observed that the jurisdiction issue was a prerequisite to any additional determination as to the constitutionality of the Town Code's warrantless search provisions and that since the issue

relates to the lack of subject matter jurisdiction of the AAB, this ground for relief could be waived and could be raised at any stage of the proceeding.

The Court noted that article VI, section 30 of the New York State Constitution states that the Legislature has the power to alter and regulate jurisdiction. Acting pursuant to this authority, the Legislature conferred jurisdiction upon the District Court to issue injunctions and to "impose and collect a civil penalty for a violation of state or local laws for the establishment and maintenance of housing standards, including . . . any applicable local housing maintenance codes, building codes, and health codes." The Court noted that the Penal Law and Town Law, read together, establish that the District Court has jurisdiction to adjudicate certain criminal actions (petty offenses and misdemeanors) to enforce Town Code violations. The Court stated that a violation of a zoning or building code was a misdemeanor for jurisdictional purposes, which enables both local superior courts and local criminal courts to exercise jurisdiction over such actions.

Further, the Court determined that article IX of the New York State Constitution limits a local government's power to interfere with the Legislature's authority to define the jurisdiction of the courts. Accordingly, local governments are prohibited from implementing local laws which affect the jurisdiction of the courts. In this case, the Court held that the Town was expressly prohibited from abrogating or superseding the jurisdictional framework created by the Legislature in order to adjudicate zoning violations in an administrative tribunal such as the AAB. Accordingly, the Court held that the Legislature intended to preempt local governments from creating alternative tribunals for the adjudication of such offenses, and so the AAB was without jurisdiction to adjudicate the matter.

Accidents; Medical Malpractice Action Commenced In Nassau County; Minor Injured At Camp In Wayne County, Pennsylvania, Taken To Hospital In New York; Forum Selection Clause In Camp Contract Requiring Litigation To Take Place In Wayne County Not Enforced As To Hospital Personnel

Bernstein v Wysoki (77 AD3d 241 [Aug. 24, 2010; Dickerson, Opinion; Rivera, Miller, Roman, Concurring])

A forum selection clause in a summer-camp contract, designating Pennsylvania as the forum for any action against a Pennsylvania camp and its agents, may not be enforced by personnel of a New York hospital located near the camp who treated an infant camper

brought to the hospital from the camp.

Here, the mother of a 13-year-old camper entered into a summer-camp contract with a Pennsylvania camp that contained both a medical emergency clause authorizing the camp and its assigns to exercise unlimited *in loco parentis* rights over all decisions to hospitalize, treat, and order injections, anesthesia, and/or surgery for the camper, and a forum selection clause laying venue of any dispute that may arise out of the contract, "or otherwise between the parties," in two designated Pennsylvania courts. After the camper developed a pain in his lower abdomen, he was treated by a doctor and a registered nurse employed by the camp, and then transported from Pennsylvania to a nearby New York hospital, where medical personnel examined and treated him. The camper's mother commenced a medical malpractice action in the Supreme Court, Nassau County, against the camp's employees, as well as against the hospital's employees.

Although the forum selection clause was prima facie valid, and enforceable by the camp's doctor, in his capacity as an employee and agent of the camp, the clause was not enforceable by the physicians and health-care personnel employed by the hospital. There was nothing in the contract indicating that the camp intended to use the hospital in New York or any member of its staff in the event that campers required off-camp medical services. Under these circumstances, the hospital's employees did not have a sufficiently close relationship with the camp such that enforcement of the forum selection clause by them was foreseeable to the plaintiffs by virtue of that relationship.

Accidents; Slip And Fall On Ice; Requirements for Snow Removal Company to Demonstrate Prima Facie Entitlement to Judgment as a Matter of Law; Plaintiff Failed To Raise Triable Issue of Fact as to the Applicability Of One Or More *Espinal* Exceptions

Foster v Herbert Slepoy Corp. (76 AD3d 210 [June 22, 2010; Mastro, Opinion; Fisher, Belen, Austin, Concurring])

To establish its prima facie entitlement to judgment as a matter of law dismissing a complaint in a premises liability action, a snow-removal contractor need not negate the applicability of the three situations described in *Espinal v Melville Snow Contrs.* (98 NY2d 136) in which a contractor may be held liable in tort to a noncontracting party. Rather,

unless the plaintiff expressly asserts the applicability of one of those three situations in the complaint or bill of particulars, the contractor need only establish that the injured plaintiff was not a party to or beneficiary under the subject snow-removal contract.

Although "a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs*., 98 NY2d at 138), a snow-removal contractor assumes a duty of care in tort to a noncontracting party in a premises liability action where (1) the contractor, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm, (2) where a plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced a property owner's duty to maintain the subject premises safely. In this case, the defendant established its prima facie entitlement to judgment as a matter of law merely by coming forward with proof that the plaintiff was not a party to the defendant's oral snow removal contract with the owner of the premises on which the plaintiff's accident occurred and that, therefore, the defendant owed no duty of care to the plaintiff. Although the defendant in this case did make a showing negating the applicability of one or more *Espinal* exceptions, it was not required, as part of its prima facie showing, to negate the possible applicability of any of the three exceptions set forth in *Espinal* and its progeny. The prima facie showing which must be made by a defendant on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings, as amplified by the bill or bills of particulars. Since the plaintiff never alleged facts in her complaint or in her bill of particulars which would establish the applicability of any of those exceptions, the defendant made the requisite prima facie showing, and the burden shifted to the plaintiff to come forward with evidence sufficient to raise a triable issue of fact as to the applicability of one or more of the three *Espinal* exceptions. The plaintiff failed to sustain this burden by raising a triable issue of fact in this regard.

Accidents; Automotive; Defendant Insurance Company Paid First Party Benefits Pursuant To Insurance Law § 5102(b); Defendant Seeks Inter-Company Loss Transfer Arbitration Pursuant To Insurance Law § 5105(a); Injured Party's Summary Judgment Motion Granted

Hunter v OOIDA Risk Retention Group, Inc. (79 AD3d 1 [Oct. 5, 2010; Dickerson,

Opinion; Fisher, Santucci, Chambers, Concurring])

The plaintiff, a New York resident driving a truck registered in New York, was involved in a motor vehicle accident in Connecticut with a car that was operated by a Connecticut resident and registered in Connecticut to a Connecticut resident. The truck's insurer paid the plaintiff certain "no-fault" first-party benefits (*see* Insurance Law § 5102[b]) to compensate him for medical expenses and lost earnings he incurred as a consequence of the accident. The truck's insurer attempted to recoup those benefits from the insurer of the Connecticut tortfeasors and, ultimately, to deduct those benefits from the plaintiff's recovery against those tortfeasors. This Court concluded that the insurer was not entitled to so-called inter-company loss transfer arbitration pursuant to Insurance Law § 5105(a), since that statute, by its express terms, does not provide for inter-company loss transfer under the circumstances presented here. Since the limitations on recovery in tort set forth in Insurance Law § 5104 are applicable only to accidents that occur in New York, and the tortfeasors in this action are directly liable in tort for the plaintiff's medical expenses and lost wages under Connecticut law, the Connecticut tortfeasors are not within the category of persons who "would have been liable, but for the provisions of" Insurance Law article 51 that prohibit or limit recovery in tort, inter alia, for medical expenses and lost wages.

Although Connecticut law bars the type of recoupment at issue in this case under an "anti-subrogation" statute, it was not necessary for this Court to determine whether there was a conflict between New York law, which permits such recoupment under certain circumstances, and Connecticut law, since (a) the truck's insurer was not entitled to inter-company loss-transfer arbitration pursuant to Insurance Law § 5105(a) by virtue of the express terms of that section, and (b) the applicability of that section was the only basis for relief advanced on the truck insurer's limited appeal.

Accidents; CPLR 2001; Summons And Complaint Mistakenly Filed Under Index Number In Related Proceeding Seeking Pre-Action Disclosure

MacLeod v County of Nassau (75 AD3d 57 [May 18, 2010; Covello, Opinion; Skelos, Santucci, Balkin, Concurring])

Where the plaintiffs filed a summons and complaint in a personal injury action with the appropriate clerk and within the applicable limitations period, but mistakenly filed those papers under the index number assigned to their related, previously-disposed proceeding for leave to conduct preaction disclosure, and later paid the required additional index number fee, the 2007 amendment to CPLR 2001 should have been applied so as to deem the personal injury action timely commenced as of the date of the filing of the summons and complaint under the index number assigned to the disclosure proceeding.

The plaintiffs ascertained that the County of Nassau (hereinafter the County) was the owner of certain premises at which an accident occurred. In order to frame a complaint, and to ascertain the identity of other potential tortfeasors, the plaintiffs timely commenced a special proceeding against the County for leave to conduct preaction disclosure by purchasing an index number and filing the appropriate papers with the Nassau County Clerk. The Supreme Court dismissed the proceeding approximately two months after it was commenced. Well within the one-year-and-90-day limitations period applicable to the commencement of a tort action against the County, the plaintiffs thereafter filed, with the Nassau County Clerk, a summons and complaint naming the County as a defendant and alleging that it was negligent in the maintenance of the subject premises. However, instead of paying a new filing fee and obtaining a new index number, the plaintiffs mistakenly filed the summons and complaint under the index number assigned to the disclosure proceeding. After the County interposed its answer and made discovery demands, the plaintiffs' mistake was discovered. After the limitations period applicable to the causes of action against the County had expired, the plaintiffs paid for and obtained a new index number, and filed a separate summons and complaint, identical to the previously-filed complaint, under the new index number. This Court held that the plaintiffs timely commenced their personal injury action against the County by virtue of their filing of the summons and complaint under the index number assigned to the disclosure proceeding.

This Court observed that, after the Legislature converted civil practice in various state courts, including the Supreme Court, from a commencement-by-service system to a commencement-by-filing system, the Court of Appeals decided a series of cases in which it determined that certain mistakes in the commencement of an action or a special proceeding

would warrant dismissal upon timely objection. In response, New York's Advisory Committee on Civil Practice sponsored an amendment to CPLR 2001, the purpose of which was to clarify that a mistake in the method of filing, as opposed to a mistake in what was filed, was a mistake subject to correction in the court's discretion. The Legislature approved the proposed amendment, which became effective August 15, 2007. In determining whether to invoke the remedial provisions of the amendment, and thereupon permit the correction or disregard of a mistake with respect to the commencement of an action or special proceeding, a court must address the key question of whether a substantial right of the defendant or respondent would be prejudiced. In this matter, the grant of the relief sought by the plaintiffs did not prejudice a substantial right of the County, and was necessary to ensure that the plaintiffs suffered no adverse consequences from their technical mistake in commencing this action. The County was not deprived of a viable statute of limitations defense, and its course of conduct in litigating the matter had demonstrated that it considered itself to be a defendant in a properly commenced action. In addition, contrary to the County's contention, the plaintiffs' mistake had no impact upon the Supreme Court's subject matter jurisdiction.

Accidents; Trip And Fall Over Metal Crowbar During Employment Which May Have Been Left By Painters After Day's Work; Labor Law § 200 Cause Of Action Sustained

Slikas v Cyclone Realty, LLC (78 AD3d 144 [Sept. 21, 2010; Dillon, Opinion; Fisher, Dickerson, Eng, Concurring])

Regarding a plaintiff's cause of action pursuant to Labor Law § 200, this Court held that a mislaid painter's tool on the floor of an office doorway, which the plaintiff tripped over, constituted a "premises condition," requiring the defendant owner to prove, on its summary judgment motion, that it did not create or have actual or constructive notice of the defect. This was a "premises condition," rather than a condition involving the "means and methods" of the painters' work (which would have required the defendant owner to prove a lack of authority to direct and control the work), because the accident occurred after the painters had completed their work for the day and had left the premises, transforming the

tool into a premises condition. Summary judgment in favor of the defendant property owner was not warranted because the proof submitted by the property owner in support of its motion did not establish the length of time the tool had been present on the floor as to exclude constructive notice. Summary judgment also was not warranted as the defendant property owner failed to set forth when the floor area had last been viewed and inspected prior to the plaintiff's fall.

Accidents; Trip And Fall During Employment; Homeowner's Insurance Policy; Discovery Issues

Tirado v Miller (75 AD3d 153 [May 18, 2010; Dillon, Opinion; Eng, Belen, Hall, Concurring])

This Court held that a court may decide a motion upon grounds other than those argued by the parties in their submissions where, as in this case, the motion regards a nondispositive discovery issue decided upon procedural grounds, where the court takes judicial notice of court documents within its file, and where the court's grant or denial of relief is confined to the specific family of relief sought in the motion. In this case, the defendants moved to quash certain subpoenas on the grounds of privilege and lack of relevance. In opposition, the plaintiff argued that those grounds were substantively meritless. In the order appealed from, the Supreme Court entirely by-passed the issues briefed by the parties regarding relevance and privilege. Instead, the Supreme Court noted that since the subpoenaed information was sought long after the plaintiff's filing of the note of issue and was being used as a discovery device, the discovery was untimely.

This Court affirmed, noting that the moving papers contained a general relief clause, requesting "such other and further relief as the Court may deem just and proper." This Court discussed the effect of general relief clauses, which cover circumstances where the appropriate relief is not what is specifically requested but which is close enough to enable the court to grant, as it is not too dramatically unlike the relief actually sought. This Court noted that the Supreme Court's grant of the defendants' motion to quash the subpoenas was the same relief that the defendants had actually requested in their moving papers, and only the reasoning for the grant of the application was different. Here, where there was a

general relief clause, the Supreme Court had the authority to decide the motion on the alternative ground of untimeliness, which was apparent upon taking judicial notice of the documents in its own file, including the note of issue as well as other filings which clearly demonstrated that there was no unusual or unanticipated circumstances warranting the post-note of issue discovery sought by the plaintiffs (22 NYCRR 202.21).

Accidents; Slip And Fall On Painted Curb; Summary Judgment Granted To Some Defendants But Not To Others

Walsh v Super Value, Inc. (76 AD3d 371 [June 22, 2010; Fisher, Opinion; Balkin, Hall, Austin, Concurring])

Reviewing and clarifying a line of cases regarding premises liability for injuries resulting from defective or dangerous conditions, this Court held that summary judgment was appropriate for defendants who, although responsible for creating a defective or dangerous condition, did not know or have reason to know about the danger created. In so holding, the Court recognized that in the system of liability based on fault, a defendant's knowledge — actual, constructive, or imputed — of the danger lies at the heart of the inquiry.

The plaintiff in this case, upon exiting a convenience store at a gas station, slipped on the painted curb and sustained injuries. The curb had been painted as part of the process of converting the gas station into a Shell Station. The plaintiff commenced this action against the property owner, the tenant which operated the gas station, the entity hired by the tenant to convert the gas station, the entity subcontracted to paint the curb, and Shell Oil Company and Shell Oil Products Company, LLC (hereinafter together Shell). The Supreme Court granted summary judgment dismissing the complaint as to each defendant, relying on a line of cases establishing that "a property owner's application of wax, polish, or paint to a floor, making the floor slippery, will not support a negligence action unless the manner of application was itself negligent."

This Court reexamined the above line of cases and noted that the question of whether wax, polish, or paint was in fact applied in a nonnegligent manner depends, in part, on the knowledge of those who cause the wax, polish, or paint to be applied. Someone who

knowingly makes a floor dangerously slippery, by causing wax, polish, or paint to be applied, acts negligently. The Court emphasized that the defendant's knowledge — actual, constructive, or imputed — lies at the very heart of the issues presented in this case and, more broadly, at the core of most cases involving premises liability. Notably, in cases where liability stems from a defendant's creation of a dangerous condition, "usual questions of notice" are generally irrelevant because the law assumes that the creator of the condition knows that it is dangerous. It is possible, though, "for a reasonable person acting reasonably to create a dangerous or defective condition without realizing it, and to remain ignorant of it for a period of time." If so, the issue of notice returns to the fore.

In this case, although each defendant was responsible, directly or indirectly, for the application of the paint to the curb, four of the defendants demonstrated that they did not know, nor have reason to know, that the particular paint used may be dangerously slippery when applied to a curb. However, Shell, the remaining defendant, failed to show such lack of knowledge, and thus, was not entitled to summary judgment.

Aggrievement; Defendants-Appellants Only Aggrieved By Dismissal Of Their Cross Claim For Contribution Against Codefendants-Respondents, But Not Aggrieved by Dismissal Of Complaint Against Codefendants-Respondents

Mixon v TBV, Inc. (76 AD3d 144 [June 22, 2010; Skelos, Opinion; Covello, Leventhal, Roman, Concurring])

The plaintiffs were passengers in a van owned and operated by the "van defendants" when the van was struck in the rear by a limousine owned and operated by the "limousine defendants." The Supreme Court granted the van defendants' cross motion for summary judgment dismissing the complaint insofar as asserted against them and, in effect, for summary judgment dismissing the cross claim for contribution asserted by the limousine defendants against them. The plaintiffs did not appeal from the order, but the limousine defendants did, contending that neither the complaint nor their cross claim should have been dismissed. This Court held that the limousine defendants were only aggrieved by the dismissal of their cross claim against the van defendants, but they were not aggrieved by the dismissal of the complaint against the van defendants.

Relying on *Parochial Bus Sys. v Board of Educ. of City of N.Y.* (60 NY2d 539), this

Court determined that the threshold issue of aggrievement focuses on whether *relief* was granted or withheld, and not the *reasons* therefor. The Court set forth a two-pronged definition of the concept of aggrievement which, although it might be subject to some rare exceptions, should cover the broad majority of cases. First, a person is aggrieved when he or she asks for relief but that relief is denied in whole or in part. Second, a person is aggrieved when someone asks for relief against him or her, which the person opposes, and the relief is granted in whole or in part.

Applying the second prong of that definition to the case at bar, the Court held that the limousine defendants were not aggrieved by the portion of the order that granted that branch of the van defendants' motion which was for summary judgment dismissing the complaint insofar as asserted against the van defendants, because that branch of the motion sought relief against the plaintiffs and not against the limousine defendants. However, the limousine defendants were aggrieved by that portion of the order which granted that branch of the van defendants' motion which was for summary judgment dismissing the limousine defendants' cross claim for contribution against them.

Thus, on the appeal by the limousine defendants, the reasons that supported both the dismissal of the plaintiffs' complaint and the limousine defendants' cross claim against the van defendants were subject to review. However, to the extent that the contentions of the limousine defendants regarding the trial court's reasoning had merit, the only relief available to them was the reinstatement of their cross claim against the van defendants, not the reinstatement of the plaintiffs' complaint against the van defendants.

Autopsy; Body Released To Family Without Advising Family That Brain Had Been Removed For Further Investigation; Cause Of Action Seeking Damages For Violation Of Right Of Sepulcher Sustained

Shipley v City of New York (80 AD3d 171 [Sept. 28, 2010; Mastro, Opinion; Florio, Belen, Roman, Concurring])

This Court held that the conduct of the defendant Office of the New York City Medical Examiner (hereinafter the Medical Examiner's Office) in releasing the decedent's body to his family for burial following an autopsy, without advising the family members that the decedent's brain had been removed and was being retained for further examination, and

without affording them an opportunity to delay the burial of the decedent's remains until such time as the brain could be returned to them, gave rise to a cause of action to recover damages for a violation of the right of sepulcher.

This Court examined the powers of the Medical Examiner's Office to conduct autopsies and concluded that although such powers are expansive, they are not unlimited. Public Health Law § 4215(1) provides for the burial or other appropriate disposition of a deceased person's remains after the legitimate purposes of an autopsy have been satisfied, and it safeguards the rights of the next of kin to receive those remains for burial. The statute draws no distinction between the return and burial of the body itself and of organs which may have been removed from it for further testing — both are remains which are to be properly disposed of once the examination has been completed.

The Court also examined the long-recognized common-law right of sepulcher, which gives "the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial, and . . . damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body" (*Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 31). A claim based on a violation of the right is designed to compensate the next of kin for the emotional suffering and mental anguish which they experience from the interference with their ability to properly bury their decedent.

This Court concluded that, while the New York City Medical Examiner (hereinafter the Medical Examiner) has the statutory authority to exercise his or her discretion to perform an autopsy in certain cases, and to remove and retain bodily organs for further examination and testing in connection therewith, he or she also has the mandated obligation, pursuant to Public Health Law § 4215(1) and the next of kin's common-law right of sepulcher, to turn over the decedent's remains to the next of kin for preservation and proper burial once the legitimate purposes for the retention of those remains have been fulfilled. This requirement, hardly onerous in nature, strikes an appropriate balance between the fulfillment of the legitimate scientific and investigative duties of the Medical Examiner's Office and the recognition of the long-established rights of next of kin to receive and provide final repose to the remains of their loved ones. This Court therefore held that to the extent the complaint was based on allegations that the Medical Examiner returned the decedent's body to the plaintiffs but failed to notify them of the retention of the decedent's brain, it stated a cause

of action to recover damages for the violation of the right of sepulcher.

Class Actions; Consumer Law; Enforceability Of Mandatory Arbitration Clause Must Consider Unconscionability, Adequate Notice Of Change In Terms, Viability Of Class Action Waivers And Costs Of Prosecuting An Individual Claim

Matter of Frankel v Citicorp Ins. Servs., Inc. (80 AD3d 280 [Nov. 30, 2010; Hall, Opinion; Skelos, Chambers, Lott, Concurring])

In connection with a written credit card agreement between a consumer and a credit card company, New York choice-of-law principles compelled the conclusion that the substantive laws of South Dakota—the state with the most significant contacts with the dispute under the contract—were applicable to the consumer's claims against the credit card company, thus obviating any conflict between the South Dakota choice-of-law provision contained in the contract and the approach required to be taken by a New York court. Applying the substantive law of South Dakota, this Court concluded that there was a substantial question as to whether a change in the terms of the contract unilaterally made by the credit card company, so as to compel mandatory, binding arbitration of any consumer claim under the contract and to prohibit any class actions arising from claims under the contract, was procedurally and substantively unconscionable under South Dakota law. Accordingly, the plaintiff's putative class action alleging that he and others similarly situated were erroneously charged for flight insurance must be permitted to proceed, the plaintiff may not be compelled to arbitrate his cause of action against the credit card company, and he is not prohibited, by virtue of the purported unilateral change of terms, from prosecuting his claim as a class action. The provisions of CPLR 4544, including its requirements for minimum font and type size in consumer contracts, must be regarded as a substantive contractual requirement rather than a procedural rule of the forum and, thus were inapplicable. Nonetheless, the typeface in the arbitration change-in-terms notice was relevant to the issue of unconscionability under substantive South Dakota law.

Colored Pistols; CPLR Article 78; Owners Challenge Enforcement Of Nassau County Amended Ordinance Banning "Deceptively Colored" Handguns; Petition Granted; Ordinance Preempted By Penal Law § 400.00

Matter of Chwick v Mulvey (81 AD3d 161 [Dec. 28, 2010; Belen, Opinion; Mastro, Santucci, Chambers, Concurring])

An amended county ordinance banning "deceptively colored" handguns was preempted by Penal Law § 400.00, the State's comprehensive firearm licensing statute, under the doctrine of implicit field preemption. Specifically, the statute contains definitional, procedural, and regulatory provisions, which evince the Legislature's intent to occupy the field of firearms regulation in the State. Since the field was intended to be occupied by a law of statewide applicability, all local laws must be deemed to have been preempted, regardless of whether they actually conflict with the State law.

Cooperatives; Successful Bidder On Foreclosed Shares In Cooperative In Non-Judicial Auction Seeks Transfer Of Shares From Cooperative Corporation; Plaintiff's Motion For Summary Judgment Denied; Prospective Purchasers Require Board Approval

LI Equity Network, LLC v Village in the Woods Owners Corp. (79 AD3d 26 [Oct. 19, 2010; Belen, Opinion; Fisher, Leventhal, Sgroi, Concurring])

Where a successful bidder at a nonjudicial auction of foreclosed shares allocated to a residential cooperative unit seeks to close title, it is nonetheless subject to the cooperative corporation's governing documents, which, in pertinent part here, required board approval of prospective purchasers, and prohibited corporate ownership of shares. Accordingly, the successful bidder, which was a limited liability company, could not be awarded summary judgment on its cause of action for specific performance of its purchase agreement, and was properly enjoined from entering the subject cooperative apartment unit pending resolution of this action.

CPLR 511(b); Proper Procedure In Seeking A Change Of Venue; Sufficiency Of Factual Averments In Affidavit May Not Be Weighed But Facial Sufficiency of Affidavit May Be Considered In Determining Propriety Of County Selected

HVT, Inc. v Safeco Ins. Co. of Am. (77 AD3d 255 [Sept. 14, 2010; Dickerson, Opinion; Mastro, Belen, Roman, Concurring])

A court may not review the factual accuracy of an affidavit served pursuant to CPLR 511(b) by a plaintiff seeking to retain venue in the county designated in the summons, but the court is required to review the facial sufficiency of the affidavit, and the affidavit must at least allege a prima facie basis for the propriety of the county designated by the plaintiff or the impropriety of the county to which a defendant seeks a transfer.

Where a defendant contends that the place of trial designated by a plaintiff is improper, CPLR 511(b) provides a mechanism by which the defendant may serve a demand to change the place of trial to a proper county. Under that section, after the defendant has served such a demand, and absent the plaintiff's timely consent, the defendant may move to change the place of trial, and may "notice such motion to be heard as if the action were pending in the county he [or she] specified, unless plaintiff within five days after service of the demand serves an affidavit showing either that the county specified by the defendant is not proper or that the county designated by him [or her] is proper" (CPLR 511 [b]). The plaintiff's affidavit must be scrutinized to assure that it shows either that the county specified by the defendant is not proper or that the county designated by the plaintiff is proper. The mere service of such an affidavit, irrespective of its content, is insufficient to satisfy the plaintiff's burden. Although the accuracy or veracity of the factual averments set forth in such affidavits may not be weighed, the contents of the affidavits may nonetheless be considered to confirm that the averments therein do indeed "show[ ] either that the county specified by the defendant is not proper or that the county designated by [the plaintiff] is proper," as required by the statute.

CPLR 3101; No Need To Show "Special Circumstances" In Order To Obtain Documents From A Non-Party

Kooper v Kooper (74 AD3d 6 [May 11, 2010; Angiolillo, Opinion; Florio, Chambers, Lott, Concurring])

Contrary to several of this Court's prior rulings, a party no longer needs to show "special circumstances" in order to obtain documents from a nonparty during discovery. In accordance with the legislative history and statutory language of CPLR 3101, when a discovery request is directed to a nonparty, the party seeking discovery must first satisfy

the threshold requirement that the disclosure sought is "material and necessary in the prosecution or defense of an action" in order to withstand a motion to quash (CPLR 3101[a][4]). In an earlier version of the statute, CPLR 3101 required a court, in considering a motion to quash or compel compliance with a request or demand for disclosure, to find that special circumstances existed before directing disclosure from a nonparty. In 1984, however, CPLR 3101(a)(4) was amended to substitute the "on motion" and "special circumstances" language with the requirement that such disclosure may be obtained "upon notice stating the circumstances or reasons such disclosure is sought or required." Notwithstanding the liberalizing amendment, this Court continued to apply the special circumstances standard in *Dioguardi v St. John's Riverside Hosp.* (144 AD2d 333) and in numerous subsequent cases. In light of the amendment, this Court now rules that it will no longer adhere to the "special circumstances" standard when determining the propriety of discovery requests served upon a nonparty, except when the nonparty is an expert witness, the one situation in which the "special circumstances" requirement was retained in the statute (CPLR 3101[d][1][iii]). Finally, since "the circumstances or reasons" for disclosure necessarily vary from case to case, this Court declined to set forth a comprehensive list of "circumstances or reasons" warranting discovery from a nonparty.

Criminal Law; District Attorney May Properly Delegate Authority To Division Of State Police To Represent The People In A CPLR Article 78 Proceeding Challenging A Town Justice's Acceptance Of A Guilty Plea Over The People's Objection; Mandamus Granted; Plea Vacated

Matter of People v Christensen (77 AD3d 174 [Aug. 3, 2010; Angiolillo, Opinion; Mastro, Balkin, Sgroi, Concurring])

This Court held that a district attorney may properly delegate authority to the Division of New York State Police (hereinafter the Division) to commence a CPLR article 78 proceeding, on behalf of the People of the State of New York (hereinafter the People), in order to challenge a Town Justice's acceptance of a plea of guilty over the People's objection in a criminal case prosecuted by the Division. Such delegation of authority to the Division, to commence and maintain a special proceeding under these circumstances, was a "logical extension" of the "well-settled" authority of a district attorney to delegate the criminal

prosecution of Vehicle and Traffic Law offenses to the Division, as occurred in the underlying criminal case here (*see People v Soddano*, 86 NY2d 727 [1995]; *Matter of Winn v Rensselaer County Conditional Release Coomn.*, 6 AD3d 929 [2004]).

This Court further held that the Town Justice in the underlying criminal case had exceeded his statutory authority in offering and accepting the defendant's plea to a reduced Vehicle and Traffic offense without the consent of the People, as clearly required by CPL 220.10(3). Accordingly, since the provisions of CPL 220.10(3) did not afford the Town Justice any discretion to accept the plea of guilty here, without the People's consent, the People were entitled to the extraordinary relief of mandamus compelling the Town Justice to vacate the plea and restore the matter to its pre-pleading status.

Criminal Law; Failure To Submit To Jury A Lesser-Included Offense Charge In Accordance With Client's Wishes Not Constitutionally Ineffective Assistance Of Counsel

People v Colville (79 AD3d 189 [Oct. 5, 2010; Chambers, Opinion; Fisher, Santucci, Eng, Concurring])

In this criminal case, the Court held that a defendant was not deprived of his constitutional right to the effective assistance of counsel where defense counsel acceded to his client's wish not to submit to the jury a lesser-included offense charge, after fully consulting with the defendant. The defendant had stabbed the victim, claiming that it was in self-defense because the victim struck him over the head with a glass ashtray, but three witnesses testified that the altercation had ended and the victim was leaving when the defendant went into his bedroom, retrieved a knife, and then proceeded to stab the victim multiple times.

During the charge conference, defense counsel informed the trial court that the defendant did not want manslaughter in the first degree and manslaughter in the second degree to be submitted to the jury as lesser-included offenses to murder in the second degree. From the lengthy colloquy between the court, defense counsel, and the defendant, it was clear that the defendant's decision was against counsel's advice, that counsel had informed the defendant of his reasons why the lesser-included offenses should be submitted

to the jury but that the defendant was convinced that the evidence showed that he had not intended to kill the victim, and that counsel acceded to the defendant's wish. The lesser-included offenses were not submitted to the jury, and the defendant was convicted of murder in the second degree.

In analyzing whether the defendant was deprived of the effective assistance of counsel, this Court noted that a defendant retains the authority over certain fundamental decisions, while strategic decisions rest with counsel. Reviewing the American Bar Association (hereinafter ABA) Standards, an earlier edition concluded that the decision whether to submit lesser-included offenses was a fundamental one. However, more recently, the ABA changed its position, finding that it was a strategic decision. Without deciding that issue, this Court concluded that the defendant was not deprived of the effective assistance of counsel.

If the decision was a fundamental one, then the defendant made the ultimate decision. If strategic, then counsel's representation was not objectively unreasonable or less than meaningful merely because, after fully consulting with the defendant, he did not overrule the defendant's decision that lesser-included offenses should not be submitted to the jury. Counsel had acted in accordance with the ABA Standards by making a record of the circumstances, his advice and reasons, and the conclusion reached. The ABA Standards recognized that the conclusion reached would not always comport with the advice of counsel, but counsel's acquiescence to his client's decision did not render counsel's representation constitutionally ineffective.

Criminal Law; Depraved Indifference Murder; Conviction Upheld

People v DiGuglielmo (75 AD3d 206 [May 25, 2010; Lott, Opinion; Covello, Santucci, Chambers, concurring], *affd* __ NY3d __ , 2011 NY Slip Op 05364 [June 23, 2011])

This Court held that the County Court erred in granting the defendant's CPL 440 motion to vacate his 1997 conviction of depraved indifference murder for a fatal shooting that took place in the parking lot of a deli owned by the defendant's parents. The jury acquitted the defendant of intentional murder, but rejected his justification defense and found him guilty of depraved indifference murder. Witnesses testified at trial that a fight

erupted between the victim and the defendant's family. After the victim struck the defendant's father in the knee with a baseball bat, the victim started backing up as the father and the defendant's brother-in-law pursued him. At that point, the defendant ran into the deli and retrieved a handgun. Several witnesses observed that while the victim was retreating, he was holding the bat above his shoulder in a baseball "batter's stance." As the victim was still retreating, the defendant ran in front of him and, without warning, fired three shots, killing him.

Eleven years after the conviction, the County Court held an evidentiary hearing and then granted the defendant's CPL 440 motion to vacate the conviction on three grounds: (1) pursuant to CPL 440.10(1)(h) as unconstitutionally obtained with insufficient evidence of depraved indifference; (2) pursuant to CPL 440.10(1)(g) on the ground that there was newly-discovered evidence that would have changed the verdict, including that one of the witnesses saw the victim swinging the bat at the moment the victim was shot but was persuaded by undue police influence to change his story to reflect that the defendant was only holding the bat in a baseball player's stance, as other witnesses had testified; and (3) pursuant to CPL 440.10(1)(f) and (h), on the ground that the prosecution violated its duty to disclose exculpatory material consisting of the same newly-discovered evidence. On appeal by the People, this Court disagreed on all three grounds.

First, this Court held that the defendant's legal sufficiency argument should have been summarily denied since the argument had been raised and decided against him on his direct appeal from his conviction (*see* CPL 440.10[2][a]). Although the law regarding depraved indifference murder had changed subsequent to the defendant's direct appeal, the Court of Appeals has unequivocally instructed that the new depraved indifference standard is not to be applied retroactively by way of a CPL 440 motion (*see People v Jean-Baptiste*, 11 NY3d 539, 543).

Next, the Court determined that even assuming that the County Court correctly credited the testimony of the defendant's witnesses at the CPL 440 hearing, the defendant failed to meet his burden of establishing that the newly-discovered evidence was of such character as to create a probability that, had it been received at trial, the verdict would have been more favorable to the defendant. The newly-discovered evidence did not significantly increase the level of the victim's aggressiveness nor change the relevant positions and

distances between the parties. Considering the trial and newly-discovered evidence in combination, the circumstances did not support an objectively reasonable inference that a deadly strike with the bat was imminent. Finally, because the defendant's *Brady* claim (*see Brady v Maryland*, 373 US 83 [1963]) was based on the same newly-discovered evidence, the Court held that the defendant failed to meet his burden of establishing a reasonable probability that nondisclosure of the evidence affected the outcome of the trial.

Criminal Law; District Attorney's Obligation To Serve Defendants With All Orders And Applicable Court Filings

Matter of Donovan v Pesce (73 AD3d 137 [Apr. 6, 2010; Per Curiam; Prudenti, Mastro, Rivera, Skelos, Concurring], *lv denied* 15 NY3d 702 [June 29, 2010])

This Court denied a district attorney's petition to prohibit the enforcement of an Appellate Term order compelling him to personally deliver, to the defendant, the People's appellate brief in a criminal appeal pending before that court.

Here, the Criminal Court granted a criminal defendant's motion to suppress certain identification testimony, and the district attorney appealed that order to the Appellate Term. The Appellate Term directed the district attorney to serve the People's appellate brief upon the defendant by personal delivery, informed the district attorney that he could seek leave of court to effect service by alternate means if personal delivery were impracticable or impossible, and set forth circumstances under which the defendant would be deemed to have waived his right to appointed appellate counsel. The district attorney perfected the People's appeal, but there was no proof that he complied with the Appellate Term's directive to personally deliver the appellate briefs to the defendant, or sought leave to employ an alternative means of service. In denying the district attorney's petition for a writ of prohibition, this Court concluded that the Appellate Term's directive did not improperly "provide[ ] for an absolute right of personal service of the People's brief" in contravention of *People v Ramos* (85 NY2d 678, 688), in which the Court of Appeals concluded that the recognition of such a right would simply invite criminal defendants to evade service and bring about the unintended dismissal of legitimate prosecutions. Rather, by providing the

district attorney with the opportunity, upon request, to employ alternative means of service if, despite due diligence, he was unable to personally deliver the appellate briefs to the defendant, the Appellate Term did not unreasonably burden the People's right of appeal from a Criminal Court order.

Criminal Law; Penal Law § 120.10(1) And (3); Depraved Indifference Reckless Assault; Conviction Upheld

People v Douglas (73 AD3d 30 [Mar. 30, 2010; Fisher, Opinion; Mastro, Angiolillo, Leventhal, Concurring], *lv denied* 15 NY3d 804 [Aug. 20, 2010])

This Court upheld a defendant's conviction of depraved indifference reckless assault (Penal Law § 120.10[3]) even though the evidence would have also sustained a conviction of intentional assault under a theory of transferred intent (Penal Law § 120.10[1]), which count was dismissed at trial. The evidence at trial showed that the defendant fired gun shots through the window of a van in an effort to kill or injure two men with whom the defendant previously had an argument, and that he harbored no intent to harm the actual victim who was injured by the shots. This Court disagreed with the defendant's contention on appeal that his conviction of depraved indifference reckless assault was precluded by the fact that his conduct was manifestly intentional.

This Court observed that, ordinarily, a defendant cannot be guilty of both the intentional and reckless assault of the same individual because a defendant cannot intend to cause serious physical injury to a person and at the same time consciously disregard a risk that he or she will succeed in doing so. The Court determined, however, that this rule did not apply where the defendant does not harbor an intent to injure the actual victim but the crime is deemed intentional by operation of law under a theory of transferred intent. A defendant may act with a specific intent directed at one person, while at the same time being reckless with respect to a different person.

The Court reasoned that if a defendant intends to cause serious physical injury to one person, but instead causes such injury to a different person by means of a deadly weapon or dangerous instrument, the crime fits the definition of an intentional first-degree assault even though the defendant intended no harm to the person actually injured. By the same token, however, if, under circumstances evincing a depraved indifference to human

life, the defendant's efforts to injure the intended victim create a substantial, unjustifiable, and grave risk of death to a different person, and the defendant is aware of the risk but consciously disregards it and engages in the conduct anyhow, deviating grossly from the standard of conduct that a reasonable person would observe in the situation, and the defendant thereby causes serious physical injury to that other person, the act constitutes a reckless first-degree assault as well.

Criminal Law; Aggravated Harassment In Second Degree; CPL 210.05; Integrated Domestic Violence Part Has Jurisdiction To Try Misdemeanor Charges Against A Defendant In The Absence Of An Indictment Or A Superior Court Information

People v Fernandez (72 AD3d 303 [Mar. 9, 2010; Leventhal, Opinion; Mastro, Fisher, Angiolillo, Concurring], *affd sub nom. People v Correa*, 15 NY3d 213 [June 3, 2010])

This Court held that CPL 210.05 did not preclude the Integrated Domestic Violence (hereinafter the IDV) Part of the Supreme Court from exercising its jurisdiction under the New York State Constitution to try misdemeanor charges against a defendant in the absence of an indictment or a superior court information. In finding that CPL 210.05 did not so preclude the Supreme Court, this Court affirmed the authority of the Chief Judge and Chief Administrative Judge to create the IDV Part, wherein the Supreme Court exercises jurisdiction over nonindicted misdemeanors which are transferred to it from local criminal courts within the same county.

The Court recognized that CPL 210.05, entitled "Indictment and superior court information exclusive methods of prosecution," provides that "[t]he only methods of prosecuting an offense in a superior court are by an indictment filed therewith by a grand jury or by a superior court information filed therewith by a district attorney." Nevertheless, the Court noted that the Supreme Court of the State of New York has general original jurisdiction in law and equity under article VI, section 7(a) of the New York Constitution, and is competent to entertain all causes of action, including misdemeanors concurrent with that of the local criminal courts (*see* CPL 10.20[1]), unless its jurisdiction has been specifically proscribed. The Court noted that any attempt by the Legislature to limit this broad jurisdiction was unconstitutional and void.

The Court further examined article VI, sections 19, 28 and 30 of the New York Constitution, as well as Judiciary Law § 211, and held that these constitutional and statutory provisions, regarding the regulation and transfer of cases among the courts, conferred upon the Chief Judge and the Chief Administrative Judge the authority to promulgate rules, such as those creating and implementing the IDV Part, to transfer misdemeanor cases to the Supreme Court. Contrary to the defendant's contention, this Court held that CPL 210.05 was not intended to preclude the Supreme Court from exercising its constitutional jurisdiction to try misdemeanor charges, even in the absence of an indictment or a superior court information, nor could it. The statute is merely procedural in nature and prescribed the method and manner required for a prosecutor to invoke the Supreme Court's jurisdiction.

Criminal Law; Hotel Guest's Reasonable Expectation of Privacy Terminated When Fails To Pay Rent Or When Guest Is Ejected For Good Cause; Police Discovered Drugs And Drug Paraphernalia In Guest's Room After Being Contacted Earlier For Assistance In Ejecting Guest; Expectation Of Privacy Extinguished

People v Hardy (77 AD3d 133 [Aug. 10, 2010; Chambers, Opinion; Mastro, Santucci, Belen, concurring], *lv denied* 16 NY3d 743 [Jan. 21, 2011])

With respect to the protection afforded under the Fourth Amendment of the U.S. Constitution against unreasonable searches and seizures, this Court held that a hotel guest's reasonable expectation of privacy is terminated either when the guest fails to pay rent, unless the hotel has a policy or practice of extending the guest's stay despite the lack of payment, or when the guest is ejected for good cause.

The defendant, in this case, had been renting a room at a hotel for four nights when the police entered his room and discovered drugs and drug paraphernalia. A hotel worker had contacted the police earlier that morning for assistance in physically evicting the defendant because he had failed to pay his rent for the previous night, and she had heard loud noises and detected the odor of burnt marijuana coming from his room. Under the circumstances of this case, where the evidence clearly showed that the hotel had already allowed the defendant to continue his occupancy despite his failure to timely pay for a

previous night, the Court concluded that the defendant's reasonable expectation of privacy was not extinguished due to his nonpayment of rent.

Nevertheless, the Court concluded that the hotel possessed good cause for evicting the defendant based on the loud noise and odor of marijuana emanating from his room. Once the hotel had good cause to eject the defendant and the hotel worker contacted the police for their assistance in physically evicting him, the defendant's expectation of privacy in the room was extinguished. Therefore, the defendant lacked standing to challenge the recovery of drugs and drug paraphernalia from his room.

Criminal Law; Penal Law § 263.15 (Promoting Sexual Performance By A Child); Penal Law § 263.16 (Possessing Sexual Performance Of A Child); Procurement Of Digital Computer Images; Pattern Of Internet Browsing For Child Pornography Established

People v Kent (79 AD3d 52 [Oct. 12, 2010; Angiolillo, Opinion; Prudenti, Balkin, Chambers, Concurring])

The Court held that there was legally sufficient evidence to support the defendant's conviction of 2 counts of promoting a sexual performance by a child (Penal Law § 263.15) and 134 counts of possessing a sexual performance by a child (Penal Law § 263.16). One promoting count and one possession count were based on the theory that the defendant used his office computer to "procure" child pornography by visiting a certain Web page on the Internet (Penal Law § 263.00[5]), and then possessed that image in the automatic storage cache of his computer. The remaining counts arose from downloaded and saved images of child pornography discovered on the hard drive of the computer.

This Court noted that in order to be found guilty under Penal Law §§ 263.15 and 263.16, the act of procuring or possessing the pornographic material at issue must be knowing, not merely inadvertent or accidental. After reviewing a split in authority among federal and state courts, this Court held that a defendant cannot be found guilty of possessing or promoting child pornography merely upon evidence that a file has been automatically stored in the cache. Rather, the totality of the circumstantial evidence must be considered in distinguishing inadvertent acquisition and possession of the offending material from knowing procurement and possession.

Here, the evidence established, among other things, a pattern of Internet browsing for child pornography, the past viewing of child pornography videos, and thousands of images of scantily clad young girls saved to the computer. Scores of pornographic images had at one time been saved on the computer's allocated space, but then deleted, sending them to unallocated space, indicating the defendant's consciousness of guilt. The Court held that, under these circumstances, there was legally sufficient evidence to support the defendant's conviction of promoting and of possessing based upon the Web page stored in the cache and those discovered on the hard drive of the computer.

The Court also held that the defendant was not deprived of the effective assistance of counsel when counsel failed to move to suppress evidence that was discovered when the police searched the computer without the defendant's consent but with the consent of his employer. The evidence established that the computer was the property of the defendant's employer and thus he had no expectation of privacy in personal files stored on the hard drive.

Criminal Law; Sexual Assault Of Minor Step Grand Daughter; Sexual Offense Charges Reinstated After Being Dismissed By Trial Court As Time Barred

People v Quinto (77 AD3d 76 [Aug. 31, 2010; Belen, Opinion; Mastro, Balkin, Chambers, Concurring], *lv granted* 15 NY3d 923 [Nov. 30, 2010])

CPL 30.10(3)(f) tolls the statute of limitations for commencing a criminal action involving a sexual offense against a child less than 18 years old until either (a) the child reaches the age of 18, or (b) the offense is reported to a law enforcement agency or statewide central register of child abuse, whichever comes first. In this case, a 19 year-old girl reported to the police in 2007 that her stepgrandfather, the defendant, had engaged in sexual intercourse with her when she was 14 years old in 2002. In 2002, however, when the police were investigating the then-14 year old's pregnancy, she falsely told them that she had consensual sex with a classmate. This Court held that the statements made to the police in 2002 did not constitute a "report" to law enforcement within the meaning of CPL 30.10(3)(f) such that the tolling provisions of that statute were inapplicable.

The Court explained that there must be a nexus between the offender's conduct in the report with what is actually charged in the accusatory instrument brought by the People. The crimes alleged in the accusatory instrument must derive, at least in part, from the report. Such nexus was lacking here. In addition, upon examining the legislative history of the relevant tolling provisions, the Court noted that the complainant's 2002 statements to the police fell squarely within the legislature's concerns to protect child victims who do not report their abuse until they are young adults and, therefore, no longer under the sway of their abuser.

Since the complainant's 2002 statements to the police were not a "report" within the meaning of CPL 30.10(3)(f), the Court concluded that the felony and misdemeanor sex crimes under article 130 of the Penal Law charged in the indictment were not time-barred. However, as the tolling provisions of that statute did not apply to the non-sex related misdemeanors and violations contained in the indictment, those charges were properly dismissed as time-barred.

Criminal Law; Warrantless Entry In Apartment; Emergency Doctrine; Police Responded To Call Of A Stabbing In Progress On Fifth Floor Of Apartment Complex; Blood Trail Lead To Subject Apartment On Third Floor Justifying Warrantless Search

People v Rodriguez (77 AD3d 280 [Aug. 31, 2010; Chambers, Opinion; Rivera, Dickerson, Hall, Concurring], *lv denied* 15 NY3d 955 [Dec. 30, 2010])

The Court held that, under the circumstances of this case, the police were presented with an emergency situation that justified their warrantless entry into the defendant's apartment under the standards articulated in *Brigham City v Stuart* (547 US 398) and *People v Mitchell* (39 NY2d 173, *cert denied* 426 US 953).

Police officers responded to a radio call of a stabbing in progress on the fifth floor of an apartment complex. There, the police found the defendant who was bleeding heavily from two large stab wounds. He told the police that he was walking along the fifth floor when an unknown man stopped and stabbed him for no reason. The defendant denied that he lived in the building. After the defendant was taken to a waiting ambulance, the police discovered from the tenant who called 911 that the defendant lived in the building. The

police also followed a blood trail from the fifth floor down to the third floor, and found a significant amount of blood in front of and on the door of apartment 3L. In order to ascertain whether anyone else had been stabbed, the police asked the building's superintendent to open the apartment door since noone responded to their knocking. Upon entering the apartment, the police observed a significant amount of marijuana and cocaine, along with drug paraphernalia, which were later seized pursuant to a search warrant.

This Court disagreed with the hearing court's conclusion that the police were not presented with an emergency situation and concluded that the defendant's motion to suppress should have been denied. The Court determined that the police had a reasonable basis to conclude that the blood on the third floor may have belonged to another victim, and that the victim was in apartment 3L. Alternatively, the police had a reasonable basis to conclude, given that the defendant may have lied about living in the building, that the defendant was involved in the attack, possibly having injured someone himself, and was trying to distance himself from where the attack occurred. Further, the police had a reasonable basis, approximating probable cause, to associate the emergency with the inside of apartment 3L given the significant amount of blood on the door, as well on the threshold underneath the door. Finally, as to the subjective motivation of the police in making the warrantless entry, a test required only under state law, the stated reason for the entry, along with the other objective facts and circumstances, demonstrated that the police were primarily motivated, not to arrest or seize evidence, but to assist any other victims.

Criminal Law; Murder In Second Degree; Kidnapping In Second Degree; Robbery In First Degree; Criminal Possession Of Weapon In Second And Third Degrees; Justification Charge Rejected; Convictions Affirmed

People v Walker (78 AD3d 63 [Sept. 28, 2010; Belen, Opinion; Mastro, Santucci, Chambers, Concurring], *lv denied* 15 NY3d 956 [Dec. 21, 2010])

This Court held that, while the defense of justification may be available and asserted as to an underlying felony offense in a felony murder prosecution, it is never a defense to felony murder itself. In this case, the defendant robbed and kidnapped a number of people at gunpoint, but he allowed one of the victims to leave. That victim came back with his armed stepson and some friends, and the defendant shot and killed the stepson. This Court

affirmed the defendant's convictions for kidnapping, robbery, weapons possession, and felony murder, holding, specifically, that his request for a justification charge as to the felony murder count was properly denied as the defense is not available for such charge.

Notably, no facts suggested, nor did the defendant argue, that he had a justification defense with regard to the underlying felony offense of kidnapping. Upon examining the caselaw in New York and other jurisdictions, this Court emphasized that in the vast majority of situations, a defendant charged with felony murder is precluded as a matter of law from relying on a justification defense for that count since, having created a potentially life threatening situation, as occurred here, the defendant forfeits the right to use deadly physical force against the victim or any rescuer.

Criminal Law; Homeowner Shoots And Kills Teenager Accompanied by Several Friends; Jury's Rejection Of Justification Defense Not Against Weight of the Evidence As A Reasonable Person Would Not Believe The Teenagers Were Attempting To Enter Home to Commit Burglary; Determination That Defendant Caused Victim's Death Not Against Weight of the Evidence

People v White (75 AD3d 109 [May 18, 2010; Eng, Opinion; Fisher, Angiolillo, Lott, Concurring], *lv denied* 15 NY3d 758 [June 29, 2010])

In this case, where the 53-year-old defendant shot and killed a 17-year-old victim at the edge of the driveway of the defendant's home, this Court held that the jury's rejection of the justification defense to manslaughter in the second degree was not against the weight of the evidence. The defendant contended that, given the circumstances surrounding the shooting, and his own past experience, a reasonable person in his position would have believed that the victim and the four teenagers who accompanied the victim were attempting to enter the defendant's home to commit a burglary.

It was undisputed that the group of teenagers drove to the defendant's home to confront the defendant's son about a threat he had allegedly made against a 14-year-old girl. However, sharply conflicting evidence was presented regarding the events leading up to the shooting, the manner in which the shooting occurred, and whether race played any role in the encounter between the white youths and the African-American defendant. In finding that the verdict was supported by the weight of the evidence, this Court emphasized that the defendant acknowledged that the youths backed up toward the street once they

saw the defendant and his son. The fatal confrontation took place approximately 65 feet away from the defendant's garage and 81 feet away from his front door. The defendant observed no weapons in the hands of the teenagers who were cursing at and arguing with his son, and the unarmed teens could not have reached the garage door without first getting past the defendant, who was armed with a pistol, and his son, who was armed with a shotgun. The victim's clearly expressed desire to fight the defendant's son outside as well as the defendant's failure to call 911 (a clear alternative to confronting the youths) further undercut the defendant's claim that he reasonably believed the shooting was committed in defense of his home.

This Court also rejected the defendant's contention that the victim's death was the result of an unforeseeable, intervening event — the victim's slapping or grabbing of the gun, which accidently caused it to discharge. The jury was entitled to credit the testimony of the victim's friends, who stated that after the victim slapped the gun away, the defendant then brought the gun back up and shot the victim in the face. In any event, given the defendant's conduct in brandishing a loaded gun in front of the youths, with his finger on the trigger and with no safety mechanism engaged, and the defendant's familiarity with weapons, a determination that he caused the victim's death would not be against the weight of the evidence even if, as he claimed, the gun accidentally discharged when the victim tried to grab it away from him.

This Court was also unpersuaded by the defendant's claim that his conviction of criminal possession of a weapon in the third degree was not supported by sufficient evidence because he possessed the weapon in his "home." The "home" exception to this weapons possession charge did not apply because the defendant criminally possessed a loaded firearm at the edge of his driveway, inches away from the public street and at a considerable distance away from his home. Moreover, the defendant did not have the equivalent degree of privacy in his driveway that he would have had in his home.

The Court also rejected the defendant's contention that the trial court should have instructed the jury that it could consider whether his possession of a loaded firearm was justified as an emergency measure to avoid imminent injury pursuant to Penal Law § 35.05(2). The Court of Appeals has held that justification based on self-defense (Penal Law § 35.15) may only excuse the unlawful use of a weapon, not its unlawful possession (*see*

People v Almodovar, 62 NY2d 126, 130; *People v Pons*, 68 NY2d 264), and this Court determined that the rationale of these cases applied with equal force to justification based upon an emergency (Penal Law § 35.05[2]), as claimed by the defendant here.

Criminal Law; Conviction Reversed; Straight-Forward Case Involving A Single Alleged Hand-To-Hand Drug Sale, Evidence Of Prior Sales Not Admissible

People v Wilkinson (71 AD3d 249 [Jan. 19, 2010; Fisher, Opinion; Covello, Florio, Dickerson, Concurring])

With respect to a trial on a single charge of criminal sale of cocaine, this Court held that it was error to admit evidence that the defendant, a 65-year-old owner of a taxi service, sold drugs to the same buyer on several prior occasions. The Supreme Court allowed the People to elicit the buyer's testimony regarding the prior sales because the defense had "opened the door" to a number of defenses by asking the buyer on cross examination if he had cooperated with the prosecutor and the police only to extricate himself from his own legal difficulty. The defense had also asked if the buyer knew that a misdemeanor possession charge was less serious than a sale charge. The Supreme Court instructed the jury that it was allowing the buyer to testify as to previous transactions with the defendant in order to "complete the narrative" of events and that such evidence was not admitted to prove the defendant's propensity to commit the charged crimes.

This Court reviewed the various *Molineux* exceptions (*see People v Molineux*, 168 NY 264) and determined that none applied to the facts of this case involving a straightforward hand-to-hand drug transaction observed by an undercover detective and testified to by the alleged buyer. Most important, the concept of "completing the narrative" could not be expanded to encompass incidents far removed from the single charged crime, and the prior relationship between the buyer and the seller was irrelevant. Moreover, there was no conversation during the charged sale that rendered the alleged prior sales "inextricably intertwined" with it. And, the evidence was not admissible to prove that the detective was not mistaken in her testimony that the defendant was the seller. Accepting such an argument would be to accept what is essentially a propensity argument: that the defendant committed prior similar acts, so he must have committed this one as well. Since the error

in admitting this evidence was not harmless, this Court reversed the judgment of conviction and remitted for a new trial.

Employer/Employee; Hospital Terminates Privileges Of Physician And Affiliated Medical Group; Defense Of Immunity From Civil Liability For Results Of Peer-Review Process Pursuant To United States Health Care Quality Improvement Act Of 1986; Defendant's Motion To Dismiss the Complaint Based On Documentary Evidence Denied

Fontanetta v John Doe 1 (73 AD3d 78 [Mar. 30, 2010; Florio, Opinion; Fisher, Covello, Dickerson Concurring])

Although the United States Health Care Quality Improvement Act of 1986 (42 USC § 11101 *et seq*.) (hereinafter HCQIA) immunizes health-care providers from civil liability for actions taken in the course of a qualified peer review process, the documentary evidence required to dismiss a complaint pursuant to CPLR 3211(a)(1) on that ground must nonetheless be unambiguous and of undisputed authenticity. Where the documentation is ambiguous, of disputed authenticity, or generated pursuant to a process where bias may be inferred, the documentation will be insufficient to support dismissal pursuant to CPLR 3211(a)(1).

Here, the plaintiff is a physician whose privileges were terminated at a certain hospital. The defendants are physicians who are affiliated with the hospital, as well as a private medical group affiliated with the hospital. The plaintiff asserted that his hospital privileges were improperly terminated by the defendants, acting in concert, to further their own pecuniary interests in arrogating, to themselves and the medical group in which they allegedly have some ownership interest, all of the orthopedic cases referred to or presented at that hospital. In moving to dismiss the complaint pursuant to CPLR 3211(a)(1), the defendants argued that the plaintiff's causes of action were based upon actions they took as part of a qualified peer review process under HCQIA, and that they were, thus, immune from civil liability. In support of their motion, the defendants submitted a completely redacted morbidity report, a memorandum from the hospital's risk management department to a hospital vice-president for administration, minutes of quality improvement committee meetings, a report from the New York Patient Occurrence Report and Tracking System, an on-line report from the NYPORTS.net website, excerpts of testimony from medical staff

hearings at the hospital, excerpts from minutes of ad hoc committee hearings, attendance sheets quality assurance committee meetings, review of a chart, copies of e-mail and paper correspondence, and similar documentation.

To be considered documentary evidence, however, the proffered material must be unambiguous, and of undisputed authenticity. In other words, none of the parties to the subject action can dispute the veracity or authenticity of the proffered document or its contents. Examples of these types of documents are judicial records, as well as executed and acknowledged mortgages, deeds, contracts, and the like. On the other hand, documents generated in an adversarial context, or unilaterally generated complaints, comments, or committee minutes, are insufficient to establish the context in which they were created. Under that standard, the proof proffered by the defendants did not—with one possible minor, immaterial exception—meet the standard required under CPLR 3211(a)(1). The materials offered constituted documents created by the defendants or a third party that can be deemed conclusory, biased, based on information that could be deemed biased, based on hearsay, or not subject to review. Since these documents were not undeniable, and did not establish that the defendants were, in fact, acting pursuant to a qualified medical peer review process, the documentary evidence was insufficient to support dismissal of the complaint pursuant to CPLR 3211(a)(1).

Employer/Employee; Firefighter; Cocaine Found In Blood System After Random Drug Test; Termination Annulled And Firefighter Allowed To Retire With Pension; Must Pay One Year's Salary As Penalty

Matter of McDougall v Scoppetta (76 AD3d 338 [July 20, 2010; Austin, Opinion; Mastro, Fisher, Belen, Concurring], *lv granted* 16 NY3d 704 [Feb. 15, 2011])

The petitioner, a 25-year-member of the New York City Fire Department (hereinafter the FDNY), was found to have cocaine in his system during a random drug test. In all prior and subsequent drug tests, the petitioner was found to be drug-free. As a result of the one positive drug test, the petitioner was served with departmental disciplinary charges. Despite a recommendation that the petitioner be allowed to retire and forfeit only his salary for approximately one year, an administrative law judge sustained the charges against the petitioner and recommended termination of the petitioner's employment. The FDNY's

Commissioner accepted the recommendation, and terminated the petitioner's employment.

Upon review, this Court concluded that the penalty of termination of employment was so disproportionate as to shock the conscience of the Court and, thus, constituted an abuse of discretion as a matter of law. The Court first determined that the "zero tolerance" policy of the FDNY was not mandatory, and that the Commissioner had the discretion to impose a penalty less severe than termination of employment when "exacerbating or extenuating circumstances" were present. Upon taking into account the facts that the firefighter was the sole breadwinner for his family, would lose more than $2 million in accrued pension value earned during his 25 years of unblemished service, and would be left without medical benefits, the Court concluded that the penalty of termination of employment was unduly disproportionate to the offense, and permitted the firefighter to retire retroactive to the date of the termination of employment, and only to forfeit approximately one year of his salary as a penalty.

Family Law; Juvenile Delinquents; Conspiracy; "Lost Boys" Gang Initiation Ritual Resulted In Beating Of Complainant; History Of Hazing

Matter of Khalil H. (80 AD3d 83 [Nov. 9, 2010; Chambers, Opinion; Fisher, Santucci, Eng, Concurring])

The complainant was beaten with closed fists and kicked by four gang members as part of an initiation ritual into the "Lost Boys" gang. The appellant, Khalil H., directed the other three gang members when to start and stop by counting aloud, and he videotaped the beating. When an assistant principal at the appellant's school discovered the videotape, the appellant was charged with acts which, if committed by an adult, would constitute conspiracy in the sixth degree and attempted hazing in the first degree. After a hearing, the Family Court found that the appellant committed those acts.

On appeal, after reviewing the history of hazing, and the legislation enacted in New York to combat it, this Court concluded that the fact-finding order was supported by legally sufficient evidence and was not against the weight of the evidence. The Court concluded, among other things, that the "Lost Boys" was the type of "organization" the Legislature

contemplated when it enacted the hazing statute. The Legislature, in 1983, expanded those subject to liability for hazing from students to all persons engaging in hazing activities. Thus, the Court noted, a broad interpretation of "organization" was required. Since the "Lost Boys" was organized for its members' mutual protection, its members wore paraphernalia to signify their membership in the gang, and had meetings, it was an "organization" within the meaning of the hazing statute.

Further, the complainant's consent to the beating was neither an element of the offense, nor a defense to it. To allow consent as a defense would be against public policy, because those who are victims of hazing are, to some degree, willing to accept humiliation and physical abuse from others in order to gain social acceptance.

Family Law; Biological Mother After Undergoing Treatment For Drug Addiction Regains Custody Of Child Placed With Foster Parent And Commences Action On Behalf Of Child Injured While In Custody With Foster Parent; Complaint Dismissed

McCabe v Dutchess County (72 AD3d 145 [Feb 2, 2010; Lott, Opinion; Skelos, Fisher, Leventhal, Concurring])

This action was commenced by a biological mother individually and on behalf of her infant son, to recover damages for personal injuries sustained by the infant while he was in foster care. This Court held that the defendant foster parents were entitled to summary judgment dismissing the complaint insofar as asserted against them because a child does not have a legally cognizable claim for damages against his or her foster parent for negligent supervision. The Court extended the holding of the Court of Appeals in *Holodook v Spencer* (36 NY2d 35 [1974]), that a child does not have such a legally cognizable claim against his or her parent, noting that many of the same considerations underlying the *Holodook* holding apply to foster parents. This included the difficulty in setting boundaries on a foster parent's potential liability, since few injuries to children could not have been avoided by closer parental supervision. The *Holodook* court had noted that if a parent may be subjected to a lawsuit for damages for each failure to exercise care commensurate with the risk, a new and heavy burden would be added to parenthood, and this Court declined to impose such a heavy burden on foster parents. Such a burden would serve to discourage otherwise qualified and able foster parents from taking on the responsibility of caring for

children who often come from difficult backgrounds.

The Court also noted that because foster parents are responsible for supervising the daily activities of children for extended periods of time and for promoting their physical, emotional, and educational development during this time, they are unlike grandparents and other temporary custodians who "take the child for a day," and, as such, have been held to be subject to causes of action alleging negligent supervision.

This Court also held that various Dutchess County defendants were also entitled to summary judgment. While agencies and counties may be sued for their negligent supervision of children in foster care, the Dutchess County defendants established, prima facie, that they did not have knowledge or notice of any dangerous condition on the premises or that any dangerous conduct was occurring, and in opposition, the plaintiffs failed to raise a triable issue of fact.

Family Law; Family Offenses Of Assault, Harassment And Menacing; Orders Of Protection Sought; Family Court Has Jurisdiction Even Where Alleged Family Offenses Occurred Outside Of State And Outside Of Country

Matter of Richardson v Richardson (80 AD3d 32 [Nov. 3, 2010; Leventhal, Opinion; Covello, Angiolillo, Sgroi, Concurring])

In this family offense proceeding, the Family Court found that the appellant, the grandmother and mother of the petitioners, committed the offenses of assault, harassment, and menacing while the parties were in Anguilla, a British territory, and the Family Court therefore entered orders of protection. On appeal, this Court held that the Family Court has subject matter jurisdiction over family offense proceedings where the alleged acts occur outside of the state and even outside of the country, and thus, the Family Court properly exercised jurisdiction in this case.

The Court observed that the Legislature gave concurrent jurisdiction to the Family Court and the criminal courts over family offenses concerning a variety of acts, including those alleged by the parties here. Further, the Court noted that neither "Family Ct Act § 812 nor the . . . ordinary definition of concurrent jurisdiction indicates that concurrent jurisdiction means identical jurisdiction[,]" therefore, the geographic limitations on the criminal courts did not extend to limit the jurisdiction of the Family Court over family

offense proceedings. The Court noted that there was no geographic limitation in Family Court Act § 812, or elsewhere in the Family Court Act, as to where a family offense must occur in order to confer subject matter jurisdiction upon the Family Court. The Court examined the legislative history of Family Court Act § 812 and determined that there was no indication that the Legislature intended to prohibit the Family Court from exercising jurisdiction over family offenses where the alleged acts occurred in another state or country.

Insurance; Homeowners; Property Damage; Failure To Timely Reach Decision On Merits Of Claim; Motion To Dismiss General Business Law § 349 Claim And Demand For Punitive Damages And Attorney's Fees Denied

Wilner v Allstate Ins. Co. (71 AD3d 155 [Jan. 12, 2010; Dickerson, Opinion; Rivera, Florio, Austin, Concurring])

This Court held that the plaintiff insureds sufficiently stated a cause of action pursuant to General Business Law (hereinafter GBL) § 349 against the defendant insurance company with whom they had homeowner policies. Specifically, the plaintiffs alleged that a provision of their policy required them to protect the defendant's subrogation interest by instituting an action to recover property damages against a tortfeasor before the statute of limitations expired. According to the plaintiffs, the defendant refused to reach a timely decision on coverage, thereby compelling them to comply with that provision and sue the alleged tortfeasor at their own expense. The plaintiffs alleged that the subject provision is not unique to their policy, but rather appears in all of the defendant's homeowner policies of this type, and thus, the conduct complained of has a "broad impact on consumers at large." This Court agreed and held that the alleged conduct was "consumer-oriented" and therefore sufficient to sustain that element of a GBL § 349 claim.

This Court also held that, accepting the allegations of the complaint as true, the plaintiffs successfully pleaded conduct which was misleading in a material way — another element of a GBL § 349 claim. This Court recognized that the plaintiffs, in essence, were alleging that the defendant purposely failed to reach a decision on the merits of their insurance claim in order to force them to bring a suit against the tortfeasor before the statute of limitations expired because, if they did not do so, the defendant could refuse reimbursement of the claim on the ground that the plaintiffs failed to protect its subrogation

rights. This forced the plaintiffs to commence such lawsuits at their own expense, thereby saving the defendant money. This Court further determined that, under the circumstances of this case, the reasonableness of the plaintiffs' belief as to their responsibilities under the contract of insurance was a question of fact, and should be determined by the factfinder.

With regard to injury, the plaintiffs sufficiently alleged that they were forced to incur the costs of hiring an attorney to prevent forfeiture of coverage for a covered loss. Moreover, the Supreme Court properly declined to dismiss the plaintiffs' demand for punitive damages based on the above allegations.

Inverse Condemnation; Attachment To Property Owner's Buildings Of Rear-Wall Terminal Boxes And Associated Wiring; Failure To Disclose Entitlement To Just Compensation Under Transportation Law § 27 Constitutes Violation Of General Business Law § 349

Corsello v Verizon N.Y., Inc. (77 AD3d 344 [Sept. 14, 2010; Leventhal, Opinion; Mastro, Belen, Lott, Concurring])

Where a regulated telecommunications utility permanently attaches switching equipment to a building without the consent of the building's owner, the owner has a cause of action against the utility to recover damages for reverse condemnation under Transportation Law § 27, but such cause of action must be asserted within three years of the installation, or the cause of action is time-barred. Nonetheless, the owner in the instant matter timely asserted a cause of action against the utility for violation of General Business Law § 349(b), arising from the utility's course of deceptive business practices in misinforming the owner of the nature and extent of the owner's and the utility's rights and obligations.

Here, the plaintiffs alleged in their complaint that, 20 years prior to the commencement of this action, Verizon's predecessor had attached a rear-wall terminal box and associated wiring to plaintiffs' building in order to service its customers, and that Verizon maintained the box and wiring since the installation. The complaint alleged that Verizon never notified the plaintiffs they were entitled to just compensation for the use of their property under Transportation Law § 27, and failed to disclose that the plaintiffs could have the terminal and associated wiring removed at-will, without loss of telephone service

to the building. According to the complaint, in 2004 or 2005 Verizon started routing new cables through the rear wall terminal box, the plaintiffs consequently complained to Verizon about the new wiring and eventually requested Verizon to remove the installation, but Verizon refused. The plaintiffs thus sought to recover damages for inverse condemnation, unjust enrichment, trespass, and engagement in a course of deceptive business practices in violation of General Business Law § 349(b), asserting that Verizon and related corporations violated General Business Law § 349(h) by failing to inform them of their entitlement to just compensation for the installation of the rear-wall terminal on their property.

Although the plaintiffs sufficiently stated a cause of action against Verizon and related corporations to recover damages for inverse condemnation, the inverse condemnation cause of action was time-barred. Transportation Law § 27 invests a telecommunications utility with the power to condemn property in exchange for just compensation paid to the property owner. In that regard, inverse condemnation, or de facto appropriation, is based on a showing that an entity possessing the power of condemnation, such as Verizon, has intruded onto the owner's property and interfered with his or her property rights to such a degree that the conduct amounts to a constitutional taking under color of law, requiring the entity to purchase the property from the owner. The alleged permanence and scope of Verizon's rear-wall terminal would support a finding of inverse condemnation because "[a] permanent physical occupation by one having condemnation powers is all that need be shown" to establish a valid cause of action.

Nonetheless, an inverse condemnation cause of action is typically governed by a three-year statute of limitations. Contrary to the plaintiffs' contention, the provisions of Real Property Law § 261 did not toll the applicable statute of limitations. Although that statute provides that "[w]henever any wire or cable used for . . . telephone . . . is or shall be attached to . . . any building . . . no lapse of time whatever shall raise a presumption of any grant of, or justify a *prescription* of any perpetual right to, such attachment," it cannot be construed to perpetually toll the statute of limitations for an inverse condemnation cause of action asserted against a telecommunications company. Accordingly, the plaintiffs' failure to commence this action within three years of the installation of the rear-wall box and wiring renders the inverse condemnation cause of action time-barred.

The plaintiffs also properly stated a cause of action to recover damages for violation

of General Business Law § 349(b), based on Verizon's violation of General Business Law § 349(h). Specifically, they alleged that Verizon failed to inform them that they were entitled to just compensation for the de facto taking of a portion of their property, and allegedly misrepresented to the plaintiffs that they had to accede to its request to attach its equipment to their building as a condition of providing telephone service. The plaintiffs sufficiently alleged that they suffered injury from this conduct because they were forced to forego the possession, use, and enjoyment of a portion of their property without any compensation whatsoever. Further, this cause of action was not time-barred because Verizon's alleged deceptive practices were made over time, constituted a course of deceptive practices, and misled the plaintiffs concerning the enforcement of their legal rights to just compensation. As a result, Verizon was estopped from asserting a statute of limitations defense to the General Business Law § 349(b) cause of action.

Finally, the cause of action to recover damages for unjust enrichment was not duplicative of the trespass cause of action because a trespass cause of action is based on an unjustified entry onto property, whereas an unjust enrichment cause of action can be based on either a justified or unjustified entry.

Judicial Dissolution; Limited Liability Company Law § 702; "Deadlock" Grounds Insufficient For Dissolution; Party Seeking Dissolution Must Show That It Is Not Reasonably Practicable To Continue Operations

Matter of 1545 Ocean Ave., LLC (72 AD3d 121 [Jan. 26, 2010; Austin, opinion; Dillon, Miller, concurring; Fisher, Chambers, concurring in part, dissenting in part])

The statutory grounds upon which a corporation or partnership may be judicially dissolved are not identical to the grounds upon which a limited liability company (hereinafter LLC) may be judicially dissolved. Although the Business Corporation Law and the Partnership Law authorize judicial dissolution of corporations and partnerships, respectively, upon the ground of "deadlock," the members of an LLC may not seek judicial dissolution on a ground of "deadlock" amongst the members, since that ground is not expressly articulated in the Limited Liability Company Law. A judicial dissolution of an LLC may only be granted under Limited Liability Company Law § 702 "whenever it is not reasonably practicable to carry on the business in conformity with the articles of

organization or operating agreement." A determination of whether it is "not reasonably practicable" to continue operation of an LLC requires an examination of the company's operating agreement, and is a contract-based analysis. Where the agreement fails to specify grounds for dissolution, as did the contract in this case, the Limited Liability Company Law controls. Here, this Court determined that dissolution should only be granted under Limited Liability Company Law § 702 if the petitioner can establish, based on the LLC's operating agreement and the articles of organization, that "(1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible."

The Court cautioned that dissolution is a drastic remedy which should only be granted when the above standard is met. The petitioner failed to meet this standard because the stated purpose of the LLC could be realized by its continued operation. The parties were operating in conformity with the operating agreement and steps were taken to accomplish the stated purpose of the entity until the proceeding for dissolution was commenced. In addition, the respondent was still able to employ other remedies to resolve the conflicts between the managers and regulate the conduct of the members.

Concurring in part and dissenting in part, the late Justice Fisher, joined by Justice Chambers, did not dispute the standard adopted by the majority. Justice Fisher stated that the authorities on which the majority relied and the plain language of the statute suggested that, pursuant to Limited Liability Company Law § 702, it is "not reasonably practicable" for an LLC to carry on its business in conformity with its articles of organization or operating agreement when disagreement or conflict among the members regarding the means, methods, or finances of the LLC's operations is so fundamental and intractable as to make it infeasible for the LLC to carry on its business as originally intended. However, Justice Fisher concluded that, without a factual finding as to that issue, this Court could not meaningfully determine whether the Supreme Court providently exercised its discretion in finding that the actions of the parties rendered it not reasonably practicable for the LLC here to carry on its business in conformity with its articles of organization or operating agreement. Accordingly, rather than denying the petition and dismissing the proceeding, Justices Fisher and Chambers would have remitted the matter for a fact-finding hearing and thereafter for a new determination on the petition.

Judicial Dissolution; Not-For-Profit Corporation Law § 1102; **Liquidation Of Collections To Pay Creditors May Not Proceed If Contrary To The Intentions Of The Donors**

Matter of Friends for Long Island's Heritage (80 AD3d 223 [Nov. 16, 2010; Fisher, Opinion; Dillon, Dickerson, Eng, Concurring])

Assets held by a not-for-profit charitable corporation for a particular purpose may not be used for other corporate purposes, including the payment of debts. The Education Law, however, provides a procedure for the dissolution of a not-for-profit charitable educational corporation, and confers discretion upon the Supreme Court to direct "the disposition of any and all property belonging to the corporation" (Education Law § 220[1]). In harmonizing the seeming tension between these two principles, this Court concluded that not-for-profit corporations, like the petitioner, must comply with the limitations imposed by donors, even in dissolution, explaining that New York's long-standing "policy honoring donors' restrictions on the use of the property they donate has greater weight than the claims of creditors. . .Even in dissolution, the limitations on the use of such assets is required to be honored." Accordingly, a charitable entity organized as a not-for-profit corporation for the purpose of accepting donations of cash, objects, and materials that benefitted the Nassau County Historical Museum may not be liquidated to pay creditors, and a specific bequest of money restricting its use to the promotion of the purposes of the corporation may not be invaded to pay creditors. On the other hand, with respect to a particular historic collection of glassworks donated to the corporation without restriction, the Supreme Court "may provide for its sale, as a single collection, to an entity that is engaged in activities substantially similar to those" of the corporation.

Jurisdiction; Long-Arm; CPLR 302(a)(1); Purposeful Creation Of Continuing Relationship; Passive Web Site Insufficient Alone To Confer Personal Jurisdiction

Grimaldi v Guinn (72 AD3d 37 [Feb. 9, 2010; Dickerson, Opinion; Mastro, Dillon, Covello, Concurring])

A New Jersey resident who agreed with a New York resident to rebuild the New Yorker's vintage car in New Jersey was nonetheless subject to New York's long-arm

jurisdiction, where the New Jersey resident not only operated a passive, noninteractive web site on the Internet, but actively pursued and solicited the plaintiff's business in New York by means of phone calls, faxes, e-mail, and regular mail.

The plaintiff purchased engine parts for a vintage Chevrolet Camaro from a Georgia-based dealer. The parts were shipped to the plaintiff at his home in New York, along with documentation that included a certification by Wayne D. Guinn, a New Jersey vintage car expert, to the effect that the parts were authentic. The plaintiff thereafter communicated with Guinn by means of numerous telephone calls, faxes, and e-mails. He also viewed Guinn's passive internet website. Guinn also mailed, to the plaintiff's home in New York, a book he authored on the subject vintage Camaros, and personally inscribed it to the plaintiff with a suggestion that they "get together" for the purpose of installing the parts. The plaintiff thereafter retained Guinn to install the parts and, according to the plaintiff, Guinn represented on several occasions that he could install the parts and rebuild the engine of the plaintiff's vintage Camaro. In reliance on these representations, the plaintiff personally delivered his Camaro and the engine parts to a Pennsylvania auto mechanic, who accepted those items on Guinn's behalf. Following delivery of the Camaro, Guinn posted information on his website, essentially advertising that plaintiff's Camaro had been delivered to him for reassembly.

As the plaintiff recounted it, once he delivered the vehicle, he learned that a different New Jersey auto mechanic would be involved in the project. After paying Guinn and the two mechanics involved in the project a sum of money that, according to the plaintiff, was more than 50% greater than the initial estimate for the project, and receiving vague assurances that the project was being completed, the plaintiff recovered the Camaro and all of the engine parts totally disassembled and not near completion, by which time approximately one year had elapsed since the date he delivered the vehicle and parts for assembly.

The plaintiff commenced this action in New York, asserting causes of action alleging breach of contract, fraudulent misrepresentation, and a course of deceptive business practices in violation of General Business Law § 349. This Court concluded that Guinn was subject to the long-arm jurisdiction of the New York courts. Although Guinn's website was a passive website (i.e., one on which an internet user may only browse) and, thus, insufficient alone to confer personal jurisdiction over Guinn, when passive websites are combined with

other activities undertaken in New York, there may be a reasonable basis for the assertion of personal jurisdiction by the New York courts. In addition to the operation of the passive website, Guinn's initiation and transmission to the plaintiff, from New Jersey to New York, of numerous telephone, fax, e-mail, and other written communications constituted sufficient contacts with New York to warrant the assertion of personal jurisdiction over Guinn. Thus, this Court concluded that Guinn engaged in the "purposeful creation of a continuing relationship" with the plaintiff (*Fischbarg v Doucet*, 9 NY3d 375, 381 [internal quotation marks omitted]) sufficient to warrant the exercise of in personam jurisdiction.

Legal Malpractice; Award Of Legal Fees In Bankruptcy Proceeding For Same Legal Services At Issue Bars Subsequent Malpractice Action Pursuant To Doctrine Of Res Judicata

Breslin Realty Dev. Corp. v Shaw (72 AD3d 258 [Jan. 5, 2010; Chambers, Opinion; Rivera, Florio, Dickerson, Concurring])

The final award of an attorney's fee by the United States Bankruptcy Court to an attorney representing the petitioners in bankruptcy bars the petitioners from maintaining a legal malpractice action against that attorney based upon the alleged inadequacy of the services rendered in the bankruptcy proceeding.

The plaintiffs filed a petition in bankruptcy, in which they were represented by the defendant attorneys. At the conclusion of the bankruptcy proceeding, the defendant attorneys applied to the Bankruptcy Court for an award of an attorney's fee from the estate in bankruptcy, without objection from the plaintiffs. The attorneys were awarded a fee. The plaintiffs thereafter commenced this legal malpractice action, alleging that one of the attorneys committed malpractice by failing to assert, in the underlying bankruptcy proceeding, that certain loans made to the plaintiffs were nonrecourse loans, which could only be asserted against certain of the plaintiffs' real properties and not against the plaintiffs' other assets.

The final fee award in the bankruptcy proceeding was a determination on the merits with respect to which the plaintiffs had an opportunity to be heard. Accordingly, the doctrine of res judicata bars this action sounding in legal malpractice. Further, since the plaintiffs were aware, prior to the award of the fee, of the factual basis upon which they

could have objected to the fee application, this Court rejected their contention that the defendants had deceived them or the Bankruptcy Court.

Marriage; Lack Of Capacity To Consent; Transfer Of Assets; Taking Unfair Advantage For Pecuniary Gain; Unjust Enrichment; Marriage And Property Transfers Declared Null And Void

Campbell v Thomas, (73 AD3d 103 [Mar. 16, 2010; Prudenti, Opinion; Miller, Chambers, Roman, Concurring])

Where a mentally incapacitated person is induced to marry despite his or her inability to consent to marriage, and dies shortly thereafter, the Supreme Court and the Appellate Division—based upon their equitable jurisdiction to assure that a person does not benefit from his or her own wrongdoing, to maintain the integrity of the courts, and to assure that the courts do not become the instrument of a party's wrongdoing—have the inherent authority not only to void the marriage and the purported spouse's inter vivos transfer of the incapacitated person's assets, but to void the purported spouse's right of election to one-third of the incapacitated person's estate, notwithstanding language in the Estates, Powers and Trusts Law which, if strictly applied, requires recognition of the right of election.

In early 2000, 71-year-old Howard Thomas (hereinafter Howard) was diagnosed with terminal prostate cancer and severe dementia. In February 2001 Howard's daughter, who served as his primary caretaker, took a one-week vacation, and left Howard in the care of Nidia Colon (hereinafter Nidia). Howard's daughter and two of her brothers later learned that, during the vacation, Nidia married Howard, and had subsequently transferred his assets into her name. After Howard's daughter and her brothers commenced this action against Nidia, seeking, inter alia, a judgment declaring that Nidia's marriage to Howard is void due to Howard's legal incapacity to consent, and that the inter vivos transfer of Howard's assets to Nidia were also void for the same reason, Nidia asserted a right to an elective share of Howard's estate.

In concluding that summary judgment was properly awarded to Howard's daughter and her brothers declaring, inter alia, that Nidia had no legal right to any of Howard's assets or to an elective share of the estate, this Court recognized that New York does not have a statute specifically addressing the situation presented here. When a party to a marriage is

incapable of consenting to the marriage due to mental incapacity, and the marriage is not annulled until after the death of the nonconsenting party, a strict reading of the existing statutes requires that the other party be treated as a surviving spouse and afforded a right of election against the decedent's estate, without regard to whether the marital relationship itself came about through an exercise of overreaching or undue influence by the surviving party. Nonetheless, the surviving party may be denied the right of election, based on the equitable principle that a court will not permit a party to profit from his or her own wrongdoing.

In this case, the record provided ample support for an inference that Nidia was aware of Howard's lack of capacity to consent to the marriage, and took unfair advantage of his condition for her own pecuniary gain, at the expense of Howard's intended heirs. Thus, Nidia procured the marriage itself through overreaching and undue influence, and equity will intervene to prevent her from benefitting from that conduct. As a result of her misconduct, Nidia forfeited any rights that would flow from the marital relationship, including the statutory right she would otherwise have to an elective share of Howard's estate. Accordingly, Nidia could claim no legal interest as Howard's spouse. This result is compelled not only by the need to prevent the unjust enrichment of the wrongdoer and to protect vulnerable incapacitated individuals and their rightful heirs from overreaching and undue influence, but to protect the integrity of the courts themselves. A court must not allow itself to be made the instrument of wrong.

Medicaid; Calculation Of Post-Eligibility Monthly Cost Of Care Must Include Income Deposited Into An Irrevocable Trust

Matter of Jennings v Commissioner, N.Y.S. Dept. of Social Servs. (71 AD3d 98 [Jan. 5, 2010; Balkin, Opinion; Prudenti, Fisher, Concurring; Leventhal, Dissenting])

Interpreting several Medicaid regulations, this Court upheld a determination of the New York State Department of Health (hereinafter the DOH) that income deposited by a settlor/parent into an irrevocable special-needs trust for the benefit of an incapacitated adult child must be included in the calculation of a settlor/parent's Medicaid post-eligibility monthly cost of care. Moreover, upon the death of the settlor/parent, the estate of the

settlor/parent is obligated to reimburse the relevant social services agency to the extent that the exclusion of those deposits from the calculation of cost of care resulted in an overpayment of Medicaid benefits to the settlor/parent during his or her lifetime.

Here, the settlor/parent created a special needs trust for the benefit of her incapacitated adult son, and then entered a nursing home. She thereafter deposited her total gross income of $1,847 per month—which represented Social Security retirement benefits and payments from a small private pension—into the special needs trust. A county social services department determined that, although the settlor/parent was eligible for Medicaid because the funds deposited into the trust were excluded from the calculation of her income for Medicaid-eligibility purposes, those same funds are treated as income for purposes of calculating her required contribution for her post-eligibility monthly cost of care. After a fair hearing, the DOH affirmed the determination of the county social services department. In upholding the DOH's determination, this Court explained that the federal and state statutes creating and implementing the Medicaid program required a Medicaid recipient such as the settlor/parent to contribute a portion of her income towards her nursing home and medical care expenses. Although this income may not be included in the calculation of total income and assets so as to disqualify the settlor/parent from Medicaid eligibility in the first instance, once she entered the nursing home and applied for benefits, these post-eligibility regulations were triggered. The DOH was, thus, required to include the income that the settlor/parent deposited into her son's special needs trust in the calculation of her post-eligibility contribution requirement.

The dissent concluded that there was no rational basis for the DOH's determination that the deposit of the settlor/parent's recurring income into a special needs trust, created for her disabled adult child, must be counted toward that settlor's net available monthly income (hereinafter NAMI) for calculation of the settlor's Medicaid post-eligibility benefits. In the first instance, the dissent reasoned that the majority's interpretation of federal regulations encouraged a settlor to create a special needs trust, but discouraged him or her from funding it. The dissent explained that this Court was not bound by the federal statutory and regulatory provisions addressing the issue presented by the appeal, since federal law does not preempt New York law in this area. The dissent would, thus, have decided this case on state statutory and regulatory grounds. Since the dissent noted that

both the Social Services Law and the DOH regulations provided no guidance on the issue of whether the corpus and income deposited by a settlor into a third-party special needs trust must be included in the settlor's Medicaid benefit contribution, it concluded that this Court should have looked to EPTL 7-1.12 as an interpretational gap-filler. New York law, as reflected by both EPTL 7-1.12 and the policy underlying it, favors the viability of a third-party special needs trust as a mechanism for planning for the future care of disabled relatives and, according to the dissent, the majority's interpretation adversely affects the viability of this trust mechanism. Finally, the dissent disagreed with the DOH's contention that exempting, from Medicaid post-eligibility benefit calculations, the corpus and income deposited into a third-party special needs trust would result in widespread abuse.

Mortgages; Foreclosure Action Dismissed; Failure To Comply With Notice Requirements Of Home Equity Theft Protection Act

First Natl. Bank of Chicago v Silver (73 AD3d 162 [Mar. 23, 2010; Florio, Opinion; Dillon, Balkin, Leventhal, Concurring])

A mortgage lender's compliance with the notice provisions of the Home Equity Theft Protection Act (hereinafter HETPA)(*see* RPAPL 1303) is a condition precedent to an action to foreclose a mortgage. Hence, a mortgage borrower does not waive a defense based on the lender's lack of compliance with HETPA by a mere failure to assert it in his or her answer.

Here, the plaintiff bank commenced a foreclosure action against two borrowers. The borrowers filed an answer which did not allege that the bank failed to comply with the notice provisions of HETPA. The bank subsequently moved for summary judgment on the complaint and to appoint a referee to compute the total amount due with respect to the underlying loan. The borrowers cross-moved for summary judgment dismissing the complaint, arguing, for the first time, that the bank failed to follow HETPA's mandatory notice provisions. The borrowers' failure to raise the bank's noncompliance with HETPA in their answer was not a bar to raising the bank's noncompliance on their cross motion for summary judgment. Adopting the reasoning of several nonappellate courts, this Court concluded that compliance with HETPA is a mandatory condition or condition precedent to

the commencement of a foreclosure action and, hence, noncompliance is fatal to a foreclosure action.

The underlying purpose of HETPA is to afford greater protections to homeowners confronted with foreclosure. As with certain provisions of the Real Property Law and the RPAPL that also employ the mandatory directive "shall" (*see* Real Property Law § 232-a [applicable to 30-day notice that must be given to holdover tenants]; RPAPL 735[1][applicable to notice that must be given in summary eviction proceedings]), HETPA's notice provisions are to be strictly construed, and require the foreclosing party in a residential mortgage foreclosure action to deliver statutory-specific notice to the homeowner, together with the summons and complaint. The foreclosing party has the burden of showing strict compliance with HETPA's notice provisions and, if it fails to demonstrate such compliance, the foreclosure action will be dismissed.

Since, here, the summons and complaint and notice of pendency were filed by the bank, but the bank undisputedly failed to deliver the required HETPA notice with the summons and complaint when service of process was effected upon the borrowers, the bank failed to demonstrate that it strictly complied with the HETPA notice requirements. Accordingly this Court was constrained to award the borrowers summary judgment dismissing the complaint.

Municipalities; Counties; Town of Huntington Seeks A Judgment Declaring That County Of Suffolk Is Exclusively Responsible For The Improvement, Maintenance, And Repair Of Six Specified County Roads; County Solely Responsible

Town of Huntington v County of Suffolk (79 AD3d 207 [Oct. 19, 2010; Balkin, Opinion; Fisher, Roman, Sgroi, Concurring], *lv denied* __ NY3d __ , 2011 NY Slip Op 76223 [June 23, 2011])

This Court held that the County of Suffolk had the responsibility, duty, and obligation, under certain statutory provisions, to improve, maintain, and repair certain roads within the boundaries of the Town of Huntington, which were included on an official map of the Suffolk County Road System in the 1930s, but maintained for decades thereafter by the Town.

County Roads are governed by article 6 of the Highway Law. Specifically, Highway Law § 129 provides that the maintenance of roads improved pursuant to article 6 "shall be the responsibility of the county." Section 115-a of the Highway Law states that a highway "excluded from the county road system shall be maintained by the town or village in which it is located." Similarly, Highway Law § 115-b provides a mechanism by which a county may remove a road from the County Road System, whereupon said road shall be maintained by the town, village, or city in which it is located.

In light of this statutory framework, this Court concluded that the legislature shifted the responsibilities for maintenance of the subject County Roads from the towns to the counties in which the roads were located, while leaving certain town highways under the town's responsibility. The Court held that the roads at issue are County Roads and thus, properly the responsibility of the County of Suffolk, not the Town of Huntington.

Personal Property; Six-Carat Diamond Engagement Ring Costing $100,000 Given In Contemplation Of Marriage; Replevin Action Brought To Recover Engagement Ring Or Its Value And To Recover Damages For Fraud

Lipschutz v Kiderman (76 AD3d 178 [July 6, 2010; Dickerson, Opinion; Santucci, Chambers, Sgroi, Concurring])

A prospective groom gave his fiancee a six-carat diamond ring in contemplation of marriage, but the fiancee was legally married to another man at the time that she accepted the ring. Although not yet civilly divorced from her prior husband, the fiancee had nonetheless obtained a "get," or Jewish religious divorce, from her prior husband at the time that she accepted the ring. The prospective groom sought the return of the ring, claiming that, both at the time he gave his fiancee the ring, and at the time the parties participated in an Orthodox Jewish wedding ceremony, he was unaware that she was legally and civilly married to another. In reversing an award of summary judgment to the prospective groom, this Court determined that there were triable issues of fact as to whether or not the prospective groom knew of the fiancee's marital status when he gave her the ring and, thus, whether there existed an impediment to a lawful marriage at that time.

New York's former so-called "anti-heart balm" statute (Civ Prac Act, former art 2-A, § 61-1 *et seq.*) abolished all causes of action to recover damages arising from breaches of

contracts to marry, including those to recover real and personal property given in contemplation of marriage. However, due to perceived abuses and potential for fraud, the Legislature subsequently enacted Civil Rights Law § 80-b to provide, in effect, that "a person, not under any impediment to marry, will no longer be denied the right to recover property given in contemplation of a marriage which has not occurred" (*Gaden v Gaden*, 29 NY2d 80, 85 [citation omitted]). Moreover, Civil Rights Law § 80-b is a "no-fault" statute, permitting the recovery of property given in contemplation of a marriage that does not take place, regardless of who is responsible for the failure of the marriage to go forward. The exception to this rule is the giving of such property with the knowledge of the existence of an impediment to a lawful marriage will preclude such recovery. Since there was a triable issue of fact as to the extent of the prospective groom's knowledge of the existence of such an impediment, he should not have been awarded summary judgment.

Real Property; Foreclosure Action Based On Tax Liens Of Approximately $3 Million; After Discovering That Property Was "Landfill" Which May Require Remediation And County May Be Exposed To Liability Well In Excess Of $3 Million; RPTL 990(1), 1138(5); Landowner Required To Litigate Tax Certiorari Proceeding Independently As Supplementary Proceeding

Matter of County of Orange (Al Turi Landfill, Inc.) (75 AD3d 224 [May 25, 2010; Angiolillo, Opinion; Dillon, Miller, Dickerson, Concurring])

Where a county properly withdraws a parcel of real property from tax foreclosure proceedings, the limitations period set forth in RPTL 1138(5), rather than that set forth in RPTL 990(1), applies to a subsequently commenced proceeding for leave to institute supplementary proceedings to recover the unpaid real property taxes. In addition, these supplementary proceedings should be litigated independently of a separate tax certiorari proceeding commenced by the landowner to challenge the tax assessments.

Here, the County of Orange (hereinafter the County) secured tax liens against the subject real property, which had an assessed value of $18 million as of 2006, based upon unpaid real property tax bills for the 2004, 2005, and 2006 tax years. Thereafter, County officials conducted an inspection of the property and determined that it was a "landfill." County officials thereafter filed certificates of withdrawal in the foreclosure proceedings, stating that, were the County to acquire the property, there was a "significant risk that it

might be exposed to a liability substantially in excess of the amount that could be recovered by enforcing the tax lien." This recitation was sufficient to support the validity of the certificate of withdrawal.

In ruling that the supplementary proceedings to collect the unpaid taxes were timely commenced, notwithstanding the withdrawal of the tax foreclosure proceedings, this Court, in order to resolve the apparent conflict between RPTL 990(1) and RPTL 1138(5), applied the long-standing rules of statutory construction that "[s]tatutes which relate to the same subject matter must be construed together unless a contrary legislative intent is expressed" (*Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149, 153) and that, in a conflict between a general statute and a special statute governing the same subject matter, the general statute must yield (*see Matter of Brusco v Braun*, 84 NY2d 674, 684). Accordingly, this Court held that the general limitations provision of RPTL 990(1) must yield to the specific provision in RPTL 1138(5). RPTL 990(1) governs all situations in which a foreclosure proceeding has not been discontinued, and RPTL 1138(5) governs a case, such as this one, where the enforcing officer has commenced and subsequently withdrawn from a foreclosure proceeding.

Finally, this Court held the landowner is required to litigate any challenge to the assessment of the real property in a tax certiorari proceeding independent of the supplementary proceeding to recover unpaid taxes.

Real Property; Personal Property; Local Church Secedes From National Congregation And Seeks To Take Possession Of Church Property; Property Held In Trust For National Congregation Based On Application of "Neutral Principles" Approach

Presbytery of Hudson Riv. of Presbyt. Church (U.S.A.) v Trustees of First Presbyt. Church & Congregation of Ridgeberry (72 AD3d 78 [Jan. 12, 2010; Dickerson, Opinion; Fisher, Dillon, Covello, Concurring], *lv denied* 14 NY3d 711 [May 11, 2010])

This Court held that the plaintiffs, a national presbyterian congregation and one of its reverends, were entitled to summary judgment declaring that the defendants, members and trustees of a local congregation, held certain real and personal property in trust for the

plaintiff national congregation. The defendants were formerly affiliated with the national congregation but had seceded from it in 2005, claiming ownership of the property at issue.

In reviewing the parties' submissions to determine the rightful owner of the property in question, this Court observed that the "neutral principles" approach requires courts to "look to 'the constitution of the general church concerning the ownership and control of church property'" (*Episcopal Diocese of Rochester v Harnish*, 11 NY3d 340, 351, quoting *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am.*, 62 NY2d 110, 122, *cert denied* 469 US 1037). This Court noted, among other things, that the Book Of Order, a component of the constitution of the national congregation here, contains language specifying that all property held by a particular church is held in trust for the national denomination. Pursuant to *Jones v Wolf* (443 US 595), the enactment of such a trust provision is one way in which the national denomination may ensure that church property is retained by the faction loyal to the national denomination upon secession of any particular church. Thus, under the neutral principles approach, this constituted proof that the church property was held in trust for the national denomination and reverted to it upon the secession of the local congregation.

The Court further rejected the defendants' contention that Religious Corporations Law (hereinafter RCL) § 69(3), which controls property disputes involving the Presbyterian Church and requires that trustees of the local churches govern the property in their possession in accordance with the constitution of the national congregation, did not apply to them pursuant to an exception codified at RCL § 24. The defendants established that their local congregation was incorporated prior to 1828, but they failed to show, as required, that RCL § 69(3) is inconsistent with the law as it existed at the time of incorporation.

Tax Certiorari; Taxpayer Communications Company Installs Fiber Optic Cable In City Streets; State Imposes Franchise Tax Assessments Pursuant To RPTL 102(7); City Imposes Its Own Real Property Tax Assessments; State Franchise Tax Assessments Preempt City's Real Property Tax Assessments; Refund Due

Matter of Level 3 Communications, LLC v DeBellis (72 AD3d 164 [Jan. 19, 2010; Dickerson, Opinion; Dillon, Angiolillo, Eng, Concurring])

The State Board of Real Property Services (hereinafter the State Board) has exclusive jurisdiction pursuant to RPTL 600 to determine whether certain real property—here, approximately three miles of fiber optic cable embedded underground—constitutes special franchise property within the meaning of RPTL 102(17) and, thus, whether that property is subject to a special franchise tax assessment rate. Accordingly, a municipality may not assess that real property at a higher "ordinary property" rate merely because the property owner did not seek to secure a franchise or revocable license from the municipality under a subsequently enacted ordinance.

In the instant dispute, a telecommunications company (hereinafter the taxpayer), upon obtaining the necessary permits from a city, installed several miles of fiber optic cable under the city's streets. Thereafter, the State Board determined that the cable constituted special franchise property. Subsequent to that determination, the city enacted an ordinance that provided that "[n]o person shall use or occupy the streets as a telecommunications provider . . . without a franchise or revocable license granted by" the city council. Since the taxpayer made no effort to secure a franchise or revocable license, and remained noncompliant with the city's ordinance, the city's assessor advised the taxpayer that its property was not special franchise property, and assessed the property at the higher rate for "ordinary real property."

The taxpayer thereafter paid its real property tax bills for several years without protest, but ultimately applied to the appropriate county tax director pursuant to RPTL 556 for a refund of excess taxes paid, asserting that the city assessor had no authority to ignore the State Board's special franchise determination merely because the taxpayer did not have a franchise awarded by, or a revocable license or issued by, the city. In a letter to the city assessor, the county tax director opined that a clerical error had been made, and that the taxpayer's applications for refunds of overpaid taxes should be approved pursuant to RPTL 550(7)(c), but the city took no action on the letter and, as a consequence, failed to make a refund to the company.

Initially, this Court concluded that this hybrid proceeding and action, commenced by the taxpayer to obtain the refunds and correct the assessment rolls, was not time-barred, noting that the procedure articulated in RPTL article 5 for the correction of certain types of errors in the assessment of real property taxes was applicable to this dispute. Where, as

here, the error is of one of the types enumerated in that article, a taxpayer may apply for a correction of the rolls and a refund of taxes actually paid, and must file that application with the county tax director in the appropriate county. The county tax director is then obligated to make a recommendation on the application to the relevant municipality which, in turn, will usually make a final determination to approve or deny the application. Such an application is timely if made within three years from the annexation of the warrant for such tax (*see* RPTL 556[1]). The denial of a refund and/or correction application by a municipal taxing authority is reviewable in a proceeding pursuant to CPLR article 78, which must be commenced within four months of the municipality's denial of the application (*see* CPLR 217). But where, as here, the municipality fails to act on a correction or refund application in the manner prescribed by statute, a special proceeding pursuant to CPLR article 78 in the nature of mandamus to compel the municipality to do so may be maintained. In that situation, the applicable four-month limitations of CPLR 217 period begins to run when the municipality refuses to comply with the taxpayer's demand to perform the duty in question. Here, the taxpayer timely commenced this proceeding and action within four months of the date of receipt of its 2007 city real property tax bill, which constituted its first notification that the refund and correction applications had never been addressed by the city council or the city's board of assessment review. Accordingly, the taxpayer also timely interposed its other causes of action, which were subject to longer periods of limitations. Moreover, since the administrative remedy sought by the taxpayer could not be rectified by the filing of a grievance with the city, but only by the filing of a refund and correction application with the county tax director pursuant to RPTL 554 or 556, and the taxpayer availed itself of this procedure, it was not precluded from commencing this proceeding for failure to exhaust its available administrative remedies.

Tax Certiorari; 100% Real Property Tax Exemption Annulled; Home For Elderly, Indigent Women Converted Into State-Of-The-Art Continuing Care Retirement Community (CCRC) For Wealthy And Healthy Seniors; Not Entitled To Charitable Use Or Hospital Use Tax Exemptions

Matter of Miriam Osborn Mem. Home Assn. v Assessor of City of Rye (80 AD3d 118 [Oct. 12, 2010; Chambers, Opinion; Rivera, Santucci, Eng, Concurring])

At the turn of the 20th century, the Miriam Osborn Memorial Home Association (hereinafter the Osborn) was founded to provide a home and support for elderly, indigent women. Over the next 80 years, the Osborn expanded and provided such care consistent with its stated purpose but, by the late 1980s, the Osborn was facing a financial crisis since it housed more residents supported its endowment fund than there were paying residents, and its facilities were becoming dilapidated. The Osborn thus undertook a plan to transform itself into a continuing care retirement community (hereinafter CCRC) providing a continuum of health services to seniors. The Osborn renovated its existing buildings and constructed new ones. It also developed a market strategy to attract prospective wealthy and healthy seniors. By the time the construction project was completed, the Osborn was transformed into a full-scale CCRC, offering high-end housing units and amenities, while charging its residents high entrance and monthly fees. Consequently, the Osborn was no longer facing a crisis, as only 5% of its residents were relying on its endowment fund.

In 1997, the Osborn's full charitable use tax exemption, which it had enjoyed since 1908, was revoked, but it was awarded a partial charitable use exemption. The Osborn challenged that determination, and sought a partial hospital use tax exemption by virtue of the fact that it was operating a skilled nursing facility on its premises. This Court concluded that the Osborn was not entitled to either a charitable use or a hospital use tax exemption. The overwhelming evidence adduced at trial established that admission to the Osborn is restricted to wealthy and relatively healthy senior citizens. The Osborn charges the vast majority of its residents high entrance and/or monthly fees, while providing charitable care for only 5% of its residents. Consequently, the Osborn's property was not being used principally or primarily for charity. Moreover, the property was not being used principally or primarily as a hospital, since the skilled nursing facility was merely an adjunct to a much larger assisted and independent living complex of apartments, garden homes, and amenities. Thus, even though a small portion of the Osborn's property was used as a hospital, the Osborn was not entitled to any exemption.

With respect to valuation, this Court, in upholding the determination of the Supreme Court, rejected the methodology employed by the expert retained by the taxing municipality, since the expert had inappropriately considered the business enterprise of the Osborn by including, in his assessment, the interest earned on fees and the Osborn's

endowment fund. Only the value of the real estate, not the business, is the subject of real property tax. In addition, the expert had included the monthly fees it charged its residents, which not only had a rental component but also included payment for goods and services received by the Osborn's residents that were unrelated to rent. The Osborn's expert, in contrast, used a methodology generally accepted within the field of real property appraisal, and one that did not include business enterprise income.

Tax Certiorari; Small Claim Assessment Review (SCAR) Proceeding; Determination That SCAR Petitions Were To Be Dismissed If Taxpayer Did Not Allow Assessor To Enter Residence And Inspect Vacated; Only SCAR Judge Has Authority To Inspect Residence Under RPTL 732(2), Not Municipality

Matter of Yee v Town of Orangetown (76 AD3d 104 [June 8, 2010; Sgroi, Opinion; Covello, Angiolillo, Balkin, Concurring])

In these proceedings, the petitioners challenged the dismissals of their Small Claim Assessment Review (hereinafter SCAR) petitions. The Judicial Hearing Officer (hereinafter the JHO) designated to hear such cases dismissed the SCAR petitions based upon the petitioners' failure to permit inspections of their respective properties by their town assessors. This Court held that the JHO's determination was in error. The Court concluded that, although RPTL 732(2) permits the JHO, as fact-finder in a SCAR proceeding, to inspect the premises in issue, the statutory authority to inspect does not extend to the municipality. This Court further held that the Fourth Amendment to the United States Constitution bars a municipal assessor from entering a homeowner's premises without permission. That constitutional right was not waived by the commencement of a SCAR proceeding, since "[n]othing about commencing a SCAR proceeding, with its informal nature and lack of disclosure, puts the homeowner on notice that the assessor must be allowed into the residence for an inspection." Accordingly, a policy of requiring inspections by a municipal assessor as a condition for maintaining a SCAR proceeding was without statutory authority, and a violation of the petitioners' Fourth Amendment rights.

This Court futher held that discovery in SCAR proceedings is only permissible in cases involving special circumstances. Home inspections, when they do occur, are to be performed by the JHO, as fact-finder, for the benefit of the fact-finder. Moreover, in the

cases before the Court, since the challenged assessments were made without the benefit of interior inspections, viewing of the precise interior characteristics of the homes was not necessary to defending the tax assessments.

Tax Certiorari; Responsibility For Refunds Of Invalidly Imposed Special Ad Valorem Levies; "County Guaranty" Requires County Of Nassau To Make Refunds And Not Town Of Hempstead; RPTL 726(1), 2006

New York Tel. Co. v Supervisor of Town of N. Hempstead (77 AD3d 121 [Aug. 3, 2010; Rivera, Opinion; Florio, Miller, Hall, Concurring], *lv denied* 16 NY3d 711 [May 3, 2011])

This Court held that the Nassau County Administrative Code (hereinafter the NCAC) § 6-26.0 (b)(3)(c), known as the "County Guaranty," required the County of Nassau, the Assessor of the County of Nassau, and the Nassau County Board of Assessors (hereinafter collectively the County), rather than the Town of North Hempstead and several special districts located within the Town, to refund certain special ad valorem levies that were judicially determined to be invalidly imposed upon the plaintiff's real property. The invalidity of the levies and the amount of damages arising therefrom were determined in the main action in which a judgment had been entered in favor of the plaintiff and against the Town. The Town then moved for summary judgment on its third-party indemnification claim against the County, arguing that the County Guaranty required the County, not the Town, to refund the levies. This Court held that the Town's motion should have been granted.

Contrary to the County's contention, the Court determined that the County Guaranty was not fully superseded by the subsequent enactment of title 3 of article 5 of the Real Property Tax Law (hereinafter RPTL). Pursuant to RPTL 559(2), the procedures for administrative corrections of errors, as articulated in the NCAC, were superseded by RPTL title 3, but only insofar as they were inconsistent with RPTL title 3 (*see* NCAC §§ 6-24.0, 6-25.0, 6-26.0; *Atria Assoc. v County of Nassau*, 181 AD2d 847, 851; *Saggolf Corp. v Town Bd. of Town of Bolton*, 63 AD2d 428, 432). To the extent that the County Guaranty was inconsistent with RPTL 556(6)(a), which provides that refunds are charged back to the Town or special districts, it was partially superseded relative only to refunds obtained through the

administrative correction-of-errors procedure of RPTL title 3. The County Guaranty, however, was not completely superseded by title 3 of article 5 of the RPTL because, by its clear and unambiguous terms, it was not limited to deficiencies arising from an administrative correction of assessments.

By contrast, refunds obtained in tax certiorari proceedings are usually governed by RPTL 726(1), which also provides that the amount of tax refunds are to be charged back to the city, town, or special district. However, the Legislature provided in RPTL 2006 that provisions of special laws, such as the County Guaranty, shall take precedence over other provisions of the RPTL. Accordingly, RPTL 726(1) did not apply to the County here, and the judicially directed refunds of taxes or levies illegally imposed due to an error, other than those administratively correctable pursuant to RPTL title 3, are governed by the County Guaranty.