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Decisions Of Interest
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The Following Case Summaries May Not Be Cited As Authority

Accidents; Automobiles; Insurance Law § 5102(d); Serious Injury

Damas v Valdes (84 AD3d 87 [Apr. 12, 2011, Dillon, Opinion; Prudenti, Balkin, Chambers, Concurring])

In a case of first impression for an appellate court, the bench held that a pregnant woman who claimed that, as a result of an automobile accident, she was confined to bed for 15 weeks and confined to home for 20 weeks in order to cope with pre-term labor and premature live birth of her twins and was, thus, incapacitated from employment, raised a triable issue of fact as to whether she sustained a serious injury under the "90/180" category of Insurance Law § 5102(d). The bench concluded that the 1984 amendment to Insurance Law § 5102(d), which added "loss of a fetus" to the recognized categories of serious injury, did not wholly displace the other categories of serious injury in connection with pregnancy-related injuries but, rather, merely reflected a general legislative intent to protect pregnancy more expansively than before. The panel noted that each prong of Insurance Law § 5102(d) is independent of each other, so that the plaintiff's failure to qualify under one prong, such as "loss of a fetus," did not prevent her from qualifying under any other prong, such as the 90/180 category.

Nonetheless, a physician's affirmation attributing the need for the plaintiff's post-accident bed rest to the subject accident was held to be speculative, conclusory, and insufficient

to satisfy the plaintiff's prima facie burden of proving entitlement to judgment as a matter of law on the issue of serious injury and, hence, the plaintiff's motion for summary judgment on that issue should have been denied.

Accidents; Choice of Law; Apportionment of Fault

Shaw v Carolina Coach (82 AD3d 98 [Mar. 1, 2011, Skelos, Opinion; Dickerson, Eng, Lott, Concurring])

CPLR 1601 generally provides that a tortfeasor found to be 50% or less at fault in the happening of an accident may only be held liable in damages for his or her percentage of fault, as found by a fact finder. CPLR 1602(6) articulates an exception to that limitation of liability in connection with actions to recover damages arising from a motor vehicle accident, and imposes joint and several liability on each and every tortfeasor involved. Thus, a negligent operator of a motor vehicle may be held liable for 100% of the damages sustained by a plaintiff, even if the operator is found to be 1% at fault. By way of contrast, NJ Stat Ann § 2A:15–5.3 provides that a plaintiff may recover the full amount of his or her damages from any party determined to be 60% or more at fault in the happening of the accident, while a party found to be less than 60% at fault is only responsible for its proportionate share of the damages.

New York's choice-of-law principles are governed by a flexible "interest analysis," under which the law of the jurisdiction having the greatest interest in resolving the particular issue is given controlling effect. These principles warrant the application of CPLR 1602(6) rather than NJ Stat Ann § 2A:15–5.3 to an action arising from a collision in New Jersey between an automobile owned by a New York resident and operated by another New York resident, on the one hand, and a bus operated by a resident of Maryland and owned by a corporation that was a domiciliary neither of New York nor New Jersey, on the other.

After examining the policies underlying the relevant conflicting laws, this Court concluded that the application of New York law to the controversy would advance the substantive law purposes of this State's law because it would insure that the plaintiff, who was

a "relatively innocent victim," would be fully compensated. In contrast, application of New Jersey's limited-liability statute would not advance that State's purposes of reducing liability insurance and litigation, because none of the vehicles involved in the accident was insured in that State and because New York was the forum state for the lawsuit. The Court explained that: "While application of New Jersey law would advance that state's purpose of promoting fairness to joint tortfeasors, and thus, its interest in this litigation 'is not nonexistent,' inasmuch as none of the tortfeasors are New Jersey residents, New Jersey's interest 'cannot be said to be substantial' in that regard" (quoting *King v Car Rentals, Inc.*, 29 AD3d 205, 216).

Accidents; General Municipal Law § 205-a; Workers Compensation Law § 11

Weiner v City of New York (84 AD3d 140 [Apr. 26, 2011, Balkin, Opinion; Prudenti, Dillon, Chambers, Concurring], *affd* 19 NY3d 852)

A New York City Emergency Medical Technician injured in the line of duty on municipal property because of alleged defects in those premises may not maintain an action against his municipal employer pursuant to General Municipal Law § 205–a by virtue of his eligibility for Workers' Compensation benefits. The exclusive-remedy provision of Workers' Compensation Law § 11 overrides the provision of General Municipal Law § 205-a(1) that created a right of action "[i]n addition to any other right of action or recovery under any other provision of law." Rejecting a contrary determination by the Appellate Division, Fourth Department, the Court explained:

> "The text of Workers' Compensation Law §§ 11 and 29(6) conflicts with that of General Municipal Law § 205–a. Both purport to override any other provision, and only one can be given effect... [T]he Workers' Compensation Law provides a comprehensive structure for guaranteeing workers compensation for injuries they suffer in the course of employment. The exclusivity provision, which the Court of Appeals has referred to as a 'basic proposition,' is central to the entire Workers' Compensation premise, and giving effect instead to the overriding language of the General Municipal Law would undermine that system. By contrast, the intended scope of General Municipal Law § 205–a is . . . much more limited, seeking only to limit and, in conjunction with General Obligations Law § 11–106, to largely abolish the judicially created firefighter's rule. Giving effect to the Workers' Compensation Law exclusivity provision would not

significantly impinge on the more modest legislative goals embodied in the General Municipal Law provisions at issue here" (citations omitted).

In May 2012, the Court of Appeals affirmed this Court's decision.

Accidents; Hit And Run; Insurance Law Article 52

Englington Med., P.C. v Motor Veh. Acc. Indem. Corp. (81 AD3d 223 [Jan. 11, 2011, Leventhal, Opinion; Covello, Angiolillo, Sgroi, Concurring])

Related proceedings: *Y&Y E. Acupuncture, P.C. v Motor Veh. Acc. Indem. Corp.* (80 AD3d 605) and *Greater Health Through Chiropractic, P.C. v Motor Veh. Acc. Indem. Corp.* (80 AD3d 561)

An owner and operator of an uninsured mini-bike (hereinafter the assignor) was injured when struck by a hit-and-run vehicle. The assignor received medical care, and assigned her right to recover first-party no-fault benefits to a medical provider. The provider commenced this action against the Motor Vehicle Accident Indemnification Corporation (hereinafter MVAIC), which is obligated, under certain circumstances, to provide no-fault benefits to "qualified persons" who sustained injuries as a consequence of vehicular accidents in which (1) no involved vehicle is insured, and (2) the injured person is not covered under an automobile insurance policy issued in connection with a vehicle owned by him or her, or by a member of his or her household. For the purposes of determining whether an individual is a "qualified person" under Insurance Law article 52, the injured party must demonstrate that he or she was in full compliance with that article. Accordingly, a person is not a "qualified person" if he or she is required by that article to maintain insurance on a vehicle, but fails to do so.

A "class C" limited-use motorcycle (*see* Vehicle and Traffic Law § 121-b) is defined as a two or three-wheeled motorized vehicle with a seat or a saddle, that can attain a maximum performance speed of not more than twenty miles per hour. The owner of a "class C" limited use motorcycle is not required to carry insurance for that vehicle, while owners of a standard motorcycle, as defined in Vehicle and Traffic Law § 123, are required to maintain insurance (*see* Vehicle and Traffic Law art 6, 8, 48-A; Insurance Law § 5102[m]). Here, MVAIC failed to establish, on its motion for summary judgment, that the mini-bike was a standard "motorcycle"

or that it was not a "class C" limited-use motorcycle; accordingly, it failed to establish, prima facie, that the vehicle was required to be insured, and, thus, failed to establish that the assignor was not a "qualified person" entitled to no-fault benefits by virtue of the fact that she owned an uninsured vehicle despite being statutorily required to carry insurance.

Accidents; Labor Law § 200

Reyes v Arco Wentworth Mgt. Corp. (83 AD3d 47 [Mar. 15, 2011, Dillon, Opinion; Rivera, Angiolillo, Austin, Concurring])

The plaintiff was employed by a landscaper, which provided him with a push mower to mow the lawn at a landowner's premises. As the plaintiff mowed the lawn with the mower on sloped ground, the front wheel of the mower went in to a hole in the ground approximately 1 foot wide, 2 feet long, and 6 to 8 inches deep. The mower tipped over, but the blades failed to stop spinning, as the mower was not equipped with an automatic shut-off mechanism, as required by federal Occupational Safety and Health Administration (hereinafter OSHA) regulations.

Generally, if a workplace accident is occasioned by a dangerous or defective premises condition, liability under Labor Law § 200 may only be imposed if the property owner created the condition, or had actual or constructive notice of it and failed to rectify it within a reasonable time. By contrast, if a workplace accident is occasioned by dangerous or defective equipment used in the performance of the work, the property owner may only be held liable if it had authority to supervised or control the means and methods of that work. Here, the plaintiff's accident is unusual in that it arguably involves both a defective premises condition (i.e., the hole in the ground) *and* defective equipment (i.e., the mower without the OSHA-compliant automatic shut-off mechanism).

Although the landowner established, prima facie, that it did not provide the mower equipment involved in the accident and did not supervise or control the means and methods of the plaintiff's work, it failed to address whether it created the hole in the ground, and failed

to describe when the area had last been inspected prior to the accident to establish the absence of prior actual or constructive notice. Since the action involved "hybrid" allegations of both defective premises and defective equipment, the landowner was required to address both standards of liability in moving for summary judgment. Since the landowner failed to address the premises liability standard of Labor Law § 200, it failed to establish its prima facie entitlement to judgment as a matter of law in connection with the plaintiff's claim that the premises were defective. Accordingly, summary judgment was properly denied.

Accidents; Liability Of Out-Of-Possession Landlords

Alnashmi v Certified Analytical Group, Inc. (89 AD3d 10 [Sept. 13, 2011, Balkin, Opinion; Skelos, Covello, Sgroi, Concurring])

The Court determined that an out-of-possession landlord that had, pursuant to a lease, retained a broad right of reentry for the purpose of inspection and repair did not thereby retain its original duty as a landowner to keep the premises reasonably safe, when the lease placed the burden of maintenance and repair squarely on the tenant. The Court explained that the general common-law rule of limited liability for out-of-possession landlords with respect to leased premises is that an out-of-possession landlord only has a duty to maintain premises in a reasonably safe condition where that duty is imposed by statute or assumed by contract or a course of conduct, and the landlord is not similarly obligated when it merely retains general "control" of the premises.

In the instant dispute, pursuant to the terms of a 20-year lease, the tenant was obligated to preserve and maintain the leased premises in good order and condition. Although the tenant was also obligated to grant the landlord a broad right of reentry for the purposes of the landlord's inspection and repair of the premises, the lease expressly stated that it did not impose upon the landlord "any responsibility or liability whatsoever for the care or supervision of said premises." Since the landlord was not obligated by contract or statute to maintain the ceiling or the floor of the premises in good condition, it was not liable for injuries sustained by

an employee of the tenant as a consequence of slipping on a puddle of water that had accumulated on an interior floor as a consequence of a leaky roof.

Accidents; Negligent Supervision Of Students

Nash v Port Wash .Union Free School Dist. (83 AD3d 136 [Apr. 12, 2011, Dickerson, Opinion; Covello, Belen, Lott, Concurring])

A public school teacher assigned to supervise two high-school students in connection with an after-school science program left the school premises, leaving the two students completely unsupervised in a chemistry laboratory. While the teacher was absent, a minor explosion occurred, injuring one of the students.

Since the duty owed by a school is derived from the school's assumption of custody of and control over the students, in place of parents and guardians, the school's duty is coextensive with its physical custody and control over the students. Once students leave the school's "orbit of authority," parents resume control and the school's duty ends. Thus,"'[a]lthough during school hours the standard is that of the reasonably prudent parent, a lesser standard, that of the reasonable and prudent person, is applicable in the context of a student's voluntary participation in an intramural or extracurricular school sport'" (*Hansen v Bath & Tennis Mar. Corp.*, 73 AD3d 699, 701).

In denying the school district's motion for summary judgment dismissing the complaint, this Court concluded that the more rigorous "reasonably prudent parent" standard applied under the circumstances of this case. The Court relied on, among other things, the fact that the activity was a graded academic pursuit conducted on school premises. Additionally, no significance was attributed to the fact that, at the time of the accident, the injured student was not actively performing work on a project for the subject class but, rather, had merely accompanied his classmate to the science lab; in this regard, this Court emphasized that the injured student was enrolled in the class and, as such, was a person to whom the school owed

a duty of adequate supervision, and to whom the school remained liable for foreseeable injuries proximately caused by the absence of adequate supervision.

Accidents; Vicarious Liability; Vehicle And Traffic Law § 2411

Mikelinich v Caliandro (87 AD3d 99 [July 5, 2011, Chambers, Opinion; Florio, Dickerson, Lott, Concurring])

The plaintiff allowed the 17-year-old ward of a friend to ride the plaintiff's all-terrain vehicle (hereinafter ATV). The ward lost control of the ATV, and, when the plaintiff went to assist him, the plaintiff was struck by the ATV. The plaintiff commenced a personal injury action against the ward and the friend. The panel, in a matter of first impression for the Court, held that Vehicle and Traffic Law § 2411, which imposes vicarious liability on an owner of an ATV for damages caused by the negligent operation of the ATV by a permissive user, and immunizes the owner from claims for damages accruing to the permissive user, did not bar the plaintiff's negligence causes of action against the ward, despite that fact that the plaintiff was the person who permitted the ward to operate the ATV. The Court looked to Vehicle and Traffic Law § 388, and case law interpreting that statute, to interpret Vehicle and Traffic Law § 2411. Although Vehicle and Traffic Law § 388 is expressly applicable only to "motor vehicles," a category that does not include ATVs, that statute employs language substantially similar to Vehicle and Traffic Law § 2411. Vehicle and Traffic Law § 388 has been held not to bar the owner of a motor vehicle from maintaining a negligence action against a permissive user who injures the owner. Rather, Vehicle and Traffic Law § 388 was designed to broaden the right of an injured person to recover damages so as to hold a motor vehicle owner vicariously liable to third persons for the negligence of a permissive operator. Thus, the panel concluded that an owner of an ATV could recover for the injuries he or she sustained, even though they were caused by a person operating the ATV with that owner's permission, and that the alleged negligence of the ward in operating the ATV would not be imputed to the plaintiff.

Appeals; Application To Be Relieved As Counsel

Matter of Giovanni S. (Jasmin A.) (89 AD3d 252 [November 1, 2011; Skelos, Opinion; Rivera, Hall, Austin, Concurring)

Anders v California (386 US 738) permits a court in a criminal case or a Family Court matter to entertain a motion by assigned counsel for permission to be relieved as counsel where there are no nonfrivolous issues that might be raised on behalf of the appellant. The Court in this Family Court proceeding identified two steps that are necessary for assigned counsel to take before he or she will be permitted to withdraw as counsel. "First, the Court 'must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for *any* arguable claim that might support the client's appeal'" (quoting *Penson v Ohio*, 488 US 75, 83 [internal quotation marks omitted]). "In the fulfillment of that responsibility, counsel should promptly obtain any transcripts, and consult with the client, as well as with trial counsel." Further, assigned counsel "'must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal'" (quoting *McCoy v Court of Appeals of Wis., Dist. 1*, 486 US 429, 438). "Only after such a diligent and conscientious examination of the case will counsel be in a position to determine that there are no nonfrivolous issues to raise on appeal. Once that determination is made . . . counsel must file a brief 'reciting the underlying facts and highlighting anything in the record that might arguably support the appeal'" (quoting *People v Saunders*, 52 AD2d 833, 833). In that brief, "counsel must, at a minimum, draw the Court's attention to the relevant evidence, with specific references to the record; identify and assess the efficacy of any significant objections, applications, or motions; and identify possible issues for appeal, with reference to the facts of the case and relevant legal authority. Counsel cannot merely recite the underlying facts, and state a bare conclusion that, after reviewing the record and discussing the case with the client, it is the writer's opinion that there are no nonfrivolous issues to be raised on appeal."

"If the Court is satisfied . . . that counsel diligently examined the case on the indigent appellant's behalf, the next step in the Court's review is to determine, based upon an

independent review of the record, whether counsel's assessment that there are no nonfrivolous issues for appeal is correct." In so doing, "it is inappropriate for this Court to analyze the merits of any particular appellate issue where the appellant has not received the benefit of a merits-based brief prepared by counsel." "The question . . . to be answered by this Court in every *Anders* case is only whether 'the appeal lacks any basis in law or fact'" (quoting *McCoy v Court of Appeals of Wis., Dist. 1*, 486 US at 439 n 10). "In other words, the question is not whether the appeal presents any issues that have merit, but whether it presents any issues that are 'arguable' on the merits" (quoting *Anders v California*, 386 US at 744).

In the present appeal, counsel's *Anders* application failed on both levels of review. Regardless of the likelihood of the success of the mother's appeal in this case, the mother was "entitled to an advocate to properly evaluate and argue the case on her behalf." Accordingly, although this Court granted the motion and relieved assigned counsel, it was constrained to assign new counsel to the mother.

Civil Procedure; Fees Paid To Fact Witnesses; Jury Instructions

Caldwell v Cablevision Sys. Corp. (86 AD3d 46 [May 31, 2011, Skelos, Opinion; Dickerson, Belen, Lott, Concurring], *affd*, ___ NY3d ___, 2013 NY Slip Op 00783 [2013])

A party who calls a witness to testify to facts within his or her knowledge is required by statute to pay that witness, inter alia, $15 for every day of his or her attendance at trial (*see* CPLR 8001). Here, the defendant in a slip-and-fall action voluntarily paid $10,000 to a physician who appeared as a fact witness and testified as to the cause of accident. Although that fee was far in excess of the mandatory witness fee, it did not render the physician's testimony inadmissible. However, the trial court here failed to adequately charge the jury regarding the suspect credibility of factual testimony by a paid witness.

Here, the plaintiff asserted a cause of action against a contractor retained by a cable television provider to lay trenches for fiber optic cable, alleging that the contractor left a public highway in a pitted condition, and that she tripped in one of these pits. The defendant

subpoenaed the physician who had treated the plaintiff in an emergency room shortly after the accident, and he testified at trial that the plaintiff admitted to him that the accident occurred when she tripped over a dog while walking in the rain. The physician further testified that the defendant was compensating him for his lost time in the sum of $10,000.

The Court explained that there was a distinction between compensating a witness for the reasonable value of lost time, which was permissible, and paying a witness for his or her testimony, which was not. "Payments that, although not contingent upon content or outcome, are unreasonably high or disproportionate to the value of the time actually spent testifying can give rise to an inference that the payment was actually a fee for testifying." Moreover, the Court concluded that "the appropriate remedy in a case such as this one, where one might reasonably infer that a fact witness has been paid a fee for testifying, is to permit opposing counsel to fully explore the matter of compensation on cross-examination and summation, and to leave it for a properly instructed jury to consider whether the payment made to the witness was, in fact, disproportionate to the reasonable value of the witness's lost time and, if so, what effect, if any, that payment had on the witness's credibility."

In this case, although the Supreme Court erred in failing to provide an appropriate instruction to the jury, the error was not so prejudicial as to warrant reversal and a new trial.

In February 2013, the Court of Appeals affirmed this Court's decision.

Civil Procedure; Motion For Default Judgment; CPLR 3215(c)

Giglio v NTIMP, Inc. (86 AD3d 301 [June 14, 2011, Dillon, Opinion; Balkin, Leventhal, Chambers, Concurring])

Pursuant to CPLR 3215(c), a motion for a default judgment must be made within one year after the date on which a responsive pleading is due. Although the statute only refers to defaults in answering complaints, it also applies to counterclaims. CPLR 3012(a) provides that a reply to a counterclaim is due within 20 days after service of the pleading to which it responds, and CPLR 2103(b)(2) provides that where a pleading is served by mail, the period

prescribed for service of a responsive paper is extended by 5 days. Here, a defendant served, by regular mail, an answer containing a counterclaim against one of the plaintiffs. The plaintiff/counterclaim defendant defaulted in connection with the counterclaim, since he failed to serve a reply to the counterclaim within the applicable 25-day period. The defendant/counterclaim plaintiff, however, failed to move to hold the plaintiff/counterclaim defendant in default within one year after the lapse of that 25-day period. Hence, the default motion was deemed to be untimely, and CPLR 3215(c) compelled the Court to dismiss the counterclaim as abandoned.

The Court rejected the arguments of the defendant/counterclaim plaintiff that CPLR 303, when read together with CPLR 2103(b)(2), provided the plaintiff/counterclaim defendant with 35 days to serve a reply (30 days plus 5 days for mailing), and that the default motion was timely, since it was made within one year after the lapse of that alleged 35-day period. CPLR 303 only applies by its terms to parties that are nondomiciliary plaintiffs. Here, the plaintiff/counterclaim defendant testified at a deposition that he resided in New York. Accordingly, the longer 30-day period permitted for service of a reply by a nondomiciliary plaintiff did not apply to him. The Court also noted the distinction between the requirement that a plaintiff reply to a counterclaim in order to avoid a default, as required by CPLR 3012(c), and the procedure applicable to cross-claims, in which cross-claims are "deemed" denied under CPLR 3011 if not answered and no demand for an answer is made. Therefore, where a cross-claimant makes no demand for an answer to a cross-claim, there will never be a "default," and the requirement that a default motion be made within one year, as set forth in CPLR 3215(c), will never apply.

Cooperatives; Application For *Yellowstone* Relief

Goldcrest Realty Co. v 61 Bronx Riv. Rd. Owners, Inc. (83 AD3d 129 [Mar. 29, 2011, Lott, Opinion; Skelos, Dickerson, Eng, Concurring])

An application for *Yellowstone* relief (*see First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630), pursuant to which a commercial tenant seeks to enjoin or prevent a landlord from evicting it or dispossessing for breach of the covenants set forth in the lease, pending the disposition of the underlying landlord/tenant dispute, must be made not only before the termination of the subject lease, but must also be made prior to the expiration of the cure period set forth in the lease and the landlord's notice to cure. Since the application for *Yellowstone* relief in this case was made 12 days after the cure period prescribed by the landlord — a residential cooperative corporation — had lapsed, the rule set forth in *Korova Milk Bar of White Plains, Inc. v PRE Props., LLC* (70 AD3d 646), required that a motion for a Yellowstone injunction made by the sponsor and holder of unsold shares of the corporation was untimely.

The Court further rejected the tenant's contention that a different rule should apply in this case because the case involved proprietary leases in a residential cooperative, as opposed to a standard commercial lease like the one in *Korova Milk Bar*, as the leases were held for commercial purposes. The Court also concluded that there was no authority for the tenant's contention that a conditional limitation in a proprietary lease providing for forfeiture of the tenancy upon the nonpayment of rent is void as against public policy.

Court Reporter Services; Direct Action Against Hiring Attorney

Elisa Dreier Reporting Corp. v Global NAPs Networks, Inc., (84 AD3d 122 [Apr. 26, 2011, Austin, Opinion; Dillon, Dickerson, Hall, Concurring])

While a court-reporting agency may obtain payment for services rendered directly from the attorney who engaged it, the court reporting agency is not precluded from recovering such payment directly from the attorney's client.

Here, the court-reporting agency was hired by a law firm, then counsel for the defendants, to provide reporting services during a series of depositions. Prior to paying for the reporting services, the law firm filed for bankruptcy, and was dissolved. When the plaintiff

contacted the defendants for payment, the defendants refused, alleging that the law firm was responsible for paying the plaintiff. The plaintiff subsequently commenced an action to recover fees for unpaid reporting services.

Pursuant to General Business Law § 399-cc, an attorney who engages a reporting service to transcribe depositions is responsible to pay for those services, subject to certain exceptions. The legislative intent of the statute was to protect court reporters in the event that they were unable to recover payment for services rendered, not to prevent the reporting agency from obtaining payment should the law firm that ordered its services dissolve or otherwise refuse to pay for the services. Accordingly, this Court held that the statute does not bar the court-reporting agency from seeking to recover fees directly from the attorney's client, and does not absolve the client of its obligation to pay the court reporter's fees for services rendered.

Cremation; Public Health Law § 4201; Cause Of Action For Wrongful Cremation

Mack v Brown (82 AD3d 133 [Mar. 8, 2011, Dillon, Opinion; Angiolillo, Hall, Roman, Concurring])

Public Health Law § 4201(2), as amended effective 2006, 2007 and 2009, defines who may control the disposition of a decedent's remains. Specifically, the statute identifies those persons, in descending priority, as follows: the decedent, as expressed in a written witnessed instrument, followed by the surviving spouse, children, siblings, guardian, and others. Public Health Law § 4201(7) further provides that no cemetery, crematory, or funeral firm shall be liable for acts reasonably undertaken and in good faith to carry out the directions of the person who represents that he or she is entitled to control the disposition of the remains.

The executrix of the decedent's estate, who purported to be his widow, signed an authorization for the cremation of her husband's body, which recited that the decedent had left no written instructions for the disposal of his body, and that no relative or other person had expressed any objection to cremation. The decedent's body was thereupon released by the

hospital at which he died to a the funeral home, which, in turn, delivered the body to a cemetery for cremation.

The plaintiff commenced this action against the executrix, the hospital, the funeral home, and the cemetery alleging that she, and not the executrix, was the lawful wife of the decedent at the time of his death, having married him more than 17 years prior to the purported marriage between the decedent and the executrix. The plaintiff sought damages for emotional distress caused by the alleged wrongful cremation of her husband's body. The Court concluded that the cemetery made a prima facie showing entitling it to dispositive relief, as it cremated the decedent's body after relying upon the executrix's authorization, as well as a copy of the executrix's Certificate of Marriage identifying her as the decedent's spouse. Under New York law, the executrix's more-recent marriage to the decedent is presumed to be valid and, to rebut that presumption, the plaintiff failed to proffer any evidence that her earlier marriage to the decedent had not been dissolved. Moreover, the cemetery and the funeral home each acted reasonably and in good faith in relying upon the executrix's authorization and marriage certificate. The intent of the protective provisions of the amended statute was not to require cemeteries and funeral firms "to cross-examine grieving widows or widowers, children, parents, siblings or others to confirm the validity of the familial or personal status claimed under the Public Health Law, or to conduct independent investigations of such persons to protect themselves from potential liability." The Court concluded that, to require the funeral home and the cemetery to conduct a further examination of the executrix under these circumstances would render meaningless the civil liability protections now afforded to such businesses under Public Health Law § 4201.

Criminal Law; Confrontation Clause; Dying Declarations

People v Clay (88 AD3d 14 [June 28, 2011, Skelos, Opinion; Dickerson, Eng, Lott, Concurring])

The statement of a dying gunshot victim, in which he identified the shooter in response to questioning by a police officer who responded to the crime scene, "constituted testimonial evidence, which is generally barred by the Confrontation Clause of the Sixth Amendment of the United States Constitution," but such evidence was "admissible as a constitutionally permissible exception to the Confrontation Clause."

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Here, however, the totality of the surrounding circumstances objectively indicated that the officer's primary purpose was not to deal with an emergency, but to give the victim what might have been — and, in fact, turned out to be — his final opportunity to "bear witness against his assailants." Nevertheless, this Court concluded that "'the Sixth Amendment incorporates an exception for testimonial dying declarations'" (quoting *Crawford v Washington*, 541 US 36, 56 n 6), and that the hearsay statement at issue fell within that exception. Therefore, the victim's statement identifying the gunman who shot him was properly admitted as a dying declaration.

Criminal Law; Drug Law Reform Act of 2009

People v Overton (86 AD3d 4 [May 17, 2011, Rivera, Opinion; Dickerson, Lott, Roman, Concurring])

A defendant's motion for resentencing under the Drug Law Reform Act of 2009 (hereinafter the 2009 DLRA), as codified in CPL 440.46, was properly granted, since the defendant was eligible for resentencing pursuant to the 2009 DLRA even though he was released on parole following his motion for resentencing.

In order to be eligible for resentencing under CPL 440.46(1), a person must: (1) be in the custody of Department of Correctional Services (hereinafter DOCS); (2) have been convicted of a class B felony offense defined in article 220 of the Penal Law; (3) have committed the offense prior to January 13, 2005; (4) be serving an indeterminate sentence

with the maximum term of more than three years; and (5) not be serving a sentence on a conviction for or have a predicate felony conviction for an exclusion offense. Here, the defendant was convicted of five counts of criminal sale of a controlled substance in the third degree (*see* Penal Law § 220.39[1]), which he committed in 2004, and was serving a sentence of concurrent indeterminate terms of imprisonment of 4½ to 9 years. He was not among the category of inmates excluded from qualifying for resentencing under subdivision (5)(a) of CPL 440.46. Significantly, at the time of the defendant's motion for resentencing, he was still in the custody of DOCS. Accordingly, the defendant met all of the criteria for eligibility. The defendant's release to parole did not render his appeal academic because the defendant's rights would be directly affected by the determination of the appeal. In this regard, this Court disagreed with and declined to follow *People v Orta* (73 AD3d 452), a decision rendered by the Appellate Division, First Department.

Criminal Law; Guilty Plea; Motion To Vacate Plea

People v Monk (83 AD3d 35 [Mar. 15, 2011, Dillon, Opinion; Balkin, Belen, Austin, Concurring])

The defendant entered a plea of guilty to one count of attempted robbery in the first degree, in satisfaction of various charges set forth in a Westchester County indictment. The negotiated plea included a promise that the defendant would receive a determinate prison sentence of 10 years that would run concurrently with any sentence imposed on a related case in Rockland County. The County Court presided over a routine allocution when the plea was entered, which included a discussion and the defendant's acknowledgment that the sentence would also include 5 years of mandatory postrelease supervision (hereinafter PRS). Prior to the sentencing proceeding, the County Court denied the defendant's motion to withdraw his plea of guilty, in which he argued that his plea was not knowingly, voluntarily and intelligently entered, since the County Court had failed to specifically advise the defendant during the plea allocution that if he violated the terms of his PRS, he would face reincarceration.

In a case of first impression at the appellate level, the Court affirmed the County Court's order, explaining that a court that presides over a plea proceeding must specifically inform the defendant of the "direct consequences of the plea," including, but not limited to, the imposition of PRS as a component of the sentence (citing, inter alia, *People v Catu*, 4 NY3d 242), but is not obligated to inform the defendant of "collateral consequences," which are defined as those consequences that are particular to the individual defendant, and involve the authority and proceedings of agencies outside of the court's control with respect to the administrative adjudication of matters such as the defendant's loss of a license, the loss of the right to travel, the loss of the right to vote or possess firearms, and the obligation to register as a sex offender pursuant to SORA.

Under Penal Law § 70.45(4) and Executive Law § 259-i(3), the ramifications of violating conditions of PRS are within the jurisdiction of the New York State Board of Parole (hereinafter the Board), an agency independent of the courts. The Board determines whether there is probable cause to believe that a violation has been committed, conducts a hearing on the alleged violation, and imposes any remedy that is warranted, which may include reincarceration. Since reincarceration ultimately rests in the discretion of the Board, a defendant's violation of the conditions of PRS is a "collateral consequence" of the plea. Thus, the ramifications of a defendant's violation of the conditions of PRS need not be explained to the defendant during the plea proceeding.

Criminal Law; Jury's Reliance On "Expertise" Of A Juror

People v Davis (86 AD3d 59 [May 24, 2011, Hall, Opinion; Angiolillo, Belen, Austin, Concurring])

The Court rejected a criminal defendant's argument that a jury should have been impeached on the ground that the jury failed to apply the trial court's instructions on the law and, instead, relied on the purported "expertise" of a juror who was an attorney.

One of the three codefendants (hereinafter codefendant 1) asked the defendant to participate in an apartment robbery. The defendant initially refused, but later agreed to participate. During the robbery, the defendant received a gun, gave it to another codefendant (hereinafter codefendant 2), and escorted a victim into the apartment upon codefendant 1's instructions. The defendant then decided to leave and started walking away. Meanwhile, codefendant 2 had fatally shot one of the victims. When the defendant heard the gunshot, he fled. The defendant testified at trial in his own defense and gave an account minimizing his participation in the robbery. Throughout deliberations, the jury requested readbacks of the defendant's testimony, requested reinstruction on the law, and asked to view the defendant's videotaped statement. After deliberations, the jury found the defendant guilty of all submitted counts, which included murder in the second degree (felony murder), robbery in the first degree, and burglary in the first degree.

One juror (hereinafter Juror R), a real estate attorney, explained to the other jurors during deliberations that they must find the defendant guilty of all charges or none. The jurors were aware of Juror R's profession. The Supreme Court denied the defendant's motion pursuant to CPL 330.30 to set aside the verdict on the ground of juror misconduct. This Court affirmed, concluding that the defendant failed to demonstrate that Juror R improperly influenced jury deliberations because Juror R did not introduce extraneous experimentation, investigation, or calculation that relied on facts outside the record. Accordingly, this Court concluded that the jurors did not commit misconduct, but, instead, strove conscientiously to do their job.

Criminal Law; Pre-Arraignment Interviews; CPLR Article 78 Proceeding To Prevent Court From Engaging In Ethical Inquiry In Context Of Suppression Motion

Matter of Brown v Blumenfeld (89 AD3d 94 [Oct. 4, 2011, Balkin, Opinion; Mastro, Dillon Miller, Concurring])

The Queens County District Attorney instituted a program, in which Assistant District Attorneys (hereinafter ADAs) interviewed unrepresented arrestees before their arraignments,

and asked the arrestees to provide the ADAs with, among other things, information that might be exculpatory. Inculpatory statements taken from the arrestees were nonetheless used against them in criminal proceedings. In the context of a hearing held in connection with a motion to suppress a defendant's statement to an ADA, a Supreme Court Justice expressed concern that the program raised ethical issues, and he appointed an expert to help him decide the issue. The District Attorney commenced a proceeding under CPLR article 78 in the nature of prohibition, seeking to prohibit the Justice from engaging in an ethical inquiry into the interview program in the context of the suppression motion. In denying the petition and dismissing the proceeding, this Court held that a CPLR article 78 proceeding was not the appropriate vehicle for a challenge to the Justice's inquiry into the legal ethics of the interview program, since such a proceeding does not lie to address a mere legal error, but requires something more, such as an unlawful use or abuse by the Justice of the entire underlying action or proceeding.

As the Court explained, if the Justice were to consider and make a finding with respect to whether the ADAs conduct of an interview of the defendant violated ethical rules, he would be doing so in determining a motion he is "authorized" to entertain, namely, a motion to suppress a statement on the ground that it was involuntarily made. Under CPL 60.45, a statement is involuntarily made if, among other things, it is obtained "[b]y any person . . . by means of . . . improper conduct . . . which impaired the defendant's physical or mental condition to the extent of undermining his [or her] ability to make a choice whether or not to make a statement" (CPL 60.45[2][a]). The Court construed the District Attorney's petition as a request that it prohibit the Justice from considering and making a finding as to a portion of the definition of the term "involuntarily made." The Court reasoned that if the District Attorney were correct, and that the ADAs' purported ethical violations had no bearing on whether their conduct was "improper conduct" within the meaning of CPL 60.45, then the Justice might be committing legal error if he proceeded with his inquiry. But, the Court concluded, that legal error would not be the kind of error that implicates an unlawful use or abuse of the entire action or proceeding such as to warrant the extraordinary remedy of prohibition, but would instead

constitute an unlawful procedure or error in the action or proceeding related to the proper purpose of the action or proceeding.

Criminal Law; SORA Assessment; Application for Downward Departure from Presumptive Risk Level

People v Wyatt (89 AD3d 112 [Oct. 18, 2011, Angiolillo, Opinion; Hall, Roman, Cohen, Concurring])

A convicted sex offender appealed from an order designating him a risk level two sex offender pursuant to Correction Law article 6-C, the Sex Offender Registration Act (hereinafter SORA), and denying his application for a downward departure to risk level one. This Court set forth the proper standard for evaluating a sex offender's application for a downward departure from the presumptive risk level calculated by the assessment of points on the risk assessment instrument. The sex offender must meet a threshold, two-part showing by (1) identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of re-offense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the SORA Guidelines, and (2) establishing the facts in support of its applicability by a preponderance of the evidence. At that point, the SORA hearing court may exercise its discretion to grant or deny the departure application based upon an examination of all circumstances relevant to the offender's risk of re-offense and danger to the community.

In applying this standard to the case at bar, the Court held that three of the factors identified by the sex offender were not appropriate mitigating factors as a matter of law. A fourth factor was expressly recognized as an appropriate mitigating factor in the Guidelines as a matter of law, but the sex offender failed to meet his burden of establishing facts in support of its applicability by a preponderance of the evidence.

Criminal Law; SORA Assessment; Effective Assistance Of Counsel

People v Bowles (89 AD3d 171 [Nov. 1, 2011, Leventhal, Opinion; Angiolillo, Balkin, Sgroi, Concurring])

While the defendant acted as a lookout, the two codefendants sexually assaulted and raped a 14-year old female student in a high school stairwell. During a portion of the incident, the defendant held the victim by her waist so that one of his two codefendants could remove her pants. The defendant was convicted, upon his plea of guilty, of unlawful imprisonment in the second degree. Prior to his release from prison, the Supreme Court conducted a risk level assessment hearing pursuant to the Sex Offender Registration Act (Correction Law article 6-C, hereinafter SORA). Although the defendant did not actually have sex with the victim, the Supreme Court properly assessed 25 points for sexual contact with the victim. While the defendant did not actually have sexual contact with the victim, he did have physical contact with her, and this contact was instrumental to the commission of the underlying sexual assault. Thus, this Court rejected the defendant's argument that, since he did not play a central role in the sexual aspect of the assault, the application of accessorial liability principles to assess him 25 points for sexual contact with the victim/sexual intercourse resulted in an inaccurate assessment. Accordingly, the Court rejected the defendant's request that he be adjudicated as a level one sex offender.

The Court agreed with the defendant that he had a due process right to the effective assistance of counsel in this SORA proceeding, a right which emanates from the Fourteenth Amendment to the United States Constitution and article I, § 6 of the New York Constitution ("No person shall be deprived of life, liberty or property without due process of law"). Additionally, the Court reasoned that, since it accepts *Anders* submissions in SORA proceedings (*see Anders v California*, 386 US 738), the acceptance of these submissions constitutes an implicit awareness by the Court that the defendants in these proceedings have a right to the effective assistance of counsel. Nonetheless, the Court concluded, upon consideration of the totality of the circumstances, that the defendant was not deprived of the effective assistance

of counsel, since defense counsel's failure to request a downward departure was not so egregious and prejudicial as to deprive the defendant of meaningful representation.

Discrimination; Human Rights Law; Executive Law § 297; Amendment To Add Defendant; Relation-Back Doctrine

Matter of Murphy v Kirkland (88 AD3d 267 [Aug. 16, 2011, Balkin, Opinion; Mastro, Leventhal, Miller, Concurring])

In an administrative proceeding commenced under the Human Rights Law (Executive Law art 15), the New York State Division of Human Rights (hereinafter the Division) abused its discretion in amending the administrative complaint (hereinafter the complaint) by adding another respondent after the one-year limitations period set forth in Executive Law § 297(5) had expired, and after the respondent had already appeared pro se on behalf of his company, the sole respondent in the original complaint, at a public hearing on the complaint (see Executive Law § 297[4][a]). The Division amended the complaint—which originally alleged sexual harassment and retaliatory termination by one corporate respondent (hereinafter the corporation)— by adding the corporation's president and sole shareholder (hereinafter the president) as an individual respondent in the middle of the hearing.

Although the Human Rights Law gives the Division the right to amend a complaint "reasonably and fairly," the Division's determination to permit the amendment here was an abuse of discretion. Utilizing the CPLR's "relation-back" analysis, the Court held that, at the time he was added as a respondent, the president could no longer have been chargeable with the knowledge that he still would be subject to being added as a respondent, especially when no request to add him had been made. The Court concluded that, under these circumstances, the president would be unfairly prejudiced by application of the relation-back doctrine.

Employer And Employee; CPLR Article 78; Challenge To Termination Of Employment Based Upon Tenure By Estoppel

Matter of Berrios v Board of Educ. of Yonkers City School Dist. (87 AD3d 329 [July 5, 2011, Leventhal, Opinion; Mastro, Skelos, Roman, Concurring])

Service as a substitute teacher does not constitute probationary service for purposes of obtaining tenure as a regular teacher. Under Education Law § 2573(1)(a), a teacher in a large city school district, such as the petitioner here, is required to serve a three-year probationary period before being awarded tenure. A "teacher" is defined as "the holder of a valid teacher's certificate issued by the commissioner of Education or a valid regional credential" (8 NYCRR 80-1.1[b][39]). While it is possible for a substitute teacher's three-year probationary period to be reduced to one year, through "Jarema credit," which is awarded where one has served as a regular substitute continuously for at least one school term immediately preceding the probationary period, this Court concluded that Jarema credit cannot be awarded to a regular substitute teacher who does not have a valid New York State teacher's certificate. Accordingly, the petitioner could not satisfy the three-year probationary requirement by combining his substitute teaching experience under an intern certificate during one school year with his probationary service for the subsequent two school years. The Court rejected the petitioner's tenure-by-estoppel claim since the school district and its officials did not accept the continued services of the petitioner while also failing to either grant or deny tenure prior to the expiration of the petitioner's probationary term.

The Court explained that a contrary determination would discourage schools from employing students teaching pursuant to intern certificates, thereby depriving both the school districts and the teachers of that valuable experience.

Family Law; Change Of Child's Surname

Matter of Eberhardt (83 AD3d 116 [Mar. 29, 2011, Chambers, Opinion; Prudenti, Dillon, Balkin, Concurring])

A mother sought to change her six-year-old daughter's surname from that of her father to a hyphenated name composed the father's and mother's surnames. In determining that the

application should have been granted, this Court concluded that the father failed to present a reasonable objection to the proposed hyphenated name, and that the interests of the child would be substantially promoted by the change. Although the father argued, among other things, that it was Anglo-American custom to give a child the father's name, the Court concluded that neither parent had a superior right to determine the surname of the child, and the father failed to articulate how the patronymic custom was in the child's best interests or bore on his relationship with the child. The Court proceeded to identify some of the many factors that should be considered in determining whether a proposed name change substantially promotes the child's best interests. Most persuasive to the disposition of the instant case was that the child identified with the proposed hyphenated surname, had been using the name for a number of years, and was generally known in the community by her hyphenated name, and the name would be a symbolic reminder of, and source of identification and association with, her parents, their heritage, and her half-siblings on each side. This Court's opinion was the first New York State appellate-level opinion to discuss this issue at length.

Family Law; Child Abuse; Forensic Medical Examination Of Child

Matter of Shernise C. [Rhonda R.] (91 AD3d 26, [Nov. 15, 2011, Cohen, Opinion; Prudenti, Angiolillo, Florio, Concurring])

Family Court Act § 1027(g) requires that, in all child protective proceedings involving allegations of abuse, the court shall order a forensic medical examination of the child. Nonetheless, the administration of a court-ordered medical examination in some cases may violate the constitutional rights of children to be secure against unreasonable searches and seizures. The Court observed that, "while harmonizing the state's extraordinary interest in protecting a child's welfare from the potential for the invasion of a child's constitutional rights may be at times difficult, a proper balance must be struck since even the most heinous crime of child sexual abuse does not automatically provide cause to ignore the rights of the victim."

The subject child, who had not yet reached the age of 14, gave birth to a daughter. A DNA test conducted more than one year later established that there was a 99.97% probability that the subject child's stepfather had fathered the daughter. The subject child, her daughter, and the subject child's four-year-old sister were placed in the custody of the New York City Administration for Children's Services (hereinafter the ACS), which filed petitions against the subject child's stepfather and mother, alleging abuse. The Family Court, in accordance with Family Court Act § 1027(g), directed the ACS to arrange for forensic medical examinations of the children, with color photographs to be taken of any visible areas of trauma to their bodies

In reversing the order of the Family Court, this Court concluded that, under the particular facts of this case, a mandatory medical examination was unreasonable and would violate the subject child's Fourth Amendment right to be free from unreasonable searches and seizures. The Court reasoned that an innocent child victim is entitled to no less protection from unreasonable searches and seizures than an accused criminal defendant. In analyzing the reasonableness of the search, the Court balanced the nature of the intrusion on the children's individual privacy against the promotion of legitimate government interests. The intrusiveness of a forensic medical examination is intensified where the subject is not only a vulnerable adolescent, but also a victim of sexual abuse. The Court recognized the State's considerable interest in protecting children from abuse, and in protecting the rights of accused individuals through the discovery and preservation of evidence. In this particular case, DNA evidence established conclusively that the child had been sexually abused by her stepfather, and that there was only a remote possibility of obtaining additional evidence through physical examination and photography. As the Court explained it, "as compelling as the State's interest is in this case, we are not persuaded that these interests need to be met via the medical examination mandated by Family Court Act § 1027(g)."

Family Law; Family Court Act § 661(a); Appointment Of Guardian; Special Immigrant Juvenile Status

Matter of Sing W.C. (Sing Y.C.-Wai M.C.) (83 AD3d 84 [Mar. 22, 2011, Prudenti, Opinion; Dillon, Balkin, Chambers, Concurring])

In the context of a proceeding commenced pursuant to Family Court Act § 661(a) for the purpose of establishing an undocumented alien's eligibility for special immigrant juvenile status under federal law, the Legislature intended the meaning of the word "child" to include any individual under the age of 21. Accordingly, since the subjects of such proceedings are "children" who have allegedly been subjected to abuse or neglect, and the underlying purpose of the proceeding is to prevent further abuse or neglect, the New York City Administration for Children's Services (hereinafter the ACS) is authorized to conduct an investigation into the "child's" household, and the Family Court, in turn, has authority to require the ACS to conduct an investigation of the proposed guardian of the undocumented alien who was older than 18 years of age, but younger than 21.

Family Court Act § 661(a) governs "[g]uardianship of the person of a minor or infant." That statute, which had previously been interpreted as applying only to persons under the age of 18, was amended by the Legislature in 2008, in response to the federal law and regulations creating special immigrant juvenile status and making it available to undocumented immigrants under the age of 21.

Rejecting the ACS's argument that it only had jurisdiction to conduct household investigations in connection with children 18 years of age or under, this Court, alluding to unmistakable legislative intent underlying the 2008 amendment of Family Court Act § 661(a), concluded that, in amending that statute, the Legislature expressly extended the provisions for the appointment of a guardian for the person of a minor or infant — terms which are elsewhere defined as referring to persons under the age of 18 (*see* Family Ct Act § 119[c]) — to individuals between the ages of 18 and 21 seeking special immigrant juvenile status. In light of the protective purpose underlying Congress's creation of special immigrant juvenile status, a purpose adopted by the Legislature in amending Family Court Act § 661(a), this Court concluded that, in a proceeding under § 661(a), the context and the subject matter "'manifestly

require[ ]'" (quoting Social Services Law § 371) that the meaning of the term "child" likewise be expanded to include all persons under the age of 21. This Court observed that the statutorily enumerated purposes of a municipal child protective agency such as ACS included preventing "'[a]bused and maltreated children in this state'" from "'suffering further injury and impairment,'" "'investigating such reports [of suspected child abuse and maltreatment] swiftly and competently,'" and "'providing protection for the child or children from further abuse or maltreatment'" (quoting Social Services Law § 411). This Court found these objectives to be congruent with those underlying Family Court Act § 661(a), particularly when that statute is employed to facilitate the procurement of special immigrant juvenile status. Indeed, the very reason for the existence of special immigrant juvenile status is to protect the applicant "from further abuse or maltreatment" by preventing him or her from being returned to a place where he or she is likely to suffer further abuse or neglect. Furthermore, the ACS has a statutory duty to "[i]nvestigate the family circumstances of each child reported to [it] as . . . neglected [or] abused . . . in order to determine what assistance and care, supervision or treatment, if any, such child requires" (Social Services Law § 398[6][a]). Thus, the relief sought on behalf of the undocumented minor immigrant, and the investigation ordered by the Family Court to aid in its consideration of such relief, fell within the ACS's legal authority and further the objects of the Family Court Act (*see* Family Ct Act § 255).

Family Law; Maternity; Listing Of Genetic Mother On Birth Certificate Of A Child Born To Surrogate Mother

T.V. v New York State Dept. of Health (88 AD3d 290 [Aug. 9, 2011, Austin, Opinion; Dillon, Leventhal, Chambers, Concurring])

In addition to having the authority to issue orders of paternity, the Supreme Court has the authority to issue orders of maternity. Moreover, the amendment of a birth certificate to list the genetic mother as the legal mother of a child born to a surrogate does not necessitate an adoption proceeding. This Court concluded that there was no basis to distinguish between

the legal rights of a genetic mother and a genetic father after the birth of the child carried by a surrogate or gestational mother, as the law must be read as gender-neutral.

Here, an egg which had been retrieved from the ovaries of the genetic mother, who was unable to carry a child, and fertilized with the sperm of the genetic father, was subsequently transferred into the uterus of a gestational mother. Before the birth of the child, the genetic and gestational parents jointly commenced this action seeking, inter alia, a declaration that the genetic parents were the legal parents of the child. Following the birth of the child, the gestational mother relinquished all parental rights to the child. The hospital submitted the birth registration documents to the Department of Health (hereinafter the DOH), which identified the gestational surrogate as the mother of the child. The Supreme Court declined to compel the DOH to identify the genetic mother as the legal mother on the child's birth certificate, but issued an order of filiation recognizing the genetic father as the legal father and directing that he be identified as such on the child's birth certificate. In an amended complaint, the genetic parents and the gestational mother sought a judgment declaring that the genetic mother is the legal mother of the child and a judgment declaring that certain provisions of the Family Court Act and the Domestic Relations Law are unconstitutional.

This Court determined that the Supreme Court had the authority to render a judgment declaring that the genetic mother is the child's legal mother, and that the amended complaint stated a cause of action for that relief. Although article 5 of the Family Court Act addresses only paternity and not maternity proceedings, pursuant to General Construction Law § 22, the construction of statutes containing "gender indicative words" should be interpreted to refer to "both male or female persons." Moreover, the Supreme Court has the inherent authority to render a declaratory judgment that a genetic mother is the legal mother of a child carried by a gestational surrogate, as it has authority to determine a child's legal parentage under Article 4 of the Family Court Act.

A declaratory judgment action is the most appropriate procedure by which to adjudicate legal maternity. An adoption order is unnecessary to amend a birth certificate, as the DOH is

required to issue a new birth certificate when a court of competent jurisdiction issues an order or judgment "relating to the parentage" of the subject child. Adoption is a less desirable and efficient alternative remedy, particularly because there is a preexisting biological link between the genetic mother and the child. Further, the conducting of a hearing shortly after the child's birth, as part of a declaratory judgment action to adjudicate legal parentage, does not interfere with the reporting requirements of Article 41 of the Public Health Law.

Family Law; Removal Of Children; Hearing Under Family Court Act § 1028

Matter of Lucinda R. [Tabitha L.] (85 AD3d 78 [May 17, 2011, Belen, Opinion; Dillon, Dickerson, Eng, Concurring])

Here, the Court reversed an order of the Family Court which denied a mother's application for a hearing pursuant to Family Court Act § 1028 for the return of her children, who had been temporarily removed from her custody, based on an allegation of neglect, and placed in the custody of their father. The Court concluded that the mother was entitled to a hearing pursuant to Family Court Act § 1028, which should have been held within three court days after her application for the return of her children was made. This conclusion was compelled by the Court's finding that the children had been "removed" from the mother's care within the meaning of the statute, even though the children had been placed in their father's custody rather than into foster care.

Landlord And Tenant; Holdover Proceeding; Attorney's Fees

Matter of Casamento v Juaregui (88 AD3d 345 [Sept. 13, 2011, Angiolillo, Opinion; Covello, Dickerson, Roman, Concurring])

Where a written lease provides for the landlord's recovery of an attorney's fee if successful in a summary proceeding to recover possession of a leasehold, Real Property Law § 234 establishes an implied covenant between the landlord and the tenant that provides a

tenant with the right to recover an attorney's fee incurred in the successful defense of such a proceeding. Here, the landlord commenced a holdover proceeding to evict the tenant, alleging that the tenant failed to cure alterations allegedly made without the landlord's consent. The tenant successfully defended the action in the Civil Court. This Court determined that the language of the provision in the parties' lease, which allowed the landlord, under certain circumstances, to recover an attorney's fee incurred in litigation occasioned by the tenant's failure to perform an obligation under the lease, triggered the implied covenant in the tenant's favor where the tenant was successful in such litigation. The Court cautioned that the outcome of any claim pursuant to Real Property Law § 234 depends upon an analysis of the specific language of the lease provision at issue in each case. The Court based its determination on the remedial nature and purpose of Real Property Law § 234 and the precedents interpreting the statute, resolving an apparent conflict in prior case law, including *Madison-68 Corp. v Malpass* (65 AD3d 445 [1st Dept 2009]) and *Bunny Realty v Miller* (180 AD2d 460 [1st Dept 1992]).

Lead Paint Exposure; Residential Lead-Based Paint Hazard Reduction Act of 1992; Standing

Brown v Maple3, LLC (88 AD3d 224 [Aug. 23, 2011, Roman, Opinion; Dillon, Dickerson, Hall, Concurring])

This Court held that the infant plaintiff, a resident in the defendant's apartment building, lacked standing to assert a cause of action under the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 USC § 4851 *et seq*. [hereinafter the RLPHRA]) for injuries allegedly sustained as a result of the defendant's alleged failure to disclose the presence of known lead-based paint hazards. Although the language of the RLPHRA and the legislative history reflect an intent to protect children, the statute accomplishes this objective by mandating disclosure to the purchaser or lessee of any known lead-based paint, or lead-based paint hazards in the purchase, sale, or lease of target housing. The plain language of the RLPHRA expressly limits recovery to a "purchaser or lessee," which did not include the infant plaintiff

or her mother. This Court noted, however, that although the plaintiffs lacked standing to maintain a cause of action under the RLPHRA, they were still free to pursue their cause of action sounding in common-law negligence.

Legal Fees; Default Judgment In Action Seeking Unpaid Legal Fees

Stephan B. Gleich & Assoc. v Gritsipis (87 AD3d 216 [June 21, 2011, Dillon, Opinion; Balkin, Belen, Austin, Concurring])

CPLR 3215(a) permits the clerk of a court to enter judgment in favor of a plaintiff upon the submission of the requisite proof, when "the plaintiff's claim is for a sum certain or for a sum which can by computation be made certain." This Court held that when one or more causes of action is for a sum certain and one or more other causes of action is not, as in the instant action, the clerk of a court is without authority to enter a judgment under CPLR 3215(a). To enter a judgment under such circumstances would, in effect, permit a clerk to perform judicial functions, such as severing the nonconforming causes of action from the sum certain claims or rendering the nonconforming causes of action academic.

The vacatur of the clerk's judgment, however, did not require vacatur of the defendant's underlying default in the case at bar. Vacatur of the default was not warranted since the defendant failed to set forth facts and circumstances warranting such relief. Thus, although the clerk's judgment entered upon the defendant's default was vacated, the only remaining action to be undertaken by the Supreme Court (and not by the clerk) was the rendering of a new judgment for the proper evidenced amount after an inquest.

Legal Malpractice; Proximate Cause

Dempster v Liotti (86 AD3d 169 [May 24, 2011, Belen, Opinion; Mastro, Rivera, Leventhal, Concurring])

The plaintiff alleged that the defendant attorney in this action was liable for legal malpractice because he failed to oppose a motion to dismiss the complaint in an underlying federal action, and thereafter failed to file a timely notice of appeal from the order that granted that motion to dismiss. Despite the defendant attorney's negligence, this Court determined that the underlying federal action was time-barred as a matter of law, and thus, the attorney's negligence, although clearly inexcusable, was not a proximate cause of the dismissal of the underlying complaint and the plaintiff's alleged damages.

Licenses; Transfer Of Taxi Cab Licenses

Village Taxi Corp. v Beltre (91 AD3d 92 [Nov. 22, 2011, Leventhal, Opinion; Florio, Hall, Austin, Concurring])

This Court held that so much of a contract as pertained to the sale of certain taxicab licenses was unenforceable and against public policy, mandating summary judgment dismissal of fraud and breach of contract causes of action relating to those licenses. A relevant Village code provision required that the plaintiff buyers apply for permission from the Village for the transfer of the subject taxi licenses, but the parties' contract allowed for the transfer of the licenses without the involvement of the Village. This Court determined that these provisions of the Village code, of which the plaintiffs were aware, existed for the protection of public health and morals, and thus, so much of the parties' contract as contravened those code provisions was illegal and unenforceable.

Lien Law; Article 3-A; Standing To Assert Cause Of Action Against Contractor And Officers Alleging That The Funds Entrusted To Them By Homeowners Were Improperly Diverted Within Meaning Of Lien Law § 72

Ippolito v TJC Dev., LLC (83 AD3d 57 [Mar. 22, 2011, Dickerson, Opinion; Skelos, Eng, Lott, Concurring])

The plaintiffs in this action were homeowners who contracted with the defendant contractor for the performance of certain home improvements. The plaintiffs terminated the defendant contractor's involvement with the project due to numerous alleged failures and shortcomings. On this appeal, the Court held that the plaintiffs were beneficiaries of the trust created by operation of Lien Law § 70, and that they had standing to assert a cause of action pursuant to Lien Law article 3-A against the defendant contractor, or its officers or agents, alleging that the funds the plaintiffs had paid to the contractor were improperly diverted within the meaning of Lien Law § 72.

Lottery; Social Services Law § 131-r; Tax Law § 1613-b; Reimbursement For Public Assistance Benefits

Matter of Carver v State of New York (87 AD3d 25 [June 21, 2011, Lott, Opinion; Covello, Dickerson, Hall, Concurring])

In this CPLR article 78 proceeding, the petitioner, a recipient of public assistance benefits, alleged that the interception of his lottery winnings by the New York State Office of Temporary and Disability Assistance (hereinafter OTDA) was in derogation of his rights under the Federal Fair Labor Standards Act (hereinafter the FLSA; *see* 29 USC § 206) and the New York State Minimum Wage Act (*see* Labor Law § 652). Specifically, the petitioner contended that the OTDA required him to work 35 hours per week in order to receive public assistance benefits, and that his bi-weekly benefits, plus the value of food stamps he received, equaled no more than the Federal or New York State minimum wage. Thus, the petitioner contended that requiring him to repay those benefits through the interception of his lottery winnings resulted in him having worked for wages far below the Federal and State minimum wage.

This Court upheld the Supreme Court's dismissal of the cause of action alleging a violation of the New York State Minimum Wage Act, but reinstated the cause of action alleging a violation of the FLSA insofar as asserted against the OTDA and its Commissioner. Although this Court concluded that the petitioner was not an "employee" within the meaning of the New

York State Minimum Wage Act, it concluded that the petitioner was an "employee" within the meaning of the FLSA. The Court relied on the expansive definition of "employee" in the FLSA, as well as the reasoning of the United States Court of Appeals for the Second Circuit, which, in dicta, strongly suggested that it would hold that WEP participants are employees within the meaning of the FLSA (*see United States v City of New York*, 359 F3d 83). The Court also relied on the fact that the United States Department of Labor, the agency charged with enforcing the FLSA, had determined that workfare participants may be employees covered by the FLSA.

Medical Malpractice; Frye Test; Expert Testimony

Lugo v New York City Health & Hosps. Corp. (89 AD3d 42 [Sept. 13, 2011, Covello, Opinion; Rivera, Florio, Lott, Concurring])

In this medical malpractice action, the Court disagreed with the Supreme Court's determination that the opinion testimony of the plaintiffs' experts that the infant plaintiff's brain injuries were caused by an episode of severe neonatal hypoglycemia lasting 81 minutes was inadmissible under *Frye v United States* (293 F 1013). Focusing on the limited purpose of the *Frye* test, to examine the basis of the expert's opinion and not whether the expert's conclusion is sound, this Court concluded that the plaintiffs demonstrated that their experts' theory of causation was based upon generally accepted scientific principles. Although the parties' experts disagreed about how long an episode of severe glucose deprivation must last before neurologic damage results, this Court concluded that such a factual disagreement should not be resolved as a matter of law and that it was unreasonable to preclude the plaintiffs' experts from testifying based on their reasonable extrapolations from existing legitimate empirical data that the injured plaintiff's severe episode of neonatal hypoglycemia caused his brain injuries.

This Court further found that the Supreme Court improvidently exercised its discretion in concluding that the plaintiffs' experts failed to proffer sufficient foundational evidence to support the admissibility of their testimony at trial. In reaching such a conclusion the Supreme Court, in effect, rendered an assessment as to the ultimate merit of the opinion testimony of

the plaintiffs' experts. This Court observed that the factual disagreements between the parties' experts went to the weight to be accorded to the testimony of the plaintiffs' experts by the trier of fact, and not the admissibility of such testimony.

Medical Malpractice; Liability Of Substance Abuse/Mental Health Facility

Fox v Marshall (88 AD3d 131 [Aug. 9, 2011, Sgroi, Opinion; Mastro, Florio, Leventhal, Concurring).

This action was commenced by a husband whose wife was murdered by a nearby neighbor's adult son (hereinafter the son). At the time of the occurrence, the son had been a voluntary patient at a substance abuse/mental health facility (hereinafter the facility) which had given him a "weekend pass" to visit his mother. This Court held that the complaint failed to state a cause of action to recover damages for medical malpractice against the facility and its employees due to the absence of any doctor-patient relationship between the murder victim and them. The Court recognized that although, under certain circumstances, the law will imply a duty of care by a doctor, in a malpractice context, to those who are not patients, the extension of such a duty has been limited to family members of the patient. By contrast, this Court held that the complaint did assert a valid negligence cause of action against the facility and its employees. Although the son was a voluntary patient at the facility, the complaint alleged that these defendants had the necessary authority or ability to exercise such control over the son's conduct so as to give rise to a duty on their part to protect a member of the general public.

Medical Malpractice; Standard To Be Applied In Determining Summary Judgment Motions

Stukas v Streiter (83 AD3d 18 [Mar. 8, 2011, Leventhal, Opinion; Prudenti, Angiolillo, Lott, Concurring])

On this appeal the Court clarified the proper standard to be applied in determining motions for summary judgment in actions alleging medical malpractice. The Court noted that a defendant physician moving for summary judgment must make a prima facie showing that there was no departure from good and accepted medical practice or that the plaintiff was not injured thereby. The Court held that in a medical malpractice action, a plaintiff opposing a defendant physician's motion for summary judgment must only submit evidence to rebut the defendant's prima facie showing. Hence, if a defendant moves for summary judgment and only demonstrates that there was no departure, a plaintiff need only raise a triable issue of fact with respect to departure. The Court explained that a plaintiff is only required to raise a triable issue of fact as to causation where a moving defendant first makes a prima facie showing that any claimed departure was not a proximate cause of the alleged injuries.

Mental Hygiene Law; Article 81; Compensation For Legal Services Rendered To Alleged Incapacitated Persons

Hirschfeld v Horton (88 AD3d 401 [Sept. 13, 2011, Dickerson, Opinion; Covello, Angiolillo, Roman, Concurring])

This Court held that the Assigned Counsel Plan (hereinafter ACP), which is the panel recognized by the City of New York to implement County Law article 18-B, is not obligated to compensate the Mental Hygiene Legal Service (hereinafter MHLS) when MHLS serves as appointed counsel to an indigent alleged incapacitated person (hereinafter AIP) in proceedings pursuant to Mental Hygiene Law article 81. This Court concluded that there was no language contained in Mental Hygiene Law article 81, the text of Mental Hygiene Law § 81.10(f), the legislative history thereof, or the case law which would require ACP to compensate MHLS when the latter served as counsel for indigent AIPs in proceedings pursuant to Mental Hygiene Law article 81.

Mortgages; Foreclosure Action; Notice Requirements of Home Equity Theft Protection Act

Aurora Loan Servs., LLC v Weisblum (85 AD3d 95 [May 17, 2011, Angiolillo, Opinion; Dillon, Belen, Roman, Concurring])

In a foreclosure action, this Court held that a lender must strictly comply with Real Property Actions and Proceedings Law § 1304 (RPAPL 1304), a notice provision of the Home Equity Theft Prevention Act (HEPTA; *see* Real Property Law § 265-a), which requires the lender to serve a notice containing statutory-specific information on the borrower at least 90 days prior to commencement of a foreclosure action. This Court followed the reasoning in *First Natl. Bank of Chicago v Silver* (73 AD3d 162 [2010]), which involved the notice provision in RPAPL 1303. Like RPAPL 1303, RPAPL 1304 contains mandatory language regarding the content, timing, and service of the required notice. Such mandatory language serves the underlying purpose of HETPA to afford greater protections to homeowners confronted with foreclosure. Proper service of RPAPL 1304 notice on the borrower with the statutory-specific information is a condition precedent to the commencement of a foreclosure action, and the lender has the burden of establishing satisfaction of this condition. In this particular case, the borrowers were entitled to summary judgment dismissing the complaint on the ground that the lender failed to comply with RPAPL 1304.

Mortgages; Standing To Commence Foreclosure Action

Bank of N.Y. v Silverberg (86 AD3d 274 [June 7, 2011, Leventhal, Opinion; Florio, Dickerson, Belen, Concurring])

This Court determined that the plaintiff bank did not have standing to commence this mortgage foreclosure action where the plaintiff's assignor—in this case, Mortgage Electronic Registration Systems, Inc. (hereinafter MERS)—was listed in the underlying mortgage instruments as a nominee and mortgagee for the purpose of recording, but was never the actual holder or assignee of the underlying notes. This Court noted that a plaintiff has standing to commence a foreclosure action where it is both the holder or assignee of the subject mortgage

and the holder or assignee of the underlying note at the time the action is commenced. In this action, although MERS was listed in the underlying instruments as a mortgagee for the purpose of recording, the subject instruments did not give MERS title to the notes, nor did the record show that the notes were physically delivered to MERS. Since MERS was never the actual holder or assignee of the underlying notes, it had no authority to assign the power to foreclose to the plaintiff bank. Consequently, the plaintiff failed to show that it had standing to foreclose.

Negligence; Frye Test; Expert Testimony

Ratner v McNeil-PPC, Inc. (91 AD3d 63 [Nov. 22, 2011, Leventhal, Opinion; Mastro, Austin, Cohen, Concurring])

In this action the plaintiff alleged that her long-term consumption of recommended dosages of Tylenol – a brand of acetaminophen manufactured by the defendant – caused her to develop liver problems and undergo a liver transplant. The defendant sought to preclude the testimony of the plaintiff's experts pursuant to *Frye v United States* (293 F 1013). This Court found that the methodology employed by the plaintiff's experts, correlating long-term, therapeutic acetaminophen use to the occurrence of liver cirrhosis, primarily based upon case studies, was fundamentally speculative and that there was too great an analytical gap between the data and the opinion proffered. The Court emphasized that when an expert seeks to introduce a novel theory of medical causation without relying on a novel test or technique, the proper inquiry begins with whether the opinion is properly founded on generally accepted methodology, rather than whether the causal theory is generally accepted in the relevant scientific community. Here, the plaintiff failed to meet that burden.

Negligent Drug Testing; Erroneous Positive Drug Test

Landon v Kroll Lab. Specialists, Inc. (91 AD3d 79, [Nov. 22, 2011, Miller, Opinion; Angiolillo, Florio, Leventhal, Concurring])

This Court held that a drug-testing laboratory may be held liable in tort to the subject of a drug test for negligence in the testing of that subject's biological specimen, notwithstanding the absence of a formal contractual relationship between the drug-testing laboratory and the subject of the drug test. This conclusion was based on a consideration of the factors relevant to determining the existence and scope of an alleged tortfeasor's duty. The Court found that the prospect of limitless liability was "extremely small," since the laboratory's duty related only to a narrow class of specific and readily identifiable individuals whose biological samples were accepted and tested for a defined contractual purpose. The Court further determined that public policy weighed in favor of imposing the legal duty given the important role of drug testing in today's society and the effect that such test results have on the very core of people's lives.

Probate; Action By Nonmarital Children Seeking To Inherit; EPTL 5-3.2

Matter of Gilmore (87 AD3d 145 [June 14, 2011, Leventhal, Opinion; Rivera, Hall, and Roman, Concurring])

On this appeal the Court determined that the biological children of a deceased testator, who were born prior to the execution of the testator's final will but were not known to exist by the testator until after he executed the will, were not entitled to be treated as adopted children under the caselaw-created exception to EPTL 5-3.2. That statute provides that when a testator has a child born after the execution of a last will, and dies leaving the "after-born child" unprovided for by any settlement and not mentioned in the will, such child shall succeed to a portion of the testator's estate. This Court held that the plain wording of the statute precluded the children in this case from being considered "after-born" children and that there was no indication that the Legislature had intended a contrary result.

Probate; Joint Will; Power of Disposal

Matter of Murray (84 AD3d 106 [Apr. 19, 2011, Belen, Opinion; Mastro, Skelos, Roman, Concurring])

This appeal involved the validity of a joint will executed by a couple that had been married for more than 40 years at the time of execution in 1993. The will bequeathed to the surviving spouse the entire estate of the first of them to die, as well as property over which the first to decease had "power of disposal, whether owned jointly or severally." Despite the subsequent divorce of the parties, as well as the wife's creation of a trust and execution of a will in 2007 (hereinafter the 2007 will), this Court held, following the wife's death, that the surviving husband was entitled to turnover of the real property held in the corpus of the wife's trust. Pursuant to the terms of trust and the earlier joint will, which was reaffirmed by the parties at the time of their divorce and in the wife's 2007 will, such real property was still part of the wife's estate even though she had placed it in the trust. Despite the creation of the trust and the 2007 will, the decedent still retained the power of disposal over the subject real property, and thus, under the terms of the joint will the real property was still part of the decedent's estate. The Court observed that "had the decedent simply gifted or even sold the [subject real property] during her lifetime, the joint will would not have served as a bar to its transfer."

Professional Corporations; Dissolution; Business Corporation Law § 1103

Matter of Bernfeld (86 AD3d 244 [June 7, 2011, Leventhal, Opinion; Skelos, Balkin, Sgroi, Concurring])

In this action, the Court held that the petitioner, a surviving spouse who inherited her deceased husband's interest in a professional service corporation (hereinafter the PC), was not permitted, as a nonprofessional shareholder, to vote for judicial dissolution of the PC pursuant to Business Corporation Law § 1103. The Court determined that Business Corporation Law § 1511 contains the exclusive list of matters upon which a nonprofessional shareholder may vote, and judicial dissolution was not among them. The Court further reasoned that since the

Legislature enabled nonprofessional shareholders to seek voluntary dissolution under Business Corporation Law § 1001, which requires a two-thirds majority vote, it seemed unlikely that the Legislature intended to permit a nonprofessional shareholder to seek judicial dissolution pursuant to Business Corporation Law § 1103 with a mere majority vote.

Real Property; Abandonment Of Unpaved Road; Statute Of Limitations

Matter of Dandomar Co., LLC v Town of Pleasant Val. Town Bd. (86 AD3d 83 [May 31, 2011, Dillon, Opinion; Angiolillo, Florio, Dickerson, Concurring])

This appeal addressed whether the petitioner, which commenced this CPLR article 78 proceeding to annul a municipality's certificate of abandonment for a highway, was required to commence the proceeding within four months, as provided in CPLR 217(1), or within one year, as provided in Highway Law § 205(2). This Court held that the general limitations provision of CPLR 217(1), which was enacted in 1962, had to yield to the later-enacted, more specific Highway Law statute, which was enacted in 1966. Accordingly, this Court treated the causes of action involving the abandonment of a public highway as an action seeking declaratory relief under Highway Law § 205(1) and held that the one-year limitations period of Highway Law § 205(2) governed those causes of action.

Real Property; RPAPL § 1201; Recovery By Estate Of Expenses Paid By Deceased Joint Tenant

Trotta v Ollivier (91 AD3d 8 [Nov. 15, 2011, Dillon, Opinion; Florio, Chambers, Miller, Concurring])

In 1992, the plaintiff’s decedent and the defendant purchased a home together as joint tenants and they lived there together as a non-married couple. Ultimately, the relationship failed, the defendant moved out, and the plaintiff’s decedent paid for the property’s upkeep over the ensuing years without any contribution from the defendant. When the plaintiff’s decedent died in 2008, the property vested entirely with the defendant as the sole surviving

joint tenant. This Court held that the complaint filed by the plaintiff estate failed to state a cause of action for unjust enrichment. Equity did not require the defendant to reimburse the decedent's estate for his share of the property's expenses, as the decedent was free during her lifetime to manage her financial affairs in whatever manner she saw fit. This Court also rejected the plaintiff's argument that under RPAPL 1201 the estate could recover from the defendant the equitable portion of the property's expenses that the defendant did not pay during the decedent's lifetime. This Court noted that the purpose of RPAPL 1201 was to require joint tenants to account for monies "received" by them that exceed their proportionate share of receipts. Here, the complaint did not seek recoupment of any monies received by the defendant during the decedent's lifetime relative to the jointly held property and, for that reason, it failed to state a cause of action under RPAPL 1201.

Tax Certiorari; Treatment Of Residential Property Improvements

Matter of Seidel v Board of Assessors, County of Nassau (88 AD3d 369 [Oct. 4, 2011, Hall, Opinion; Angiolillo, Dickerson, Roman, Concurring])

The issue presented on this appeal was whether the County of Nassau may consider improvements made to real property after the taxable status date in assessing property values for the particular tax year to which the taxable status date applies. Upon reviewing the statutory construction and legislative history of the relevant provisions of the Real Property Tax Law and the Nassay County Administrative Code (hereinafter the Code), this Court held that the valuation of real property must be assessed for tax purposes on the taxable status date and that Code § 6-24.1 did not give the County of Nassau the authority to consider evidence of an improvement occurring after the taxable status date, and then apply it to that tax year. Instead, Code § 6-24.1(e) required that the new assessment be applied to the next following tentative assessment roll.

Zoning; Conflict Between Town Zoning Ordinance And State Law

Sunrise Check Cashing & Payroll Servs., Inc. v Town of Hempstead (91 AD3d 126 [Nov. 29, 2011, Dickerson, Opinion; Skelos, Hall, Sgroi, Concurring])

In 2006, the Town of Hempstead enacted a zoning provision which prohibited the existence of check-cashing establishments within the Town in any districts other than industrial and light manufacturing districts. This Court concluded that the Town zoning provision was invalid pursuant to the doctrine of conflict preemption because it directly conflicted with existing New York State law. In enacting the Town zoning provision, the Town had "necessarily determined that, in its estimation, the Town's business district [was] not an appropriate location for check-cashing establishments." Under Banking Law § 369, however, the State Legislature specifically delegated to the Superintendent of Banks the task of determining whether particular locations were appropriate for check-cashing establishments. Existing check-cashing establishments at locations in the Town's business district, each of which was issued a license by the Superintendent and necessarily determined by the Superintendent to be appropriately located to serve a community need, were now in violation of the Town's zoning provision. Since this violation did not exist under State law, and because the Legislature had vested the Superintendent with the authority to determine appropriate locations for check-cashing establishments, the Town zoning provision was preempted by State law.