Appellate Division
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Decisions of Interest

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The Following Case Summaries May Not Be Cited As Authority

Administrative Agencies; Enforcement of Nonjudicial Subpoena

Matter of State Div. of Human Rights v Berler (46 AD3d 32 [Rivera, opinion; Santucci, Angiolillo, Dickerson, concur]).

The employee of a medical group filed a complaint against her employer with New York State Division of Human Rights (hereinafter the NYSDHR), alleging discrimination. The employer served the employee with a nonjudicial subpoena seeking certain documents. When the employee did not comply, the employer commenced a proceeding in Supreme Court pursuant to CPLR 2308(b) to enforce the subpoena. The Supreme Court directed the employee to comply with the subpoena. The employee did not comply, and the employer filed a motion with the Supreme Court to hold her in contempt for violating the Supreme Court's order. This motion was denied.

The proceeding was transferred to another Supreme Court Justice, who ordered the parties to appear for a conference or be precluded from pursuing the matter. The employee failed to appear at the Supreme Court conference. A hearing on the administrative complaint was commenced before the NYSDHR. The Supreme Court Justice ordered that, by the previous order mandating preclusion for failure to appear, the employee was precluded from offering evidence of her income and alleged damages at the NYSDHR hearing.

The NYSDHR commenced a CPLR article 78 proceeding in the nature of prohibition in the Supreme Court against the Supreme Court Justice, seeking to undo the preclusion order so that the employee might offer evidence at the NYSDHR hearing. The CPLR article 78 proceeding was required to have been commenced in the Appellate Division, and the Supreme Court denied the NYSDHR's petition on that basis. In the interests of judicial efficiency and economy, this Court, on appeal, considered the case upon its dismissal, as though it had been properly commenced in the Appellate Division.

This Court granted the petition, and held that CPLR 2308(b)(1), the statute on which the employer relied to enforce the nonjudicial subpoena, does not grant the Supreme Court unfettered authority to preclude a party from offering evidence in an administrative proceeding. The order of preclusion interfered with the NYSDHR's authorized powers, procedures, and functions. CPLR 2308(b)(1) does not permit the Supreme Court to interfere with the administrative and fact-finding functions of the NYSDHR with respect to the evidence the NYSDHR may consider in an administrative hearing.

Agricultural and Markets Law § 121; Order Directing Destruction of Dog Reversed; Secure Confinement Warranted

Matter of Motta v Menendez (46 AD3d 685 [Schmidt, Rivera, Santucci, Balkin]).

This Court held that the "dangerous dog" provisions of the Agriculture and Markets Law in effect at the time of a dog-on-dog attack instigated by the respondent's pit bull terrier did not mandate the destruction of the attacking dog as a remedy for the offense. Hence, this Court reversed the order of the District Court directing the destruction of the dog, holding nonetheless that the permanent secure confinement of the attacking dog was warranted.

Attorneys; Representation of LLC

Michael Reilly Design, Inc. v Houraney (40 AD3d 592 [Prudenti, Schmidt, Crane, Mastro]).

The Court held that an LLC may only be represented in court by an attorney, and not by one of its non-attorney members pro se.

Civil Rights Law § 79-b; Nassau County Administrative Code

County of Nassau v Pazmino (40 AD3d 905 [Miller, Ritter, Covello, Balkin]).

The defendant was convicted of driving while ability impaired. Thereafter, the County of Nassau commenced a civil forfeiture action under Nassau County Administrative Code § 8-7.0(g), seeking title to the vehicle the defendant was driving when he was arrested. Nassau County Administrative Code § 8-7.0(g) authorizes the County to bring a civil forfeiture action to obtain title to the instrumentality of a crime.

The defendant moved to dismiss the action, claiming that it violated Civil Rights Law § 79-b, which provides that a conviction of a person for any crime does not work a forfeiture of property.

The Supreme Court denied the defendant's motion, and this Court affirmed. This Court held that Nassau County Administrative Code § 8-7.0(g) does not violate Civil Rights Law § 79-b because it does not work a general forfeiture of a defendant's interest in any property simply because of a conviction.

Civil Service; Discontinuance of Positions

Matter of Civil Serv. Empls. Assn., Inc., Local 1000, AFSCME AFL-CIO v Rockland County Bd. of Coop. Educ. Servs. (39 AD3d 641 [Rivera, Skelos, Angiolillo, Balkin]).

This Court found that a group of clinical psychologists whose positions had been discontinued by a County Board of Cooperative Educational Services (hereinafter BOCES) failed to satisfy their burden of demonstrating that the BOCES acted in bad faith or that the school psychologists who had assumed some of their functions occupied the same or similar positions.

Accordingly, this Court held that a public employer has the authority and discretion to discontinue civil service positions for purposes of economy and efficiency, provided that the discontinuance is not a subterfuge to evade the statutory protections afforded civil servants prior to their discharge.

Class Actions; Toxic Torts; Exposure to Nuclear and Non-Nuclear Materials; Federal Preemption over State Law Claims

Osarczuk v Associated Univs., Inc. (36 AD3d 872 [Krausman, Florio, Lunn, Covello]).

The plaintiffs, who resided or owned property near a nuclear facility, brought an action against the facility seeking money damages and an injunction to stop the facility from giving off hazardous toxins, both nuclear and non-nuclear. The plaintiffs brought the action under state common-law theories, including negligence, nuisance, and strict liability based on an ultrahazardous activity, and also alleged that the defendant had violated federal laws, statutes, and regulations.

The Supreme Court found that the plaintiffs' lawsuit in effect stated the elements of a "public liability action" under the federal Atomic Energy Act, which empowers an aggrieved party to sue an operator of a nuclear facility for exposure to radiation. To establish a defendant's liability under a "public liability action," plaintiffs must prove that they or their property were exposed to radiation levels greater than radiation dosage standards set by the federal Nuclear Regulatory Commission. Here, the Supreme Court, finding that the defendant nuclear facility had proved that neither the plaintiffs nor their property were exposed to levels of radiation above these standards and that plaintiffs had failed to raise a triable issue of fact in opposition, granted the defendant's summary judgment motion and dismissed the complaint.

This Court held that all state common-law causes of action for radiation exposure from a nuclear facility must instead be brought as actions under the federal Atomic Energy Act, but that the Atomic Energy Act did not likewise preempt state common-law causes of action when it comes to exposure to a nuclear facility's hazardous toxins that are non-nuclear.

This Court found that the Supreme Court properly dismissed the plaintiffs' state common-law causes of action to the extent they arose from exposure to nuclear material, but improperly dismissed the same causes of action to the extent they alleged exposure to volatile organic compounds and heavy metals. Hence, this Court found that the motion for summary judgment dismissing the "public liability action" portion of the complaint was properly granted.

Class Actions; Craftsman Tools; General Business Law § 349 Claim Dismissed

Vigiletti v Sears, Roebuck & Co. (42 AD3d 497 [Ritter, Goldstein, Fisher, Balkin], *lv denied* 9 NY3d 818).

Consumers brought a class action suit against Sears, alleging that, by marketing its Craftsman tools as "Made in USA," despite the fact that the tools contained components produced in other countries, with many tools bearing these countries' names-- for example, "China" or "Mexico"-- diesunk or engraved into various parts of the tools, Sears was liable for violation of General Business Law § 349 and unjust enrichment.

In dismissing the General Business Law § 349 claim, this Court held that plaintiffs had failed to prove actual injury ("no allegations . . . that plaintiffs paid an inflated price for the tools . . . that tools purchased . . . were not made in the U.S.A. or were deceptively labeled or advertised as made in the U.S.A. or that the quality of the tools purchased were of lesser quality than tools made in the U.S.A."), causation ("plaintiffs have failed to allege that they saw any of these allegedly misleading statements before they purchased Craftsman tools"), and territoriality ("no allegations that any transactions occurred in New York State").

Class Actions: Snapple Distributors; Complaint Dismissed

McGuckin v Snapple Distribs., Inc. (41 AD3d 795 [Mastro, Covello, Angiolillo, Dickerson]).

The plaintiff marketed, sold, and distributed Snapple products to retail outlets in a certain area in New York City and commenced this class action after Snapple entered into agreements "with the New York City Department of Education to directly sell their products to public schools and with the New York City Marketing Development Corporation to directly

sell their products to municipal entities" (id.). This Court affirmed dismissal of the complaint, finding that the distribution contract allowed Snapple to sell directly to public schools and municipal entities.

Class Actions; Mortgages; Document Preparation Fees; Complaint Dismissed

Fuchs v Wachovia Mtge. Corp. (41 AD3d 424 [Rivera, Santucci, Angiolillo, Dickerson], *lv denied* 9 NY3d 810).

The plaintiffs obtained a mortgage loan from the defendant, a mortgage company. The defendant charged plaintiffs a $100 document preparation fee for completing a standard mortgage loan form with information that included the name and address of the borrower and the date and terms of the loan.

The plaintiffs brought a putative class action suit against the mortgage company, alleging that the defendant's document preparation fee constituted the unauthorized practice of law under Judiciary Law §§ 478, 484, and 495(3) and a deceptive business practice under General Business Law § 349. The plaintiffs, who were represented by counsel at the closing, did not allege that they received advice from the defendant in connection with the mortgage transaction.

This Court affirmed the dismissal of the plaintiff's complaint, holding that, in this instance, the preparation of mortgage documents for a fee did not constitute the unauthorized practice of law.

Other state courts have also addressed this issue in a similar fashion (*see Charter One Mortg. Corp. v Condra*, 865 NE2d 602, 607 [Ind 2007] ["if the completion of legal documents is ordinarily incident to a lender's financing activities, it is generally not the practice of law, whether or not a fee is charged"]; *King v First Capital Fin. Servs. Corp.*, 215 Ill2d 1, 20, 828 NE2d 1155, 1167 [2005] ["the charging of a fee, without more, for the preparation of the loan documents by the lenders' employees did not transform their [permissible] conduct into the unauthorized practice of law"]; *Dressel v Ameribank*, 468 Mich 557, 568, 664 NW2d 151, 157 [2003] [completion of standard mortgage documents by non-attorney employees did not constitute the practice of law: "It is immaterial that [the bank] charged a fee for its services. Charging a fee for nonlegal services does not transmogrify those services into the practice of law"]; *cf*. *Eisel v Midwest Bankcentre*, 2006 WL 3408185, *5, 2006 Mo. App. LEXIS 1820, *13 [Mo 2006]["The trial court did not err in finding that Midwest engaged in the unauthorized business of law when it charged customers a separate document preparation fee for the completion of loan forms"], *affd* 230 SW3d 335 [Mo 2007]).

Class Actions: Mortgages; Payoff Statement Fee; Voluntary Payment Doctrine

MacDonell v PHH Mtge. Corp. (45 AD3d 537 [Schmidt, Angiolillo, McCarthy; Goldstein concurs in the result]).

The plaintiff was a mortgagor who had given a mortgage to the defendant, a mortgage company. The defendant faxed a payoff statement-- a statement including the mortgage balance, per diem rate, and other charges it was due-- to the mortgagor. Among the items in the payoff statement was a $40 charge for "unpaid other fees." In fact, this was simply a fee for faxing the payoff statement.

The plaintiff brought a putative class action suit under Real Property Law 274-a(2), which prohibits a mortgagee from charging a mortgagor for initially providing mortgage documents and limits the fee for each subsequent payoff statement to $20, and under General Business Law 349(a), which prohibits consumer fraud.

This Court held that, despite having paid the $40 fee, the plaintiff was not barred by the "voluntary payment doctrine" from stating a cause of action under the statutes (*see e.g.*, *Dowd v Alliance Mtge. Co.*, 32 AD3d 894 [2d Dept 2006]; *Dougherty v North Fork Bank*, 301 AD2d 491 [2d Dept 2003]; *Negrin v Norwest Mtge.*, 263 AD2d 39 [2d Dept 1999]), although the "voluntary payment doctrine" does bar the plaintiff's common-law causes of action to recover damages for unjust enrichment, money had and received, and conversion. Accordingly, this Court also held that, to the extent it runs contrary to this current decision, the holding in *Dowd v Alliance Mortgage Company* should not serve as precedent (*see generally*, *Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525 [2003]).

Class Actions; Health Insurance; Complaint Dismissed

Cohen v Nassau Educators Fed. Credit Union (37 AD3d 751 [Miller, Spolzino, Ritter, Lifson]).

A credit union member brought a class action against the credit union for breach of contract, breach of covenant of good faith and fair dealing, unjust enrichment, and violation of General Business Law § 349.

In affirming the dismissal of the complaint, this Court found that the documentary evidence "flatly contradicted the plaintiff's claim that the defendant . . . was obligated to maintain a group insurance policy for its members, since [it] clearly showed that the credit union was authorized to terminate the insurance policy at any time" (*Id*. at 752).

Class Actions; Life Insurance; Class Certification Granted

Beller v William Penn Life Ins. Co. of New York (37 AD3d 747 [Schmidt, Rivera, Covello, Balkin]).

The plaintiff, a holder of an insurance policy, brought suit against the insurance company, alleging that the annual premiums the company was charging for flexible premium adjustable life insurance policies exceeded the policy terms. The plaintiff sued for breach of contract, constructive trust, and fraud in the sale of insurance contracts, and moved for certification under CPLR Article 9 to bring the suit as a class action.

The Supreme Court certified the class, and this Court affirmed, holding that "CPLR Article 9, which authorizes and sets forth the criteria to be considered in granting class action certification, is to be liberally construed" (*Id*. at 748).

Class Actions; Employees; Davis-Bacon Act; No Private Right of Action

Gawez v Inter-Connection Elec., Inc. (44 AD3d 898 [Lifson, Covello, Angiolillo, Dickerson]).

The plaintiffs, formerly employed on public works projects, brought a putative class action suit, alleging that they had not been paid the "prevailing wage" for their work as mandated by Labor Law § 220 and State common law.

The defendants in this action were members of two groups. The first group of

defendants consisted of the plaintiffs' former employers who had entered into contracts with government entities to provide construction services for the public works projects. The contracts for those projects that were federally funded called for workers' wages to accord with wage schedules set by the United States Secretary of Labor under the Davis-Bacon Act (40 U.S.C. § 3141). The second group of defendants consisted of insurance companies which had provided payment bonds for the public works projects.

This Court affirmed dismissal of the plaintiffs' action, holding that "[n]o private right of action exists to enforce contracts requiring payment of prevailing wages pursuant to the Federal Davis-Bacon Act" (*Id*. at 900). Additionally, the Court held that private entities are not subject to prevailing wage guidelines. As for the actions against the insurance companies, it was proved that none of the named plaintiffs had actually worked on the projects which the companies had insured. See also *Cox v. NAP Constr. Co., Inc.* (40 AD3d 459, 461 [1st Dept 2007] [holding that "the Davis-Bacon Act neither preempts nor otherwise precludes state law causes of action, be they common-law or statutory, seeking payment of the very wages that the Davis-Bacon Act requires," where plaintiffs sought prevailing wages for work on federally funded projects in New York City, and defendant argued that plaintiffs' claims were preempted by federal law because no private right of action exists under the Davis-Bacon Act to recover prevailing wages]).

Class Actions; Lien Law; Opportunity to Comply with Class Action Requirements

ADCO Elec. Corp. v McMahon (38 AD3d 805 [Schmidt, Santucci, Krausman, Balkin]).

The defendant, in an action to enforce a Lien Law trust for funds paid to a contractor, moved to dismiss the complaint because the plaintiffs had failed to seek class certification, as required by Lien Law § 77. The Supreme Court granted the defendant's motion to dismiss. This Court reversed, holding that the Supreme Court erred in granting the motion to dismiss without giving the plaintiffs the opportunity to comply with the Lien Law by seeking class certification.

Class Actions; Lien Law; Punitive Damages

ARA Plumbing & Heating Corp. v Abcon Assoc., Inc. (44 AD3d 598 [Prudenti, Santucci, Fisher, Angiolillo]).

This Court vacated an award of punitive damages to the plaintiffs in a class action brought under Article 3-A of the Lien Law to recover damages for diversion of trust assets. The Court noted that not every violation of Lien Law article 3-A constitutes larceny, and, observing that the Lien Law does not create a strict liability crime, held that a conviction of larceny by misappropriation of trust funds pursuant to Lien Law § 79-a requires proof of larcenous intent. The Court found that, in this case, the plaintiff had proved a violation of Lien Law Article 3-A, but had failed to prove the defendant's larcenous intent.

Construction Payment Bonds; State Finance Law § 137

Triboro Hardware & Supply Corp. v Federal Ins. Co. (45 AD3d 134 [Angiolillo, opinion; Miller, Fisher, Dillon, concur]).

This Court held that the timeliness of a claim under a private payment bond securing the delivery of materials is measured from the final delivery date of the materials for which

the claim is made, rather than from each separate date on which the materials were delivered. In so holding, this Court harmonizes the treatment of bonds involving private projects with the treatment accorded by the Court of Appeals to public project payment bonds pursuant to State Finance Law § 137.

Consumer Law; Caveat Emptor; Real Property Disclosure Forms

Simone v Homecheck Real Estate Servs., Inc. (42 AD3d 518 [Mastro, Santucci, Skelos, Dickerson]).

After purchasing a house from the defendants, the plaintiff brought several claims against them, including fraud.

In accordance with Real Property Law §§ 462 and 465, the defendants had filled out a property condition disclosure statement in connection with the sale. In the disclosure statement, the defendants, by responding "No" to a list of questions, had indicated the absence of certain defects in the property. After the closing, the buyer allegedly discovered a host of material defects in the property, including "water leaking through the porch, the rear deck sinking because of excessive water and pooling of water, the roof separating from the rest of the house due to the deck sinking, improper footings on the deck, mold behind the sheetrock caused by water in the basement, the radon system blower was inoperative, a cracked chimney, rotted bathroom floors due to excessive water leakage and evidence of long-term heavy water damage on the garage roof and walls" (*Id*. at 520).

New York adheres to the doctrine of caveat emptor: a seller is not liable for failing to disclose information regarding the premises when the parties deal at arm's length, unless the seller engages in conduct that constitutes active concealment.

This Court held that the alleged false representations by the sellers in the disclosure statement may constitute proof of active concealment and thus support a cause of action for fraudulent misrepresentation. See also *Ayres v Pressman* (14 Misc 3d 145[A], 2007 NY Slip Op 50397[U][2007]) and *Calvente v Levy* (12 Misc 3d 38, 2006 NY Slip Op 26163 [holding that the failure to complete a Real Property Law § 462 disclosure statement with information certified to be true and complete to his or her actual knowledge makes a seller liable to a buyer for resulting damages, regardless of whether the contract of sale contains an "as is" provision]).

Consumer Law; Home Improvement Contractor Licensing

Matter of Andrew Naclerio Assoc., Inc. v Pradhan (45 AD3d 585 [Ritter, Fisher, Dillon, Dickerson]).

A home improvement contractor appealed from a determination by the Appeal Panel of the Legislature of the County of Rockland that confirmed a decision of the Home Improvement Licensing Board of the County of Rockland to revoke the home improvement contractor's license. This Court, finding that the determination to revoke the contractor's license was supported by substantial evidence, confirmed.

In addition to other wrongdoing, including failure to pay judgments obtained against it by a supplier and a customer, the contractor's company violated Rockland County law by demanding excessive down payments from its customers, flouting the three-day right-to-cancel notice contained in its contracts, and unlawfully conducting business under another

name.

In other decisions relating to home improvement contractors, this Court has held that, to recover damages for breach of contract or quantum meruit, a home improvement contractor must have been licensed at the time the work was performed for which the contractor is seeking seeks compensation (*Flax v Hommel*, 40 AD3d 809 [Miller, Angiolillo, Carni, Dickerson]). Likewise, a home improvement contractor must be licensed to enforce a construction contract in arbitration (*Al-Sullami v Broskie*, 40 AD3d 1021 [Spolzino, Florio, Skelos, McCarthy]).

CPLR 205(a); Accrual of Six-Month Time Period

Pi Ju Tang v St. Francis Hosp. (37 AD3d 690 [Prudenti, Krausman, Dillon, McCarthy]).

The issue presented in this appeal-- one never squarely raised before in this judicial department-- is whether, under CPLR 205(a), the six-month time period in which to commence a new action runs from the date of termination of the earlier action or from the date of service of the notice of entry of the judgment or order that terminated the earlier action. The Court held that the express language of the statute provides for the six-month period to run from the date of termination of the earlier action.

CPLR 308(4); Due Diligence

Estate of Edward S. Waterman v Jones (46 AD3d 63 [Balkin, opinion; Crane, Santucci, Florio, Dillon, concur]).

This Court held that in a legal malpractice action, one unsuccessful attempt to personally deliver a summons and complaint to the defendant attorney at his place of business is insufficient to establish the “due diligence” necessary to permit the use of the “affix and mail” method of service authorized by CPLR 308(4).

CPLR 327; Forum Non Conveniens

Rosenberg v Stikeman Elliott, LLP (44 AD3d 840 [Miller, Goldstein, Skelos, Balkin]).

In this decision, the Court reversed the Supreme Court in a legal malpractice action, and granted the defendant’s motion to dismiss the complaint on the ground of forum non conveniens. Here, the allegations of legal malpractice arose from the defendant’s representation of the plaintiff in several probate proceedings in Quebec. This Court held that, even if the plaintiff owned residences in both New York and Quebec, the doctrine of forum non conveniens should have been applied by the Supreme Court, since the plaintiff had already availed herself of Canadian courts in the past with respect to those probate proceedings, as well as in an almost identical fee-dispute/legal malpractice action.

CPLR 2001; Mistake or Irregularity

Silverman v Flaum (42 AD3d 447 [Rivera, Goldstein, Lifson, Balkin]).

Although a cause of action possessed by a debtor who has filed a petition in bankruptcy with the United States Bankruptcy Court properly belongs to the trustee in bankruptcy, the commencement of an action in state court naming the debtor as the plaintiff is a mere “mistake or irregularity” which did not prejudice the defendants and which

may thus be corrected at any stage of the action pursuant to CPLR 2001.

CPLR 2104; Oral Stipulation Unenforceable; Not Placed upon the Record in Open Court

Maldonado v Novartis Pharms. Corp. (40 AD3d 940 [Miller, Angiolillo, Carni, Dickerson]).

This Court held that an alleged oral stipulation negotiated by the parties in the presence of a court-appointed mediator was not an enforceable agreement within the meaning of CPLR 2104, since the purported settlement was not placed upon the record in open court.

CPLR 3211(a)(3); Waiver of Defense of Lack of Standing

Wells Fargo Bank Minn., N. A. v Mastropaolo (42 AD3d 239 [Prudenti, opinion; Mastro, Santucci, Dillon, concur]).

This Court held that, under CPLR 3211(e), a party's alleged lack of standing to bring an action is a defense that the opposing party must raise in an answer or in a pre-answer motion to dismiss the complaint. If the opposing party does not use the defense at this stage, it is waived.

In this case, the Court found that, since the defendant first raised the standing issue in an attorney's affirmation submitted in opposition to the plaintiff's motion for summary judgment, which is past the answer stage in proceedings, he had waived the right to raise lack of standing as a defense.

CPLR 3212; Timeliness of Motions in Consolidated Actions

Jones v Ricciardelli (40 AD3d 936 [Schmidt, Rivera, Santucci, Krausman]).

In this case, two related actions were joined for trial. The defendant in the first action filed a motion for summary judgment in a timely fashion. The defendant in the second action, who was not a party to the first action, filed a motion for summary judgment after the period for doing so under CPLR 3212(a) had expired.

This Court found that the timely filing of a motion for summary judgment in the first action did not provide the defendant in the second action with good cause for his late filing, and that therefore his motion should be denied for untimeliness. In so holding, the Court noted that the two actions, although joined for trial, had not been consolidated and thus remained separate actions.

CPLR article 78; Fire Fighters; Disability Benefits

Matter of Stack v Board of Trustees of the N.Y. City Fire Dept., Article 1-B Pension Fund (38 AD3d 562 [Santucci, Goldstein, Carni, McCarthy]).

The petitioner appealed from a determination denying his application for disability retirement benefits by the Board of Trustees of the New York City Fire Department, Article 1-B Pension Fund, based on findings by its Medical Board. The criteria for a such a determination to withstand review on appeal is that the determination was supported by credible evidence and was not irrational.

Here, the Court held that the medical findings did not support the determination with respect to the petitioner's application for ordinary disability retirement benefits. The Court found that, because the expert's opinion that was relied on failed to consider newly submitted evidence that the petitioner suffered from a non-in-line-of-duty disability, the Board's determination on this issue was irrational, and the Court remitted the matter to the Board of Trustees.

Criminal Law; Appeal of Post-Judgment Order Dismissed

People v Fricchione (43 AD3d 410 [Crane, Goldstein, Fisher, Lifson]).

In this decision, it was held that once this Court has affirmed a judgment of conviction, the Court does not have jurisdiction to consider an appeal from an order of the sentencing court that was issued after this Court's affirmance, directing the defendant to pay restitution to a third party, since the order appealed from was not enumerated in CPL 450.30 as among the judgments, sentences, and orders from which a defendant may appeal as of right. This Court noted, however, that its dismissal of the appeal does not foreclose the defendant from seeking relief from the order directing restitution by proper procedural means.

Criminal Law; Blood Sample Taken from Patient by Medical Professional Not Information Protected by Physician-Patient Privilege

People v Elysee (49 AD3d 33 [Skelos, opinion; Schmidt, Santucci, Lifson, concur], *lv granted* 10 NY3d 840).

This Court held that a physical blood specimen taken from a patient by a medical professional does not fall under the CPLR 4504(a) definition of "information" protected by the physician-patient privilege. Accordingly, the Court found that such a blood sample may be subject to seizure pursuant to a warrant issued under CPL 690.10.

In so holding, the Court determined that this physical specimen is not a hospital or medical "record" or "communication," which would fall within the privilege, but is instead in the nature of personal property, and is therefore subject to the warrant, and may be introduced as evidence in a criminal action where blood alcohol content is in dispute.

Criminal Law; Conviction for Attempted Disseminating Indecent Material to Minors; Sexual Contact Theory

People v Kozlow (46 AD3d 913 [Rivera, Krausman, Dillon; Crane, dissent]).

The defendant was convicted of five counts of attempted disseminating indecent material to minors in the first degree. This Court initially reversed the conviction upon ruling that the statute only prohibited the dissemination of indecent "depictions," but not textual "descriptions." The Court of Appeals reversed this Court, and remitted the matter back to this Court for further proceedings, which included resolution of the other issues first raised by the defendant on his appeal.

The majority, while noting that the prosecution, in effect, changed the theory of the prosecution during trial from unlawful sexual "contact" to the unindicted charge of unlawful sexual "conduct for the benefit of the defendant," held that a judge presiding over a nonjury trial is uniquely capable of distinguishing those issues properly presented to him or her from

those that are not properly presented, and that the trial judge here expressly stated that he would make a decision based upon what was actually charged.

The dissent contends that only a sexual "contact" theory was charged, that there was absolutely no proof of sexual "contact," that the entirety of the People's factual presentation at trial was based on sexual conduct for the benefit of the defendant, and that the trial judge thus erroneously convicted the defendant on a charge that was not part of the indictment. In particular, the dissent explains that the defendant clearly importuned, invited, and/or induced a person he believed to be a 14-year-boy, via e-mail, to engage in sexual conduct for the defendant's benefit, and had the defendant been charged under this theory, convictions would have been certain.

Since the grand jury never charged the defendant under this theory, and the People never took the simple step of obtaining a superseding indictment, the dissent would reverse the judgment and dismiss the indictment.

Criminal Law; Conviction for Murder in Second Degree Reversed; Failure to Give Intoxication Charge

People v Smith (43 AD3d 475 [Miller, Goldstein, Fisher, Covello], *lv denied* 9 NY3d 1009).

This Court reversed the defendant's conviction of murder in the second degree and aggravated criminal contempt and directed a new trial, upon finding that the trial court erred in declining to give the jury an "intoxication charge," which would have permitted the jury to consider whether the element of intent was negated.

Criminal Law; Conviction of Depraved Indifference Murder in the Second Degree Reduced to Manslaughter in the Second Degree

People v Boyce (36 AD3d 711 [Crane, Skelos, Fisher, Lifson], *lv denied* 9 NY3d 863).

The defendant, who, in an apparent rage, attacked, stomped upon, strangled, and choked the victim to death, was acquitted of intentional murder in the second degree, but convicted of depraved indifference murder in the second degree.

On appeal, this Court reduced the conviction of depraved indifference murder in the second degree to manslaughter in the second degree. The Court found that since the homicide resulted from the defendant's direct one-on-one attack upon the victim, the narrow definition of depraved indifference is inapplicable, as virtually all such attacks, such as the one here, involve intent.

Nonetheless, although the defendant's conduct was voluntary, it was not necessarily undertaken with the intent or conscious objective to kill. Because the jury, in convicting the defendant of depraved indifference murder in the second degree, necessarily found that the defendant was reckless, and, in acquitting him of intentional murder in the second degree, necessarily found that he did not have the conscious objective to kill the victim, the jury found that the defendant committed all of the elements of the lesser included offense of manslaughter in the second degree.

Criminal Law; Criminal Possession of Controlled Substance; Interstate Agreement on Detainers

People v Pizetzky (46 AD3d 709 [Schmidt, Skelos, Covello, Balkin], *lv denied* 10 NY3d 815).

The Court held that, by pleading guilty to a count of criminal possession of a controlled substance in the fifth degree, the defendant, a Federal prisoner brought into Suffolk County to respond to that charge, waived his argument that the People violated the Interstate Agreement on Detainers (codified at CPL 580.20[IV][e]) by failing to try him on the charge prior to returning him to his original place of imprisonment.

Criminal Law; Double Jeopardy; Motion to Prohibit Retrial Denied

Matter of Lazartes v Walsh (36 AD3d 917 [Krausman, Goldstein, Florio, Lifson], *lv denied* 8 NY3d 813).

A jury convicted the defendant of depraved indifference murder in the second degree and numerous other assault charges. On appeal, this Court determined that there was legally insufficient evidence to establish that the defendant automobile operator, who engaged in a 100-mph game of "race/chase" with another car on the Belt Parkway in Brooklyn, killing two and injuring several, had the requisite depravity to sustain the murder conviction (*see People v Lazartes*, 23 AD3d 400 [KR, LU, LI concur; FL, GO, dissent]).

Accordingly, this Court dismissed the depraved indifference murder count, reversing the defendant's conviction on several of the assault counts due to erroneous jury instructions by the trial court, and directing a new trial as to those counts. When the People sought to retry the defendant not only on the assault counts, but on two counts of manslaughter in the second degree as a lesser-included offense of depraved indifference murder, the defendant petitioned this Court to prohibit his retrial.

This Court denied the petition, finding that the defendant's right to not be put in jeopardy twice for the same offense was not implicated because the jury had been instructed on the manslaughter count as a lesser-included offense, had been told not to reach that count if it convicted the defendant of murder, and had necessarily found that the People had established all of the elements of the manslaughter count when it convicted the defendant of murder. Since a new trial was required in any event because of the trial court's unrelated errors in instructing the jury, the Court found that there was no bar to retrying the defendant on the manslaughter count.

Criminal Law; Drug Law Reform Act; Failure to Notify Defendant of Statutorily-Prescribed Options

People v Newton (48 AD3d 115 [Skelos, opinion; Spolzino, Dillon, McCarthy, concur]).

The Drug Law Reform Act of 2005 provides that a defendant has the right to withdraw his or her application for resentencing upon remand after the appeal of an order specifying and informing the defendant of the term of the determinate sentence the court would impose upon resentencing. This provision, however, does not preclude the defendant from withdrawing the application for resentencing prior to the appeal from the order, although, as a practical matter, it would be in the defendant's best interests to appeal from the order rather than withdraw the application for resentencing.

In the instant case, the Court found that the County Court had failed to adequately

notify the defendant of his statutorily-prescribed options, including the right to withdraw his application for resentencing either before or after any appeal from the order of specification. Thus, the Court found that the defendant cannot be held to have knowingly and intelligently waived his right to appeal from that order.

Criminal Law; Drug Law Reform Act; Sentencing Provisions Applied Prospectively Only

People v Denton (41 AD3d 729 [Miller, Mastro, Dillon, McCarthy], *lv denied* 9 NY3d 875); *People v Faison* (41 AD3d 730 [Miller, Mastro, Dillon, McCarthy], *lv denied* 9 NY3d 875); *People v Javaris* (41 AD3d 735 [Miller, Mastro, Dillon, McCarthy]); *People v Opharrow* (41 AD3d 739 [Miller, Mastro, Dillon, McCarthy]); *People v Warren* (41 AD3d 745 [Miller, Mastro, Dillon, McCarthy]).

The sentencing provisions of the Drug Law Reform Act (hereinafter DLRA) reduce the sentences for certain drug offenses and make the sentencing terms determinate rather than indeterminate. This Court held that the DLRA sentencing provisions, by their very terms, only have prospective application.

Thus, the Court found that since the defendants committed the pertinent drug offenses prior to January 13, 2005, the date the DLRA became effective, the sentencing of the defendants must be conducted pursuant to prior law. The Court held that their sentences, which had been imposed in accordance with the more lenient DLRA standards, must therefore be vacated, and the matters remitted for resentencing under pre-2005 law. Pursuant to a separate statute enacted after the DLRA, however, the defendants may thereafter apply to again be resentenced under the DLRA standards, but only if they had been convicted of a class A-II felony.

Criminal Law; Expert Testimony; Custom and Practices of Mexican-American Gangs

People v Cruz (46 AD3d 567 [Schmidt, Skelos, Fisher; Goldstein concurs in result], *lv denied* 10 NY3d 763); *People v Flores* (46 AD3d 570 [Schmidt, Skelos, Fisher; Goldstein concurs in result], *lv denied* 10 NY3d 765).

The majority holds that expert testimony concerning the customs and practices of Mexican-American gangs was admissible in evidence as relevant to the defendant's motive and as necessary background information.

One of the complainants was a member of a Mexican street gang called the "Sombras," and he testified at trial that he attended a party where he had the disc jockey shout out "Sombras" to greet other gang members. When the complainants and the decedent left the party, they were shot by the defendants, reputed members of a rival gang.

At the trial, an expert who gave testimony on the customs of Mexican gang members testified that the practice of "shouting out" a gang name at a party has been known to result in violence, if rival gang members are present.

The concurrence would have ruled the expert testimony to be inadmissible for the prosecution's failure to lay a foundation as to whether the disc jockey in this case actually "shouted out" the name of the defendant's gang, or whether the defendant actually heard the disc jockey shout out the name of the gang. Nonetheless, the concurring Justice agrees

with the result by virtue of the overwhelming evidence of the defendant's guilt.

Criminal Law; Failure to Inform of Right to Appeal Encompasses Right to Challenge Sentence as Excessive

People v Vaughn (40 AD3d 1135 [Prudenti, Rivera, Goldstein, Dillon]).

The Court held that where the sentencing court fails to inform a defendant that his or her right to appeal also encompasses the right to challenge the sentence as excessive, the sentence must be vacated. Here, the defendant, who was sentenced to 5 years of imprisonment after his conviction of criminal possession of a weapon in the third degree upon his plea of guilty, thus had his sentence reduced to time served, i.e., 13 months.

Criminal Law; Waiver of Miranda Rights; Admissibility of Grisso Instrument

People v Hernandez (46 AD3d 574 [Spolzino, Dillon, Angiolillo, Dickerson]).

This Court found that the County Court did not err in declining to admit into evidence the results of a "Grisso instrument," which is a document reporting the outcome of a battery of tests administered to a criminal defendant that purportedly assesses his or her ability to knowingly and intelligently waive his or her *Miranda* rights. Applying the *Frye* test for admissibility of scientific and technical evidence (*see Frye v United States*, 293 F 1013 [1923]), the County Court properly determined that the reliability of a Grisso instrument has never gained acceptance within the relevant scientific community.

Criminal Law; Indictment for Kidnapping Improperly Dismissed

People v Banks (42 AD3d 574 [Rivera, Krausman, Skelos, Balkin], *lv denied* 9 NY3d 1004, *lv denied* 9 NY3d 1005, *lv denied* 9 NY3d 1009).

This Court held that leading a victim at gunpoint from one location to another, even one very close to the first, constitutes kidnapping in the second degree. Hence, the Court found the count of the indictment for kidnapping should not have been dismissed for legally insufficient evidence. The Court also held that even if the defendants are correct that the "merger doctrine" vitiates the charge of kidnaping, by virtue of the fact that said charge was ostensibly alleged only to enhance other, lesser felony charges, this Court may not consider that argument on this appeal, since CPL 470.15(1) permits the Appellate Division only to consider errors or defects adverse to the appellant, which, in this case, is the People.

Criminal Law; Ineffective Assistance of Counsel

People v Argueta (46 AD3d 46 [Schmidt, opinion; Santucci, Krausman, Balkin, concur], *lv dismissed* 10 NY3d 761).

Where a defendant is an undocumented alien, and defense counsel advises the defendant that deportation is a possible outcome of the defendant's conviction of a crime, whether by a jury or upon a plea, it does not constitute ineffective assistance of counsel if the attorney declines to quantify that possibility and the defendant nonetheless pleads guilty. There is thus no basis to reverse the defendant's conviction here, and no merit to his argument that he would not have pleaded guilty had he known that the chances of his deportation were slight.

People v Green (37 AD3d 615 [Schmidt, Crane, Fisher, Dickerson], *lv denied* 8 NY3d 985).

This Court affirmed the trial court's order granting a CPL 440.10 motion to vacate the defendant's judgment of conviction for murder in the second degree and robbery in the first degree, upon a finding that the defendant's trial counsel rendered ineffective assistance. Here, counsel failed to interview or even contact potential witnesses known to counsel prior to trial, including eyewitnesses who could have offered exculpatory testimony at trial concerning the alleged misidentification of the defendant as the assailant.

Criminal Law; Motor Vehicles; Statutory Presumption of Knowing Possession of Controlled Substance; Marijuana

People v Gabbidon (40 AD3d 776 [Spolzino, Krausman, Skelos, Dickerson]).

This Court held that the statutory presumption that the operator of a motor vehicle has knowing possession of a controlled substance found within that motor vehicle, as set forth in Penal Law § 220.25(1), expressly excludes marijuana from the presumption. Thus, where a prosecutor instructed a grand jury in a marijuana possession proceeding that the statutory presumption of knowing possession is applicable, this Court found that the County Court properly dismissed the indictment.

Criminal Law; New Trial Ordered; CPL 440.10(1)(g)(h); Newly Discovered Evidence

People v Tankleff (49 AD3d 160 [Rivera, opinion; Krausman, Florio, Dillon, concur]).

This Court reversed an order of the County Court denying the defendant's motion pursuant to CPL 440.10(1)(g) and (h) to vacate two judgments convicting him of murdering his parents, and ordered a new trial based on newly-discovered evidence.

In this case, covered extensively by the news media, a 17-year-old boy was accused of murdering his parents by slashing, stabbing, and choking them to death. Based primarily on an equivocal oral confession primarily made by the defendant when he was without legal representation, and notwithstanding that the defendant refused to sign a confession written out for him by a police detective and immediately recanted his oral confession, a jury convicted him of both murders when he was 19.

After the defendant spent 15 years in jail, a private investigator retained by relatives who believed him to be innocent, and were convinced that the decedents' business partner was responsible for arranging the murders, uncovered numerous witnesses-- virtually all unknown to each other-- who had heard others confess to the killings and/or heard the business partner brag about having the decedents killed.

After a hearing, the County Court denied the defendant's motion to vacate the convictions and for a new trial, finding that the defendant's witnesses lacked credibility due in part to prior criminal histories and that their testimony constituted inadmissible hearsay.

This Court reverses, vacates the convictions, and directs a new trial, holding that the County Court erred in the standard it applied to the new evidence, thus misconstruing its gatekeeper function. This Court holds that the cumulative weight of the new evidence, coming from at least 11 witnesses who never met each other and never spoke with each other, including the 17-year-old son of one of the likely killers, implicated a known drug dealer and two accomplices acting at the behest of the decedents' business partner, who

owed the victims a substantial sum of money and was the last person to see them alive.

The Court found that since a) most of the testimony of these witnesses involved admissions of guilt or declarations against penal interest made by the drug dealer, his accomplices, and the decedents' business partner, as well as potential perjury by the investigating detective, b) none of the information was available at the time of the defendant's trial, and c) had it then been available, the outcome of the defendant's trial would likely have been different, application of the recognized standards for the granting of a new trial were satisfied.

Criminal Law; Predetermined Sentence Vacated

People v Zuniga (42 AD3d 474 [Florio, Fisher, Carni, McCarthy], *lv denied* 9 NY3d 966).

This Court held that where a trial judge in a criminal action states, prior to trial, that he or she will impose consecutive terms of imprisonment if the defendant chooses to go to trial on a multi-count indictment, rather than plead guilty, and the defendant is convicted after trial, justice requires that the sentence imposing consecutive terms of imprisonment be vacated, and the matter remitted to a new judge for resentencing, since "'[t]here is not and cannot be any fair system of justice which would permit the Presiding Judge or Justice to predetermine the discretionary sentence that would be imposed if an accused person exercises his [or her] right to trial and is found guilty'" (*Id*. at 475, quoting *People v James*, 70 AD2d 706, 707 [3d Dept 1979]).

Criminal Law; Punishable False Written Statement

People v Feola (40 AD3d 874 [Crane, Skelos, Lifson, Dillon], *lv denied* 9 NY3d 961); *People v Hepp* (40 AD3d 880 [Crane, Skelos, Lifson, Dillon]).

This Court held that where a defendant is charged with making a punishable false written statement, based on allegations that he or she signed a false affidavit, the People must adduce legally sufficient evidence that the defendant actually signed the affidavit. Here, where the People's witnesses could only testify to circumstantial evidence leading them to believe that the defendant had signed the false affidavit, and such circumstantial evidence did not establish to a moral certainty that the defendant did in fact execute the affidavit, there was legally insufficient evidence to sustain the defendant's conviction.

Criminal Law; Right to Public Trial

People v Stover (36 AD3d 837 [Miller, Spolzino, Florio, Dillon], *lv denied* 9 NY3d 869).

This Court held that the defendant was not deprived of his right to a public trial by the trial court's sua sponte determination to exclude certain of the defendant's friends and relatives from the courtroom during a portion of one witness's cross-examination. This Court found that legitimate concerns for the security and safety of the witness, as underscored by that witness's reluctance to testify in front of those relatives and friends, supported the trial court's determination.

Criminal Law; Retrial; Request for Short Adjournment Denied

People v Jackson (41 AD3d 498 [Schmidt, Santucci, Covello; Fisher, dissent], *lv denied* 9

NY3d 876).

Based in part on the alibi testimony of a person unrelated to the defendant by consanguinity or affection, the jury in the defendant's first robbery trial could not reach a verdict, and a mistrial was declared. After his retrial had gone on for several days, the defendant's attorney asked for a one-day adjournment in order to locate that witness, who was employed by the federal Transportation Security Administration at JFK Airport. After the trial court granted the adjournment from a Friday to a Monday, the defendant's lawyer sent investigators to the airport on a Sunday to locate the witness, but they were unsuccessful. The trial court denied counsel's motion for an additional short adjournment, and completed the retrial within a day. The defendant was convicted.

This Court affirmed the judgment of conviction, ruling that the determination of whether to grant or deny an adjournment of the trial was within the sound discretion of the trial court, and that the trial court did not improvidently exercise its discretion in this regard.

The dissent argued that the defendant was denied a fair trial by the trial court's denial of defense counsel's request for an adjournment, that the trial justice had no basis for wishing to complete the trial so expeditiously other than to keep a promise it had made to the jury that it would finish the trial by a date certain, and that this error was compounded by allowing the prosecutor, during summation, to repeatedly refer to the defendant's inability to produce the alibi witness his counsel had described in his opening.

Criminal Law; Retrial on Murder Count Barred; Manslaughter May Be Represented to New Grand Jury

Matter of Rivera v Firetog (44 AD3d 957 [Crane, Ritter, Carni; Dillon dissent], *lv granted* 10 NY3d 703).

This Court granted, to a defendant in a criminal action, a petition in the nature of prohibition so as to prohibit the defendant's retrial on charges of murder in the second degree.

Here, in connection with a barroom stabbing homicide, the trial court instructed the jury with respect to murder in the second degree, the lesser included offenses of manslaughter in the first degree and manslaughter in the second degree, and criminal possession of a weapon in the fourth degree. The trial court further instructed the jury not to reach the manslaughter counts unless it acquitted the defendant of the murder count. The jury deliberated for six days, requesting various read-backs and instructions relevant to the manslaughter counts. When the jury nonetheless indicated that it could not come to a unanimous decision, the trial court declared a mistrial, despite defense counsel's repeated requests to permit the jury to render a partial verdict.

This Court ruled that retrial on the murder count was barred by the Double Jeopardy clauses of the state and federal constitutions since the jury likely was ready to acquit the defendant on that count, that retrial on the weapon possession count was improper since that count was dismissed by the trial court, and that retrial on the manslaughter counts could not proceed pursuant to the present indictment, since it did not expressly charge the defendant with manslaughter. Nonetheless, this Court ruled that the People are free to re-present the manslaughter charges to a new grand jury for possible indictment.

The dissent would have denied the petition for prohibition on the ground that the

jury's requests for information did not reveal that it had determined to acquit the defendant on the murder count, since the trial court clearly gave it a sequence pursuant to which it was first to consider murder, then manslaughter in the first degree, then manslaughter in the second degree, and the jury was apparently, and improperly, considering all of the counts together.

Criminal Law; SORA Applied to Kidnapping in the First Degree

People v Taylor (42 AD3d 13 [Spolzino, opinion; Miller, Ritter, Dillon, concur], *lv dismissed* 9 NY3d 887).

This Court held that even though the defendant's commission of kidnapping in the first degree had no sexual component, the defendant was nonetheless subject to the Sex Offender Registration Act (hereinafter SORA), since the Penal Law provision defining kidnaping in the first degree (Penal Law § 135.25[1]) is enumerated as an offense triggering the applicability of SORA.

The Court found, moreover, that application of SORA to the defendant was constitutionally permissible, because the application of SORA even to persons convicted of certain conduct that is not explicitly sexual in nature is reasonable in relation to its subject and adopted in the interests of the community.

The Court found that kidnapping in the first degree, while not necessarily requiring proof of a sexual component, is frequently a precursor to a sex offense, and thus that the Legislature could reasonably have concluded that convicted kidnappers should be required to register as sex offenders under SORA, even if there was no proof of a sexual component to their crime, because a kidnapper may have fortuitously been apprehended before he could consummate any plan of sexual molestation of the victim.

Criminal Law; Speedy Trial; 18 Years between Murder and Prosecution

People v Pacheco (38 AD3d 686 [Mastro, Krausman, Florio, Balkin], *lv denied* 9 NY3d 849).

This Court held that a lapse of 18 years between the defendant's commission of a murder and his prosecution for the crime did not deny him due process or speedy trial rights in this case. Here, the prosecution of the defendant was commenced immediately after he became a suspect as a consequence of his having admitted to several witnesses that he had committed the crime 18 years earlier.

Criminal Law; Vindictiveness; Excessive Resentencing Reduced

People v Jenkins (38 AD3d 566 [Schmidt, Krausman, Covello, Balkin], *lv denied* 8 NY3d 986).

The defendant's state-court sentence was vacated on federal habeas corpus review. Upon resentencing, the Supreme Court imposed a sentence that was harsher than the sentence that had been vacated. On appeal, this Court reduced the sentence, finding that there was nothing in the record to rebut the presumption that, upon resentencing, the sentencing court acted out of vindictiveness toward the defendant's success in securing a writ of habeas corpus.

Criminal Law; Waiver of Appeal Form Misleading

People v Hurd (44 AD3d 791 [Prudenti, Rivera, Goldstein, Dillon, McCarthy], *lv denied* 9 NY3d 1006).

In this case, the Court stated once again that the waiver of appeal form used in the Supreme Court, Kings County, is insufficient to establish that a defendant knowingly, intelligently, and voluntarily waived his or her right to appeal, since it misstates the applicable law by misleading a potential signatory into believing that he or she did not possess, in the first instance, a right to challenge the excessiveness of his or her sentence on appeal.

Criminal Law; Warrantless Search; Emergency Doctrine

People v Desmarat (38 AD3d 913 [Mastro, Florio, Carni, McCarthy]).

In 2006 the United States Supreme Court ruled, in *Brigham City, Utah v Stuart* (547 US 398), that for Fourth Amendment purposes the question of whether a warrantless search was justified by an emergency precluded inquiry into the subjective motivations of the law enforcement official who had conducted or was engaged in the contested search. Some years earlier, in *People v Mitchell* (39 NY2d 173 [1976], *cert denied* 426 US 953 [1976]), the Court of Appeals had interpreted the Fourth Amendment as requiring such an inquiry, particularly as to whether the law enforcement official subjectively undertook the search in the mere desire to apprehend a suspect for later criminal prosecution, rather than to protect against an imminent threat to life, personal safety, property, or evidence. Because the Court of Appeals has yet to determine whether the State's constitutional safeguard against unreasonable searches and seizures, as articulated in Article 1, Section 12 of the New York Constitution, provides broader protection than the United States Constitution, and thus supports retention of the *Mitchell* standard under State law, this Court declined to address the issue.

In any event, this Court held that, under either the *Brigham City* test, or the more protective *Mitchell* standard, the officers in the instant appeal could avail themselves of a warrantless search of a hotel room under the emergency doctrine, where a trail of blood led from that room to a location outside of the hotel where the victim's body was discovered, shredded and bloody clothing and paper currency was discovered in close proximity to the room, and a witness heard a person enter the hotel room and turn up the volume on the television. The Court found that it could thus be inferred that the law enforcement officers had both an objective intent and subjective motivation to protect life, public safety, property, and evidence when they entered the hotel room.

Defamation; Legislative Hearing; Absolute Privilege

Crowe Deegan, LLP v Schmitt (38 AD3d 590 [Mastro, Krausman, Florio, Balkin]).

This Court held that a county legislator has an absolute privilege to make statements in the course of a legislative hearing, even if those statements would otherwise be defamatory. The Court found that, here, as to other statements made by the legislator outside of the hearing, the plaintiff raised a triable issue of fact as to whether the statements were made with actual malice, and ruled that the defamation causes of action based on those statements were permitted to proceed to trial.

Divorce; Bribery of Justice; Equitable Distribution; Egregious Marital Fault

Levi v Levi (46 AD3d 520 [Santucci, Krausman, Lifson, Balkin], *lv dismissed* __ NY3d __, 2008 NY Slip Op 73517).

The husband in this divorce action bribed a Supreme Court Justice in order to obtain a favorable outcome. Both the husband and the Justice were convicted of attempted bribery and bribery, respectively. After the divorce action was transferred to a different Justice, the Supreme Court equitably distributed the sole marital asset-- the marital residence-- to the wife, based in part on the attempted bribery.

This Court affirmed the judgment of divorce and the equitable distribution of the marital property contained therein, explaining that Domestic Relations Law § 236(B)(5)(d) allows the consideration of egregious marital fault, as well as "any other factor" which may be "just and proper" in connection with equitable distribution, and that the husband's attempt to bribe the first Justice constituted egregious marital fault which must be factored into the distributive award.

Divorce; Stipulation Reduced to Judgment Notwithstanding Death of Wife; Ministerial Act

McKibben v Jenkin (41 AD3d 795 [Schmidt, Skelos, Lifson, Covello], *lv dismissed* 9 NY3d 955).

In an action for a divorce and ancillary relief, the husband and wife had stipulated to the resolution of several issues, and tried the remaining issues before a Judicial Hearing Officer. After the Judicial Hearing Officer rendered a decision on the outstanding issues, but before his decision could be reduced to a judgment, the wife died.

This Court found that, nonetheless, the issues resolved both by stipulation and by trial could be memorialized in a judgment, nunc pro tunc to a date prior to the wife's death, since the entry of a judgment was a ministerial act. Accordingly, the Court held that the Supreme Court properly denied the husband's motion to abate the action.

Education Law § 3813(2-b); Notice of Claim; Accrual of Breach of Contract Action

Mainline Elec. Corp. v East Quogue Union Free School Dist. (46 AD3d 859 [Spolzino, Krausman, Fisher, Angiolillo]).

Under Education Law § 3813(2-b), a breach of contract action against a school district must be commenced within one year of the alleged breach, which, in contrast to breach of contract actions against other persons or entities, occurs when the claimant's bill is expressly rejected or when the party seeking payment should have viewed its claim as having been constructively rejected. Moreover, service of a timely notice of claim upon the school district is a condition precedent to the commencement of such an action. Thus, this Court found that a school district's mere failure to pay a contractor over a period of time is not sufficient to establish constructive rejection.

Here, this Court determined that the school district's failure to respond to two letters requesting payment and a final billing requisition should not have been deemed a constructive rejection, and the subject contract itself did not impose an unequivocal 30-day deadline in which it was required to make a final payment. Hence, the Court held that the breach of contract cause of action had not yet accrued, and the limitations period set forth

in Education Law § 3813(2-b) had not yet begun to run when the contractor requested the court's permission to serve a late notice of claim upon the school district. Accordingly, the Court found that there was no need to serve late notice of claim, and the action itself was not time-barred.

Election Law; Second Special Election

Matter of Sharpe v Eugene (39 AD3d 777 [Fisher, Dillon, Carni, Dickerson]).

A New York City Council seat became vacant when it was revealed that the candidate elected to fill that seat in a special election did not qualify for that office because he did not meet the residency requirements established by the New York City Charter, and he thus declined to be sworn in. A new special election was called, and the same candidate, who had since established his residency within the relevant district, circulated nominating petitions in order to get on the ballot. This Court found that a petition by a challenger was properly dismissed on the law, since Public Officers Law § 30(1)(h), which governs certain aspects of special elections, did not preclude the candidate from seeking office in the second special election.

Eminent Domain; Determination Authorizing Condemnation Annulled

Matter of 49 WB, LLC v Village of Haverstraw (44 AD3d 226 [Dillon, opinion; Miller, Spolzino, Fisher, concur]).

In *Kelo v New London* (545 US 469 [2005]), the United States Supreme Court ruled that a state or municipality may exercise its eminent domain powers under the Fifth Amendment to take private property, even if the subject property is in a non-blighted area, and the taking is for the purpose of benefiting a private developer, as long as the taking is in furtherance of a plan for economic development that would ultimately be open to use by the general public. Such a goal was deemed to constitute a "public purpose" within the meaning of the Fifth Amendment. The United States Supreme Court nonetheless permitted states to enact or enforce, under their own constitutions or statutes, more restrictive criteria defining the contours of the term "public purpose."

Responding to the United States Supreme Court's invitation, this Court construed the term "public use," as set forth in EDPL 207(c)(4), more narrowly than did the Supreme Court. The Court thus held that a village may not use its eminent domain power to condemn and take private property for the ostensible purpose of allowing a private developer to construct affordable housing, where that alleged purpose was a mere pretext to benefit private entities and would result in the creation of a lesser number of affordable housing units than if there had been no taking at all, and the taking does not rationally relate to any other public purpose.

Here, the Court concluded that the true reason for the village's proposed condemnation of private property was to assist the developer of a geographically distinct, already approved, and apparently desirable waterfront project in meeting its obligations to provide affordable, private scattered-site housing which had been imposed as a condition of the approval of the waterfront project, and to reduce its costs in doing so. Accordingly, the Court annulled the village's determination authorizing the condemnation.

Eminent Domain; Preservation of Agricultural Land; Historic Rural Character

Matter of Aspen Cr. Estates, Ltd. v Town of Brookhaven (47 AD3d 267 [Krausman, opinion; Crane, Fisher, concur; Lifson dissent]).

The Court upheld the condemnation of a 39-acre parcel of real property by the Town of Brookhaven located within the Town's Manorville Farmland Protection Area (hereinafter MFPA). The majority, citing to the public policy of the State, as articulated in the Agriculture and Markets Law and the General Municipal Law, and referring to the US Supreme Court's decision in *Kelo v City of New London* (545 US 469 [2005]), held that the town's condemnation of the subject real property, in order to prevent its development as a residential subdivision, served the legitimate public purpose of preserving the largest and most contiguous belt of productive agricultural land within the Town and the historic rural character of that portion of the Town.

The majority further held that the condemnation was not a subterfuge to improperly confer benefits upon private persons. Testimony at the public hearing held by the Town established that the Town's efforts to preserve farming in general and the MFPA in particular was not limited to condemnation of the subject property, but included the Town's purchase of development rights to four farms in the MFPA, including one immediately adjacent to the subject property.

The majority rejected the condemnee's argument that it was constitutionally entitled to an adversarial, trial-type hearing, and held that the public hearing provided for by the EDPL meets constitutional standards of notice and an opportunity to be heard. The majority also rejected the condemnee's contention that the Town violated SEQRA by issuing a negative declaration, finding that the Town's determination that the preservation of the agricultural character of the parcel would not have a significant environmental impact was rationally based.

Although the dissent agreed with the majority that the preservation of farmland constitutes a legitimate public purpose and that the condemnation was not procedurally flawed, it concluded that the condemnation was a mere pretext to benefit particular private owners of land within the MFPA. In particular, the dissent noted that no town ordinance or formalized plan creating the MFPA is extant. The dissent further wrote that the approval of the Town's Open Space Committee for the protection of the area, and the issuance of Town and County bonds for the purchase of parcels within the area, are insufficient to establish a "coherent" plan for the preservation of the area that would support a public purpose in this instance. As characterized by the dissent, "the willingness of the Town to increase its offer [to purchase to subject parcel] nearly 300% in less than two years, and the concomitant loss of millions of dollars for further acquisitions of property or development rights within the alleged targeted preservation area, raises questions as to the motivations of those involved as well as the propriety of the transactions" (*Id*. at 281), particularly since the Town attempted to purchase the subject parcel from the prior owner in 2003, but declined at that juncture to match the $1.4 million purchase price offered to the prior owner by the condemnee, and because the subject parcel was not actually in agricultural use when the Town condemned it.

Eminent Domain; Temporary Easement Prevents Use of Remaining Land; Damages Equal Decrease in Fair Rental Value

McCurdy v State of New York (37 AD3d 779 [Rivera, Skelos, Dillon, Covello], *mod* 10 NY3d

234).

This Court held that where the State invokes its eminent domain power to take a temporary easement over a portion of a landowner's undeveloped real property, thus rendering the landowner's remaining real property inaccessible and unavailable for development during the time that the easement is in effect, the landowner is entitled to recover damages from the State equal to the decrease in the fair rental value of the entire extent of the real property over that interval.

Here, the State took a temporary easement over a portion of the claimant's undeveloped real property in order to widen a State highway. The Court found that even though the remaining portion of the claimant's real property was undeveloped, he was entitled to recover not only the fair rental value of the real property subject to the temporary easement, but the fair rental value of the remaining undeveloped property, which was rendered landlocked, inaccessible, unavailable for development, and unmarketable while the State used the easement.

The Court of Appeals modified by limiting consequential damages to "the rental value of the parcel's unencumbered interior acreage for any period of time when highway access was not possible by virtue of the easement's use" (10 NY3d at 235-236).

Environmental Law; Residents Challenge Long Island Power Authority; Power Purchase Agreement and Adequacy of Final Environmental Impact Statement; No Standing to Raise Issue of Violation of Public Authorities Law

Matter of East End Prop. Co. #1, LLC v Kessel (46 AD3d 817 [Rivera, Ritter, Florio, Fisher]).

The Long Island Power Authority (hereinafter LIPA) authorized its chairperson to enter into a power purchase agreement and other related agreements with a private company concerning the construction and operation of a 350-megawatt dual-fuel, combined-cycle combustion turbine generator on a 15-acre parcel of real property in the Town of Brookhaven. In connection with this grant of authority, LIPA ultimately prepared and circulated a Final Environmental Impact Statement (hereinafter FEIS) with respect to the project, and issued the necessary State Environmental Quality Review Act (hereinafter SEQRA) findings statements. Several persons, civic associations, and landowners near the project site challenged the adequacy of the FEIS and the propriety of the SEQRA findings statements pursuant to CPLR article 78. They also alleged that LIPA violated both State Finance Law § 123-b for improper use of taxpayer funds and Public Authorities Law § 1020-f for entering into the agreements without approval from the New York State Public Authorities Control Board.

This Court ruled that, while the challengers had standing to challenge LIPA's compliance with SEQRA and to prosecute a taxpayer action pursuant to the State Finance Law, they were without standing to raise the Public Authorities Law issue, since they were not within the zone of interest sought to be protected by that statute. In any event, this Court held that LIPA's FEIS was adequate, in that it took a hard look at all relevant environmental impacts anticipated from the project, and identified and analyzed a reasonable number of feasible alternatives to the project. Moreover, this Court further ruled that whatever "new" information may have been developed or come to light since the issuance of the FEIS was not of the type that necessitated the preparation and circulation of a supplemental EIS. The Court held that the mere fact that LIPA issued a request for proposals and executed a Memorandum of Understanding with a natural gas pipeline

company to undertake a study as to the feasibility of the construction of a pipeline for the provision of gas to the power plant site did not commit LIPA to a specific project plan that required additional environmental review at this juncture; even if it did commit LIPA, and the provision of natural gas were considered part of a cumulative development plan, the approval of the pipeline is within the jurisdiction of the Federal Energy Regulatory Commission, in any event, and federal environmental review pursuant to the National Environmental Policy Act preempts any additional state environmental review under SEQRA. Finally, this Court also held that the allegations in the complaint that LIPA "illegally" expended taxpayer money were conclusory and insufficiently pleaded to state a cause of action pursuant to State Finance Law § 123-b.

Environmental Law; Residents Challenge Village Contract with Wireless Computer Access Provider to Install Antenna on Water Tower; SEQRA; Zoning

Matter of Herman v Incorporated Vil. of Tivoli (45 AD3d 767 [Crane, Goldstein, Florio, Dillon]).

Residents of a village lived adjacent to a public park in which a water tower had been constructed. The Village entered into an agreement with a wireless computer access provider, permitting the provider to install an antenna on the water tower. The residents commenced a hybrid declaratory judgment action and article 78 proceeding, seeking a declaration, inter alia, that the mayor of the Village was without authority to enter into the agreement on behalf of the Village, and seeking to review the approval of the construction of the antenna on the grounds that the approval was arbitrary and capricious and affected by error of law, i.e, in violation of local zoning regulations.

The Supreme Court transferred the entire action/proceeding to this Court, incorrectly ruling that the issue presented was whether the Village's determination was supported by substantial evidence. This Court remitted the matter back to the Supreme Court, ruling that judicial economy did not militate in favor of this Court's retention of the matter and resolution of the dispute on the merits, since: a) the record was insufficiently developed to permit this Court to make an informed decision on the disputed issues in the case, including the Village's compliance with local zoning regulations and the State Environmental Quality Review Act, and whether the residents failed to exhaust their administrative remedies, and b) the residents also requested a declaratory judgment, relief for which a transfer pursuant to CPLR 7804(g) is not authorized.

Environmental Law; New York City Watershed Protection Program; Phosphorus Offset Pilot Program

Kent Acres Dev. Co., Ltd. v City of New York (41 AD3d 542 [Schmidt; Santucci, Krausman, Balkin concur]).

Pursuant to the New York City Watershed Protection Program brokered by Governor Pataki in 1997, and the New York City Watershed Regulations promulgated pursuant thereto, the New York City Department of Environmental Protection (hereinafter the DEP) instituted a phosphorus offset pilot program (hereinafter POPP) to regulate the discharge of phosphorus into surface and groundwater located within the lower Hudson Valley watershed serving the City's water supply, even though such water bodies were outside of the geographical boundaries of the City. Pursuant to the regulation at issue, the DEP is empowered to review applications for permits to construct wastewater treatment plants that

discharge phosphorus into otherwise restricted City watershed areas, provided that the developer seeking approval to construct such facilities-- usually in connection with a proposed subdivision-- provided a plan to remove, from other portions of the watershed, at least three times the amount of phosphorus permitted to be discharged into the treatment facilities.

Here, a subdivision project in the City watershed had been approved, and construction thereon had been substantially undertaken prior to the promulgation of the Watershed Regulations, when financial problems caused the developer temporarily to cease work. This Court found that the Supreme Court nonetheless properly determined that the subsequently enacted POPP regulation was a valid and constitutional exercise of the City's police powers, and further properly determined that the DEP did not exceed its powers in conditioning the inclusion of the developer's proposed treatment facility in the POPP upon the consent of either the town or county in which the facility was sought to be sited.

This Court found that the Supreme Court also properly held that a stipulation of settlement in a prior proceeding, pursuant to which the relevant town consented to the construction of a treatment plant subject to the POPP, superseded a later resolution of the town purportedly withholding its consent. This Court found that, nonetheless, the court below correctly determined that the proposed treatment plant was not a "noncomplying regulated activity" that could avoid the applicability of the Watershed Regulations, including the POPP.

Environmental Law; SEQRA; Village of Kiryas Joel; Failure to Take a Hard Look

Matter of County of Orange v Village of Kiryas Joel (44 AD3d 765 [Spolzino, Ritter, Dillon, Dickerson]).

The residents of the Village of Kiryas Joel, located in Orange County, are all members of a Chasidic Jewish sect. The Village, faced with an astounding increase in population over the last 15 years, sought a reliable supply of potable water for its growing population by tapping into the upstate water supply of the City of New York. The City preliminarily agreed to permit the Village to tap into a particular aqueduct, which required the Village to construct a 13-mile-long pipeline through several adjoining municipalities, and a pumping station and filtration plant within the Village.

Although the Village prepared an environmental impact statement (hereinafter EIS) in connection with its approval of the project, this Court held that the EIS was insufficient, and thus violative of the State Environmental Quality Review Act, since, inter alia, it did not take the necessary hard look at the growth inducing impacts of the project. Due to their religious beliefs, the residents of the Village have high birth rates, women give birth beginning at age 18, very few residents leave the Village, and there is a large population of co-religionists in the New York City metropolitan area who may wish to relocate in the Village.

Thus, the Court determined that it was irrational for the Village to conclude that construction of the project would have no impact upon absolute population, population growth rates, or patterns of population settlement. Since a supplemental EIS is only required where there is a proposed change to a project, other changed circumstances, or new information, none of which occurred here, this Court found that the Supreme Court should not have remitted the matter to the Village Board of Trustees (hereinafter the Board) for the preparation of a supplemental EIS. Rather, this Court held, the matter should have been remitted to the Board for the preparation of an amended final EIS that takes the

necessary hard look at growth-induced impacts, as well as impacts upon wetlands, archaeological resources, groundwater, and other similar issues that were not fully evaluated in the EIS.

This Court ruled that The Board, however, need not identify alternatives to the project in addition to those already identified in the EIS, since the number and nature of those alternatives was sufficient and had a rational basis. The Court held that the Board must nonetheless more fully evaluate the anticipated impacts of the alternatives that it has already identified.

Family Law; Adoption; Consent of Biological Father

Matter of M. (39 AD3d 754 [Schmidt, Goldstein, Fisher, Lifson]).

This Court held that a hearing is required to determine whether the consent of the biological father was required as a condition precedent to the adoption of his two biological children, who were born out of wedlock. In this case, the Court found that there were significant, material, and disputed issues of fact as to whether the biological father "maintained substantial and continuous or repeated contact with the child[ren]" (Id. at 757) within the meaning of Domestic Relations Law § 111(1)(d), as manifested by support payments, monthly visitation, and regular communication with the children, or whether his attempts at visitation or communication were impeded by court order or by third parties.

Matter of Seasia D. (46 AD3d 878 [Crane, Goldstein, Carni; Dillon, dissent], *revd* 10 NY3d 879).

This Court affirmed an order denying the adoption petition of prospective adoptive parents who had custody of the subject child for more than three years.

Here, the 17-year-old biological father was prevented from further involvement with the teenage birth mother by the birth mother's family, who placed the child for adoption without the consent of the biological father. Moreover, although the sexual relations which brought about the pregnancy were apparently consensual, the birth mother's family threatened the biological father with prosecution for rape, although, in light of his minority, he could at most have been charged with sexual misconduct due to the fact that the birth mother was under 15.

The biological father contended that his consent to the adoption was required under statutory and constitutional principles, since he immediately and publicly acknowledged paternity, attempted to maintain contact with the birth mother during her pregnancy, and offered, through his own mother, to provide support for the child.

The majority held that this was sufficient to establish that the biological father was a "consent father," i.e., one whose consent was required before the child was placed for adoption.

The dissent contended that consideration of the four factors necessary to a determination of "consent father" status militates against such a finding in this case, since the biological father did not have the means to support the child, his mother made the offer of support in his place and stead, he did not register with the New York State Putative Father Registry, he moved out of the state with his mother during the period when he knew the child was about to be born, he never sent any small or affordable gifts to the child, and he took no other steps consonant with a father's duties and responsibilities to the child. The dissent implied that, in any event, it is unlikely that the biological father would raise the child

in lieu of the prospective adoptive parents, and that it is the biological father's own mother (i.e., the child's biological grandmother) who would likely raise the child if she were not placed for adoption.

Both the majority and the dissent, however, agreed that the birth mother, who signed an extrajudicial consent to adoption under duress (in the form of her own mother's unenforceable threat to disown her), should be given the opportunity to sign a new extrajudicial consent free from duress, however that may affect the biological father's future decision either to consent or withhold his consent to adoption.

The Court of Appeals, in effect adopting the dissent, found that the record did not support the trial judge's determination that the biological father is a consent father and held that the adoption petition should be reinstated and the matter remitted to Family Court for further proceedings on that petition.

Family Law; Custody Proceedings; Intervention

Matter of Calvin L. v Nassau County Dept. of Social Servs. (43 AD3d 445 [Miller, Mastro, Lifson, Carni]).

This Court held that Social Services Law § 383(3), permitting certain foster parents to intervene in custody proceedings involving their foster children, applies to custody proceedings commenced by a biological parent pursuant to Family Court Act article 6.

Family Law; Judicial Surrender of the Child

Matter of Destiny O. (44 AD3d 951 [Skelos, Dillon, McCarthy; Spolzino, dissent]).

A child was placed with a pre-adoptive foster family when she was one month old, and had resided with that family for 18 months. This Court found that, at that point, the Family Court properly accepted the birth mother's judicial surrender of the child and denied the petition of the incarcerated biological father to transfer custody of the child from the pre-adoptive parents to the paternal grandmother and a paternal aunt. The Court held that the Family Court had sufficient information before it to deny the father's custody petition without a hearing, since he was brought before the Family Court less than two hours after the birth mother's surrender petition was heard, he had the benefit of assigned counsel, had sufficient time to confer with counsel, and made no allegation whatsoever to warrant a hearing, and no allegations of changed circumstances sufficient to support a change in custody.

Family Law; Juvenile Delinquency; Sexual Abuse

Matter of Jermaine G. (38 AD3d 105 [Ritter, opinion; Krausman, Florio, Covello, concur]).

This case reversed the dismissal of a juvenile delinquency petition alleging sexual abuse of a five-year-old by an eleven-year-old. This case dealt with the facial sufficiency of a juvenile delinquency petition alleging such sexual abuse. The opinion addressed a case from the Court of Appeals (*Matter of Neftali D.*, 85 NY2d 631 [1995]), which apparently requires that allegations in support of a juvenile delinquency petition must meet a greater standard of proof than would be required to establish guilt beyond a reasonable doubt at a criminal trial, i.e., sworn, nonhearsay, factual allegations establishing every element of the offense.

That requirement posed a unique problem here, since the victim and only eyewitness

was five years old, and thus presumed to be incompetent to provide sworn testimony. This Court held that, nonetheless, Family Court Act § 311.1 does not require a five-year-old victim to "swear to" the allegations of sex abuse, as the purpose of an oath or affirmation would be lost on such a declarant. The Court found that where, as here, the five-year-old child's statement was "said to" an adult who took his statement, and his mother's sworn allegations-- although not establishing every element of the appellant's offense-- added relevant facts, the petition should not have been dismissed as legally or facially insufficient. This outcome satisfies the Court of Appeals' concern that there be a valid and documented basis for subjecting a juvenile to prosecution, and a measure of reliability regarding the contents of a juvenile delinquency petition.

Federal Supportive Housing Program; Waiver of Procedural Rights to Challenge Potential Eviction

Coppa v LaSpina (41 AD3d 756 [Schmidt, Skelos, Lifson, Covello]).

The plaintiff, a 62-year-old woman suffering from depression, who had recently been homeless, was accepted into a federally-subsidized program operated by the defendant Transitional Services of New York for Long Island, Inc. (hereinafter TSLI), and placed in a TSLI-owned house. In consideration for her occupancy in the TSLI house, the plaintiff expressly agreed, in writing, to waive any procedural rights she otherwise may have had under the federal Supportive Housing Program (42 USC § 11386[j]) to challenge any potential eviction. After the manager of the house determined that the plaintiff created a dangerous condition in the house, and personally notified the plaintiff of the dangers, he changed the locks and excluded the plaintiff from residing in the house.

In the instant action, this Court determined that any due process rights created under the federal statute were waivable, that the plaintiff did indeed waive those rights, and that it was thus unnecessary to determine whether the Supportive Housing Program created a private right of action for injunctive relief to remedy a violation of that program.

General Municipal Law § 103; Competitive Bidding; Recycling Contract

Matter of Omni Recycling of Westbury, Inc. v Town of Oyster Bay (41 AD3d 482 [Fisher, Covello, Balkin, McCarthy], *lv granted* 10 NY3d 703).

In *Matter of Signacon Controls v Mulroy* (32 NY2d 410 [1973]), the Court of Appeals held that the mandatory competitive bidding provisions of General Municipal Law § 103, referable to public contracts, apply not only where a municipality seeks to let out a contract that would entail the expenditure of the statutory minimum (then $1,000 and now $20,000) from the public fisc. The Court of Appeals held that mandatory competitive bidding is also required where a municipality proposes to accept a thing of value from a contractor, although the municipality might have received benefits for the same item from another contractor, over and above that received from the successful contractor, in a sum equal to or greater than the statutory minimum.

Here, a town delivered a request for proposal (hereinafter RFP) directly to several chosen contractors to provide collection and disposal services for recycled material generated by residents of the town. It was anticipated that the contractor would generate revenue by selling the material to salvors and industrial recyclers, and remit a percentage of the revenue back to the town as consideration for securing the exclusive right to collect the materials from town residents. After narrowing its choice down to two of the chosen contractors, the

town selected one, without any bidding. The disappointed contractor commenced the instant proceeding, seeking to annul the resolution awarding the contract to the successful contractor, and to annul the contract itself.

Applying *Signacon*, this Court annulled the resolution and the contract, and directed the town to conduct competitive bidding for the recycling contract. In doing so, this Court determined that, even though the disappointed contractor could not establish that either it or the other contractors receiving RFPs would have generated $20,000 or more in revenue for the town over and above that which was to be generated by the successful contractor over the 5-year term of the contract, it was hypothetically possible that some contractor existed that would generate that amount.

Thus, this Court held that competitive bidding was required. It should be noted that the Court, in interpreting and applying *Signacon*, declined to articulate any burden of proof that must be satisfied by a petitioner in a case such as this (e.g., a "reasonable likelihood" that a contractor exists that would provide a contract generating $20,000 for the municipality over and above that promised by the successful contractor, or "a substantial likelihood," or "a rational likelihood"). Instead, this Court held that the existence of such a contractor need only be shown to be hypothetically possible. Based on this ruling, it appears as if all public contracts that generate revenue for a municipality are subject to the competitive bidding requirements of General Municipal Law § 103, as it is always hypothetically possible that some contractor somewhere would generate at least $20,000 more for any given municipality than a contractor chosen in the absence of competitive bidding.

General Municipal Law § 207-a; Injured Fire Fighter; Collateral Source; Deduction of Disability Retirement Benefits Received from Retirement and Social Security Law

Terranova v New York City Tr. Auth. (49 AD3d 10 [Spolzino, opinion; Krausman, Angiolillo, McCarthy, concur]).

This Court held that disability retirement pension payments to be received by an injured firefighter pursuant to the Retirement and Social Security Law constitute a collateral source pursuant to CPLR 4545 that must be deducted from a firefighter's tort recovery in an action commenced pursuant to General Municipal Law § 205-a for line-of-duty injuries proximately caused by the defendant's failure to comply with governmental requirements.

General Municipal Law § 207-c; Injured Police Officer; Social Security Disability Insurance; Duplication of Coverage

Matter of McCaffrey v Town of East Fishkill (42 AD3d 22 [Spolzino, opinion; Rivera, Krausman, Lifson, concur]).

A police officer was injured in the line of duty and was thus unable to perform his job. Pursuant to General Municipal Law § 207-c, he applied for and received the full measure his salary and medical expenses from the town that employed him. When the town learned that the officer also applied for and received Social Security Disability Insurance (hereinafter SSDI) benefits from the federal Social Security Administration, it reduced the amount of his benefits under General Municipal Law § 207-c by the amount of SSDI benefits he received.

This Court, in reversing the Supreme Court's judgment dismissing the officer's petition to review the town's determination in this regard, held that such a reduction was not

proper, and directed the town to reimburse the officer retroactively by the amount it had reduced his General Municipal Law § 207-c benefits. In particular, this Court ruled that SSDI benefits do not fall within one of the three types of benefits enumerated in General Municipal Law § 207-c which, if received by a disabled police officer, permit a municipality not only to reduce its payment of benefits to that officer, but to discontinue them entirely. The Court held that here the town may not rely on the provision of General Municipal Law § 207-c permitting it to recover from a tortfeasor those benefits it has paid to a disabled officer, as the officer was not the tortfeasor.

General Obligations Law § 11-106; Negligence of Coworkers

Rodriguez v County of Rockland (43 AD3d 1026 [Mastro, Covello, McCarthy, Dickerson]).

This Court held that, although General Obligations Law § 11-106, enacted in 1996, repealed the so-called common-law "firefighter's rule," which prohibited both firefighters and police officers from suing in negligence to recover for line-of-duty injuries, the statute expressly retained the common-law prohibition on tort actions arising from the negligence of the firefighter's or officer's employer or coworkers. Here, the Court found that a State Trooper, who was injured in a line-of-duty incident while discharging his duty as part of a joint police task force with county and village law enforcement officers, fell within the express prohibition, since the county, the village, and their officers were essentially the State Trooper's coworkers. Moreover, the Court determined that the State Trooper failed to raise a triable issue of fact as to whether these other officers owed him a special duty.

Insurance; Automobiles; Assigned Risk Policy; Cancellation

Matter of Government Empls. Ins. Co. v Lopez (44 AD3d 256 [Covello, opinion; Schmidt, Santucci, Skelos, concur]).

This Court found that a lender that finances the premiums for an assigned risk auto insurance policy, and that wishes to cancel the policy due to the insured's failure to make payments required under the financing agreement, need not advise the insured of a particular right of review in order for the cancellation to be effective. The Court held that neither the relevant provisions of Banking Law § 576, nor those of Insurance Law § 5301, as they existed at the time that the insurer cancelled the insured's policy, require such notice or review.

Insurance; Automobiles; No-Fault; Fraud Defense Waived

Fair Price Med. Supply Corp. v Travelers Indem. Co. (42 AD3d 277 [Prudenti, opinion; Mastro, Santucci, Dillon concur], *affd* ___NY3d___, 2008 NY Slip Op 04946).

This Court held that, after the statutory and regulatory 30-day period for processing or denying a no-fault claim has lapsed, an insurer may not deny no-fault benefits to a medical supply company that allegedly supplied medical devices to a person injured in a motor vehicle accident on the ground that the supply company fraudulently made a claim for supplies it did not actually provide to the injured person. Rather, the Court held that, because such a disclaimer is not based upon the nonexistence of insurance coverage in the first instance, it must be made within the 30-day period. Here, the insurer denied the claim, based on the alleged fraud, almost two years after the claim was submitted. The Court found that it had thus waived the fraud defense. The Court found that an alleged fraud

based on failure to provide equipment and supplies that were billed to the insurer is not the same as a fraud based upon the complete staging of an accident, to which the 30-day disclaimer period is inapplicable. Instead, the Court held that such an alleged fraud is more nearly comparable to overbilling by a medical equipment provider, to which the 30-day disclaimer period applies.

Insurance; Automobiles; Default; Proof of Serious Injury at Inquest

Abbas v Cole (44 AD3d 31 [Santucci, opinion; Ritter, Skelos, Dickerson, concur]).

This Court held that where a defendant defaults in answering the complaint or appearing in an action to recover damages for personal injuries arising from a motor vehicle accident, the plaintiff must nonetheless demonstrate, at the inquest on damages, that he or she sustained a "serious injury" within the meaning of Insurance Law § 5102(d) before he or she may recover for pain and suffering, unless the issue has already been decided in some other appropriate forum, or the defendant has conceded the issue.

Insurance; Automobiles; No-Fault; Prejudgment Interest

Van Nostrand v Froehlich (44 AD3d 54 [Dillon, opinion; Miller, Krausman, concur; Spolzino, Fisher, dissent], *lv dismissed* 10 NY3d 837).

This Court held that since proof of "serious injury" in a personal injury action arising from a motor vehicle accident more nearly involves the establishment of damages, rather than liability, prejudgment interest in such an action, as permitted by CPLR 5002, begins to run upon a finding of liability, and proof of serious injury is not required to trigger the accrual of prejudgment interest.

The Court of Appeals held in *Love v State of New York* (78 NY2d 540 [1991]) that prejudgment interest in a personal injury action runs from the date when the defendant's obligation becomes "fixed at law." The Court of Appeals explained that, in a typical personal injury action, that date is the point in time that common-law liability is established or resolved in favor of the plaintiff. This Court found this case distinguishable on the facts from *Love* because it involved an automobile-related injury subject to the peculiarities of the serious injury provisions of Insurance Law §§ 5102 and 5104.

Accordingly, the majority here held that in personal injury actions arising from a motor vehicle accident, interest also runs from the date common-law liability is established, whether that occurs by means of a liability trial, a summary judgment motion, or a default by the defendant. Thus, the Court held that where liability is established pursuant to the defendant's admission, the defendant's default in answering the complaint or appearing in the action, a motion for summary judgment on the issue of liability, or a verdict in a bifurcated trial, prejudgment interest begins to run on that date even though the plaintiff has yet to establish that he or she sustained a serious injury as a proximate result of the relevant motor vehicle accident.

Insurance; Automobiles; Supplemental Underinsured Motorist Claim; Stay of Arbitration

Matter of New York Cent. Mut. Fire Ins. Co. v Ward (38 AD3d 898 [Ritter, Santucci, Skelos, Dickerson]).

This Court held that an insurance carrier that wishes to disclaim coverage under a Supplemental Underinsured Motorists (hereinafter SUM) endorsement because the insured failed to timely provide it with a proof of claim must demonstrate that it was prejudiced by the delay. The Court found that, because the insurance carrier failed to make such a showing here, the Supreme Court should have denied its petition to permanently stay arbitration of a SUM claim submitted to it by the insured.

Insurance; Investigation Reports; Hearsay; Business Records Exception

Hochhauser v Electric Ins. Co. (46 AD3d 174 [McCarthy, opinion; Spolzino, Goldstein, Santucci, concur]).

The principal issue in this appeal was whether an insured's statement to an insurance investigation report, as well as testimony regarding the statement, were admissible at a hearing under the business records exception to the hearsay rule. The Court held that, since an insured lacks a business duty, as opposed to a contractual duty, to report to his or her insurer in the course of its insurance coverage investigation, neither the insured's statement nor testimony regarding such a statement is admissible pursuant to the business records exception to the hearsay rule.

Insurance; Negligent Issuance of Life Insurance Policy

Katchalova v Perchikov (43 AD3d 873 [Mastro, Dillon, Covello, Dickerson]).

This Court held that New York does not recognize a cause of action for "negligent issuance" of a life insurance policy, i.e., a claim against an insurance company that it breached a duty to the decedent, while he or she was still alive, by failing to recognize that the beneficiary purchased a policy insuring the decedent's life for nefarious purposes, in this case, solely to collect the proceeds after murdering the decedent. Other states have recognized such a cause of action. See *Bajwa v Metropolitan Life. Ins. Co.*, 208 Ill 2d 414, 804 NE2d 519 (2004); *Bacon v Federal Kemper Life Assur. Co.*, 400 Mass 850, 512 NE2d 941 (1987); *Life Ins. Co. Of Georgia v Lopez*, 443 So 2d 947 (Fla 1983); *Burton v John Hancock Mut. Life Ins. Co.*, 164 Ga App 592, 298 SE2d 575 (1982); *Ramey v Carolina Life. Ins. Co.*, 244 SC 16, 135 SE2d 362 (1964); *Liberty Natl. Life Ins. Co. v Weldon*, 267 Ala 171, 100 So2d 696 (1957).

Labor; Unions Seek to Enforce Collective Bargaining Agreements

Amalgamated Tr. Union Local 1181, AFL-CIO v City of New York (45 AD3d 788;45 AD3d 790 [Schmidt, Rivera, Florio, Balkin]).

This Court reversed the Supreme Court and granted the motions of the Metropolitan Transportation Authority (hereinafter the MTA) to dismiss the complaints in two actions insofar as asserted against it, pursuant to which several transit unions sought specific performance of a 1975 agreement, which provided for the continuation of the terms of several collective bargaining agreements (hereinafter CBAs).

In particular, the 1975 agreement provided that the City of New York, as a condition to the receipt of federal transit funds during that year's fiscal crisis, would assure that several private bus companies to which it awarded franchises continued to honor the terms of several CBAs that those companies had negotiated with its unions. In 2004 the MTA announced that it would take over those private bus lines and continue service through one

of its subsidiaries. In 2005 that subsidiary, MTA Bus, formally absorbed the private bus lines into its operations. The unions commenced two actions against the MTA and the City, among others, seeking specific performance of the terms and conditions of the CBAs, including obligations that the private bus lines had made to employee pension funds. The MTA moved to dismiss the complaints insofar as asserted against it.

This Court agreed with the MTA that, inasmuch as the MTA was not a party to the 1975 agreement, it could not be bound by its terms, and that although the 1975 agreement purported to bind the successors and assigns of the parties to the agreement, an assignee or successor will not be bound to the terms of a contract absent an affirmative assumption of the duties articulated in the contract. Here, the Court found that although the MTA absorbed the private bus lines and took over their routes, it did not accept an "assignment" of the 1975 agreement, and affirmatively disclaimed any preexisting liabilities of the private bus companies, including pension obligations.

Labor; Illegal Strike under Taylor Law; Suspension of Right to Dues Check-Off and Payroll Deduction

MTA Bus Co. v Transport Workers Union of Am., AFL-CIO (37 AD3d 674 [Spolzino, Florio, Lifson, Covello]); *New York City Tr. Auth. v Amalgamated Tr. Union, AFL-CIO* (37 AD3d 677 [Spolzino, Florio, Lifson, Covello]); *New York City Tr. Auth. v Transport Workers Union of Am., AFL-CIO* (37 AD3d 679 [Spolzino, Florio, Lifson, Covello]).

The Supreme Court issued several preliminary injunctions prohibiting several public employee unions from striking. The unions nonetheless engaged in an illegal strike in violation of the Taylor Law. Upon the employers' motion, the Supreme Court determined that the unions violated the preliminary injunctions and the no-strike provision of the Taylor Law itself. After a nonjury trial, the Supreme Court adjudged the unions to be in contempt of court, and imposed a per diem contempt fine upon them. Upon the employers' later motion, and after a second nonjury trial, the Supreme Court found that the unions had been on strike for 2½ days, fixed a determinate fine on the basis of its findings, and, in accordance with the mandate of the Taylor Law, suspended the unions' statutory right to collect union dues by means of an employee checkoff and payroll deduction.

This Court held, in affirming the Supreme Court's judgments, that there is no requirement that the branch of the employers' motion which was to suspend the unions' right to collect its dues by means of an employee checkoff and payroll deduction be initiated in any particular manner or at any particular time, and thus no requirement that said branch of the motion be made simultaneously with the initial motion to hold the unions in contempt. Moreover, the Court found that the suspension of the right to a dues checkoff and payroll deduction did not punish the unions twice for the same offense. Rather, the Court found that, unlike the contempt fines, the suspension did not deprive the unions of property, but only restricted the manner in which they could collect dues. In addition, the Court determined that the suspension constituted a statutory civil penalty for violation of the Taylor Law itself, in contrast with the contempt fines, which constituted punishment for violations of the several preliminary injunction orders prohibiting the strike.

Landlord/Tenant; Accelerated Rent

Ross Realty v V & A Fabricators, Inc. (42 AD3d 246 [Lunn, opinion; Miller, Mastro, Fisher, concur]).

This Court held that, once a landlord successfully prosecutes a summary proceeding for nonpayment of rent and possession of premises against a tenant pursuant to Real Property Actions and Proceedings Law article 7, the parties' relationship as landlord and tenant terminates, and whatever other monetary liability the tenant may have had to the landlord, such as for liquidated damages, is no longer in the nature of rent, but in the nature of contract damages. The Court found that, because the obligation of a tenant to pay "accelerated rent," as set forth in a commercial lease, is not properly considered to be an obligation to pay "rent due," as the latter term is used in various court acts defining the jurisdiction of inferior courts, those inferior courts, including the Suffolk County District Court, do not have jurisdiction to consider a claim for accelerated rent. As such, the Court ruled that a determination of such an inferior court awarding possession of premises and unpaid past-due rent to a landlord is not a determination of a claim for accelerated rent, and thus res judicata does not bar the landlord from commencing a plenary action in the Supreme Court against the tenant to recover liquidated damages such as accelerated rent.

Legal Fees; Absence of Retainer Agreement; Quantum Meruit

Seth Rubenstein, P.C. v Ganea (41 AD3d 54 [Dillon, opinion; Mastro, Florio, Fisher, concur]).

This Court held that an attorney who represents a client in a non-matrimonial action or proceeding, and who fails to obtain a written retainer agreement or letter of engagement, may nonetheless recover the value of his or her services rendered on a quantum meruit basis. The relevant court rule (22 NYCRR 1215.1) requires a written retainer or letter of engagement for non-matrimonial actions.

This Court found that, unlike the rule applicable to the same issue in matrimonial actions, 22 NYCRR 1215.1 does not expressly preclude the attorney from recovering his or her fees even if he or she violates 22 NYCRR 1215.1 by failing to provide a written retainer or letter of engagement. Thus, the Court held that if the attorney can demonstrate that his or her failure to obtain a written agreement was not willful, that the client understood that the attorney's services were not pro bono, and that the oral terms of the agreement were known, understood, and assented to by the client, he or she may recover those fees based on quantum meruit. Moreover, the Court ruled that an attorney who is awarded fees in a guardianship proceeding from an allegedly incapacitated person pursuant to Mental Hygiene Law § 81.16(f) is not barred by res judicata from recovering additional fees from the client who sought the appointment of the guardian.

Legal Fees; Arbitration; Collateral Estoppel

Wallenstein v Cohen (45 AD3d 674, *lv denied* 10 NY3d 711 [Spolzino, Krausman, Carni, Dickerson]).

In this case, a dissatisfied client arbitrated a fee dispute with her former attorney, claiming not only that the fees were excessive, but that the attorney committed fraud and malpractice. The Court determined that since the arbitrator awarded the attorney substantially all of the fees he billed, it must be presumed that the issues of fraud and malpractice were subsumed in the arbitration, and the plenary action commenced by the client against the attorney must thus be dismissed as barred on the grounds of both arbitration and award and collateral estoppel.

Legal Fees; Void Retainer Agreement; Quantum Meruit

Rimberg & Assoc., P.C. v Jamaica Chamber of Commerce, Inc. (40 AD3d 1066 [Spolzino, Florio, Skelos, McCarthy]).

This Court held that a retainer agreement in which an attorney purportedly charges a nonrefundable minimum fee is void as against public policy, and may not be enforced. Nonetheless, the Court found that the attorney may proceed under a theory of quantum meruit against a client who has refused to pay.

Legal Malpractice; Real Estate; Failure to Reveal Full Knowledge of Environmental Violations

Barnett v Schwartz (47 AD3d 197 [Ritter, opinion; Crane, Balkin, concur; Lifson, dissent]).

This Court held that a jury verdict in favor of the plaintiffs in a legal malpractice action against their real estate attorneys was not against the weight of the evidence, where the attorneys: a) were informed that the commercial real property that the plaintiffs sought to lease from the landlord, with an option to purchase, had environmental violations, and b) engaged in correspondence with respect to those violations with regulatory agencies, yet c) advised the plaintiffs to lease and purchase the property "as is."

In affirming the judgment entered upon the verdict, this Court rejected the attorneys' argument that there were no "definitive" standards governing environmental assessments of real property as of the date they advised the plaintiffs, as well as the attorneys' contention that the plaintiffs, after learning of the violations, made an independent business decision to await the clean-up of the property and subsequently renegotiate and extend the lease/purchase agreement. Rather, the Court found that the attorneys' malpractice, which caused the plaintiffs to execute the lease/purchase agreement without full knowledge of facts in the possession of those attorneys, was a proximate cause of the plaintiffs' damages.

The dissenting Justice would have reversed the judgment in favor of the plaintiffs and dismissed the complaint on the grounds that: a) the use of "as is" clauses in lease/option agreements was common during the period when the attorneys were advising the plaintiffs, b) there was no proof that the attorneys' disclosure of the property's environmental status to the plaintiffs or the attorneys' insistence that the landlord alter the "as is" clause would have yielded a more favorable lease/purchase agreement, and c) the environmental status of the property did not impair the intended use of the property by the plaintiffs as a factory for the manufacture of BBQ sauce in any event.

Long Arm Jurisdiction; Burden of Proof

Alden Personnel, Inc. v David (38 AD3d 697 [Spolzino, Ritter, Covello, Balkin]).

This Court held that, while the ultimate burden of proof with respect to whether New York courts may exercise in personam longarm jurisdiction over a defendant lies with the plaintiff or any other party asserting jurisdiction, on the defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, the plaintiff need only make a prima facie showing of personal jurisdiction in opposition. Here, the Court determined that in opposition to the motion the plaintiff made a prima showing that the defendant transacted business within New York and that there was a substantial relationship between the defendant's activity in this regard and the plaintiff's causes of action.

Medical Malpractice; "Capitation" Cause of Action

Morris v Queens-Long Is. Med. Group, P.C. (43 AD3d 394 [Schmidt, Spolzino, Florio, Skelos]).

This Court held that a plaintiff in a medical malpractice action failed to demonstrate that a "capitation" negligence cause of action, alleging that physicians did not provide the requisite level of medical care because their contract with a health maintenance organization effectively compelled them to economize by providing substandard care, survived independently of proof of medical malpractice, i.e., proof of a deviation from the standard of medical care that constituted a substantial factor in bringing about her injuries.

Mental Hygiene Law article 81; Allegedly Incapacitated Person; Misappropriation of Funds

Matter of Lee J.P. (45 AD3d 774 [Miller, Ritter, Santucci, Balkin]).

This Court held that where an allegedly incapacitated person (hereinafter the AIP) dies in the course of a proceeding to appoint a guardian of the person and property, Mental Hygiene Law article 81 does not empower the Supreme Court to adjudicate the potential liability of a proposed guardian for misappropriation of the AIP's assets. Rather, the Court determined that the issue must be pursued in an appropriate probate or accounting proceeding in the Surrogate's Court, where the existence and extent of debts owed to the AIP's estate must be resolved.

Mortgages; Foreclosures; Oral Modifications

Daniel Perla Assoc., LP v 101 Kent Assoc., Inc. (40 AD3d 677 [Spolzino, Goldstein, Fisher, McCarthy]).

The principal issue in this case was whether the defendant rebutted the plaintiff's prima facie showing of entitlement to summary judgment in a mortgage foreclosure proceeding by submitting an affidavit averring that the plaintiff's limited partner agreed to an oral modification of the subject mortgage. This Court held that the defendant did not rebut the showing because the defendant "failed to demonstrate that [the limited partner's] conduct, inter alia, to forbear in foreclosing the mortgage was unequivocally referable to the alleged oral modification" (*Id*. at 678).

New York City Civil Court Act § 2102; 22 NYCRR 208.14(c)

Chavez v 407 Seventh Ave. Corp. (39 AD3d 454 [Prudenti, Fisher, Carni, McCarthy]).

This Court held that although New York City Civil Court Act § 2102 recites that the provisions of the CPLR relating to practice and procedure in the Supreme Court are applicable in the Civil Court, CPLR 3404, which requires dismissal of a case in the Supreme Court or the County Court that has been marked off the trial calendar and not restored within one year, is inapplicable in the Civil Court. The Court determined that this conclusion is warranted because, in 1986, the Civil Court repealed its own court rule that mirrored CPLR 3404, and the current Civil Court rule applicable to actions stricken from the calendar (22 NYCRR 208.14[c]) makes no provision for dismissing an action for neglect to prosecute.

Notice of Claim; Injurious Falsehood against Commercial Entity

W.E. Rest., Inc. v Wilson (38 AD3d 762 [Schmidt, Skelos, Lifson, Covello]).

Here, a clerk in a town building department contacted the relevant county health department about the operations of a local restaurant, thus triggering the county health department's review of the restaurant's wastewater treatment and discharge practices. In response, the restaurant commenced an action against the clerk to recover damages for injurious falsehood. This Court, in reversing the Supreme Court's denial of the clerk's motion for summary judgment dismissing the complaint, held that the clerk's communication with the county health department was undertaken in the course of her employment with the town, and within the scope of her duties for the town. As such, the Court found that the timely service of a notice of claim was a condition precedent to the commencement of the action against the clerk, and, since the restaurant failed to timely serve a notice of claim upon the town, summary judgment dismissing the complaint should have been granted.

Partnership Law § 20(2); Responsibility for Personal Loans

Beizer v Bunsis (38 AD3d 813 [Mastro, Florio, Carni, McCarthy]).

The principal issue in this case was whether loans allegedly made to a partner of a public accounting firm partnership for the purpose of investing in other business ventures "were apparently made in the usual course of business" of a public accounting firm and, therefore, binding upon the partnership. This Court held that the acts of the partner in accepting the loans were neither permitted pursuant to the terms of the partnership agreement nor were they acts "apparently made 'for the carrying on . . . in the usual way' the business of a public accounting firm" (*Id*. at 814, quoting Partnership Law § 20[2]).

Personal Injuries; Collateral Source Rule

Kihl v Pfeffer (47 AD3d 154 [Dillon, opinion; Prudenti, Fisher, Dickerson, concur]).

The collateral source rule provides for a setoff, from a personal injury recovery, of any past or future cost of or expense for medical, dental, custodial, or rehabilitation care, loss of earnings, or other economic loss that was or will be replaced or indemnified, in whole or in part, from any collateral source. The rule, as codified in CPLR 4545, only provides for the setoff where the replacement or indemnification was or will be made with "reasonable certainty."

This Court and other courts have held that the defendant bears the burden of establishing the setoff by proof greater than a preponderance of the evidence but less than a reasonable doubt. The proof requires a showing that the collateral source payments specifically correspond to particular items of economic loss awarded by the trier of fact.

Here, the cost of the injured plaintiff's future medication expenses, in the form of a morphine supplement, is the type of expense which would be subject to a collateral source reduction if continued receipt of benefits from his medical insurer were reasonably certain. Nonetheless, after considering 5 factors-- 1)the uncertainty that the plaintiff's husband would remain employed for 46 years with the company providing the relevant family medical insurance, corresponding to the number of years which the jury determined that the plaintiff would require future medical expenses; 2) the uncertainty that the insurer would continue to cover that medication even were the plaintiff to remain covered by the same insurer over those 46 years; 3) the uncertainty that the plaintiff would remain married to the covered

person; 4) the uncertainty of the covered person's life expectancy; and 5) the noninsurability of the plaintiff in the absence of her husband's coverage-- the Supreme Court properly determined that future reimbursement of the cost of morphine was anything but reasonably certain, and thus properly denied the tortfeasor a collateral source setoff for the future cost of morphine.

Personal Injuries; Default; Inquest on Damages

Singh v Friedson (36 AD3d 605 [Miller, Santucci, Goldstein, Skelos, Lunn], *lv dismissed* 9 NY3d 861).

A defaulting defendant in an action to recover damages for personal injuries may, despite his or her default, employ a subpoena duces tecum to compel the plaintiff to execute and provide HIPAA-compliant authorizations for medical records for use in the inquest on damages.

Personal Injuries; Labor Law §§ 200, 240(1); § 241(6)

Cunha v City of New York (45 AD3d 624 [Spolzino, Ritter, Covello, Dickerson]).

This Court held that where an owner or general contractor of real property is only vicariously liable to the plaintiff by virtue of a violation of Labor Law § 240(1), that owner or general contractor is entitled to full common-law indemnification from the party actually responsible for the accident, and is thus permitted to shift the entire burden of loss to the actual wrongdoer. Here, this Court found that once the jury determined that the tortfeasor was in fact negligent, the Supreme Court thus erred in permitting the jury to assign a percentage of fault to the tortfeasor and a percentage of fault to the owner; this Court held that the court below should instead have simply determined that the owner was entitled to full common-law indemnification, and that the tortfeasor was 100% liable for the plaintiff's injuries.

Keating v Nanuet Bd. of Educ. (40 AD3d 706 [Prudenti, Crane, Goldstein, Dillon]).

In this case, the Court articulated the standard for the imposition of liability upon general contractors or owners where an injured worker asserts causes of action under Labor Law § 200 and the common law of negligence, arising from a defective or dangerous condition at the work site. Thus, the Court held that, where a plaintiff's injuries stem not from the manner in which the work was being performed, but, rather, from a dangerous condition on the premises, a general contractor or owner may be liable under Labor Law § 200 and in common-law negligence if it has control over the work site, as opposed to the means and methods of the work, and actual or constructive notice of the allegedly dangerous condition. This standard is slightly different from that applied to owners and general contractors where the plaintiff alleges causes of action under Labor Law § 200 and common-law negligence arising from the means and methods of work. In the latter situation, a plaintiff must establish that the owner or general contractor had supervisory authority over the work itself.

Dooley v Peerless Importers, Inc. (42 AD3d 199 [Miller, opinion; Ritter, Covello, Balkin, concur]).

This Court held that where a worker is injured due to an elevation risk created by construction or demolition work on a stage or platform floating on the surface of a creek, he is entitled to the protections of Labor Law § 240(1).

In this case, the platform, which had no railings or guardrails, gave the plaintiff access to a bulkhead on which he was working. While so engaged, the platform shifted on the water's surface. The plaintiff suspended himself above the water's surface by placing his hand into an anchor hole in the bulkhead, and pulled himself up a short distance. However, he eventually fell, and as he did, he twisted his body toward the floating stage. He didn't land on it, but as he fell into the water, he struck his elbow and armpit on the corner of the platform. The plaintiff ended up in water up to his chest; by his estimate, including the depth of the water, he fell approximately eight feet.

The Supreme Court determined that the plaintiff did not fall from an elevated work site and was not struck by a falling object, and thus denied that branch of his cross motion which was for summary judgment on the issue of liability on his Labor Law § 240(1) cause of action. This Court reversed that determination, and awarded summary judgment in the plaintiff's favor on that cause of action.

Based on *Rocovich v Consolidated Edison Co.* (78 NY2d 509 [1991]), this Court reasoned that the plaintiff was exposed to, and injured because of, a gravity-related hazard. On the other hand, the Court held that the plaintiff was not entitled to the protections of Labor Law § 241(6), since the Industrial Code provision upon which he relied, establishing standards for safety railings, does not require their installation in the first instance.

Romero v J & S Simcha, Inc. (39 AD3d 838 [Spolzino, Goldstein, Fisher, McCarthy]).

The primary issue in this appeal was whether the defendant City of New York was liable as an owner under Labor Law § 241(6), where the City issued a permit to install a sewer line on the City's property, albeit under the direction/control of a private contractor. The Court held that the City failed to establish its prima facie entitlement to summary judgment on the issue of its liability under the statute, noting that "ownership of the property makes it liable for violations of Labor Law § 241(6) which occur on its property regardless of whether it retained or controlled the contractor" (*Id*. at 839).

Personal Injuries; Damages for Future Pain and Suffering; CPLR article 50-B

Stinton v Robin's Wood, Inc. (45 AD3d 203 [McCarthy, opinion; Spolzino, Fisher, Covello, concur], *lv denied* 10 NY3d 708).

CPLR article 50-B provides that an award for future pain and suffering in a personal injury action that is greater than $250,000 must be structured by reducing it to net present value. Here, the personal injury plaintiff secured an award, after an inquest, of only $150,000 for future pain and suffering, but died only one day after the Supreme Court directed the award to be memorialized in a judgment.

Rejecting the defendant's argument that the plaintiff's estate would garner a "windfall" if permitted to retain damages for the future pain and suffering of a person who no longer would sustain such pain and suffering, this Court held that the Supreme Court providently exercised its discretion in refusing to set aside the award and that, had it done otherwise, it would have judicially rewritten the unambiguous provisions of CPLR article 50-B, which recite that the court "shall" enter judgment when the future pain and suffering award is $250,000 or less.

In particular, the Court found that the legislative history of CPLR article 50-A, upon which CPLR 50-B is based, clearly demonstrates that the Legislature intended to allow recoveries for future pain and suffering in the sum of $250,000 or less to remain in the form

of a lump sum, unaffected by the structured periodic payment provisions of the CPLR. These provisions include CPLR 5045, which recites that the death of a judgment creditor terminates his or right to any periodic payments not yet due at the time of his or her death. In the absence of any statutory provision similarly terminating the right of a decedent, or his or her estate, to collect on a judgment that, by definition, is not in the form of a periodic payment, the Court held that there is no basis for this Court to terminate the right of recovery in such a situation.

Personal Injuries; Prior Written Notice of Defective Sidewalk

Gorman v Town of Huntington (47 AD3d 30 [Dillon, opinion; Spolzino, Skelos, McCarthy, concur]).

A town enacted a local law requiring that prior written notice of a sidewalk defect be given to the town clerk or the town highway department prior to the commencement of a tort action based on the defect. Here, however, the town vested authority to inspect and repair sidewalks in its Department of Engineering Services (hereinafter the DES), rather than its highway department, the DES maintained a complaint and repair index, and DES representatives repeatedly told members of the public to make complaints about defective sidewalks to it. Since numerous written complaints and prior notices concerning the sidewalk defect allegedly causing the plaintiff to fall were in fact timely provided to the DES, this Court held that the prior written notice requirement was satisfied, notwithstanding the fact that prior written notice was not provided to the town clerk or the town highway department.

Personal Injuries; Automobile Accident; Injured Infant May Sue Owner and Driver and Two Years Later Sue Manufacturer and Distributor of Vehicle Alleging Defective Design; No Collateral Estoppel

Sneddon v Koeppel Nissan, Inc. (46 AD3d 869 [Crane, Goldstein, Florio, Dillon]).

The infant plaintiff was injured when, while a passenger in a motor vehicle, the vehicle suddenly accelerated as the driver attempted to park, and struck another object. The infant plaintiff commenced an action solely against the owner and driver of the vehicle. In that action, the Supreme Court granted the plaintiff's motion for summary judgment on the issue of liability, writing that the driver's negligence was the "sole proximate cause" of the accident. Two years later, but still within the applicable limitations period, the plaintiff commenced a second action, naming the manufacturer and distributor of the vehicle and its component parts, and alleging that the vehicle or the parts were defectively designed or manufactured.

This Court reversed the Supreme Court's order awarding summary judgment to the manufacturer and distributors of the vehicle, and held that the ruling in the action against the driver and owner of the vehicle did not collaterally estop the plaintiff from arguing that defective design and/or manufacture was a proximate cause of the accident. The Court found that, in the first action, the only determination necessary to the outcome was that neither the plaintiff nor any other driver caused or contributed to the accident, which did not foreclose the possibility that there were additional proximate causes of the accident unrelated to careful operation of a vehicle.

Personal Injuries; Evidence of Permanency

Hughes v Webb (40 AD3d 1035 [Rivera, Krausman, Goldstein, Lunn]); *Langhorne v County of Nassau* (40 AD3d 1045 [Crane, Ritter, Lunn, Covello]).

In these two decisions, the Court held that permanency of an injury is not, in and of itself, an "injury or condition" that requires a plaintiff to produce a medical report lest he or she be precluded from offering testimony on that issue at trial. Rather, the Court found that where a previously-served medical report describes an injury and its causation, the physician who made that report may testify at trial as to the permanency of that injury, even in the absence of a subsequent report.

Personal Injuries; Accident During Waterfront Renovations; Not a Contract for Maritime Services

Mulhern v Manhasset Bay Yacht Club (43 AD3d 425 [Schmidt, Spolzino, Krausman, Balkin]).

The plaintiff was injured in the course of working on a waterfront renovation project and commenced an action against the owner of the waterfront property. In order to circumvent the "grave injury" standard required for a claim of contribution against the plaintiff's employer, the owner sought implied contractual indemnification from the employer. The owner based its claim on the theory that, pursuant to the federal Longshore and Harbor Workers' Compensation Act and the US Supreme Court's holding in *Ryan Stevedor. Co. v Pan-Atlantic Steam. Corp.* (350 US 124), the employer impliedly warranted that it would perform its tasks in a workmanlike fashion, and that it breached that implied warranty when it negligently operated the barge-mounted crane so as to injure the plaintiff.

This Court rejected the owner's contention, holding that the federal statute and case law were inapposite since the employer's contract with the owner was not one for "maritime services," inasmuch as it did not relate to a ship in its use as a ship, commerce, or navigation on navigable waters, transportation by sea, or maritime employment, but instead to a land-based construction project that only incidentally required the placement of equipment on a barge.

Personal Injuries; Son-Of-Sam Law

Thompson v 76 Corp. (37 AD3d 450 [Miller, Rivera, Krausman, Goldstein]).

The defendant was convicted of assault in criminal court. In an action by his victim to recover damages for the assault, the trial court, invoking the so-called Son-of-Sam law (Executive Law § 632-a), and in order to preserve the corpus of funds so that they would satisfy any judgment in the action, preliminarily enjoined the defendant from dissipating most of the funds he was to receive from a recording contract. The defendant moved to release an additional $100,000 from the funds in order to pay his civil attorney. This Court held that, because the motion was, in effect, one to modify a preliminary injunction order, the defendant was required to show changed circumstances and come to the court with "clean hands." The Court found that, because he failed to discharge his burden in that regard, the motion was properly denied.

Physician-Patient Relationship

Sosnoff v Jackman (45 AD3d 568 [Crane, Lifson, Carni, Balkin]).

Where the plaintiff enrolled as a subject in a cancer research study, but was not "merely a subject or control person," but instead expected to receive medical treatment and services at part of her participation, this Court found that the supervising hospital could not make a prima facie showing that there was no physician-patient relationship between itself and the plaintiff. Hence, the Court held that the hospital's motion for summary judgment dismissing the medical malpractice complaint, insofar as asserted against the hospital, should not have been granted on that ground.

Polygraph Testing; Job Application; Law Enforcement Officers

Matter of Mullen v County of Suffolk (43 AD3d 934 [Schmidt, Crane, Krausman, Dickerson], *lv denied* 10 NY3d 708).

This Court held that, regardless of the admissibility of the results of polygraph tests as evidence in court proceedings, a county police department, in making hiring determinations, may rely on its own polygraph testing of an a job applicant and/or an independent review of a polygraph test it had administered to the applicant, since an appointing authority, particularly one involved in the appointment of law enforcement officers, has broad discretion in fashioning its own rules for fitness of applicants.

Prenatal Injuries

Leighton v City of New York (39 AD3d 84 [Goldstein, opinion; Spolzino, Ritter, Skelos, concur]).

This Court held that even though a fetus that has gestated for only 14 weeks is not viable outside of the uterus, where the fetus was allegedly injured in utero through the negligence of the defendant, and the child is born alive with injuries allegedly caused by that negligence, the child has a cause of action against the tortfeasor. The Court determined that there is no requirement that the injury be inflicted only after the fetus is viable. Compare *Kelly v Gregory*, 282 AD 542 (3d Dept 1953) ("The right of a person to recover for a prenatal injury inflicted during the ninth month of the mother's pregnancy was upheld in 1951 by the Court of Appeals; the case before us seeks to advance the area of recovery to injury at a much earlier stage of the life of the fetus, to the third month of pregnancy. We think the same rule should govern both cases").

Public Health Law § 1105; Taking of Real Property

Putnam County Natl. Bank v City of New York (37 AD3d 575 [Mastro, Krausman, Fisher, Lifson], *lv denied* 8 NY3d 815).

Pursuant to the New York City Watershed Regulations, the New York City Department of Environmental Protection (hereinafter the DEP) was granted authority to approve or deny sewage disposal plans for proposed subdivisions located outside of the City, but within the City's watershed area. In this case, the DEP denied an application for the construction of a central sewage system for a proposed 36-lot subdivision within Putnam County. It instead granted approval of a subsurface septic system for a scaled-down 17-lot subdivision, and the landowner later sold those lots for $1.4 million.

This Court found that the landowner's consequent action to recover damages for injury to real property based upon, inter alia, an unconstitutional taking of the real property, was properly dismissed for failure to state a cause of action. The Court held that Public

Health Law § 1105, upon which the plaintiff relies, is inapplicable to the lots in question, as that statute only creates a private right of action to recover damages where an owner's structure is removed in order to comply with the Watershed Regulations, and no structure was involved here. Moreover, the Court found that there was no regulatory taking because the owner was not deprived of all reasonable use of its land, and did not and could not allege that the regulatory restrictions deprived it of a reasonable return on its investment, as reflected by the $1.4 million sales price.

Punitive Damages; Abortions; Violation of Privacy Rights

Randi A. J. v Long Is. Surgi-Center (46 AD3d 74 [Fisher, opinion; McCarthy, Dickerson, concur; Krausman, Crane, dissent]).

This Court held that punitive damages were available to an adult plaintiff who alleged and proved that a nurse at the surgical clinic at which she had obtained an abortion violated her privacy rights by revealing the procedure to the plaintiff's mother.

Here, although the plaintiff, who resided with her parents, provided the clinic with her home telephone number upon registration, she expressly directed the clinic and its staff only to call her on her cell phone. Nonetheless, a clinic nurse, who purportedly sought to follow up with the plaintiff to check on her condition after her discharge and to confirm the necessity of certain blood tests, telephoned her home. Upon reaching the plaintiff's mother, the nurse did not simply ask the mother to have the plaintiff call back the clinic, but expressly asked the mother if the plaintiff had suffered from any vaginal bleeding as a result of her procedure. After the mother surmised that the plaintiff had an abortion, the plaintiff became estranged from her parents, who were devout Catholics and opposed to abortion.

The plaintiff commenced an action against the clinic, alleging that it negligently inflicted emotional distress and violated several privacy statutes. After a jury trial, she was awarded compensatory damages in the sum of $65,000, and punitive damages in the sum of $300,000. On appeal, this Court, in a 3-2 decision, ruled that the clinic's conduct was sufficiently egregious to warrant an award of punitive damages, given the public policy favoring medical privacy in the realm of reproduction and birth control, and the serious consequences that often arise when privacy is breached. The Court nonetheless set aside the award of punitive damages, and remitted for a new trial on that issue, in order to permit the clinic to adduce evidence that its standards and procedures for protecting privacy were adequate, that breaches of privacy as occurred here were rare if not otherwise non-existent, and that the breach of privacy in this instance constituted an aberration.

The dissent opined that this case fits none of the recognized situations in which punitive damages are regularly awarded, such as "morally culpable conduct," "willful and wanton behavior," and the need to deter others from engaging in similar conduct. At most, argued the dissent, the nurse's conduct was careless or negligent, and statutes already exist which deter others from compromising a patient's privacy.

Real Property Tax Exemptions; Not-For-Profit Health Maintenance Organization

Matter of Health Ins. Plan of Greater N.Y. v Board of Assessors of Town of Babylon (44 AD3d 1044 [Schmidt, Skelos, Lifson, Balkin], *lv denied* __ NY3d __, 2008 NY Slip Op 74143).

This Court held that where a not-for-profit corporate landowner has previously been granted a real property tax exemption pursuant to Real Property Tax Law § 420-a(1), and

the taxing authority withdraws the exemption, the taxing authority bears the burden of establishing that the real property is no longer entitled to the exemption. Here, the Court found that the withdrawal of the exemption was neither rational nor warranted, whether the exemption sought was pursuant to RPTL 420-a(1) or RPTL 486-a, since the landowner, a not-for-profit health maintenance organization, established that its real property was exclusively dedicated to a not-for-profit use, a contention borne out by an advisory opinion of the New York State Office of Real Property Services, rendered at the behest of both the landowner and the taxing authority.

Real Property Tax Exemptions; Not-For-Profit Adult Home

Matter of Adult Home at Erie Sta., Inc. v Assessor & Bd. of Assessment Review of City of Middletown (36 AD3d 699 [Miller, Krausman, Fisher, Dillon], *affd* 10 NY3d 205).

The needs of our elderly citizens have continued to increase, particularly in the area of assisted living and related senior housing (*see e.g.*, *Matter of Jamil v Village of Scarsdale Planning Bd.*, 24 AD3d 552 [2005] [Prudenti, Miller, Spolzino, Dillon], *affg* 4 Misc 3d 642 [2004] ["The Assisted Living Study discussed the need for facilities to care for an increasing number of Westchester County residents over the age of 85 who are no longer able to care for themselves but are not in need of 24-hour intensive medical care"]).

In this case, a not-for-profit adult home applied for a tax exemption pursuant to RPTL 420-a(1)(a), which sets forth a mandatory real property tax exemption for property used for charitable purposes. The application was denied by the Board of Assessment Review of the City of Middletown. The Supreme Court denied the petition of the adult home seeking review of that determination. In reversing the Supreme Court's order and judgment, and restoring a 100% tax exemption, this Court found that the real property in question was exclusively used by the adult home for charitable purposes, since "[t]he evidence established that the petitioner accepts and maintains in residence individuals without regard to ability to pay, [and] approximately 90% of its residents are unable to afford the regular room rates in comparable facilities" (36 AD3d at 701).

Real Property Tax Exemptions; Not-For-Profit Russian Cultural Organization

Otrada, Inc. v Assessor, Town of Ramapo (41 AD3d 678 [Rivera, Spolzino, Florio, Angiolillo], *lv denied* 9 NY3d 811).

The Court restored a 100% real property tax exemption pursuant to RPTL 420-a(1)(a) to a not-for-profit charitable corporation dedicated to the preservation of Russian culture, traditions and language. Compare *Miriam Osborn Memorial Home Ass'n v Assessor of the City of Rye*, 14 Misc 3d 1209(A), 2006 NY Slip Op 52461(U) (2006) (denying charitable use exemption under RPTL 420[a][1][a]; granting partial hospital use exemption under RPTL 420[a][1][a]). See also Brennen, *The Commerciality Doctrine as Applied to the Charitable Tax Exemption for Homes for the Aged: State and Local Perspectives*, 76 Fordham L Rev 833 (2007).

Settlements; High-Low Agreements

Cunha v Shapiro (42 AD3d 95 [Dillon, opinion; Prudenti, Krausman, McCarthy, concur], *lv dismissed* 9 NY3d 885).

This Court held that an enforceable "high-low" agreement-- in which the parties agree

that if a jury awards the plaintiff a certain amount or greater, the plaintiff will receive the agreed-upon “high” number, and if it awards a certain amount or less, the plaintiff will receive the agreed-upon “low” number-- is properly characterized as a settlement, and is thus subject to the “prompt-payment” provisions of CPLR 5003-a, unless expressly excepted from those provisions by prior agreement.

Here, the parties to a personal injury action entered into a "high-low" agreement with limits of $75,000/$325,000. The jury rendered a verdict in favor of the plaintiff in the sum of $400,000, triggering the defendant’s obligation to pay the agreed-upon upper limit of $325,000. Thereafter, the plaintiff entered a judgment with the clerk of the court, adding the sum of $46,000 in statutory interest to the principal amount, plus costs and disbursements, on the purported ground that payment of the principal sum of $325,000 was not made within 21 days of the verdict, and that the plaintiff was thereby entitled to interest and costs. The defendants successfully moved in the Supreme Court to vacate the judgment, arguing that: a) the 21-day period relied upon by the plaintiff only applied to settlements, and not verdicts, b) the high-low agreement in the instant case was a settlement, c) pursuant to CPLR 5003-a, it was entitled to a general release and stipulation of discontinuance in connection with the settlement before the 21-day time period in which it must pay the settlement amount began to run, and d)the plaintiff's counsel had refused to tender those documents prior to filing the judgment.

This Court agreed with the defendant, finding that while there had been a jury verdict after trial, the verdict was supplanted by a settlement (i.e., the high-low agreement limiting the defendant’s liability to the sum of $325,000) and that upon the settlement, its obligation to pay did not begin to run until after the plaintiff tendered a general release and stipulation of discontinuance. Compare *Matter of Eighth Jud. Dist. Asbestos Litig.*, 8 NY3d 717 (2007)(“In this multi-defendant action, Supreme Court erred in failing to disclose to all of the parties the existence of a high-low agreement between the plaintiffs and one of the defendants. Because this error prejudiced the determination of the rights and liabilities of the nonagreeing defendant at trial, a new trial on liability and damages is warranted”).

Tax Certiorari; Selective Reassessment

Matter of Young v Town of Bedford (37 AD3d 729 [Miller, Spolzino, Florio, Angiolillo]).

This Court has previously held that the “selective reassessment” of improved property “utilizing the recent purchase price as a basis for determining the increase in assessed value of a property on which improvements have been made” is prohibited (*Matter of DeLeonardis v Assessor of City of Mount Vernon*, 226 AD2d 530, 532-533 [2d Dept 1996]).

Here, this Court addressed the issue of whether the prohibition of selective reassessment applies to the initial assessment of newly-created property on vacant, unimproved land. The court found no selective reassessment, noting that “the petitioner failed to submit any evidence demonstrating that the Town assessed newly-constructed property at a higher percentage of market value than existing property” (37 AD3d at 730).

Matter of McCready v Assessor of Town of Ossining (41 AD3d 851 [Rivera, Goldstein, Skelos, Balkin], *lv denied* 9 NY3d 812).

This Court held that, in this case, the methodology used by the Assessor of the Town of Ossining to update and correct inventory data on 10,000 tax parcels was neither selective nor discriminatory reassessment. For a discussion of real property selective reassessment, see Dickerson, *The Selective Reassessment of Real Property in New York State*, The Real

Property Tax Administration Reporter, New York State Office of Real Property Services, Vol. 15, at 186-203 (June 2007), also available at *http://www.nycourts.gov/courts/9jd/TacCert_pdfs/SELECTIVEREASSESSMENT.pdf* (accessed June 24, 2008).

Tax Certiorari; Total Assessment Must Be Appraised

Matter of Johnson v Kelly (45 AD3d 687 [Prudenti, Krausman, Fisher, Dillon]).

Where, in a petition challenging real property tax assessments, the petitioners submitted an appraisal evaluating only a portion of the property at issue, this Court found that the petitioners failed to meet the substantial evidence burden of proof necessary to overcome the presumption of validity of the challenged tax assessments and that, accordingly, the Supreme Court properly dismissed the petition.

Tax Certiorari; Valuation of Golf Course; Triple Net Lease

Matter of Mill River Club v Board of Assessors (48 AD3d 169 [Fisher, opinion; Schmidt, Goldstein, Lifson, concur]).

This Court held that it was not error, in assessing the value of real property used as a private golf course and country club for real property tax purposes, for the Supreme Court to adopt and approve the method of evaluation employed by a county board of assessors, which involved the calculation of the value of "triple net lease assumption" for tax-exempt properties that are comparable to the subject parcels. The subject parcels were significantly larger than most other equivalent taxable parcels located nearby, and thus only tax-exempt parcels, such as those used for public parks and recreation, were equivalent in size and quality.

The Court found that the rental income actually received by a municipality from a tax-exempt golf course, expressed as a percentage of actual revenue, can be viewed as being "net" of any real estate taxes. Thus, in translating information from regulated, tax-exempt municipal "comparables" to the unregulated and fully taxable subject property, the Court found that it was not unreasonable for the Supreme Court, based on the testimony of the County's expert, to assume that golf revenue for the subject property would be comparatively higher, and-- consistent with the court's triple net lease assumption-- could account for a correspondingly lower percentage of market rent paid to the owner. The Court held that, since the triple net lease assumption method of valuation was a "fair and nondiscriminating" method of valuation, it is an "acceptable" method on which to premise the valuation of the golf course and country club property at issue here.

Tax Certiorari; Failure to Include Return Date

Matter of Allstate Equities, LLC v Town of Newburgh (43 AD3d 1044 [Prudenti, Fisher, Lifson, Angiolillo]); *Matter of Webb Props., Inc. v Town of Newburgh* (43 AD3d 1070 [Prudenti, Fisher, Lifson, Angiolillo]).

This Court held that since Real Property Tax Law § 712(1) provides that, in a tax certiorari proceeding, a taxing municipality that fails to answer a petition is deemed to have denied all of the allegations therein, the petitioner's failure to include an exact return date on the notice of petition does not divest the Supreme Court of subject matter jurisdiction. The Court found that, at most, the failure to include an exact return date in a tax certiorari

petition is a mere irregularity, which should have been rectified in this case by granting the petitioner's cross motion to amend the petition to include an exact return date.

Trials; Public Access

Fiorenti v Central Emergency Physicians, PLLC (39 AD3d 804 [Mastro, Santucci, Krausman; Fisher, dissent]).

This Court found that the defendant's rights were not violated under either the United States or New York State Constitutions, or any other statutes, when a Referee held the damages portion of a civil trial in a courtroom virtually inaccessible to the public at large due to general security concerns in the courthouse. The Court held that although the right to an open and public trial in a civil action, in the absence of extraordinary circumstances, is essentially guaranteed by the First Amendment and Judiciary Law § 4, the right is not absolute, and the record in this case "wholly fails to support the conclusion that the mere physical location of the courtroom itself denied members of the public access to the proceedings" (*Id*. at 806).

According to the dissent, the award of damages should be reversed, and a new trial held on that issue, because the damages trial was held in an area of the courthouse that was effectively closed to the public at large, and that the Referee's attempts to accommodate the presence, at trial, of any person identified by any party who wished to observe the proceedings, did not regularize the otherwise irregular proceeding.

Unjust Conviction Claim; Court of Claims Act § 8-b(3); Waivable Defects

Harris v State of New York (38 AD3d 144 [Prudenti, opinion; Mastro, Fisher, Lunn, concur]).

To present a claim for unjust conviction and imprisonment, a claimant is required to "establish by documentary evidence," inter alia, that his conviction was vacated on certain grounds, which include those specified in "paragraph (a), (b), (c), (e) or (g) of subdivision one of [CPL] section 440.10" (Court of Claims Act § 8-b[3]).

Here, this Court held that the Court of Claims should not have dismissed the claim for unjust conviction and imprisonment, but should have granted the claimant's cross motion for leave to amend the claim, where the claim stated that the claimant's conviction was vacated pursuant to CPL 440.10, but did not specify that the precise basis for the vacatur was CPL 440.10(1)(g) (newly-discovered evidence). The Court concluded that the omission of the designation "(1)(g)" was not a jurisdictional defect requiring dismissal of the claim, but a technical defect that could be corrected in an amended pleading.

The time limitations and service requirements set forth in Court of Claims Act §§ 10 and 11 have been referred to in prior decisions as "jurisdictional," and in a decision issued subsequent to this opinion, the Court of Appeals noted that "[w]e have consistently held that nothing less than strict compliance with the jurisdictional requirements of the Court of Claims Act is necessary" (*Kolnacki v State of New York*, 8 NY3d 277, 281 [2007]). The Court of Appeals, however, has also held, in a different context, that "technical defects in filings do not fall under the umbrella of subject matter jurisdiction when they do not undermine the constitutional or statutory basis to hear a case" (*Matter of Ballard v HSBC Bank USA*, 6 NY3d 658, 663 [2006]).

In light of these potentially competing principles, this Court determined that the preliminary proof requirements of Court of Claims Act § 8-b(3) are not "jurisdictional in

nature, such that imperfect compliance therewith is not curable by amendment of the claim" (38 AD3d at 149). Indeed, Court of Claims Act § 8-b(3) does not actually prescribe any particular notice to the State or require any particular language to appear in the claimant's pleading; rather, it provides that the claimant must "establish" certain facts through documentary evidence. Thus, this Court concluded that "[i]t is the existence of the fact, as opposed to the documentation of the fact, that is a "'statutory requirement conditioning suit'" (38 AD3d at 150, quoting *Long v State of New York*, 7 NY3d 269, 276 [2006]).

In this case, the State was well aware that the claimant's conviction had been vacated based on newly discovered evidence, and the formality of establishing that fact could easily be accomplished through an amendment of the claim. Accordingly, this Court found that the claim was improperly dismissed. The Court went on to conclude that the claimant made a prima facie showing, inter alia, that there was clear and convincing evidence that he was innocent of the underlying crime, and that, in opposition, the State failed to raise a triable issue of fact. Thus, the Court held that the claimant was entitled to summary judgment on the issue of liability.

Worker's Compensation Law; Partial Amputation of Index Finger

Mentesana v Bernard Janowitz Constr. Corp. (36 AD3d 769 [Rivera, Spolzino, Ritter, Angiolillo]).

This Court held that, while "loss of an index finger" is an injury enumerated by Workers' Compensation Law § 11 as a "grave injury" that allows a nonemployer defendant in a tort action to seek contribution from the plaintiff's employer, the partial amputation of an index finger to just above the proximal interphalangeal joint (i.e., leaving intact both the bottom one-third of the finger and the first joint) does not constitute the "loss" of the index finger.

Castillo v 711 Group, Inc. (41 AD3d 77 [Goldstein, opinion; Crane, Lifson, Carni, concur], *affd* 10 NY3d 735).

This Court held that the complete loss of both interphalangeal joints on an index finger, leaving less than the bottom one-third of the index finger, constitutes a "loss" of the finger within the meaning of Workers' Compensation Law § 11, and is thus a "grave injury" permitting the tortfeasor defendant to implead and seek contribution from the injured plaintiff's employer.

Zoning; Extension of Variance

420 Tenants Corp. v EBM Long Beach, LLC (41 AD3d 641 [Miller, Mastro, Krausman, Carni]).

Where a municipal zoning board of appeals (hereinafter ZBA) grants a variance, but limits the time in which the applicant must secure a building permit or commence construction, this Court held that the ZBA has inherent jurisdiction to extend that period of time where the landowner seeks an extension before the lapse of that period of time. The Court found that a timely application for such an extension need not be treated as a new application for a variance, and thus need not be subject to public notice and hearing requirements applicable to initial variance applications. Where, as here, the landowner makes a timely application for an extension of the effective dates of the variance, the Court found it immaterial that the ZBA did not approve the extension until after the expiration of the initial life span of the variance. Moreover, since the ZBA had jurisdiction to extend the

effective life of the variance, the Court found that the petitioner's challenge to the extension was subject to the 30-day limitations period contained in General City Law §81-c(1), and the petitioner could not avail itself of the toll of the limitations period applicable to ZBA determinations made without or in excess of its jurisdiction.

Zoning; Immunity for State-Owned Telecommunications Tower

Town of Hempstead v State of New York (42 AD3d 527 [Miller, Santucci, Florio; Lifson, dissent], *lv denied* 10 NY3d 703).

Applying the Court of Appeals' "balancing of public interests" test, as articulated in *Matter of County of Monroe (City of Rochester)* (72 NY2d 338, 341 [1988]), this Court ruled that a State-owned telecommunications tower was immune from local zoning restrictions under the circumstances presented, but that the ruling "does not mean that immunity is a foregone conclusion in every similar case wherein it is sought" (42 AD3d at 529).

Specifically, this Court determined that where the New York State Department of Transportation (hereinafter NYSDOT) sought to erect the communications tower near the intersection of the Seaford-Oyster Bay Expressway (New York State Route 135) and Sunrise Highway (New York State Route 27), the State-sanctioned nature and scope of the instrumentality seeking immunity from local zoning restrictions, the positive extent of the public interest to be served by that instrumentality, and the negative extent of the local land use regulation upon the tower, outweighed the detrimental impact upon legitimate local interests caused by recognition of the immunity.

The dissent drew the opposite conclusion, noting that the detrimental impact upon legitimate local interests in preserving aesthetics and planning integrity militated against immunizing NYSDOT from compliance with local zoning restrictions, particularly since the locality did not seek to prohibit the erection of the tower, but only to relocate it from the proposed site to another site nearby.